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Metaphors and Persuasion

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METAPHORS AND PERSUASION

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I. INTRODUCTION

Persuasion is not a completely rational process. Some would say that, in many instances, it is mostly non-rational.¹ This is why stories are so important in the process of persuasion.² Stories connect with the subconscious mind in ways that a strictly rational argument can never touch.³ Stories speak directly to the listener's deeply embedded values; they resonate with and shape the listener's moral infrastructure.⁴ Stories help to make sense of things in a way that invites the listener to affirm the truth of the story and its application to present circumstances.⁵ In addition to stories, there is another, often more common and efficient way to reach the same level where decisions are made—metaphors. Metaphors are compact stories.

A good story usually takes some time to set up. The storyteller sets the scene, introduces the characters, directs the action from problem to resolution, and may comment on the meaning of the story. Metaphors⁶ can make a point in a single phrase or sentence. In its compact version, it may take the listener by surprise. The point works swiftly, before the listener has a chance to set up defenses. An effective metaphor's humor and insight has a way of getting past the normal resistance of a listener. Brevity, humor, creativity, and insight provide great camouflage for the true nature of metaphor, which is argument. A skillfully delivered metaphor does not feel like argument. It is like the soft-sell.

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1. See DAVID BALL AND DON C. KEENAN, REPTILE: THE 2009 MANUAL OF THE PLAINTIFF'S REVOLUTION (2009) [hereinafter Reptile]; see generally DAVID EAGLEMAN, INCOGNITO: THE SECRET LIVES OF THE BRAIN 4 (2011) ("The first thing we learn from studying our own circuitry is a simple lesson: most of what we do and think and feel is not under our conscious control."); CHARLES DUHIGG, THE POWER OF HABIT: WHY WE DO WHAT WE DO IN LIFE AND BUSINESS xv-xvi (2012) (most behavior is not the product of deliberative choice; habit drives much of daily action and is rooted in the subconscious).

2. See Jonathan K. Van Patten, *Storytelling for Lawyers*, 57 S.D. L. REV. 239 (2012).

3. *Id.* at 240, 244-45.

4. See BRUNO BETTELHEIM, THE USES OF ENCHANTMENT: THE MEANING AND IMPORTANCE OF FAIRY TALES (1976).

5. See, e.g., JIM M. PERDUE, WINNING WITH STORIES: USING THE NARRATIVE TO PERSUADE IN TRIALS, SPEECHES & LECTURES (2006); JAMES W. MCELHANEY, MCELHANEY'S TRIAL NOTEBOOK 183 (4th ed. 2006). "Stories go deeper than just law. They are at the heart of how we think and act. Stories have been used since the beginning of time to make sense of the world." *Id.*

6. In this article, I will use metaphor in the broader sense of non-literal comparison. From the viewpoint of rhetorical devices, it is a category (trope) within the rhetorical common topic of argument by comparison. See EDWARD P.J. CORBETT, CLASSICAL RHETORIC FOR THE MODERN STUDENT 115-24 (2d ed. 1971). In this Article, metaphor will include similes (which are a type of metaphor), analogies, symbols, parables, and allegories.

It reaches down to the subconscious without seeming to lecture or demand.

In his book, *The Culture Code*, Clotaire Rapaille discusses the process of tapping into the subconscious mind by focusing on cultural imprints or meanings associated with products or relationships.⁷ These meanings are not found in what people say, at least not initially.⁸ They are found through exploring impressions, expressed after a substantial time spent in digging through memories stretching back to early childhood.⁹ In other words, it takes time to break through the rational level to reach the emotional level to discover what people really value. From this process, Rapaille formulates "culture codes" that provide access to these fundamental imprints.¹⁰ In somewhat the same way, metaphors provide access to these imprints, meanings, and values.

Metaphors are an important part of the language of popular discourse. They are used in almost every context. Whether in politics (e.g., Inaugural Addresses¹¹), advertisements,¹² preaching,¹³ or sports talk,¹⁴ metaphors are

7. CLOTAIRE RAPAILLE, *THE CULTURE CODE: AN INGENIOUS WAY TO UNDERSTAND WHY PEOPLE AROUND THE WORLD BUY AND LIVE AS THEY DO* 5-10 (2006).

8. *Id.* at 1.

9.

For Chrysler, I gathered participants and asked them to tell me what they wanted from a car. The initial responses I got were pure cortex: good gas mileage, safety, mechanical reliability, and all the other things we have learned to say about this subject. I, of course, did not believe them. As each session continued, I began to hear other things about cars that resonated. Memories of distinctive cars of the past, like the 1964½ Mustang, the original VW Beetle, and the Cadillacs of the 1950s with their huge fins. Stories of the sense of freedom that came with holding their first set of car keys. Bashful mutterings about first sexual experiences taking place in the backseat of a car. Slowly, the sense of what American consumers really wanted from an automobile began to emerge. They wanted something distinctive. They wanted freedom. They wanted a sensual experience.

Id. at 16.

10. "When it is time for them to buy a car, this emotional connection guides them subconsciously."

Id. at 24. Thus, Rapaille concludes: "To access the meaning of an imprint within a particular culture, you must learn the code for that imprint" *Id.*

Even our most arbitrary actions are the result of the trips we take down our mental highways. We take these trips hundreds of times a day, making decisions about what to wear, what to eat, where to go, what to say in conversation, and so on. What most people don't realize, however, is that there is a Code required to make these journeys. Think of the Code as a combination that unlocks a door. In this case, we need not only to punch in the numbers, but also to punch them in in a specific order, at a specific speed, with a specific rhythm, etc. Every word, every action, and every symbol has a Code. Our brains supply these Codes subconsciously, but there is a way to discover them, to understand why we do the things we do.

Id.

11. See, e.g., President Barack Obama, Second Inaugural Address (Jan. 21, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama>.

But we have always understood that when times change, so must we; that fidelity to our founding principles requires new responses to new challenges; that preserving our individual freedoms ultimately requires collective action. For the American people can no more meet the demands of today's world by acting alone than American soldiers could have met the forces of fascism or communism with muskets and militias.

Id.; President Abraham Lincoln, Second Inaugural Address (April 10, 1865), available at <http://www.ourdocuments.gov/doc.php?flash=true&doc=38&page=transcript>.

Fondly do we hope -- fervently do we pray -- that this mighty scourge of war may speedily pass away. Yet, if God wills that it continue, until all the wealth piled by the bond-man's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash, shall be paid by another drawn with the sword, as was said three thousand years

commonly used to express ideas in terms of common values. Metaphors are effective because they speak to a common level of understanding. They utilize material from everyday life and invite the listener to participate in a non-threatening manner, i.e., internally and privately. Compare, for example, the use of metaphor, which invites silent agreement in the mind of the listener, with the more public and demonstrative use of: "How many of you would agree with the statement that there are too many lawsuits these days? Raise your hands, please." The latter part, a staple of *voir dire*, seems, to this reserved Dutch person, as overly intrusive or invasive, thereby generating discomfort and possible resistance, whereas the former allows for agreement without bullying or group pressure.¹⁵

Metaphors can also take the extended form of a story, such as a parable or allegory. Because there is a greater length of time required to complete the story, it is important to start strong in order to bring the listener in. The use of humor, a point of interest, or a story within a story may serve this purpose. The storyteller should not abuse the position as speaker and assume agreement, even when "preaching to the choir."¹⁶ Members of a "captive audience" can generate

ago, so still it must be said "the judgments of the Lord, are true and righteous altogether."

Id. The Franklin Roosevelt presidency was known by its slogan "The New Deal." The Kennedy presidency was often referred to as "Camelot." The Lyndon Johnson presidency was known for launching a "War on Poverty."

12. "Like a good neighbor, State Farm is there." *Like A Good Neighbor, State Farm is There*, STATE FARM, http://www.statefarm.com/aboutus/_articles/videoText/sf-is-there.asp (last visited Mar. 13, 2013). "You're in good hands with Allstate." *The Allstate Corporation at a Glance*, ALLSTATE, <http://www.allstate.com/about.aspx> (last visited Mar. 13, 2013). Whether or not these metaphors are actually true, they carry great power in connecting with deeply-held values.

13. See, e.g., DIETRICH BONHOEFFER, *THE COST OF DISCIPLESHIP* (2D ED. 1959); JOYCE MEYER, *BATTLEFIELD OF THE MIND: WINNING THE BATTLE IN YOUR MIND* (1995).

14. When a team is an overwhelming underdog and does well, it is called a "Cinderella team." A coach in jeopardy of losing his or her job is said to be on the "hot seat." A desperation pass at the end of a football game is called a "Hail Mary." A team that clinches an early spot in the playoffs and then later encounters problems is said to be "rusty." There are many, many more. Sports talk is filled with metaphors.

15. The interactive aspect of metaphors is very well expressed in this reflective passage by the writer, Emma Darwin:

I found myself posting this in another forum:

"... a novel is only a set of black marks on a page till someone reads them, or, as some would say, decodes them. A novel doesn't exist of itself, except as a physical object. Printed words are a set of instructions by the writer for the reader to construct the story, and what we mean by a novel is really a joint operation by writer and reader."

If you take this (to me) self-evident fact about writing and reading, then metaphors become only one kind of instruction. *What's unique about them, though, is that they engage our most primitive understanding: instead of using the abstractness of "red" or "wet road" or "fear", the writer engages the reader's own physical memory of blood or snake or heart-in-the-mouth. The best writing, you could say, is the writing that takes place in the reader's head.*

Emma Darwin, *My true love hath my heart* . . . , *THIS ITCH OF WRITING* (Nov. 9, 2007), <http://emmadarwin.typepad.com/thisitchofwriting/2007/11/my-true-love-ha.html> (emphasis added). This insight also underlies both CLOAIRE RAPAILLE, *CULTURE CODES*, *supra* note 7, and FRANK LUNTZ, *WORDS THAT WORK: IT'S NOT WHAT YOU SAY, IT'S WHAT PEOPLE HEAR* (2007).

16. The use of this nice little metaphor has expanded nicely over time. Its origin lay in the irony of the preacher complaining to those present, i.e., the choir, about those who did not attend church. Its use now includes those with whom the argument already finds substantial agreement.

resistance to the speaker's message on that fact alone. Extended metaphors can be powerful because they build along the way as each reference point, often a metaphor itself, solicits agreement that will lead to the ultimate conclusion.

Because metaphors are widely used in the law, there is already a substantial amount of discussion of metaphor in legal scholarship.¹⁷ The focus of this Article will be on how metaphors work, what makes them more or less effective, how to avoid some of the common mistakes that diminish their power, where to find sources for the creation of new comparisons that further the argument, and, finally, some particularly outstanding examples of metaphor. Properly understood and executed, metaphors are a powerful tool in the advocate's repertoire.

II. THE STRUCTURE OF METAPHOR

"The essence of metaphor is understanding and experiencing one kind of a thing in terms of another."¹⁸ It provides an alternative way of describing a subject or action, often done for emphasis, humor, explanation, reiteration, insight, creativity, or some combination thereof. Within a narrative framework that moves forward—with subject, verb, and object—metaphor represents a slowdown, a change of pace, which provides a different view. The slowdown may be a slight hesitation in the form of a simile (e.g., "catlike") or a longer diversion in the form of an extended metaphor (e.g., the parable of the "Good Samaritan" as a metaphorical answer to the question: "Who is my neighbor?").¹⁹ The persuasive pull of the metaphor comes from the comparison of the matter asserted with another thing whose attributes are already known or, at least, partially known.

The use of metaphor requires care and restraint. Every virtue has a dark side. As Bryan Garner observes: "Skillful use of metaphor is one of the highest attainments of writing; graceless and even aesthetically offensive use of metaphors is one of the common scourges in writing, and especially of legal writing"²⁰ The problems seem to come from inexperience and misuse.

17. See, e.g., PERDUE, *supra* note 5, at 273-318; 3 ATLA'S LITIGATING TORT CASES § 37.47 (Roxanne Barton Conlin & Gregory S. Cusimano eds., 2003); Louis J. Sirico, Jr., *Failed Constitutional Metaphors: The Wall of Separation and the Penumbra*, 45 U. RICH. L. REV. 459 (2011); Linda L. Berger, *The Lady or the Tiger? A Field Guide to Metaphor and Narrative*, 50 WASHBURN L.J. 275 (2011); J. Christopher Rideout, *Penumbral Thinking Revisited: Metaphor in Legal Argumentation*, 7 J. ASS'N OF LEGAL WRITING DIRECTORS 155 (2010); Symposium, *Using Metaphor in Legal Analysis and Communication*, 58 MERCER L. REV. 835 (2007); Michael R. Smith, *Levels of Metaphor in Persuasive Legal Writing*, 58 MERCER L. REV. 919 (2007); Pradeep Sopory & James Price Dillard, *The Persuasive Effects of Metaphor: A Meta-Analysis*, 28 HUM. COMM. RES. 382 (2002); James E. Murray, *Understanding Law as Metaphor*, 34 J. LEGAL EDUC. 714 (1984).

18. GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 5 (1980).

19. Luke 10:25-37.

20. BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 558 (2d ed. 1995) [hereinafter MODERN LEGAL USAGE]; see also JOSEPH M. WILLIAMS, STYLE: TOWARD CLARITY AND GRACE 164 (1990).

Of metaphor, Aristotle wrote,

By far the greatest thing is to be a master of metaphor. It is the only thing that cannot be learned from others. It is a sign of genius, for a good metaphor implies an intuitive perception of

“With great power comes great responsibility.”²¹ The key is restraint. “Writers should use metaphors sparingly, should wait for the aptest moments, elsewhere using a more straightforward style.”²² When it is the moment, “[k]now your audience and the parameters of good taste.”²³

One common use of the metaphor is to give emphasis, especially as a superlative, such as “hotter than hell” or “colder than a brass toilet seat.”²⁴ A person might describe his or her mood as “happy as a clam.” This wry description is both nicely understated and playfully ambiguous.²⁵ When asked during the preparation of this Article how it was coming, I would reply that I was “happier than a witch in a broom factory,” which is several notches up from clam bliss.²⁶ Other examples of giving emphasis through metaphors include “when hell freezes over,” to indicate the unlikeliness of some event happening (or “when pigs fly”), “longer than a Sunday sermon on NFL Sunday,” and “Hell hath no fury like a woman scorned.”²⁷

The meaning of the metaphor should be grounded in what the audience knows. The comparison runs from what is known to what is in issue. If the audience doesn’t understand the context of the comparison, it will fall flat. With a general audience, the references should be to what nearly everyone would be familiar with. Thus, a great metaphor, such as “truth is toxic, like water to witches” will work only if the audience understands the reference to the Wizard of Oz and its outstanding visual of the water causing the witch to melt. The invitation to the audience to participate in the application of the metaphor will be lost if it does not catch the reference.

similarity among dissimilars.

Id.

21. SPIDER-MAN (Columbia Pictures 2002). “We can attribute the earliest usage of the phrase ‘With great power comes great responsibility’ to Voltaire,” *Stan Lee*, WIKIQUOTE, http://en.wikiquote.org/wiki/Stan_Lee (last modified Feb. 4, 2013, 4:44 PM).

22. MODERN LEGAL USAGE, *supra* note 20, at 559.

23. WINNING WITH STORIES, *supra* note 5, at 295.

24. Here, an example of restraint, by knowing of the tender sensibilities of law review editors and readers and allowing good taste to eliminate some of the obvious alternative descriptions.

25. The full saying is “happy as a clam at high tide,” which, according to the explanation, means that the clam is enjoying the feeding opportunities brought in by the tide, while being protected from predators, especially humans. See Michael Quinion, *Happy as a Clam*, WORLD WIDE WORDS (Jul. 20, 2002), <http://www.worldwidewords.org/qa/qa-hap1.htm>. This is a good image for the reptilian part of the brain—food and safety, key aspects of survival. See REPTILE, *supra* note 1, at 45.

26. See GEICO, *GEICO Witch Commercial: Happier Than a Witch in a Broom Factory*, YOUTUBE (Sept. 7, 2012), <http://www.youtube.com/watch?v=3btVEGC00Ns&feature=relmfu>. The recent series of GEICO commercials have presented humorous metaphors for happiness, some of which require the visual to make sense. My favorites have been: happier than a Slinky on an escalator; happier than a body builder directing traffic; and happier than Christopher Columbus with speedboats. GEICO, *GEICO Slinky Commercial: Happier Than A Slinky On An Escalator*, YOUTUBE (Oct. 3, 2012), <http://www.youtube.com/watch?v=yOubW2A-e2Q>; GEICO, *GEICO Bodybuilder Commercial: Happier Than a Body Builder Directing Traffic*, YOUTUBE (Aug. 3, 2012), http://www.youtube.com/watch?v=TBSt1CtJEOK&list=PL139A69A037F3A12D&index=1&feature=plpp_video; GEICO, *GEICO Christopher Columbus Commercial: Happier Than Christopher Columbus with Speedboats*, YOUTUBE (Aug. 16, 2012), <http://www.youtube.com/watch?v=raPLzhxAeU&feature=relmfu>.

27. Hence the marketing of a hot sauce under the implicit metaphor of “Scorned Woman.” See FireGirl’s, *Scorned Woman Hot Sauce*, HOT SAUCE CATALOG, <http://www.hotsaucecatalog.com/scorned-woman-hot-sauce/> (last visited Mar. 20, 2013).

This does not mean that one always plays to the general audience. If you are writing (or arguing) to a more specific group, you have more freedom to use references that would otherwise make no sense to those outside the group. One of my favorites is from Bill Simmons, who is known for his metaphors tying popular culture to sports:

If Bill Belichick arrived at practice in a Ferrari Enzo one day, everyone would assume the Patriots coach was battling a severe midlife crisis. But seeing him trade a fourth-rounder for Randy Moss? Nobody knows how to react. Every Patriots fan I know was legitimately speechless after the trade. We'd heard the rumors for weeks but never believed this thing would, you know, *happen*.

Maybe Moss isn't a brand-new Enzo, but he's definitely a Ferrari—one of those with about 75,000 miles on it that you'd buy from a rapper who's going bankrupt. You're not exactly sure what condition it's in. It might be more trouble than it's worth. You have to keep it covered almost all the time. The parts are expensive. At the same time, it's a Ferrari and you're getting it at a discount, right? If you have the money and you always wanted a car like that, you have to make the deal.²⁸

If you understand the reference, this is an amazing metaphor—humorous, creative, and memorable. This almost certainly cannot work in a legal brief, but it is included to give a sense of how metaphors allow for extraordinary creativity and have a great potential to work with a more narrowly focused audience.

There are times when the metaphor does not require full knowledge of the audience with respect to the reference in order to work. In fact, the lack of knowledge might be a part of the metaphor. Consider this example:

You used to be able to fix a carburetor with a screwdriver and a basic

28. Bill Simmons, *Live (sort of) from the NFL draft*, ESPN PAGE 2 (Apr. 30, 2007), <http://sports.espn.go.com/espn/page2/blog/entry?id=2854154&name=simmons>; see also Malcolm Gladwell's humorous exchange with Bill Simmons, which included the following metaphors:

Gladwell: Let's get one thing straight. At the time the bartender came up to us, it was not at all clear that I was the object of her attention, and the fact that my first words to her ("See that guy over there. He's a famous sportswriter") only muddled the waters further. For all I knew, she was a Red Sox fan wanting to trade Oil Can Boyd stories with you. (*By the way, amidst all the talk about the misguided Reggie Bush lateral after the Rose Bowl, why nothing on the equally problematic romantic lateral? It just never works, even though -- in the thick of things -- you're always convinced it will.*) Secondly, even if she was hitting on me, let's also be clear that this never happens. *You were the Martian who came down to earth, saw Kelly Holcomb throw for 300 yards against the Bengals, and went back to your planet convinced you'd seen the future of this strange earthling game "football."*

Bill Simmons, *Curious Guy: Malcolm Gladwell*, ESPN PAGE 2, <http://sports.espn.go.com/espn/page2/story?page=simmons/060302> (last updated Mar. 2, 2006) (emphasis added). One more example, comparing a sports figure (Gary Payton) to a television entertainer (Jason Alexander):

Like any other Celtic fan who watched him stink up the joint in the 2005 playoffs, I've been fascinated by Gary Payton's mini-renaissance -- not that he's good again, but how he figured out that he is NOT good and adjusted accordingly. Last season in Boston, GP was trying to beat guys off the dribble, posting people up down low, demanding to cover the other team's best scorer and sulking if he didn't get the ball. *It was like watching Jason Alexander order people around on the set of some crappy sitcom ("Don't you realize who I am? I'm Jason Alexander!") and failing to realize that his time had come and gone.*

Bill Simmons, *State of the NBA Finals*, ESPN PAGE 2 (July 9, 2008, 3:15 PM), <http://sports.espn.go.com/espn/page2/story?page=simmons/060620> (emphasis added).

knowledge of how carburetors in general work. Now cars are more efficient while they work, but their system operating characteristics are embedded in sophisticated electronics and you have no hope of diagnosing without both a computer and a lot of very detailed knowledge about the programmed error codes, etc. In other words they work great until suddenly they don't work at all, and as soon as they don't work you have a hard problem on your hands instead of an easy one.

This is what we have done to our financial systems, in the name of efficiency. They have more sophisticated electronics, but our politicians are not more sophisticated mechanics.²⁹

Even if you don't know anything about fixing a carburetor with a screwdriver or know even less about the electronics of modern engines, it doesn't hurt your understanding of the metaphor. The financial system has become more inscrutable, but that is the point and it resonates with this metaphor.

There are metaphors that are so influential that they have become fixtures in the law. Some are strong enough to shape the legal analysis itself. These include "wall of separation of church and state,"³⁰ fruit of the poisonous tree,³¹ the "chilling effect" of restrictions on speech,³² and the Tragedy of the Commons.³³

The problems with metaphors usually come with overuse—too much of a good thing.³⁴ "Worn out" or "dead" metaphors become clichés and lose their

29. Richard Fernandez, *Eve of Destruction* 2, BELMONT CLUB (Mar. 9, 2009, 7:35 PM), <http://pjmedia.com/richardfernandez/2009/03/09/eve-of-destruction-2/> (comment 12. Nomenclatura (Mar. 9, 2009, 10:46 PM)).

30. See Jonathan K. Van Patten, *In the End Is the Beginning: An Inquiry Into the Meaning of the Religion Clauses*, 27 ST. LOUIS U. L.J. 1, 17 (1983); Patrick M. Garry, *The Myth of Separation: America's Experience with Church and State*, 33 HOFSTRA L. REV. 475 (2004); Louis J. Sirico, Jr., *Failed Constitutional Metaphors: The Wall of Separation and the Penumbra*, 45 U. RICH. L. REV. 459 (2011).

31. See, e.g., *Wong Sun v. United States*, 371 U.S. 471, 484-88 (1963).

32. See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 300 (1964) (Goldberg, J., concurring).

33. See, e.g., *Natural Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1378 n.19 (D.C. Cir. 1977).

34. See Emma Darwin, *Over-done, over-written, and over here*, THIS ITCH OF WRITING (May 5, 2011), <http://emmadarwin.typepad.com/thisitchofwriting/2011/05/over-done-over-written-and-over-here.html>. A classic example of overdone and overwritten writing is *Cordas v. Peerless Trans. Co.*, 27 N.Y.S.2d 198 (N.Y. Cty. Ct. 1941).

It appears that a man, whose identity it would be indelicate to divulge was feloniously relieved of his portable goods by two nondescript highwaymen in an alley near 26th Street and Third Avenue, Manhattan; they induced him to relinquish his possessions by a strong argument ad hominem couched in the convincing cant of the criminal and pressed at the point of a most persuasive pistol.

....

There are those who stem the turbulent current for bubble fame, or who bridge the yawning chasm with a leap for the leap's sake or who 'outstare the sternest eyes that look outbrave the heart most daring on the earth, pluck the young sucking cubs from the she-bear, yea, mock the lion when he roars for prey' to win a fair lady and these are the admiration of the generality of men; but they are made of sterner stuff than the ordinary man upon whom the law places no duty of emulation.

Id. at 199-201.

Although considerable effort and skill were devoted to the opinion, the author lost sight of the original purpose of the writing, which was to get the decision right. This should have been a relatively simple decision in which the issue of whether the defendant acted reasonably under the circumstances was

power. For example, the war on poverty; war on drugs, war on AIDS, and war on terrorism have succumbed to war weariness.³⁵ Others include “witch hunt,” “turn back the clock,” and “digging out of holes.” Other metaphors, in addition to being clichés, are simply inapt. That is, they invite disagreement with the metaphor itself and the point may be lost: “hindsight is always 20/20,”³⁶ “working like a dog,”³⁷ and “clean as a whistle.”

Avoid the use of clichés or tired metaphors, unless you can add creatively to it:

They say, the Eskimos have several dozen words for snow because the exact kind of snow is critical knowledge to them. You would think the English language would have at least two dozen words for fool.³⁸

The fat lady sang a long time ago in this opera, and all that’s left are some assorted violas and bassoons still squawking because they won’t/can’t/don’t want to admit that the conductor has already left the podium.³⁹

There is a large category of mistakes, usually referred to as mixed metaphors. The basic rule is: one metaphor at a time. Bryan Garner explains why this rule is self-enforcing: “Yet the greater problem in using metaphors is that one metaphor should not crowd another. The purpose of an image is to fix the idea in the reader’s or listener’s mind; if disparate images appear in abundance, the audience is left confused or sometimes, at the writer’s expense, knee-slapping.”⁴⁰ There are many, many examples, including the following:

It’s time to step up to the plate and lay your cards on the table.

We have to get all our ducks on the same page.

“It’s as easy as falling off a piece of cake.”⁴¹

This is “a virgin field pregnant with possibilities.”⁴²

Here, the references clash with each other and demonstrate the incompetence of the writer. Other examples include mangled metaphors, which are humorously failed mixed metaphors. Again, they are more notable for the unintentional humor they produce than for any persuasive effect:

He’s like a duck out of water.

It sticks out like a sore throat.

properly submitted to the jury. For all the effort and skill displayed, I think the judge got it wrong.

35. A possible exception may be “war on women,” which may have had an impact in the 2012 Presidential election.

36. If so, there should not be major political disagreements.

37. Most dogs don’t work hard, if at all. Notable exceptions include sled dogs, hunting dogs, and herding dogs.

38. Walter Adams, , *Down in Africa* Comment No. 32 , BELMONT CLUB - January 12, 2013 - 7:45 p.m.

39. William J. Dyer, *Three-judge federal panel again tosses Dem complaints about 2003 Texas Redistricting*, BELDARBLOG (June 10, 2005), <http://beldar.blogs.com/beldarblog/2005/week23/>.

40. MODERN LEGAL USAGE, *supra* note 20, at 558. See also MICHAEL R. SMITH, *ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING* 179-221 (2002) (discussing Chapter 9 – The Power of Metaphor and Simile in Persuasive Writing).

41. Jim Carlton, *My Favorite Mixed Metaphors*, JIM CARLTON.COMEDY, http://www.jimcarlton.com/my_favorite_mixed_metaphors.htm (last visited Apr. 2, 2013).

42. MODERN LEGAL USAGE, *supra* note 20, at 559.

It's like looking for a needle in a hayride.

People are dying like hotcakes.

"These hemorrhoids are a real pain in the neck."⁴³

Some metaphors are ineffective or even counter-productive because they give offense. This is not about being politically correct. It is about being an effective persuader. For example, President Obama was clearly talking about a larger perspective when he described the unfortunate events in Benghazi as a "bump in the road."⁴⁴ From the larger perspective, okay (although there wasn't much to be gained from the use of a tired metaphor). But from the perspective of describing an event that involved the death of American citizens, including a United States Ambassador, not good at all.

During a Negotiation Competition at the Law School, I commented to one student that her face was too expressive. I knew she had a theater background and I wanted her to realize that this was a different venue. So, I said: "You need to develop a poker face during negotiation. When something goes your way, don't look too happy, like a dog wagging its tail." Seemed like good advice at the time, but she took the analogy personally and it took a long time for both of us to recover from that.⁴⁵

On the other hand, offense does have its uses. In politics or the culture wars, you may be preaching to the choir and do not care about convincing an opponent. Former Governor Ann Richards, for example, said George H.W. Bush was "born with a silver foot in his mouth."⁴⁶ Neither did a concern for civility extend down to his son. Hence, there was a popular bumper sticker: "Somewhere in Texas a village is missing its idiot."⁴⁷ Offense is the point of the metaphor. In fact, Ann Coulter seems delighted to give offense: "Throughout the 2004 campaign, the Democrats were looking for a Democrat who believed in God—a pursuit similar to a woman searching for a boyfriend in a room full of choreographers."⁴⁸ As my former colleague and friend, John Hageman, often

43. Carlton, *supra* note 41.

44. See Peter Grier, *Obama and Romney on '60 Minutes': What were the defining moments?* (+video), CHRISTIAN SCIENCE MONITOR (Sept. 24, 2012), <http://www.csmonitor.com/USA/DC-Decoder/Decoder-Wire/2012/0924/Obama-and-Romney-on-60-Minutes-What-were-the-defining-moments-video>. The response was swift and merciless. See, e.g., *Ramierz Editorial Cartoons*, INVESTORS.COM (Sept. 25, 2012), <http://www.investors.com/editorial-cartoons/michael-ramirez/627036>.

45. Unlike golf, life usually doesn't allow for a "Mulligan," but if it did, I would say, "Your background and training have led you to be very expressive, especially in your mannerisms. You need to scout yourself now and understand how you come across to other people. Don't display your emotions as you experience this new role as a lawyer and negotiator for your client." I am still embarrassed about this incident years later. Another self-enforcing rule: Do not give needless offense.

46. See *Great Texas Women: Ann Richards*, UNIV. OF TEXAS AT AUSTIN, <http://www.utexas.edu/gtw/richards.php> (last visited Apr. 2, 2013); see also *Ann Richards-Bush Born with Silver Foot in his Mouth*, YOUTUBE (Mar. 21, 2008), http://www.youtube.com/watch?v=ZgeQ_y7LMRI.

This is an intentional, and effective, mixing of the metaphors of born with a silver spoon in his mouth (meaning he had a head start through inherited wealth) and stuck his foot in his mouth (meaning he had a tendency to embarrass himself with inopportune comments).

47. IRREGULAR GOODS, <http://www.cafepress.com/irregulargoods.10747222> (last visited Apr. 2, 2013).

48. ANN COULTER, *GODLESS: THE CHURCH OF LIBERALISM* 19 (2007). Again, I apologize for any offense given. None was intended. But I regard it as a "teaching moment." In order to appreciate the

said, "What's sauce for the goose depends on whose ox is being gored."⁴⁹

Think through the metaphor so that it cannot be turned effectively against you. The example above involving the "bump in the road" came during a *60 Minutes* interview, where the President was responding to a question. I'm sure he would have liked that one back. I once second-chaired a trial where lead counsel attempted to use an image from Walt Disney's *The Sorcerer's Apprentice*⁵⁰ to make a point in closing argument. The point was about how a little problem led to a big problem and it might have worked, but counsel showed the jury a visual of Mickey Mouse in the character's costume. I watched this unfold, with a sinking feeling, knowing what opposing counsel (Sioux Falls lawyer Mike Schaffer) was going to do with that one. And he did.⁵¹ Cross-examine your metaphors before putting them on the stage.

III. SOURCES FOR METAPHORS

Where can one find sources for metaphors? The short answer is: anywhere. The better answer, however, is that while you can look anywhere, you must choose wisely.⁵² Because the comparison usually requires a reference to which the listener already understands, the familiar is preferred. When possible, the reference should seek access to the deeply embedded values of the listener. Thus, popular references from culture—magazines, books, music, television, and movies—are a good starting point. For example, the extended metaphor from the Kenny Rogers song, *The Gambler* ("Know when to hold 'em, know when to fold 'em")⁵³ is familiar enough that an audience can immediately connect to an argument about greed or knowing when to stop. Bob Dylan's line: "You don't need a weatherman to know which way the wind blows"⁵⁴ provides an emotional connection for some to the Sixties (emotional comfort food) and allows all to make a connection with an argument about the direction of history.

The process starts with identifying the argument you want to make and then thinking about a way to express it in terms of another type of reference. This may take a while. Find a connecting core between the two. Examine whether

power of metaphor when used to give offense, it is necessary to experience it, rather than just talk about it.

49. See *Proceedings of the Fifty-third Judicial Conference of the District of Columbia Circuit*, 145 FRD 149, 180 (1992) (statement by Professor H. Richard Uviller quoting Professor Herbert Wechsler).

50. See *Fantasia*, IMDB, <http://www.imdb.com/title/tt0032455/> (last visited Apr. 2, 2013).

51. To the best of my recollection, Mike ignored the point of the story (a little problem leading to a big problem) and began his closing argument with the observation that this case was important to his clients and could not be understood by any reference to a cartoon character, especially Mickey Mouse. In that case, the negative impact of the visual overwhelmed whatever value the story could have conveyed.

52. Recall the comment made by the Grail Knight in *Indiana Jones and the Lost Crusade*, after the Nazi drank from the wrong cup and disintegrated on the spot: "He chose . . . poorly." *INDIAN JONES AND THE LAST CRUSADE* (Paramount Pictures 1989); see also *Indiana Jones, Nazi Uber aging*, YOUTUBE (Mar. 30, 2008), <http://www.youtube.com/watch?v=-DGFuHC75aY>.

53. KENNY ROGERS, *The Gambler*, on *THE GAMBLER* (Capitol Records 1978).

54. BOB DYLAN, *Subterranean Homesick Blues*, on *BRINGING IT ALL BACK HOME* (Columbia 1965); see also *Subterranean Homesick Blues by Bob Dylan*, BOBDYLAN.COM, <http://www.bobdylan.com/us/songs/subterranean-homesick-blues> (last visited Apr. 3, 2013).

the similarities are compatible or whether there are some dissonances that emerge upon reflection. There will be “dry wells” in this process. Test the connection in context. It should fit within the flow of the argument and not appear contrived or jarring to the overall style.

The language of religion seems naturally grounded in metaphor, especially symbol. It is at home with stories—Adam and Eve and the forbidden fruit; Cain and Abel (“Am I my brother’s keeper?”); Noah and the Flood; Joseph and his brothers; Jonah and the whale; Daniel and the Lion’s Den—which provide rich and varied possibilities for arguments grounded in comparison.⁵⁵ As fruitful as it is to speak in metaphors with those who share a particular religious tradition, one has to be careful not to give offense to those outside of that tradition. Not an easy task these days.

Authoritative secular texts, like the Constitution or the Declaration of Independence, may be used as good sources for metaphors because they can provide a tie to fundamental shared beliefs.⁵⁶ Similarly, heroes, like Abraham Lincoln or Martin Luther King, Jr., may supply the common ground from which to draw upon. Stories from the life of a hero permit an implied endorsement if the connection to the argument is reasonably close.

Sports provide rich areas for metaphor hunting, but be careful that the reference is not so esoteric as to cut out those who do not engage in or follow the sport. Fishing⁵⁷ and hunting⁵⁸ are probably most common, with football⁵⁹ and

55. See also Ann Coulter, *Hey you, browsing 'Godless' - buy the book or get out!*, TOWNHALL.COM (June 6, 2006), http://townhall.com/columnists/anncoulter/2006/06/07/hey_you_browsing_godless_-_buy_the_book_or_get_out!/page/full/ (discussing Coulter’s book *Godless: The Church of Liberalism*).

The Christian religion, for example, frowns on lying and premarital sex. That is simply a fact about Christianity. This does not mean no Christian has ever lied or had premarital sex. Indeed, some Christians have committed murder, adultery, thievery, gluttony. That does not mean there’s no such thing as Christianity any more than a videotape of Rep. William Jefferson accepting cash bribes means there’s no such thing as congressional ethics rules.

Id.

56. See ROBERT N. BELLAH, *THE BROKEN COVENANT: AMERICAN CIVIL RELIGION IN TIME OF TRIAL* (1975).

57. “But, with the big fish declining to nibble, [the Alternative Candidate Task Force] decided to go with Mister Available rather than Mister Right.” Mark Steyn, *Mister Available: Eugene McCarthy (1916-2005)*, ATLANTIC, Mar. 1, 2006, <http://www.theatlantic.com/magazine/archive/2006/03/mister-available/304616/>. Many of the metaphors center around the bait or setting the hook. Thus, to sniff out an Internet dating scam, one might conclude: The bait was not acting naturally. Supermodels don’t just contact you out of the blue to talk to you and to “make arrangements.”

58. “That dog won’t hunt” meaning that the argument will not work is a common one, perhaps too common. “Shot your load” or “You’re out of ammo” still has some “firepower” left. Also, stalking (both good and bad connotations) remains a useful metaphor.

59. See Mark Knoller, *Obama attacks Romney with extended football metaphor*, CBSNEWS, Sept. 3, 2012, http://www.cbsnews.com/8301-503544_162-57505265-503544/obama-attacks-romney-with-extended-football-metaphor/.

At a Labor Day event sponsored by the United Auto Workers Union, Mr. Obama seized on a comment Romney made in Ohio after the Republican Convention that “he’s gonna be the coach that leads America to a winning season.”

....

Mr. Obama downplayed Romney’s chances of delivering a winning season for the economy, saying, “Everybody’s already seen his economic playbook.”

baseball⁶⁰ being very productive areas as well. Other abundant categories include:

Food.

"How can you govern a country which has 246 varieties of cheese?"⁶¹

"You have pounds of barbeque knowledge, but you only give me a few ounces at a time!"⁶²

In the course of a book review, a writer makes an observation that is "spot-on" and witty:

He agrees to investigate and goes to Dallas, where an old friend in charge of the FBI field office warns him that he's not to engage in any "cowboy" stuff, that he's to play by the rules, etc. Since Swagger is a thriller hero, there's no chance he'll comply, but the warnings are a polite necessity, like calorie-listings on a boxed chocolate cake.⁶³

Animals.

Speaking about cross-examination, a well-known lawyer advises: "Get the dog collar to work on every single witness."⁶⁴ Gerry Spence uses a vivid

And then, as if he were the play-by-play man on the presidential gridiron, Mr. Obama began his call of Romney's game:

"On first down - he hikes taxes . . . by nearly \$2,000 on the average family with kids in order to pay for a massive tax cut for multi-millionaires."

"Sounds like unnecessary roughness to me," said the president to cheers from his audience of union members.

"On second down: he calls an audible and undoes reforms that are there to prevent another financial crisis and bank bailout. He wants to get rid of rules that are there to protect our air and water and workers' rights and protections that are there to make sure health care is there for you when you get sick."

"Then on third down, he calls for a Hail Mary - ending Medicare as we know it - by giving seniors a voucher that leaves them to pay any additional costs out of their pocket."

Then - as if a whistle sounded:

"There's a flag on the play! Loss of up to an additional \$6,400 a year for the same benefits you get now."

"That's their playbook," said Mr. Obama of the Romney-Ryan ticket. "That's their economic plan."

Id.; see also A SCHOLAR'S PURSUIT: THE JOHN HAGEMANN QUOTATION COLLECTION 92 (2010) [hereinafter A SCHOLAR'S PURSUIT]. "Football is a mistake. It combines the two worst elements of American life. Violence and committee meetings." *Id.* (quoting George F. Will). "Outlined against a blue-gray October sky, the Four Horsemen rode again. In dramatic lore they were known as Famine, Pestilence, Destruction and Death. These were only alias. Their real names are Stuhldreher, Miller, Crowley, and Layden [members of the Notre Dame football team]." *Id.* (quoting Grantland Rice, N.Y. TRIBUNE, (10/18/24)).

60. Here is a great metaphor, which draws from baseball and religion: "The Bible, which devout baseball fans consider the *Sporting News* of religion, counsels patience." GEORGE F. WILL, THE MORNING AFTER: AMERICAN SUCCESSES AND EXCESSES 1981-86, at 26 (1986); see also A SCHOLAR'S PURSUIT, *supra* note 59, at 17 (quoting Wes Westrum: "Baseball is like church. Many attend, but few understand.").

61. A SCHOLAR'S PURSUIT, *supra* note 59, at 91 (quoting Charles de Gaulle).

62. MIKE MILLS AND AMY MILLS TUNNICLIFFE, PEACE, LOVE, AND BARBEQUE 190 (2005).

63. Steve Donoghue, *Book World: 'The Third Bullet,' by Stephen Hunter*, WASH. POST, Jan. 13, 2013, http://www.washingtonpost.com/entertainment/books/book-world-the-third-bullet-by-stephen-hunter/2013/01/13/c7191e8a-5993-11e2-beee-6e38f5215402_story.html.

64. Don Keenan, Trial Attorney and Author, Speech at Trial Lawyer's Seminar in Las Vegas, Nev. (Nov. 16-17, 2012). Here are some other Keenan quotes from that seminar:

"If they ever re-locate the Statute of Liberty, it won't be in Dallas."

metaphor for cross-examination:

I had mauled their witnesses and torn apart their case. Sometimes I shook them like a terrier does a rat in its mouth. Sometimes I played with their witnesses like a cat with its catch. Now I had to decide whether I would give the prosecution the same chance at our witnesses.⁶⁵

Sheep are not only useful animals, they are a useful source for metaphors:

My father had a saying about taxes - you can shear a sheep many times (taxes, moderate in scope and amount) but you can only skin him once. Shear too close, try to get too much wool and you cut the skin, with infections and parasites getting hold. Then you don't get nearly so much wool, and eventually the sheep dies.⁶⁶

The natural world provides many possibilities for metaphors. I use a National Geographic documentary on the migration of caribou to explain the strong-arm powers of a trustee in bankruptcy.⁶⁷ Wolves follow the herd and prey on the elderly, the young, and the sick, much like the trustee voids security interests.. The mating habits of the bull walrus provide a good story for the Negotiation class. In contrast to many animal species who establish dominance among the males through fighting, male walruses establish a hierarchy within the male herd on the basis of body size, tusk size, aggressiveness, and general posturing (snorting), without necessarily fighting.⁶⁸ Perhaps a more civilized method (and certainly less harsh on the losers), and in any event, not unlike negotiation among lawyers.

Leslie Goss Erickson, a friend, who is also a writer, kept a journal of her travels in the West this last summer. Here is a beautifully done metaphor:

The hike to the Bristlecones was very nice – a little bit of a climb but nothing terrible. The pines themselves are magical. These trees are the oldest trees in the world. Not these specific ones, but the species of tree. They live up to more than 4000 years. I did see a few that were around 3000 years old though. These trees don't rot when they die; they erode like the soil and rocks they grow from. Their shapes are unique and twisted, and they can grow in the most desolate of situations. My favorite quote from the informational plaques that dotted part of the grove said, when talking about a tree that lived 1500 years in a very tough spot, hence becoming more resistant to rot by growing thin growth rings, "... its ability to stand for centuries after death is directly related to the adversity of its life." I think there's a metaphor there for the strength adversity

"By the time you get there, the air will be out of that balloon."

"The guy hadn't even been to the Reptile seminar, but he had read the book and thought he could fly a 747."

Id. Keenan also had a memorable metaphor for working the facts: "squeeze the orange," meaning don't stop thinking through the facts and their significance until you have squeezed all the juice out.

65. GERRY SPENCE, *SMOKING GUN: DAY BY DAY THROUGH A SHOCKING MURDER TRIAL WITH JERRY SPENCE* 360 (2003).

66. Victor Davis Hanson, *Graffiti on Trees, High-Speed Rail to Nowhere – the Wages of Liberalism*, PJ MEDIA (Aug. 27, 2012, 12:01 AM), <http://pjmedia.com/victordavishanson/the-wages-of-liberalism/#respond> (comment 3. JLawson (Aug. 27, 2012, 3:04 AM)).

67. See 11 U.S.C. § 544(b) (2006).

68. See Jennifer Horton, *How Walruses Work*, HOW STUFF WORKS, <http://science.howstuffworks.com/zoology/marine-life/walrus4.htm> (last visited Apr. 15, 2013).

gives us in our own lives.⁶⁹

Farming.

A simple narration with still pictures was an unexpected hit commercial at the telecast of the 2013 Super Bowl. *So God Made a Farmer* was an extended metaphor that tied into fundamental values.⁷⁰ In addition, the resonant, driving narration by Paul Harvey made it a very powerful commercial. The use of seed as a metaphor can also be effective. In a novel reflecting that, in Japan, many of the brightest students go on to a career in government, the writer observed: "The States could learn something from this. There, the government gets the college rejects. Like sowing the smallest seeds of corn."⁷¹ Another seed metaphor involves consuming the seed to express the problem of a short-sighted policy. Thus, "[Detroit Mayor] Coleman Young and his successors ate their seed corn, and now there is no harvest."⁷²

Law.

A trial lawyer from Texas writes a splendid blog, mostly about the law: But the doctors who are eager to spread alarm about John McCain's cancer prognosis, as quoted in Saturday's Washington Post, aren't giving their opinions for money, but instead out of other motivation. So for them, I'll use the second term of art that courtroom lawyers use to describe doctors who opine without having access to either patient or full records - a term which captures the joy we take in getting to cross-examine them: Piñatas.⁷³

Some law metaphors become bad symbols. For example, the notion in the common law that when two people marry, the two become one and the one is the husband.⁷⁴

69. Leslie Goss Erickson, *Day 26, August 13: Leaving the Wilderness*, BETWEEN A ROCK AND A SOFT SPOT (Aug. 13, 2012), <http://betweenarockandasoftspot.blogspot.com>. Here is one more memorable one from Leslie:

On my way back, I stopped to get a Diet Coke. I was standing in the 7-11, sweaty and flushed from the exertion of the hike, when a young black man, probably in his 20s, walked by me, leaned in, and said, "You look like Halle Berry dipped in vanilla." I spun around and told him that was about the nicest thing anyone had ever said to me. I wanted to give him a big hug, so I guess it worked. Now granted, all this hiking has been good for me and I did actually have a little eye makeup on today, but Halle Berry? Not in the greatest stretch of imagination could I fathom being compared to that goddess. But all logic and sense aside, it made my day.

Id. at Day 27, August 14: *The Great Salt Lake* (Aug. 14, 2013). Behold, the power of metaphor.

70. *So God made a farmer* (Dodge Ram Commercial) (CBS television broadcast Feb. 3, 2013), available at <http://www.ramtrucks.com/en/keepplowing/>.

71. BARRY EISLER, RAIN FALL 64 (2002).

72. Paul A. Rahe, *What About Michigan?*, RICOCHET (Oct. 18, 2012), <http://ricochet.com/main-feed/What-About-Michigan>.

73. William J. Dyer, *Docs opining on McCain's prognosis divide into two groups: Those who know what they're talking about, and those who're guessing*, BELDARBLOG (Oct. 18, 2008), http://beldar.blogs.com/beldarblog/trial_lawyer_war_stories/.

74. See 1 WILLIAM BLACKSTONE COMMENTARIES *442 (Thomas M. Cooley ed., 1899) (stating "By marriage, the husband and wife are one person in law: (1) that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband . . ."). The modern usage of the quote is "The husband and the wife are one, and that one is the husband."

Poetry.

Let us end this section on sources on a more elevated note. Poetry, of course, is full of metaphor. Here is one that would make a fine epitaph on a tombstone:

Though here at journey's end I lie
 In darkness buried deep,
 Beyond all towers strong and high,
 Beyond all mountains steep,
 Above all shadows rides the Sun
 And Stars for ever dwell:
 I will not say the Day is done,
 Nor bid the Stars farewell.⁷⁵
 Still round the corner there may wait
 A new road or a secret gate;
 And though I oft have passed them by,
 A day will come at last when I
 Shall take the hidden paths that run
 West of the Moon, East of the Sun.⁷⁶

IV. THE JOY OF METAPHOR⁷⁷

If one were to describe the characteristics of effective argument, the description would employ adjectives like clear, concise, simple, vivid, and memorable. Here are some of metaphors that fit that description.

Mark Twain has a line that would be a perfect title for a murder mystery written for a university setting: "Sacred cows make the best hamburger."⁷⁸ In one of Dorothy Sayers's mystery novels, a character, who is a writer, asks a friend: "Do you find it easy to get drunk on words?" He responds: "So easy that, to tell you the truth, I am seldom perfectly sober."⁷⁹ Another dazzling metaphor from Sayers describes a wine cellar with the following: "And below, in the cool cellar, lie row upon row the dusty bottles, each an enchanted glass coffin in which the Sleeping Beauty of the vine grows ever more ravishing in sleep."⁸⁰

75. J.R.R. TOLKIEN, *THE RETURN OF THE KING: BEING THE THIRD PART OF THE LORD OF THE RINGS*, bk. 6, ch. 1, at 888 (Houghton Mifflin Co. 2002) (1955).

76. *Id.* at bk. 6, ch. 9, at 1005.

77. A device often used in headlines, here the metaphor allows the reader's own experience to supply the connection to the implicit reference, whether to The Joy of Cooking or the Joy of Sex (the latter here itself an implicit reference to the former), but the title stands alone and is not incomprehensible without knowledge of the implicit reference.

78. *Mark Twain quotes*, THINKEXIST.COM, http://thinkexist.com/quotation/sacred_cows_make_the_best/181805.html (last visited Apr. 15, 2013).

79. DOROTHY L. SAYERS, *GAUDY NIGHT* 346 (Bourbon Street Books Ed. 2012).

80. DOROTHY L. SAYERS, *The Bibulous Business of a Matter of Taste*, in DOROTHY L. SAYERS: *THE COMPLETE STORIES* 163, 166 (2002). I am indebted to Jasmine Simeone, Secretary of the Dorothy L. Sayers Society, for finding this wonderful story that I had read many years ago, but could not find on my own.

Perfect. Simple does not mean simplistic. Much is expressed in this single line. If ever you have a wine cellar, this would serve as an exquisite salutation above the entrance.

Roger L. Simon, a novelist and mystery writer, provides this splendid description of a scene on the west side of Los Angeles:

By two o'clock I was turning off the Ventura Freeway onto Topanga Canyon Boulevard, climbing past the upper-middle-class tracts to the studied funkiness of the canyon. Visiting Topanga was like examining an archeological dig, a layered cross section of the last twenty years — farmers and old-time radicals, under rednecks and chicanos, under hippies, rock stars and professors from UCLA.

Topanga Center was the meeting place for the hipper sectors of the community. It was the only shopping center south of Berkeley where seven-grain wheat loaves outnumbered Wonder Bread by five to one. *But the whole place had a shopworn quality to it, a style frozen in time while the rest of the world moved on. In their tie-dye shirts and beaded headbands, the patrons reminded me of those Japanese soldiers hidden out in Pacific jungles for thirty years who didn't realize the war was over.*⁸¹

In the movie *Sideways* there is a scene where one of the principal characters, Miles (played by Paul Giamatti), is trying to explain to his lady friend, Maya (Virginia Madsen), why he likes Pinot Noir. His explanation evolves into a description of himself as well:

[I]t's a hard grape to grow, as you know. Right? It's, uh, it's thin-skinned, temperamental, ripens early. It's, you know, it's not a survivor like Cabernet, which can just grow anywhere and uh, thrive even when it's neglected. No, Pinot needs constant care and attention. You know? And in fact it can only grow in these really specific, little, tucked-away corners of the world. And, and only the most patient and nurturing of growers can do it, really. Only somebody who really takes the time to understand Pinot's potential can then coax it into its fullest expression. Then, I mean, oh its flavors, they're just the most haunting and brilliant and thrilling and subtle and . . . ancient on the planet.⁸²

Fortunately for Miles, Maya is patient and eventually she decides to nurture him.

Mysteries often include cutting observations about the state of society. Here is one of my favorites, whose haunting comparison of the treatment of the homeless and stray animals leads an ironic ending:

The westside chapter of the Society for the Prevention of Cruelty to Animals was sandwiched between warehouses on a cul-de-sac in the industrial section of Santa Monica—a collection of storage buildings and body shops near the bus station. Shopping carts full of derelicts' worldly goods parked in doorways served as declarations of homesteading claims. Blanket rolls, layers of newspaper, and empty wine bottles spilled onto the sidewalk. Mace couldn't help but wonder about a civilization that

81. ROGER L. SIMON, *WILD TURKEY* 43-44 (1974) (emphasis added).

82. *SIDEWAYS* (Fox Searchlight 2004). See also *Sideways: Did You Know? Quotes*, IMDB, <http://www.imdb.com/title/tt0375063/quotes> (last visited Apr. 5, 2013).

sheltered and fed the stray animals and left the humans to face the elements alone. Of course, the hospitality extended to animals lasted only so long. No easy answer.⁸³

The use of "debt" as a metaphor shapes this masterful description of the quest for racial equality from the Civil War to the Civil Rights movement:

The Union fought the Civil War on borrowed moral capital. With their noble belief in their purpose and their extravagant faith in the future, the radicals ran up a staggering war debt, a moral debt that was soon found to be beyond the country's capacity to pay, given the undeveloped state of its moral resources at the time. After making a few token payments during Reconstruction, the United States defaulted on the debt and unilaterally declared a moratorium that lasted more than eight decades. The country was only nominally spared the formality of bankruptcy by the injunctions of the Supreme Court that cast doubt on the validity of the debt. In the meantime, over the years, interest on the debt accumulated. The debt was further augmented by the shabby treatment of the forgotten creditors, our own Negro citizens.

Then in the middle of the twentieth century conscience finally began to catch up with commitment. Very suddenly, relatively speaking, it became clear that the almost forgotten Civil War debt had to be paid, paid in full, and without any more stalling than was necessary. As in the case of the commitment to emancipation during the Civil War, amoral forces and pressures such as the exigencies of foreign propaganda, power politics, and military necessities exercised a powerful influence upon the recommitment to equality. But also as in the case of emancipation, the voices of conscience, of national creed, and of religious conviction played their parts. In the second instance the demands of the Negroes themselves played a more important part in the pressure than before. Equality was at last an idea whose time, long deferred, had finally come.

Once again there was a lag between popular conviction and constitutional interpretation. Only this time the trend ran the opposite way, and it was the Constitution that dawdled behind conviction. Again it proved unfeasible to close the gap by statutory or amendatory procedures, and again it became the embarrassing task of the Supreme Court to effect an accommodation, a rationalization. Once more the justices scrutinized the words of the Fourteenth Amendment, and this time they discovered that those words really meant what they said, and presumably had all along. The old debt that the court had once declared invalid they now pronounced valid.

Although this was acknowledged to be a national debt, in the nature of things it would have to be paid by a special levy that fell with disproportionate heaviness upon one section of the country. The South had been called on before to bear the brunt of a guilty national conscience. It is now called on a second time. One could hope that the South's experience in these matters might stand it in good stead, that having

83. Barbara Seranella, *No Human Involved*, in *L.A. NOIR* (Steven Gilbar, ed., 1999). See also Walter Mosley, *A Little Yellow Dog*, in *L.A. NOIR* (Steven Gilbar, ed., 1999) (stating "The cops found Andrew Brown trying to limp away from the school. He was the definition of a loser in L.A.: A man without a car.").

learned to swallow its own words before, it might do so again with better grace, that it might perform what is required of it with forbearance and humility. I do not know. I can only admit that present indications are not very reassuring.⁸⁴

Drawing upon the epic failure of French military strategy to resist the advance of the Nazi army because it did not anticipate that the German offensive would go around the entrenched line and attack through the Ardennes forest, Richard Fernandez expresses the paradox of a society that is both over-protective and under-protective of its children: "At great expense society has built an impregnable Maginot line against every physical threat. But for some reason it left the Ardennes forest of the mind completely undefended"⁸⁵

Finally, one of my favorite movies is *Being There*,⁸⁶ which is a comedic treatment of politics in the modern age, where the simple platitudes of a mentally challenged gardener are taken as wise words of prophecy.

President "Bobby": Mr. Gardner, do you agree with Ben, or do you think that we can stimulate growth through temporary incentives?

[Long pause]

Chance the Gardener: As long as the roots are not severed, all is well. And all will be well in the garden.

President: In the garden.

Chance: Yes. In the garden, growth has it seasons. First comes spring and

summer, but then we have fall and winter. And then we get spring and summer again.

President: Spring and summer.

Chance: Yes.

President: Then fall and winter.

Chance: Yes.

Benjamin Rand: I think what our insightful young friend is saying is that we welcome the inevitable seasons of nature, but we're upset by the seasons of our economy.

Chance: Yes! There will be growth in the spring!

Benjamin: Hmm!

Chance: Hmm!

President: Hm. Well, Mr. Gardner, I must admit that is one of the most refreshing and optimistic statements I've heard in a very, very long time.

[Benjamin Rand applauds]

President: I admire your good, solid sense. That's precisely what we lack on Capitol Hill.⁸⁷

When skillfully done, metaphors represent a higher form of argument through

84. C. VANN WOODWARD, *THE BURDEN OF SOUTHERN HISTORY* 84-86 (1968).

85. Richard Fernandez, *The Shadow in the Hallway*, BELMONT CLUB (Dec. 15, 2012, 11:49 AM), <http://pjmedia.com/richardfernandez/2012/12/15/the-shadow-in-the-hallway/?singlepage=true>

86. *BEING THERE* (United Artists 1979).

87. *Being There: Did You Know? Quotes*, IMDB, <http://www.imdb.com/title/tt0078841/quotes> (last visited Apr. 5, 2013).

comparison. But as this passage demonstrates, it is not the form itself that is wise. People here mistook the form for wisdom. Chance was a simple man, “a blank slate,” upon whom others projected their own values and hopes.

V. *THE VERDICT*: A STUDY OF THE USE OF METAPHOR

The power of metaphor can be seen in the movie *The Verdict*.⁸⁸ Movies, of course, are filled with metaphors—verbal, visual, as well as auditory.⁸⁹ The storyline as a whole may be viewed as a metaphor. *The Verdict*, for example, is a story about redemption. Metaphors give the story meaning and depth and deliver an unstated invitation to the audience to participate in the story.⁹⁰ Effective storytelling depends on this audience participation.⁹¹

The Verdict opens with a scene of quiet despair. Frank Galvin (played by Paul Newman) is a lawyer whose daily routine begins with playing pinball, while smoking cigarettes and drinking beer. The visual of Galvin, alone in the dark, a silhouette against the bleak light from the outside, foreshadows the descent of his career. The only sound is the empty jangle of the pinball machine.⁹² At one time a successful lawyer, Galvin is now an ambulance chaser, and a poor one at that. He is addicted to alcohol, moving through the day with beer for breakfast, whiskey during his morning review of the obituaries, and finally ending the day with more whiskey at his favorite bar. The alcohol is “medication” for an underlying rage at his situation. When he goes back to his office to sleep off the alcohol, he first trashes the office and, tellingly, destroys his law school diploma.⁹³ He is found passed out on the floor the next morning

88. *THE VERDICT* (20th Century Fox 1982).

89. This is not the place to explore the use of music as an aid to storytelling, but its effect on the subconscious mind should not go unnoticed. The music that accompanies a movie is a vital part of the process. In a way that is similar to how metaphors speak to the unconscious mind, film music works the emotions to support and accentuate the story portrayed on the screen. See, e.g., Bradley J. Martin, *Modern Business Life, How “Gladiator” and Other Film Soundtracks Help Work Productivity*, MODERN BUSINESS LIFE (Mar. 26, 2009), <http://modernbusinesslife.com/?p=146>.

The primary purpose of a good movie soundtrack is to compliment the story being told on the screen. Good storytellers draw you in, and make you feel and relate to the characters in the story. The movie soundtrack then serves as a magnifying glass for these emotions, drawing out and evoking these feelings to create a heightened state of emotion. In fact, some of the best movie soundtracks are transparent while watching the film. You don’t necessarily hear them . . . rather, you feel them.

Id.

90. In discussing the popularity of the movie *THE SHAWSHANK REDEMPTION* (Castle Rock Entm’t. 1994), director Frank Darabont made the following observation:

The film seems to be something of a Rorschach for people. They project their own lives, their own difficulties, their own obstacles, and their own triumphs into it, whether that’s a disastrous marriage or a serious debilitating illness that somebody is trying to overcome. They view the bars of Shawshank as a metaphor for their own difficulties and then consequently their own hopes and triumphs and people really do draw strength from the movie for that reason.

Charlie Rose: *A discussion with the cast of “The Shawshank Redemption,”* (PBS television broadcast Sept. 6, 2004), available at <http://www.youtube.com/watch?v=N2UHAgCzXR0>.

91. *Storytelling for Lawyers*, *supra* note 2, at 240-41.

92. There is also the symbol of Galvin’s life, subjected to the bouncing around by outside forces, much like the ball in the machine.

93. I am indebted to Ernest Thompson, USD Class of 2015, for noticing this detail and making the

by his friend and mentor, Mickey Morrissey. Morrissey had come by to check on how the big case he had given to Galvin was going. He had his answer without asking: not well.

The case involved a young woman, Deborah Ann Kaye, who had come to the hospital to deliver her baby. During the labor, she vomited into her mask, thereby cutting off her oxygen supply. By the time the oxygen supply was restored, she had suffered irreparable brain damage. She was placed in a limited care facility, while her sister, Sally Doneghy, continued to attend to her. On the day that Morrissey came by and surveyed the disarray in the office, Galvin was due to meet that afternoon with Sally and her husband. Galvin, however, had done nothing on the case. So, now he starts. But not before playing some more pinball, prior to visiting Deborah at the facility to observe her condition.

When he returns to his office to meet with the Doneghys, the lies begin. There is no secretary, but Galvin has purposely left a note on his door, purportedly from his secretary, explaining why the door is locked and, as a nice touch, giving Galvin a reminder about a non-existent date with a judge, as if Galvin was still influential in the profession. They meet in the reception area (due to the mess in the inner office from the night before) because Galvin claims he is preparing for a trial next week (which, of course, he is not).⁹⁴ The Doneghys want to settle the case at this point and Galvin agrees, primarily because he is completely unprepared to go to trial. Even though settlement appears to be the only option, Galvin can barely bring himself to go through the motions. He has a brief first (yes, first!) meeting with his expert, Dr. Gruber, and then "counsels" the Doneghys regarding the making of a settlement offer.

On the day that he is to meet with the Diocese that operates the hospital, Galvin first goes back to take pictures of Deborah Ann Kaye, in order to bolster his demand. It is here, however, that the case turns around. Galvin takes a few Polaroid snapshots of his client, lying in the facility bed. In a great visual metaphor, we see the pictures beginning to come into focus, just as we see Galvin realizing that his client is a human being. That is, until this point, Galvin had viewed his client as merely a means for extracting money from a defendant. He then goes to the meeting with the Bishop, who is speaking for the Diocese. Galvin has decided on his own, without informing the Doneghys, that he will not accept any settlement. The exchange with the Bishop goes like this:

The Bishop: We have a question of balance. . . . Young woman in her prime deprived of her life, her sight, her family is tragic. A tragic accident. Nothing of course can begin to make that right. We must do what we can. We must do all that we can. We must try to make it right.

...

The Bishop: Nothing we can do will make that woman well.

Galvin: And no one will know the truth.

connection to his feelings about the law.

94. Galvin lies to avoid the truth at what he has become, a train wreck (my own metaphor). Lies help to cover up his negligence. He fears being exposed. Lying allows Galvin to blame someone or something, other than himself, for the condition of his career and his life.

The Bishop: What is the truth?

Galvin: That that poor girl put her trust into the . . . the hands of two men who took her life. She's in a coma. Her life is gone. She has no home or family. She's tied to a machine. She has no friends. And the people who should care for her - her doctors . . . and you and me - have been bought off to look the other way. We've been paid to look the other way. I came here to take your money. I brought snapshots to show you so I could get your money. I can't do it. I can't take it. Because if I take the money, I'm lost. I'll just be a . . . rich . . . ambulance chaser. I can't do it. I can't take it.⁹⁵

There is much irony here, with the heretofore unprincipled Galvin standing on principle and the Bishop is put in the position of asking: "What is the truth?" Playing to what was believed to be Galvin's weakened financial circumstances, a check, in the amount of \$210,000, was placed in Galvin's hands. Almost as if they had placed a drink in his hands, Galvin looks at the check, briefly, and comments on the odd amount, which was easily divisible by three, and then hands it back. Galvin has begun the road back.⁹⁶ He acknowledged how close to the edge he had come. "[I]f I take the money, I'm lost."

Why does Galvin do this? I believe it is because he had come to see himself in Deborah Ann Kaye's situation. As we find out a little bit later, Galvin had worked on a case with a senior partner while at the law firm he started with upon graduation. When Galvin learned that the partner had tried to fix a case, he went to the other partners to inform them of this. The partnership turned on him and it was Galvin who had to face jail and disciplinary charges. Only when Galvin agreed to say nothing about the jury tampering did the charges against him go away. But he was dismissed from the firm and his marriage dissolved. In other words, Galvin was wronged by certain professionals, even when he had done nothing wrong, and his life was changed for the worse (though, unlike Deborah Ann Kaye, Galvin did have a hand in his own destruction). What must have grated hard on Galvin is that nothing happened to the wrongdoers. Life went on for them, as if they had done nothing wrong. Galvin sees the settlement offer from the Diocese in the same light: "And the people who should care for her - her doctors . . . and you and me - have been bought off to look the other way."⁹⁷ What happened to Galvin made him lose faith in the law. The trashing of his law degree was symbolic. He hated that the system turned against him when he tried to do the right thing. The loss of self-respect led to self-loathing and drinking. Now, maybe, there is a chance for redemption.

But, Galvin needs help. He goes to his mentor, Mickey, for assistance. Mickey is incredulous that the settlement offer was turned down. "You need a keeper." Galvin says he can win the case. Mickey responds, "Win. You've already won. When they pay you the money, that means you've won." If that is not bad enough, consider who is on the other side: Concannon. Galvin says he is

95. The Bishop spoke of balance, while surrounded by opulence.

96. It should be noted that the road back begins with a patently unethical act, that of declining an offer of settlement without first communicating that offer to the Doneghys.

97. I am indebted to Nick Moser, USD Class of 2015, for making this connection.

a good man. Mickey retorts: "Good man? He's the Prince of F***ing Darkness."⁹⁸ In any event, Mickey agrees to help and they begin to work on the case together. The scene shifts to the inside of a law firm conference room for the opposing counsel, lavishly appointed with amenities, and lined with a dozen associates, each of whom will read again all of the prior discovery. A David and Goliath metaphor is thus in place to shape the action.

Goliath, however, fights back with some low blows. Dr. Gruber, the plaintiff's expert, disappears suddenly, almost certainly as a result of being bought off by Concannon and sent to an island in the Caribbean. In addition, a spy is sent to find out what is going on in the plaintiff's camp. Laura Fischer is a young lawyer who is sent to spy, but who becomes emotionally conflicted during her assignment. Whether or not she is swayed by Galvin's talk about giving the poor a chance at justice, she discovers there is more to Galvin than she had been led to believe, especially when she learns from Mickey the tale of Galvin's fall from prosperity. Mickey, unknowingly, plants some doubt about the goodness of large firms when he responds to her shock about the corruption of Galvin's former law firm. "They're all sharks. How do you think they got all that money? By doing good?"

When Galvin loses his expert witness and is denied a continuance by the judge, he tries to regain the \$210,000 offer, but to no avail. He hires another expert, who is available, but not impressive. Galvin decides to go after another witness, Nurse Rooney, who had been in the operating room, but had not given a deposition. He visits her at her apartment and attempts to pressure her into testifying. He is unsuccessful, but he elicits the following statement from her: "You know, you guys are all the same. You don't care who you hurt. What you care about is a dollar. You're a bunch of whores. You got no loyalty, no nothing."

By this point, this metaphor has some applicability to just about everyone in the movie. It has some substance for the professionals—the lawyers and the doctors, both of whom at times appear to treat their clients or patients as a means of extracting money. Concannon is rather blunt about this. He tells Laura: "I'm not paid to do my best. I'm paid to win." The corruption of the system eventually envelops the seemingly uncorrupted Dr. Gruber, who is bought off by the defense. Just about everyone is tainted in this light—the Church, which has become wealthy through its service, has no interest in finding out the truth; the judge seems more interested in whether his luncheon soup is sufficiently warm than he is in the justice of the case being tried before him; Sally Doneghy's motives remain essentially intact, but her husband, Kevin, is tired of the sacrifice and now simply wants money in order to leave town and start a new life elsewhere. Kevin is especially direct in expressing his disappointment to Galvin:

You ruined my life, mister . . . me and my wife.

...

98. A rather vivid metaphor, yes?

You guys, you guys are all the same. The doctors at the hospital, you, it's always what I'm gonna do for you. And then you screw up and it's 'We did the best that we could, I'm dreadfully sorry.' And people like us live with your mistakes the rest of our lives.

Galvin is almost catatonic by the end of the first day of trial when he comes back to his apartment and announces to Laura: "it's over." It is as if he wants to quit right then. Laura by now is sympathetic to the cause and rightly brings him up short. If his drunkenness at the beginning of the movie was a form of quitting, Laura's charge echoed this: "You just want me to write an excuse for you so you don't have to go to school." Hinting at her past, Laura says that she is tired of investing in failure. Galvin is finally able to pull himself together and go back into court for another round.⁹⁹ Galvin's failed expert witness, Dr. Thompson, encourages him with these words: "You know, Mr. Galvin, sometimes people can surprise you. Sometimes they have a great capacity to hear the truth."

Galvin hates the law for what it has done to him, but he respects justice ("the courts exist to give a chance at justice"). He keeps fighting and finally makes the breakthrough when he realizes that the admitting nurse, Kaitlin Costello, may have the key to understanding what happened in the delivery room. After more deception and even illegal action (tampering with the mail), he finally locates her and convinces her to testify. For dramatic reasons, Galvin does not complete the examination of Ms. Costello at trial, but the otherwise masterful Cancannon obliges by walking right into the trap. It turns out that Deborah Ann Kaye ate one hour before her admission and that the administering of the general anesthetic under those circumstances was negligent, according to the doctor's own testimony. The cover-up dictated by the doctor forced Ms. Costello to change the number on the admitting form from a "1" to a "9." Although ultimately stricken from the record and from the jury's consideration, it was too late to unring that bell.¹⁰⁰ Ms. Costello's emotional testimony, ending with—"Who were these men? I wanted to be a nurse."—shows us yet another victim who was wronged by professionals.

The closing argument becomes a metaphor for Galvin. In contrast to his opening statement, generally ineffective and focused on himself ("I, I, I") with no mention of his client, Galvin now speaks for the community. "We're tired of hearing people lie. . . . We doubt ourselves. We doubt our beliefs. We doubt our institutions. And we doubt the law. But today, you are the law." Galvin transitions from talking about "we" and looking nowhere in particular to directly addressing the jury with "you." The key to the argument is honesty. Contrasted with the lies, "verdict" literally means to tell the truth. Galvin, like his client, had lost everything because of the callous, self-serving actions of the

99. A reminder of Vincent Bugliosi's metaphor of trial that the winner is the one who gets up off the canvas one more time than the other guy. See VINCENT BUGLIOSI, *AND THE SEA WILL TELL* (1991).

100. I don't think that the judge was required to direct a verdict after this exclusion of evidence. The jury already had the sister's testimony that Ms. Kaye had eaten one hour before admission and the defendant doctor's expert opinion that if that were the case, then it would be negligent to administer the general anesthetic.

establishment, now he speaks for Deborah Ann Kaye, to stop this from happening again.

After the verdict in favor of Ms. Kaye (we are not told how much, only that it was likely more than Galvin had asked for), Galvin sits in his office, alone. But, in contrast with the opening scene, he is now in the light, with the darkness in the background. He is drinking a cup of coffee. Celebration and sobriety together. And the phone call from Laura (representing his past) goes unanswered. Redemption through reflection and honesty. Self-discovery requires identification of the wolf (the problem) and ending the self-delusion. Once you start looking at the movie through the lens of metaphor, it opens up these different associations and insights. The story can be told with metaphors as themes—addiction, redemption, fair play, and justice. *The Verdict* was the truth, in many ways.

VI. CONCLUSION

The language of persuasion uses clear and direct propositions, together with careful, but unaffected word choices, as well as stories and metaphors. Like stories, metaphors engage the listener behind the wall of conscious skepticism and resistance. Metaphors speak in the language of the people. Whether the subject matter is politics, business, popular culture, sports, country music, or the law, metaphors are a familiar way to express a point. Their effectiveness lies in avoiding recognition as argument. They are vitally a part of argument, but usually escape detection because their charm distracts from the sales pitch of argument. Metaphors will be like music that accompanies a film. They shape and move without drawing attention.

Argument should be driven by theme, but the execution of the theme will be tied together and reflected in the word choices and the metaphors. A metaphor will not, in and of itself, turn the argument in your favor. It must reflect, aptly, the theme that will tie into the underlying emotions and values of the listener. Metaphors also tie into principle. This is inevitable because the comparison points to an underlying or unifying principle that fits the comparison of the disparate things. If the metaphor works, the listener will supply the principle and thus strengthen the listener's attachment to the argument. By their nature, metaphors invite participation.

For persuasion purposes, the most effective argument is the argument that goes on inside the listener's head. That is a sobering thought, given the amount of misinformation that is carried within any average juror. You can choose to participate in that argument, or not. The point is the juror will bring emotions and values to the deliberation. Would you like to speak to those concerns? You will need a good metaphor or two. It is like arming your sympathetic jurors with the arguments to meet those from the other side. An effective metaphor will speak to the juror's moral infrastructure by showing the connection between your point and the juror's own unconscious beliefs.