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Themes and Persuasion

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THEMES AND PERSUASION

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*The search for the right theme is one of the most critical tasks facing a trial lawyer in presenting a case to a jury. Human beings do not absorb facts in the abstract. The theme gives them the necessary perspective to understand the evidence. If the plaintiff attorney does not provide jurors with the right theme, the defense will, or jurors will do it for themselves. The most powerful themes appeal to a broad spectrum of humanity and tie into people's basic needs. Themes are the core ingredient of great literature, plays, and cinema—and of winning cases.*¹

I. INTRODUCTION

There is widespread agreement that themes are important to the task of persuasion.² A good theme brings conciseness to an argument, provides a lens or filter through which to evaluate evidence, and ties into core values that may move the decision maker into agreement and even over into advocacy. Themes have organizational power – they collect certain pieces and discard others, provide guidance in sequencing, influence word choices, supply continuity, and generally shape the argument, often through a story that ties the particulars to the moral center of the argument.

A theme is a short statement, often one sentence or shorter, of why one should win. They are like “sound bites” with a sense of urgency. They range from the familiar (“In the eyes of the law, the defendant is presumed innocent.”), to common sense (“One should not complain about a problem that was created by one’s own actions.”), to metaphors (“Truth is sometimes toxic, like water to witches.”), to irony (“The greatest of all Hollywood lies is that villains look the part. Nothing could be further from the truth. All really evil villains are

[†] Professor of Law, University of South Dakota School of Law. I have been collecting themes for a long time and I must admit, at the outset, that I do not have the original source for some of the quotations. I apologize to those whose insight I may have appropriated and I hope to make due attribution in the final version of this essay, which I expect will be part of a book length treatment of writing and persuasion. I wish to thank Kasey Wassenaar, USD School of Law, Class of 2012 for her very able assistance on this project.

1. William S. Bailey, *Tie Your Case Together With A Good Theme*, 37 TRIAL 58 (Feb. 2001).

2. See, e.g., DAVID BALL, THEATER TIPS AND STRATEGIES FOR JURY TRIALS 255-58 (3d Ed. 2003); Celia W. Childress, *An Introduction to Persuasion in the Courtroom: What Makes a Trial Lawyer Convincing?*, 72 AM. JUR. TRIALS 137 (1999); Hon. Charles L. Becton, *Theming*, in LITIGATING TORT CASES § 12 (2010) (Roxanne Barton Conlin & Gregory S. Cusimano, Eds.); Richard Waites, *The Psychology of Powerful Opening Statements*, 809 PLI/Lit 235 (Dec. 2009); Thomas J. Vesper, *Breathing Life Into a Case with Theme in Opening: Storytelling and Damages in Opening Statements*, 2 Ann. 2003 ATLA-CLE 1457 (2003); Terence Quinn, *Theming Your Case for Success*, ATLA Focus Group Presentation, Atlanta, GA, 1997.

beautiful at first.”³), to dramatic (“Great nations, like great men, should keep their word.”⁴), and even to the exotic (“It’s like Michael Jackson’s nose—the more they try to correct the previous mistake, the worse it gets.”⁵). There is a great deal of power and wisdom in these pithy expressions.

Themes may be found everywhere – in the Bible, in literature, in popular culture, and in the ebb and flow of daily life. They are most easily found in collections of quotations. The most famous quotation about quotations comes from Winston Churchill:

It is a good thing for an uneducated man to read books of quotations. Bartlett’s Familiar Quotations is an admirable work, and I studied it intently. *The quotations when engraved upon the memory give you good thoughts.*⁶ They also make you anxious to read the authors and look for more.

For legal argument, the best collection of themes, by far, is Thomas Vesper’s *Uncle Anthony’s Unabridged Analogies: Quotes, Proverbs, Blessings & Toasts for Lawyers, Lecturers & Laypeople.*⁷ This is one of the essential books for the lawyer’s library.⁸ One could have a reasonably productive and successful career

3. Posting of Richard Fernandez, blogging as Wretchard, to Belmont Club, <http://fallbackbelmont.blogspot.com/2008/05/silent-city.html> (May 16, 2008, 12:08).

4. Fed. Power Comm’n v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960) (Black, J., dissenting). *But cf.* LORD JOHN DALBERG-ACTON, *ESSAYS ON FREEDOM AND POWER* 364 (H. Finer ed., 1948):

I cannot accept your canon that we are to judge Pope and King unlike other men, with a favourable presumption that they did no wrong. If there is any presumption it is the other way against holders of power, increasing as the power increases. Historic responsibility has to make up for the want of legal responsibility. Power tends to corrupt and absolute power corrupts absolutely. *Great men are almost always bad men*, even when they exercise influence and not authority: still more when you superadd the tendency or the certainty of corruption by authority.

(emphasis added), *quoted in* Wyman v. James, 400 U.S. 309, 394-95 n.12 (1971) (Douglas, J., dissenting).

5. This classic line was written, I believe, by the late Dean Barnett, but I cannot find the original source.

6. SIR WINSTON S. CHURCHILL, *ROVING COMMISSION: MY EARLY LIFE* Chapter 9 (1930) (emphasis added), *quoted in* THOMAS J. VESPER, *UNCLE ANTHONY’S UNABRIDGED ANALOGIES: QUOTES, PROVERBS, BLESSINGS & TOASTS FOR LAWYERS, LECTURERS & LAYPEOPLE* 12 (2d ed., 2010) [hereinafter *VESPER*].

7. *VESPER*, *supra* note 6.

8. Also on the “essential” list for the lawyer’s library is *A SCHOLAR’S PURSUIT: THE JOHN HAGEMANN QUOTATION COLLECTION* (2010). This collection, representing a life-long effort by my friend and former colleague, the late John Hagemann, has many wonderful quotes that will delight the reader who simply reads from cover-to-cover. In order to give the reader a sense of the great range of John’s sources, here are a few of my favorites:

After three days without reading, talk becomes flavorless. (Chinese proverb) *Id.* at 22.

The gods too are fond of a joke. (Aristotle) *Id.* at 122.

After I’m dead, I’d rather have people ask why I have no monument than why I have one. (Cato the Elder) *Id.* at 58.

Life can only be understood backwards, but it must be lived forwards. (Soren Kierkegaard) *Id.* at 73.

I know of no method to secure the repeal of bad or obnoxious laws so effective as their stringent execution. (Ulysses S. Grant) *Id.* at 141.

Laziness is nothing more than the habit of resting before you get tired. (Jules Renard) *Id.* at 142.

It is easier to love humanity as a whole than to love one’s neighbor. (Eric Hoffer) *Id.* at 156.

on the basis of these sources alone. But there is also value in thinking about an argument without dependency upon the thoughts of others. Not only may there be a temptation to jam the “square peg” of a great quotation into the “round hole” of an argument, the important process of discovering the moral center of the case may be shortened or bypassed altogether. In fact, locating the moral center of the case first should make the search for the right theme drawn from the collections more productive.

This Article will describe how to locate the moral center of the case and thereby discover themes that may provide a better fit for the evidence and the argument. Because themes are mini-arguments, it is also helpful to understand the structure of arguments. The identification of arguments through classical rhetorical learning will lead to the discovery of additional arguments to make in a particular case. The Article will conclude with specific suggestions for the use of themes to reflect the moral center of the case.

II. FINDING THE MORAL CENTER OF THE CASE

Themes should reflect the moral center of the case. What the case is about in its simplest terms should be cast as a moral imperative. Contract cases, for example, are usually based on the proposition that “promises should be kept.” For torts cases, it might be: “We are asking you to right a wrong.” In a criminal case, it might be: “Before the government may imprison someone, it must play by the rules.”

Explicit consideration of morals to help shape the case is becoming more

Originality is the fine art of remembering what you hear but forgetting where you heard it. (Laurence Peter) *Id.* at 168.

When you steal from one author, it’s plagiarism; if you steal from many, it’s research. (Wilson Mizner) *Id.* at 205.

Everything is held together with stories. That is all that is holding us together, stories and compassion. (Barry Lopez) *Id.* at 174.

Not all those who wander are lost. (J.R.R. Tolkien) *Id.* at 179.

Getting caught is the mother of invention. (Robert Bryne) *Id.* at 183.

For those of us too weak to dig and too proud to beg, the university provides a splendid refuge. (James Nuechterlein) *Id.* at 75.

This is not just a book of one-liners. There are also many extended quotes for the reader’s reflection. One of my favorites was found by John, buried in an otherwise average action/thriller book by Greg Iles:

Einstein said the arrow of time flies in only one direction. Faulkner, being from Mississippi, understood the matter differently. He said the past is never dead; it’s not even past. All of us labor in webs strung long before we were born, webs of heredity and environment, of desire and consequence, of history and eternity. Haunted by wrong turns and roads not taken, we pursue images perceived as new but whose provenance dates to the dim dramas of childhood, which are themselves but ripples of consequence echoing down the generations. The quotidian demands of life distract from this resonance of images and events, but some of us feel it always.

And who among us, offered the chance, would not relive the day or hour in which we first knew love, or ecstasy, or made a choice that forever altered our future, negating a life we might have had? Such chances are rarely granted. Memory and grief prove Faulkner right enough, but Einstein knew the finality of action. If I cannot change what I had for lunch yesterday, I certainly cannot unmake a marriage, erase the betrayal of a friend, or board a ship that left port twenty years ago.

Id. at 270. Thank you, John. This fine book is your monument.

fashionable.⁹ This has not always been so. Morals talk, especially in the political context, makes some people very nervous.¹⁰ Perhaps a legacy from the 1960s, and perhaps also related to an aversion to rules generally, the implicit prohibition of morals talk is a self-limiting restriction that inhibits complete analysis of the case. Whatever understandable reservations one might have about mixing morality and politics,¹¹ these habits should not be carried over into the realm of advocacy.

It might be argued, however, that any explicit resort to morality that is grounded in non-sectarian terms would be so general as to be useless. But one of our founding documents, for example, speaks in non-sectarian terms and manages to provide understanding and guidance for particular problems:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men deriving their just powers from the consent of the governed.¹²

In writing these words, Thomas Jefferson said that he was attempting to express the basic principles of “the American mind.”¹³ In terms of providing guidance, Abraham Lincoln stated that he derived all of his political principles from this portion of the Declaration of Independence.¹⁴ The point here is that general principles, provided that they are good principles, will lead to themes that will resonate with people because of their inherent soundness.

It is in this sense that the following observation of Justice Michael Musmanno was made:

As much as the law world may assume that law consists of a game in the abracadabra of words, and as much as that assumption may have been true in Shakespearean days, it is reassuring to note that the law of today aims at realities and the achievement of a justice which will appeal to the reason of the most unlettered man on the street. Law is simple justice in action.¹⁵

This appears, at first, to beg the question. That is, how do we know appealing to the reason, opinions, and prejudices of the man on the street will achieve justice? This passage presupposes a moral base that is part of, and in fact helps to define, the community. It may not always be possible to find a common moral base.

9. See DVD: Moral Core Advocacy: Finding the Heart of Your Case (Rick Friedman 2010) (on file with author).

10. See, e.g., GEORGE LAKOFF, *MORAL POLITICS: HOW LIBERALS AND CONSERVATIVES THINK* (Univ. of Chicago Press 2002).

11. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (concluding that anti-sodomy laws are unconstitutional).

12. HENRY STEELE COMMAGER, *The Declaration of Independence*, in *DOCUMENTS OF AMERICAN HISTORY* 100 (9th ed., 1973).

13. THOMAS JEFFERSON, *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 719 (A. Koch & W. Peden ed., 1944) (letter of May 8, 1825 to Henry Lee).

14. ABRAHAM LINCOLN, IV *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 240 (Roy P. Basler ed., 1953) (speech in Independence Hall, Philadelphia, February 22, 1861).

15. *Jeannette Glass Co. v. Indemnity Ins. Co. of N. Am.*, 88 A.2d 407, 411-12 (Pa. 1952) (Musmanno, J., dissenting), quoted in *VESPER*, *supra* note 6, at 544.

That may say something about the community.¹⁶ Still, one should look for it.

A good place to start is to identify basic character traits that generally garner agreement as positives, such as trustworthy, loyal, helpful, friendly, courteous, kind, obedient, cheerful,¹⁷ thrifty, brave, clean, and reverent.¹⁸ If one were to ask a person how a close friend would describe his or her character, using only adjectives, many of these traits would probably come up. In fact, I have used this technique during *voir dire* of prospective jurors. Even though the descriptions might have been edited or shaded favorably for that person, that is okay, because the statement is usually revealing of the juror's own values. Other character descriptions that emerge are honest, reasonable, hardworking, passionate, open-minded, humble, deferential, opinionated, sarcastic, humorous, and fair. Not only are these descriptions revealing of the mindset of a particular juror, but some of these traits can be incorporated as themes for the closing argument. Think of the jury panel as your last focus group before trial.

The attempt to express the common sense of the problem may in fact expand the advocate's view of what is possible for persuasion. An example of this may be found in the story of David, Bathsheba, Uriah, and Nathan. King David lusted after Bathsheba, who was married to Uriah the Hittite. David slept with Bathsheba while Uriah was away at war. Bathsheba became pregnant with David's child. In order to cover up the affair, David summoned Uriah from the front lines and set up several opportunities for Uriah to sleep with his wife. Uriah chose not to, because he viewed it as being disloyal to the men who were still serving at the front. When this attempt to provide a cover failed, David sent Uriah back to the front with explicit orders to put him in harm's way. Uriah was killed and David married Bathsheba, who then bore David's child.¹⁹

How does one persuade a powerful king that he had done something wrong?

The LORD sent Nathan to David. When he came to him, he said, "There were two men in a certain town, one rich and the other poor. The rich man had a very large number of sheep and cattle, but the poor man had nothing except one little ewe lamb he had bought. He raised it, and it grew up with him and his children. It shared his food, drank from his cup and even slept in his arms. It was like a daughter to him."

"Now a traveler came to the rich man, but the rich man refrained from taking one of his own sheep or cattle to prepare a meal for the traveler who had come to him. Instead, he took the ewe lamb that belonged to the poor man and prepared it for the one who had come to him."

David burned with anger against the man and said to Nathan, "As surely as the LORD lives, the man who did this must die! He must pay for that

16. See Robert N. Bellah, *Cultural Pluralism and Religious Particularism* 45 in HENRY B. CLARK II, ED. FREEDOM OF RELIGION IN AMERICA: HISTORICAL ROOTS, PHILOSOPHICAL CONCEPTS AND CONTEMPORARY PROBLEMS (1982) ("It is increasingly unpleasant to live in a society that lacks common beliefs and that is being torn apart by individuals and group self-seeking at the expense of others.").

17. "[H]e that is of a merry heart hath a continual feast." *Proverbs* 15:15. I love this quote and I hope to incorporate it into a closing argument some day.

18. Boy Scout Law, <http://usscouts.org/advance/boyscout/bsoathlaw.asp> (last visited Apr. 6, 2011).

19. 2 *Samuel* 11:1-11:27 (New International Version).

lamb four times over, because he did such a thing and had no pity.”

Then Nathan said to David, “You are the man!”

Then David said to Nathan, “I have sinned against the LORD.”²⁰

It should be apparent that a straight-forward denunciation of David’s behavior would have been unavailing. He was a powerful king and probably thought that this was one of the benefits of kingship.²¹ So, Nathan told a story that took David out of the problem and placed it in a different setting in order that David himself could be the judge of the described actions. Note that the theme of this story is not that adultery is wrong, although it could have been. Closer, but still not quite the theme, is that coveting is wrong. Instead, it is about a rich man who, rather than offering the traveler a meal from his own resources, took from a poor man. It is about greed and theft. From this vantage point, King David condemned his own actions.²²

We see from this example that one aspect of the moral center of the case is that it can even appeal to the opponent, if a common ground of principle exists. To find that common ground, it may be necessary to explore the problem in stages. First, try to articulate, in the most concise terms possible, to a colleague or friend why your side should win. Try it then with strangers, also known as focus groups. Finally, envision making the case to your opponent. The process of going from “preaching to the choir” to presenting the matter to strangers and then to opponents should lead one’s perception of the moral center of the case to its common ground.

To look at this process in another way, my friend, Patrick Duffy, a lawyer in Rapid City, South Dakota, will take a boat out on to Pactola Lake and think about sound bites that would work for his case. Sound bites might sound a little glib or commercial, but this is a good exercise to find the moral center of the case. How can I explain this case to a stranger holding a microphone and thereby also to a viewing audience as to why my client should win? It is particularly important to think of the strategy of how the case will unfold and how the endgame will be played out. To have a sound bite ready for the anticipated endgame is especially critical.

The idea of having the core of the case examined by strangers is what leads to the use of focus groups. Not only will a focus group evaluate the significance of particular pieces of evidence, they will express their conclusions in terms of strongly held beliefs or prejudices. One may be surprised by what some or all in the group will attach significance to or how their expressed opinions reveal a different, but important, angle to the problem. It is important to listen carefully to what is said, and also to what is not said, and to discern what may be underneath whatever is on the surface. Lawyers are like detectives. They have

20. 2 *Samuel* 12:1-12:13. Leo Strauss begins his discussion of natural law and natural right with this story. LEO STRAUSS, *NATURAL RIGHT AND HISTORY* (Univ. of Chicago Press 1953).

21. His attempt at a cover-up may have been the homage that vice pays to virtue, but it did show some regard for the opinions of the community.

22. This only works if the listener adheres to the underlying principles that shape the story. If the equivalent of this story were to be told to some modern despot, the reaction could well be: “So?”

to identify the significant pieces and find the tie (the theme) that connects them together into a coherent story.²³

For those who do not have the resources to use focus groups, one should at least rely on friends and family to provide a common sense assessment of the facts and the theory of recovery or defense. It is essential to move the analysis out of the lawyer's head and into the realm of plain English.²⁴ Tell the story while seeking an evaluation of the facts presented. If one already has a theme in mind, fine, but don't be closed to how the story may be reassembled and to why a conclusion may be drawn by another person who has good judgment. Because the arena of decision is ultimately a layperson's world, it is best to give respect to the assessment of the layperson.

An example of how the moral center can be identified and used to drive a case may be seen in a lottery dispute that arose in 1999, in Urbandale, Iowa. A twenty-one year-old man, whose name was Tim, turned in the winning Powerball ticket, worth about \$15.9 million. Tim worked in a convenience store in Urbandale with a co-worker named Sarah, who was twenty years old. Tim had decided to purchase a Powerball ticket from the store, but he did not have the one dollar required to make the purchase. He had fifty cents, and he asked Sarah for an additional fifty cents. The two disagreed as to whether Sarah's contribution of fifty cents was to have been a loan or was part of the purchase. There was writing on the ticket Tim turned in that stated: "Sarah + Tim's." Although it was illegal at the time for Sarah to have been a participant in the purchase of a lottery ticket, Iowa law allowed underage persons to receive a lottery ticket as a gift. A lawyer from the state attorney general's office said that if Tim and Sarah could agree on a split, there would be no objection. If they could not agree, then the state would take action to have the sale of ticket cancelled and the proceeds to be put back into the Powerball system.²⁵

If Sarah were to present her case in mediation or her lawyer were to make a closing argument at a trial, the argument with the theme "promises should be kept" might look something like this:

I know there is a lot of money at stake in this case. There is more money on the table than either Tim or Sarah might see the rest of their lives. But this case is not really about money. It's about a promise.

23. In connection with this aspect of lawyering, I like to tell the story of how the planet Neptune was discovered. Its existence was predicted before it was actually seen. This was accomplished through mathematical measurement of the planet Uranus, which at the time could be seen through then existing telescopes. Scientists had noticed the irregular path of Uranus, which suggested that another, unseen force was behind it. Even though they could not see Neptune, scientists surmised that it was there and was exercising a gravitational pull upon Uranus. Thus, it was "discovered" before it could be actually seen. See Wikipedia, Neptune (<http://en.wikipedia.org/wiki/Neptune>). Similarly, detectives (and lawyers) must infer from what is known to what unseen forces must therefore be acting on those objects in view.

24. If the first year of law school is understood as the learning of a foreign language, then the last year should be devoted, in part, to "decompression" and return to the earth's atmosphere, so that the lawyer can talk with normal folks. Both are essential. One must learn to think like a lawyer and to talk like a normal person.

25. This story was reported in the February 25, 26, and March 3, 1999 editions of the Des Moines Register. The two parties eventually did reach a settlement.

If you look at the lottery ticket itself, there is a promise on the back. It says: "Sarah + Tim's." This was last in Tim's possession and so whether he wrote it on his own or they wrote it together doesn't matter. This is Tim's promise to Sarah that if this was the winning ticket, they would share the proceeds. Now, they probably weren't thinking that this would be the winning ticket in the same way that two people preparing to go into business together would view their future prospects, but it's a promise just the same.

So why are we here? Because Tim won't honor his promise. He hasn't kept his word. The result is that the Attorney General is threatening to challenge the winning ticket if the parties cannot reach an agreement. Why can't they reach an agreement? Because Tim has let greed overcome his promise.

Now he looks to Sarah to see if she will accept something less than a 50-50 split. Tim wants to stand on the fact that Sarah was not of a legal age when they went in together on the ticket. He is counting on Sarah to back off and take less than what he has promised. At stake is the whole deal. It could all turn to dust.

Sarah, however, will stand on the principle that promises should be kept. If it all turns to dust, she at least will be content knowing that she did what she did because of an important principle. Tim, on the other hand, will have to live with the consequences of not keeping his word. It is a choice that has consequences, life-changing consequences for both of them.

[Here, turning to look at Tim] So, Tim, in twenty years, when you look back, perhaps then you'll be sitting on a tattered used sofa, holding a can of cheap beer, and looking out of the window of your mobile home. You might ask yourself whether that choice you made was worth it. How would your life have been different—when all you had to do was keep your word?

On the other side, if Tim were to speak at mediation, or his lawyer were to speak during closing argument at trial, an argument based on theme of reasonableness might look like this:

Sarah is out on the ledge. And she is threatening to jump and to take Tim with her. Why? Because of a promise? No. It is because she can't have it her way. Sarah is being childish – greedy and petulant. Like a child can sometimes behave, Sarah is being unreasonable.

What is the promise she so heavily relies on? It is a promise that the law says cannot be made. Sarah cannot buy a ticket for herself, for anyone else, or even with someone else. Now, the law does allow Tim to buy a ticket and gift it to a minor. But not even Sarah claims that that was the promise he made.

There is potentially enough money for everyone in this case. For Tim and Sarah, for Tim and Sarah's lawyers. But only if an agreement can be reached. You may have seen this before. On the playground, someone has the ball and won't give it back until the rules are changed in her favor. It's my way or no way. This is how kids become schooled in the abuse of power.

So, it falls to Tim to be the adult here. He recognizes that Sarah is entitled to a reasonable amount for her assistance to Tim. Without Sarah's

assistance, Tim would not have been able to purchase what turned out to be the winning ticket.

So, what is fair? This is much harder because the value of the ticket has now been established. It's like trying to establish the percentage of the lawyer's contingency fee after the trial. The lawyer's contingency of 1/3 of the recovery, however, might be a good place to start. I think it has to be adjusted downward because there is no risk anymore. The result is known. For some types of claims, the fee is capped by law at 25%. But again, the result here is already known. A reasonable and fair amount for Sarah would be in the neighborhood of 20 to 25 %. This would be an adult solution to this problem. And Sarah then can come down off of the ledge.

In both instances, themes drive the argument, as they should. For Sarah, "promises should be kept" is the foundation for all that follows. For Tim, after suggesting that Sarah is being unreasonable, *i.e.*, childish, greedy, and petulant, he must also diffuse the promise argument. Perhaps Tim's argument is more complicated, but in the end, it comes down to finding a reasonable solution for an adult problem.

Thinking about a case in moral terms ties the facts to the community sense of justice. It combines simplicity with a sense of urgency and helps to shape the facts into a coherent and meaningful story. One can take a theme from a single word—like honesty, trust, or fairness – and shape the case around it. Now let us look at how to find and improve themes based upon an understanding of the internal structure of an argument.

III. THE STRUCTURE OF ARGUMENTS

Although arguments come in a seemingly infinite number of shapes and sizes, it has been known from antiquity that there are identifiable types of arguments. This knowledge was described and passed on through the centuries under the branch of learning called Classical Rhetoric.²⁶ It assists the speaker to find arguments.²⁷ The common topics were the basic classifications for arguments that could be used for all purposes. "To put it another way, the topics constituted a method of probing one's subject in order to discover possible ways of developing that subject."²⁸ The topics, or types of arguments, provided possible additional arguments. The common topics are definition, comparison,

26. See ARISTOTLE, *THE RHETORIC OF ARISTOTLE* (Lane Cooper, trans. 1932); II CICERO, *DE INVENTIONE: DE OPTIMO GENERE ORATORUM TOPICA* (G. P. Goold, ed., H.M. Hubbell, trans., Harvard Univ. Press 1976) (1949), III CICERO, *DE ORATORE* (G. P. Goold, ed., E.W. Sutton & H. Rackham, trans., Harvard Univ. Press 1979) (1942). See generally EDWARD P. J. CORBETT, *CLASSICAL RHETORIC FOR THE MODERN STUDENT* (2d ed., Oxford Univ. Press 1980) (1965). This section is drawn largely from the Corbett book. Shortly before I arrived at the University of South Dakota School of Law in 1981, I had discovered this book at the Claremont Colleges Bookstore and decided to use it in the legal writing course, which, as a newcomer, I was assigned to teach. It was probably one of the oddest book assignments for law school, but I believe that studying the structure of arguments makes a more effective advocate.

27. CORBETT, *supra* note 26, at 33.

28. *Id.* at 35.

relationship, circumstance, and testimony.²⁹ Understanding the structure of the various types of arguments – classification, function, and rules – will assist in developing arguments from the bottom up and will complement the more commonly used top down approach of borrowing quotes from others.

A. DEFINITION

A definition states what makes the thing what it is and how it is different from other things.³⁰ According to the Aristotelian model, one puts the thing to be defined into a class and then gives the specific differences that distinguish this thing from other things.³¹ For example, an automobile is a vehicle (class) that runs on four wheels (difference). If one looks at dictionary definitions at random, it will be noted that many definitions follow this model. The subject of the definition, of course, can be defined in many ways.³²

Other methods of definition include the use of synonyms to describe the subject.³³ For example, “busy” might be described as active, hectic or eventful. Or it might be described as cluttered, to convey a slightly different meaning. The origin of a word (etymology) may provide greater understanding and may also help to avoid inappropriate usage.³⁴ Thus, the word “intelligence” comes from two Latin words which, when put together, literally means “the act of choosing between” and suggests the act of examining different things and making choices, gathering some and leaving others.³⁵ The intelligent mind knows how to sift through facts, discarding the irrelevant or unimportant ones, and collecting the significant ones in a coherent sequence. Sometimes, less is more. Definition can also be accomplished through description of some of the properties of the subject, often through the use of analogies and metaphors.³⁶ “True friendship is like sound health; the value of it is seldom known until it is

29. *Id.* at 110.

30. *Id.* at 51-52.

31. *Id.* at 52.

32. Corbett states:

Definitions of anything will vary, of course, according to the definer’s point of view and his particular basis of classification. In fact, one of the ways to distinguish the various branches of knowledge is to note the methods and bases of definition used by each science. A biologist, for instance, might define a man as “an erect, bipedal, giant mammal relatively unspecialized in body form.” Or if he were attempting an operative definition, he might define man as “the only creature capable of modifying his evolutionary future.” A behavioral scientist might define man as a “social animal” or a “tool-making creature” or “a creature that prepares his food with fire.” A theologian might define man as “an adopted son of God.” Each of these definitions is true in its own way, and each of them tells us something useful to know about man . . . A rhetorician is especially interested in the fact that words admit of a variety of valid definitions.

Id. at 53.

33. *Id.* at 54.

34. Bryan Garner suggests that “etymological awareness” will help to avoid embarrassing references, such as the use of the already much abused “holocaust” (from the Greek meaning “burnt whole”) to describe a flood. BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 330 (2d ed., 1995).

35. Wiktionary, <http://en.wiktionary.org/wiki/intelligence> (last visited Apr. 8, 2011).

36. See CORBETT, *supra* note 26, at 54.

lost.”³⁷ “The best mirror is an old friend.”³⁸ Finally, definition by example is a favored technique to give more specific meaning to general concepts, such as: “Friendship consists in forgetting what one gives and remembering what one receives.”³⁹ “Your friend is the man who knows all about you, and still likes you.”⁴⁰ “A friend is someone who will help you move. A real friend is someone who will help you move a dead body.”⁴¹

There are three basic rules for definitions. The first rule is “[t]he defining terms should be clearer and more familiar than the term to be defined.”⁴² This is the basic method used in dictionaries, using simpler words to explain the more complex. It should be noted that sometimes the opposite is necessary when it comes to defining simple, everyday objects, such as a chair, or an egg. The second rule is “[t]he definition should not repeat the term to be defined or use synonymous or derivative terms.”⁴³ Repetition does not advance the inquiry; it “kicks the can down the road.” For example, “justice consists of acting justly toward your neighbor.” This simply begs the question. Using a synonym will also beg the question: “Justice consists in doing the right thing.” The third rule is “[t]he definition, wherever possible, should be stated positively, not negatively.”⁴⁴ This is not a hard and fast rule. Generally, one wants to state what a thing is. But it is also legitimate, particularly when the concept is difficult, to begin, at least by stating what the thing is not.

The argument from definition is very familiar to lawyers. It is probably the most common type of argument involved in summary judgment, where the elements of a cause of action are being tested. For instance, the establishment of (or challenge to) a cause of action for malicious prosecution will always start with the elements:

To establish a claim for malicious prosecution, [the plaintiff] must prove: (1) the commencement or continuation of an original criminal or civil judicial proceeding; (2) its legal causation by the present defendant against the plaintiff, who was [a] defendant in the original proceeding; (3) its bona fide termination in favor of the present plaintiff; (4) the absence of probable cause for such proceeding; (5) the presence of malice; and (6) damages conforming to legal standards resulting to plaintiff.⁴⁵

The elements that define the tort of malicious prosecution drive the argument. In this particular tort, the “and” between the fifth and sixth elements means that the plaintiff must meet all of the elements and that the defendant can win by showing that any one of the elements is not met.⁴⁶

37. HAGEMANN, *supra* note 8, at 97 (Charles Caleb Colton).

38. *Id.* at 96 (George Herbert).

39. *Id.* at 95 (Alexandre Dumas).

40. *Id.* (Elbert Hubbard).

41. *Id.* at 96 (Unknown).

42. CORBETT, *supra* note 26, at 55.

43. *Id.* at 56.

44. *Id.*

45. *Kaarup v. St. Paul Fire & Marine Ins. Co.*, 485 N.W.2d 802, 804 (S.D. 1992) (citing *Schwartz v. First Nat'l Bank in Sioux Falls*, 390 N.W.2d 568, 571 (S.D. 1986)).

46. *Manuel v. Wilka*, 2000 SD 61, ¶ 18, 610 N.W.2d 458, 462.

Definition, as an organizing principle, makes the argument easier to follow. It also may set up an argument by elimination. This is especially useful when trying to prove a negative, such as, the defendant did not commit this crime. Proving a negative (or at least creating a reasonable doubt) is a daunting task without the structure of argument by elimination. The lawyer in this situation posits the possible explanations for what might have happened and then proceeds to deal with and eliminate each one in light of the evidence in the case. If the lawyer has been fair with the positing of the possible options and fair with the evidence available for each option, then the argument should be persuasive.

Themes that come within the definition category of arguments include the following:

The Constitution is color-blind.⁴⁷

In the eyes of the law, the defendant is presumed innocent.⁴⁸

Fraud can be accomplished through a lie or through concealment. This is a case involving both.⁴⁹

“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”⁵⁰

B. COMPARISON

“[The] tendency to compare things is as natural . . . as the tendency to define things.”⁵¹ For lawyers, comparison seems like the lifeblood of argument. Lawyers live (and die)⁵² by analogies and metaphors. Here, the lawyer must take care to be close to the layperson’s sense about matters. Comparisons only work if they resonate with the decision maker’s knowledge or experience.

47. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). The full quote is: “Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.”

48. *See, e.g., Wagner v. United States*, 171 F.2d 354 (5th Cir. 1948). The following was part of the jury charge in that case:

Gentlemen, the defendant is presumed to be innocent of each one of those charges, and that presumption follows him -- as a matter of fact, *all men in the eyes of the law*, all defendants in all counts of that indictment *are presumed to be innocent*, and in Alabama you are presumed to be innocent and this defendant is in this case. That presumption follows him with you in that jury room and until you deliberate and consider all the evidence in this case, and it follows him then until you are convinced beyond a reasonable doubt that he is guilty as charged in each count, in those counts.

Id. at 358 (emphasis added).

49. Appellant’s Brief at *16, *Schwaiger v. Mitchell Radiology Assocs.*, 2002 SD 97, 652 N.W.2d 372 (No. 22197), 2002 WL 34221490.

50. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

51. *CORBETT*, *supra* note 26, at 116.

52. Justice Musmanno made the following observation regarding comparisons:

There is no argument in logic so wearisome as that which seeks to prove a point by an irrelevant comparison or one so exaggerated in scope as to make it wholly foreign to the discussion. It is like equating an ant hill with Mt. Everest because they are both protuberances from the earth’s surface, or comparing a flea with an eagle because they both fly, or a monkey with an elephant because they both eat peanuts.

Dugan v. Pa. R. Co., 127 A.2d 343, 357 (1956) (Musmanno, J., dissenting).

Otherwise, it is like “inside baseball.”⁵³

Arguments based on comparison fall into three categories: similarity, difference, and degree.

1. Similarity

“Similarity is the basic principle behind all inductive argument and all analogy.”⁵⁴ Inductive reasoning identifies one or more particulars and makes a conclusion about an unknown.⁵⁵ This is an every day process. If I am working inside in March and I see a number of people coming in the building dressed in t-shirts and shorts, I can infer that the weather is nice outside. If I make a statement in class and I observe a number of puzzled faces, I can infer that perhaps I was not clear and, in any event, I need to explain the matter again more carefully. Analogies proceed by comparing two things that are similar in one or more respects and arguing that they may be similar in another important respect. Explicit comparisons, using “like” or “as,” are called similes, and implicit comparisons are called metaphors.⁵⁶

From a formal perspective, the effective analogy will show that the similarities between the two things are significant and that the dissimilarities are

53. See Broadcasting Brain, *Inside baseball or what the hell does that mean?* <http://broadcasting-brain.com/2010/01/27/inside-baseball-confuses/>:

Inside baseball – a description of this metaphor from Wikipedia:

The expression “inside baseball” is sometimes used as a metaphor for details or minutia of a subject so detailed that they generally are not well known by outsiders.

You would conclude, then, that *inside baseball* is used when people catch themselves speaking in the jargon of their industries and need to use more generally known language to make their point to outsiders. As in:

Talking about conversions, PPC, whuffie are too inside baseball – we need to speak to the general public.

I find this amusing, though, because a number of people will just use the term *inside baseball* and then not explain it. Therefore, outsiders like me have to figure out what they really mean.

In an ironic twist of fate, the term *inside baseball* becomes, in fact, **inside baseball**.

(emphasis in original).

54. CORBETT, *supra* note 26, at 116.

55. There are many examples of inductive reasoning about character, for example:

The measure of a man’s real character is what he would do if he knew he would never be found out. VESPER, *supra* note 6, at 141 (Lord Macauley).

The true test of character is how we behave when no one is looking. *Id.* at 137 (Greg Cusimano).

You can measure a man’s character by the choices he makes under pressure. *Id.* at 136 (Winston Churchill).

The true measure of a man is how he treats someone who can do him absolutely no good. *Id.* at 140 (Samuel Johnson).

You can judge the character of others by how they treat those who can do nothing to them or for them. *Id.* at 138 (Malcolm Forbes).

Character consists of what you do on the third and fourth tries. *Id.* at 141 (James Michener).

A man shows his character by what he laughs at. *Id.* at 139 (German proverb).

56. GARNER, *supra* note 34, at 558. We should all be aware of Bryan Garner’s warning: “Skillful use of metaphor is one of the highest attainments of writing; graceless and even aesthetically offensive use of metaphors is one of the most common scourges of writing” *Id.* One of the highest goods can also be one of the worst.

immaterial.⁵⁷ And, of course, the attack on the analogy must show that the similarities are coincidental and the dissimilarities are significant. The other way to attack a party's use of an analogy is to adopt it and turn it around.⁵⁸

Analogy is not proof in the strictest sense in that it relies on an inductive leap to the conclusion. But it can be persuasive if it resonates with the listener's own sense of probabilities: "When you look at the plaintiff's overall medical history, this last incident was like a drop in a thunderstorm."⁵⁹ It can also be persuasive if it resonates with the listener's experience: "[The judge] gave Michele's plea for bail a perfunctory listen, like one glances across the obituaries without a sense of the pain represented on the printed page."⁶⁰ Part of the effectiveness comes when the listener makes the leap before the speaker gets to the end. When that happens, the conclusion is the listener's and is much more resistant to change.

Metaphors that do not strictly follow the parallel case model can nevertheless be effective in conveying a feeling or an assessment in a very descriptive way:

I feel like a fish out of water.

He is a diamond in the rough.

He will be toast if his wife finds out.

With most men life is like backgammon – half skill and half luck.⁶¹

"It's a mere moment in a man's life between the All-Star Game and an old-timers game."⁶²

Comparisons that incorporate popular culture references provide interest, so long as the reference is understood and has not been overused.

[L]ife is like a box of chocolates . . . you never know what you're gonna get.⁶³

Truth is toxic, like water to witches.⁶⁴

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

57. CORBETT, *supra* note 26, at 118.

58. Louis Genevie & Daniel Cooper, *Why Analogies Often Fail*, 43 FOR THE DEF. 22 (2001), available at <http://www.litstrat.com/Articles/ANALOG1.pdf>.

59. JAMES MCELHANEY, MCELHANEY'S TRIAL NOTEBOOK 613 (3d ed. 2003).

60. GERRY SPENCE, THE SMOKING GUN: DAY BY DAY THROUGH A SHOCKING MURDER TRIAL 66 (2003).

61. Justice Oliver Wendell Holmes, *quoted in* VESPER, *supra* note 6, at 635.

62. Vin Scully – Quotes, http://www.baseball-almanac.com/quotes/vin_scully_quotes.shtml.

63. Forrest Gump, *quoted in* VESPER, *supra* note 6, at 634.

64. I love this line. It can be very effective in a closing argument, but only if the reference to the Wizard of Oz is understood. This is still a pretty safe bet, but, after nearly thirty-six years of teaching, I am increasingly aware that some of my historical or cultural bearings, whether they be to the Vietnam War or to Johnny Carson, may no longer resonate with my audience.

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.⁶⁵

Metaphors are very useful in expressing themes:⁶⁶

We may have all come over on different ships, but we're in the same boat now.⁶⁷

A wound, though cured, yet leaves behind a scar.⁶⁸

Evil is easy and has infinite forms.⁶⁹

When they dipped into that reserve, it was like they were consuming the seed corn.

2. Difference

If the movement in comparison by similarity is to point to the conclusion through parallel cases, the movement in comparison by difference is to suggest a conclusion different to the object of comparison. The structure for the argument from difference is the opposite of similarity. The proponent of the difference must show that the two cases differ in material respects and are similar only in non-material or superficial ways. The opponent will respond accordingly. Argument by showing difference can be just as powerful as argument by similarity:

Representative government and trial by jury are the heart and lungs of liberty. Without them we have no other fortification against being ridden like horses, fleeced like sheep, worked like cattle and fed and clothed like swine and hounds.⁷⁰

Here, the argument uses a metaphor to underscore the importance of

65. 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>. I like this analogy very much, but if the listener does not understand it, the speaker will have reached too far with the analogy and will have lost the listener who does not have the common background to understand the reference.

66. Plaintiff's Reply Brief at *7-8, *Schwaiger v. Mitchell Radiology Assocs.*, 2002 SD 97, 652 N.W.2d 372 (No. 22197), 2002 WL 34221492. For example, if the theme is fraud:

This case is similar to the sale of the diseased herd in *Ducheneaux v. Miller*, 488 N.W.2d 902 (S.D. 1992). There, this Court concluded: "It is beyond cavil Ducheneaux would never have entered into this transaction had he known of the presence of suspects and reactors in the herd." (*Id.* at 913). The Court quoted Comment 1 to section 551 of the Restatement:

Thus a seller who knows that his cattle are infected with tick fever or contagious abortion is not free to unload them on the buyer and take his money, when he knows that the buyer is unaware of the fact, could not easily discover it, would not dream of entering into the bargain if he knew and is relying upon the seller's good faith and common honesty to disclose any such fact if it is true.

This corporation was like a herd of cattle with tick fever.

67. Rev. Martin Luther King, Jr., *quoted in* JIM M. PERDUE, WINNING WITH STORIES: USING THE NARRATIVE TO PERSUADE IN TRIALS, SPEECHES & LECTURES 333 (2006).

68. John Oldham, *quoted in* VESPER, *supra* note 6, at 796.

69. Pascal, *quoted in* VESPER, *supra* note 6, at 1129.

70. John Adams, *quoted in* VESPER, *supra* note 6, at 517. This is not a mixed metaphor. It is a comparison by contrast of two different groups of metaphors.

representative government and trial by jury and then posits, with the use of several additional metaphors, how matters would be different without them.

One analytical format, familiar from school days, is to both compare and contrast. This provides a good organizing method for the analysis and helps to pre-empt the arguments regarding similarity and difference coming from the other side.

Here are two extended examples of argument by contrast:

Isn't it strange that the only place where pain becomes cheap is in the courthouse? We spend billions of dollars a year in this country in quest for cures for diseases, in quest of means to alleviate pain When corporations fight among themselves, there is never any quarrel about the fact that the loss of profits, loss of business, or loss of property is worth millions of dollars. Yet when we talk about the individual and the pain and agony that irresponsible conduct can bring, it is only then – in the courtroom – that pain becomes cheap.⁷¹

A permanent cripple is an object of constant pity and a subject for repeated discard. He awakens sympathy but not assistance, he arouses compassion but not employment. In the economic world he is the last one to be employed and the first one to be discharged. In the race of life for the awards of comfort, promotion and happiness, he always arrives last Considering all the additional expenses to which the plaintiff will inevitably be subjected because of medication, treatment, X-rays and forced rests, the amount remaining after accrued costs and disbursements, will be none too much as [the plaintiff] limps across the span of life left to him in the arduous years of this fast-moving twentieth century which has little or no time for cripples.⁷²

Proving a negative is often difficult, but one way to approach it is to demonstrate through difference. “The defendant did not commit this crime because there is no evidence of motive or opportunity” can be an argument based on the implied assertion that the type of crime in question will normally require the presence of these. “There is no evidence of manipulation or bad faith because the owner paid all the bills before closing instead of taking the last few dollars for himself” would be another example. Argument from difference allows the advocate to chip away at the other side's arguments.

3. Degree

A third category of comparison is also quite familiar to lawyers, as well as to all those who like to argue, and that is degree. Unlike the prior category of comparison by difference, which deals with differences in kind, this comparison deals with differences in degree. Someone or something is argued to be better, greater, smarter, tougher, or more ethical or unprincipled, or more hardworking or lazier than another. What would people talk about in bars if they didn't talk about comparisons by degree? Note that the degree may have several measures, like quantity, quality, and context. One might argue that a certain college

71. Jim M. Perdue, *quoted in VESPER*, *supra* note 6, at 153.

72. *Shields v. Larry Constr. Co.*, 88 A.2d 764, 769 (1952) (Musmanno, J., dissenting).

football recruiting class was better than another college's even though it gave out fewer scholarships. Or one might argue that the 1968 UCLA men's basketball team was the greatest college team of all time.⁷³ The key here is to identify the facts (e.g., achievements, statistics, opponents, or conditions of the game) and assess them in terms of quantity, quality, and context. Opinions of "experts" may be helpful as well.

One special argument by degree is the *a fortiori* ("from the stronger") argument: "If a thing does not exist where it is more likely to exist, it will not exist where it is less likely to exist."⁷⁴ This type of argument will set up an inference to be drawn from a strong or indisputable fact. If it is true or likely true, then another thing is true. The *a fortiori* argument can run in two directions: (1) from the greater probability to the lesser probability; and (2) from the lesser probability to the greater probability. An example of the former is: "If members of the track team couldn't reach the burning house in time, then Professor VP, who was with them, but was considerably older, could not have done so." If the more probable was the case, the less probable must also be the case. An example of the latter is: "If this person would steal from a friend, he would steal from a stranger." Whatever is true about the less probable can be asserted with greater force about the more probable.

The strength of the *a fortiori* argument depends on the validity of the predicate. "If 2Ls are not qualified for editorial positions, then 1Ls are not qualified." Only if the first proposition about 2Ls is likely true will the second proposition about 1Ls be persuasive. "If the witness was present at the scene, she would have heard the shot, if there was one." The second proposition is not necessarily true, but more likely true if the first is true. *A fortiori* argument is especially useful in dealing with circumstantial evidence and what may be inferred from it.

Other examples include: If one is untruthful in small matters, how much more is the temptation to lie when the stakes are higher? "If one is cruel to himself, how can we expect him to be compassionate with others?"⁷⁵ Atticus Finch's argument in *To Kill a Mockingbird*: Tom Robinson could not have beaten Mayella Ewell because the blows had to have come from a left-handed person and Tom did not have use of his left hand.⁷⁶ Sherlock Holmes solved a case on the basis of a dog that did not bark. If the intruder was a stranger, the dog would have barked, therefore the intruder was known to the dog.⁷⁷

73. See, e.g., <http://www.espn.go.com/page2/s/list/greatestcollegebasketball.html>.

74. CORBETT, *supra* note 26, at 123.

75. Hasdai, *quoted in* VESPER, *supra* note 6, at 213.

76. HARPER LEE, *TO KILL A MOCKINGBIRD* 188-90 (1960).

77. SIR ARTHUR CONAN DOYLE, *Silver Blaze*, in *MEMOIRS OF SHERLOCK HOLMES I* (1893).

C. RELATIONSHIP

1. Cause and Effect

A lot of litigation deals with the relationship between events. Cause is an essential legal concept; with respect to argument, there are rules that relate to cause and effect.⁷⁸ First, an effect may have several possible causes. The goal is to find which cause. Lawyers are like detectives and they should be open to consideration of all possible causes. A premature closing off of the possibilities may lead to false conclusions.⁷⁹ Second, the cause that is identified as a probable cause must be capable of producing the effect. Next, are there other causes that are capable of producing the effect? Then, is it the efficient cause, that is, *could* it have brought about the effect? Finally, *would* the probable, adequate, and efficient cause produce the effect?

A common fallacy that one encounters with cause and effect arguments is *post hoc ergo propter hoc* (“after this, therefore because of this”). Because two things are closely related in time does not necessarily mean that they are causally connected. Many superstitions arise in this way. “If I don’t wear my lucky hat when watching the game, my team will lose.” Why? “My team always won when I wore the hat, except one time when I forgot to wear it and, sure enough, my team lost.” Proximity of two events may be suggestive of cause, but it is not, in and of itself, conclusive.

The lack of cause, of course, is an argument to be made by the defense. “The plaintiff doesn’t deserve money simply because something bad happened.” “Whatever can be said about the doctor’s conduct, they have not shown that anything they did caused the plaintiff’s injury.”

2. Antecedent and Consequence

This type of argument is a looser form of cause and effect.⁸⁰ The form is: given this situation (the antecedent), what follows (the consequence). “If the glove doesn’t fit, you must acquit.”⁸¹ Note that this is not cause and effect, but there is a relationship between the antecedent and what follows. Here are several examples of this type of argument:

Before the government may imprison someone, it must play by the rules.

If you take the risk, you shouldn’t complain about the consequences.

The only thing necessary for the triumph of evil is for good men to do nothing.⁸²

If you want justice, you must first act justly.

78. See CORBETT, *supra* note 26, at 125.

79. In a dialogue with Einstein concerning the Uncertainty Principle, Werner Heisenberg reported Einstein to have said: “[I]t is the theory which first determines what can be observed.” <http://www.intercom.net/~tarababe/Einstein-Heisenberg.html>. Words for lawyers to heed.

80. CORBETT, *supra* note 26, at 128.

81. Johnnie Cochran, *quoted in* JEFFREY TOOBIN, *THE RUN OF HIS LIFE: THE PEOPLE V. O.J. SIMPSON* 420 (1996).

82. Edmund Burke, *quoted in* VESPER, *supra* note 6, at 259.

If there is technological advance without social advance, there is, almost automatically, an increase in human misery.⁸³

If you will not fight for the right when you can easily win without bloodshed, if you will not fight when your victory will be sure, you may come to the moment when you will have to fight with all the odds against you and only a precarious chance of survival.⁸⁴

3. Contraries

Difference is based on comparison of things that differ in kind. Contraries involve the relation of “opposite or incompatible things of the same kind.”⁸⁵ Freedom and slavery are examples of contraries. Because of their incompatibility, contrary propositions cannot both be true, although it is possible that both can be false.⁸⁶ For example, the book is red—the book is green. If one proves that the book is red, then there is no need to prove that green is false. On the other hand, if green is proved to be false, that does not mean that the book is red. It could be another color. Even though this appears to be simplistic, it is helpful as a format for setting up the argument that simultaneously advances your position and attacks the opposing contrary proposition. There are two ways to win a race. One is to run faster than anyone else and the second is to make sure that no one else runs faster than you.⁸⁷

4. Contradictions

Contrary propositions would be “the water is hot” and “the water is cold.” Contradictory propositions would be “the water is hot” and “the water is not hot.”⁸⁸ Here, the rules are slightly different. For contradictions, if one is true, the other is false; if one is false, the other is true. This provides a roadmap for the strategy of the argument. Thus, if the question is whether O.J. murdered Nicole, one will argue both offensively and defensively. The prosecution would argue that O.J. did murder Nicole and that the claim he did not murder her is not true. The defense would argue that O.J. did not murder Nicole and that the claim he did murder her is not true. Notice what this does as an invention or finder of arguments. It doubles the field of potential argument. One asserts the positive claim and attempts to negate the contradiction. Again, there are two ways to win a race.

D. CIRCUMSTANCE

One might think that the argument from circumstance is purely situational,

83. Michael Harrington, *quoted in VESPER, supra* note 6, at 882.

84. Sir Winston Churchill, *quoted in VESPER, supra* note 6, at 220.

85. CORBETT, *supra* note 26, at 129.

86. *Id.* at 130.

87. Jonathan K. Van Patten, *Twenty Five Propositions on Writing and Persuasion*, 49 S.D. L. REV. 250, 252-54, 262-63 (2004).

88. CORBETT, *supra* note 26, at 131.

based on the exigencies of the moment. Examples of this would include:

The university must reduce its budget because the state projections for revenue and expense project a substantial deficit.

The employer did not foster or tolerate a hostile environment because it had instituted a confidential process by which complaints could be received and acted upon and it had not heard anything about this supervisor from the plaintiff or any of her co-workers.

Friend, either you are closing your eyes to a situation you do not wish to acknowledge, or you are not aware of the caliber of disaster indicated by the presence of a pool table in your community. Well you got trouble, my friend! Right here! I say Trouble, right here in River City.⁸⁹

In classical rhetoric, however, the argument from circumstance has a structure based more on logic than on the situation.

1. *The Possible and the Impossible*

Possibility is an important part of persuasive argument. Even if one believes that a course of action is desirable, there may be some reluctance to embrace it, if there are doubts about its feasibility.⁹⁰ There are many ways to show possibility.⁹¹ For example, if one of a pair of similar things is possible, the other thing is possible. “If one can surf, one can also snowboard.” If the more difficult of two things is possible, then the easier is possible. “If VCU can beat Kansas, it can beat Butler.” If the parts of a thing are possible, then the whole is possible. “If one has sufficient start-up capital, the capacity to produce a product that people will buy, and a market through which to deliver the product to customers, then the business will probably be a success.” If the whole is possible, then the parts are possible. “If winning the tournament is possible, then beating each opponent along the way is possible.”

For argument based on impossibility, the foregoing examples could be turned around with opposites: if one of a pair of similar things is impossible, then the other thing is impossible. There is an element of the *a fortiori* argument in some of these arguments from circumstance: if the easier task is impossible, the more difficult task is impossible. Thus, if walking is impossible, then running is impossible.

2. *Past Fact and Future Fact*

This sub-topic deals with probabilities, both as to what happened in the past and what is likely to happen in the future. When a past fact cannot be established directly, one can use deductive reasoning to argue from plausible premises to plausible conclusions.⁹² Again, there are established types to follow. “If the less probable of two events has occurred, the more probable event is

89. Meredith Wilson (*The Music Man*, 1957), quoted in VESPER, *supra* note 6, at 1049.

90. CORBETT, *supra* note 26, at 132.

91. *Id.* at 132-34.

92. *Id.* at 135.

likely to have occurred too.”⁹³ “If the defendant did not harm his rival, when he had every opportunity to do so, it is not likely that he would have stolen the painting from him two weeks later.” “If something that naturally follows something else has occurred, then that something else has happened too.”⁹⁴ We can presume that lightning flashed, even though we don’t see it, because we heard thunder. This can be argued as well for the negative: “In the morning, there were no tracks in the snow outside of the cabin. Whatever violence occurred inside that night was between the decedent and the defendant.”

Predictions, or probabilities, concerning the future will follow similar forms of argument. “If the power and the desire to do something are present, then that something will be done.”⁹⁵ “If Hannibal Lecter is released from prison, he will kill again.” “If the antecedents of something are present, then the natural consequences will occur.”⁹⁶ “If he starts drinking, he will become abusive and get into a fight.” “If the means are available, the end will be accomplished.”⁹⁷ “If we allow this tyrant free rein, he will crush the opposition.” The future, of course, is never certain, but this form of argument serves to advance a position, even under conditions of uncertainty, that appeals to one’s sense of probabilities.

E. TESTIMONY

“Unlike the other topics, which derive their material from the nature of the question under discussion, testimony derives its material from external sources.”⁹⁸ This is argument from the outside, that is, external to the question. It is based on sources, which attempt to provide an answer to the question.

1. Authority

Authority may not be what it used to be, but it still has power in argument. Even in an age in which “authority” may instinctively be viewed with suspicion, there is always room for informed opinion. In modern litigation, there is a tendency for experts to dominate, if only because information is becoming more specialized. The power of authority sometimes stretches beyond its express pronouncements. When there is no authoritative text, for example, a court might resort to what it believes the authority would say relating to the situation.⁹⁹

An inherent weakness of the argument from authority was illustrated by Albert Einstein, who responded to the news that the Nazis had announced “100 Authorities Against Einstein” to disprove his theory of relativity: “It would not take 100 authorities to prove relativity wrong, one single fact would do the

93. *Id.*

94. *Id.*

95. *Id.* at 136.

96. *Id.*

97. *Id.*

98. *Id.* at 137.

99. For instance, there is a provision within the Rosebud Sioux Tribal Code that says if there is no code provision on point the court may look to the tribe’s customs and traditions. Interview with Frank Pommersheim, Chief Justice, Rosebud Sioux Supreme Court, in Vermillion, S.D. (May 25, 2011).

trick.”¹⁰⁰ What is regarded as authoritative is also subject to changing trends or fashion, or even a change in perspective.¹⁰¹

“As my father taught me . . .” or “When I was growing up, my mother told me . . .” are natural sources for authority. Similarly, we have all had pastors, teachers, coaches, and friends who may have been mentors along the way. We regard the pronouncements of those special people as authoritative. The same may be said for certain books, especially books regarding religious faith.¹⁰²

2. Testimonial

Like the argument from authority, the testimonial is argument intended to persuade on the basis of who the speaker is. In an affidavit, the speaker first gives qualifications and then testifies. The testimony must also lay foundation for the facts and opinions stated. The counter-argument will focus on any weak point in the qualifications and foundation, as well as on any hint of bias.

“In rhetorical terminology, the testimonial has ‘ethical appeal’ – the kind of appeal that Aristotle says is often more effective in persuading an audience than appeals to reason or appeals to emotions.”¹⁰³ Although unbiased testimony is generally regarded as more persuasive, people are paid great sums of money to give their endorsement to a product. There is no inherent reason why Michael Jordon should know anything about t-shirts, or Danica Patrick about Internet domain names, or George Clooney about politics. Yet there is much invested in this type of argument.

3. Statistics

Arguments from statistics are similar to testimonials, except that the testifier may be identified only generally. “Three out of four doctors recommend . . .” “Fifty-two percent of the voters oppose [or favor] . . .” Questions about the source of the data, how the data was compiled, whether it was a fair and representative sampling of the potential data, and bias on the part of the pollster are fair game for rebuttal.

The argument may also be grounded in numbers that drive the argument: “The State receives substantial revenues from its share of video lottery net machine income and licensing fees. More than 10% of the annual state generated revenues are generated through video lottery.”¹⁰⁴ Or, “The

100. Albert Einstein, *quoted in VESPER, supra note 6, at 353.*

101. Mark Twain, *quoted in VESPER, supra note 6, at 804:* “When I was a boy of fourteen, my father was so ignorant I can hardly stand to have the old man around. When I got to be twenty-one, I was astonished at how much he had learned in seven years.”

102. A great line regarding authoritative texts, which is not in A SCHOLAR’S PURSUIT (inexplicable, because it was a favorite of John’s), is from George Will: “The Bible, which devout baseball fans consider the Sporting News of religion, counsels patience.” GEORGE WILL, *THE MORNING AFTER: AMERICAN SUCCESSES AND EXCESSES 1981-1986* 26 (1986).

103. CORBETT, *supra note 26, at 139.*

104. Respondent’s Brief at *6, *Brendtro v. Nelson*, 2006 SD 71, 720 N.W.2d 670 (No. 24139), 2006 WL 4672538.

Congressional Budget Office now concludes that President Obama's budget underestimates the deficit over the next ten years by \$2.3 trillion."¹⁰⁵ Although maybe not technically within the boundaries of the classic topic, this type of argument is characterized by the idea that numbers can drive the proposition.

4. Maxims

This is somewhat of a catch-all category that includes aphorisms, proverbs, self-evident truths, and high-minded generalizations.¹⁰⁶ They are a natural way to state a theme. "No one is above the law."¹⁰⁷ This is one of the themes, for example, in *United States v. Nixon*.¹⁰⁸ It was essential to the communication of the principle for what otherwise might have been viewed as a *coup d'etat*. Maxims infuse the argument with a sense of moral urgency (the ethical appeal according to Aristotle) that is vital to persuasion.¹⁰⁹

Aristotle treated maxims in his discussion of the syllogism because they often constitute the initial premise of the syllogistic argument.¹¹⁰

1. No one should be a judge in his or her own case.¹¹¹
2. Judge Mudrock has a financial interest in a company that is a party before the court.
3. Judge Mudrock should be disqualified from sitting on the case.

While lawyers do not usually use the strict form of a syllogism in argument, they use it in loose form quite frequently, often in connection with a maxim. A strong maxim is an excellent start to an argument. Other familiar maxims include:

- No one should profit from his or her own wrong.¹¹²
 "Great nations, like great men, should keep their word."¹¹³
 All men are created equal.¹¹⁴

105. See Congressional Budget Office, Summary, *Preliminary Analysis of the President's Budget for 2012*, <http://www.cbo.gov/doc.cfm?index=12103>.

106. CORBETT, *supra* note 26, at 141.

107. *State of Mississippi v. Johnson*, 71 U.S. 475, 478 (1866):

Can the President of the United States be made a party defendant to this bill? There is no precedent directly to the point. Yet it is believed the question has been virtually settled. It is important, in this connection, to mark the distinction between what are called political powers and such as are ministerial. In the exercise of discretionary or political powers, courts will not undertake to control the action of officers; but not so with regard to ministerial duties, in the exercise of which *no one is above the law*, however exalted his position. Fortunately, we have neither a king nor an emperor, nor a parliament, who are omnipotent or above the Constitution.

Id. (emphasis added).

108. 418 U.S. 683 (1974).

109. CORBETT, *supra* note 26, at 142.

110. ARISTOTLE, *Book II*, in *THE RHETORIC OF ARISTOTLE* 149-54 (Lane Cooper trans., Prentice-Hall 1960) (1932).

111. Lord Coke, *Bonham's Case*, 8 Coke 113b, 77 Eng. Reprint 646 (1610).

112. Lord Coke, *quoted in* George P. Fletcher, *The Nature and Function of Criminal Theory*, 88 CAL. L. REV. 687, 703 (2000).

113. *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting).

114. HENRY STEELE COMMAGER, *The Declaration of Independence*, in *DOCUMENTS OF AMERICAN*

In the kingdom of the blind, the one-eyed man is king.¹¹⁵

“[I]t is proper to take alarm at the first experiment on our liberties.”¹¹⁶

“It is better to deserve honors and not have them than to have them and not to deserve them.”¹¹⁷

Great services are not canceled by one act or by one single error.¹¹⁸

5. Law

This topic is broader than the popular meaning of the word. “Under the topic law will be comprehended all statutes, contracts, testaments, records, and documents which can be drawn on to substantiate or refute a claim.”¹¹⁹ This topic, as Corbett points out, is grounded on “respect for the recorded word.”¹²⁰ Documentary evidence, however, does not end the debate; it may only be the start. Questions of interpretation may come to dominate. Thus, modern constitutional analysis may start with the text, but rarely ends there.

6. Precedent

Lawyers are very familiar with precedent. In the broader rhetorical sense, precedent means to argue from what has gone on before. It is argument by example. The example must be defensible on its own because there is a classic counter-argument to precedent that no longer makes sense:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.¹²¹

The common topics of classical rhetoric can be used like a checklist for the lawyer to search for additional arguments to bring to the case. They are aids to invention of arguments. Knowing how the types of arguments work will assist in their construction as well as their critique.

IV. THEMES AND THE CRAFT OF ADVOCACY

To find a theme is not the end of the case, rather, to paraphrase Churchill, it is the end of the beginning.¹²² When the advocate has a sense of the moral

HISTORY 100 (9th ed. 1973).

115. I used this as a theme in closing argument in a construction case to suggest that the contractor was, in effect, a king with respect to his subjects (his customers), who lacked knowledge about construction and were therefore blind. A one-eyed king is a flawed king and this contractor had flaws, putting it mildly.

116. James Madison, *Memorial and Remonstrance Against Religious Assessments*, ¶ 3, reprinted in *Everson v. Bd. of Educ.*, 330 U.S. 1, 63 (Rutledge, J., dissenting).

117. Mark Twain, quoted in *PERDUE*, *supra* note 67, at 331.

118. Benjamin Disraeli, quoted in *VESPER*, *supra* note 6, at 339.

119. *CORBETT*, *supra* note 26, at 142.

120. *Id.* at 143.

121. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

122. “Now this is not the end. It is not even the beginning of the end. But it is, perhaps, the end of

center of the case, then it is time to go to work to bring the case to its final presentation. The theme should express the moral center of the case and shape all decisions about it. Think about how the following themes will act as the centerpiece of a case.

No one likes a bully.

We are here asking you to right a wrong.

The plaintiff is seeking to put the blame elsewhere when it rightly belongs with the plaintiff.

In the eyes of the law, all are equal [or deserving of respect].

“To everything there is a season, and a time to every purpose under the heaven.”¹²³

“I have a dream that my four little children will one day live in a nation where they will not be judged by the color of our skin, but by the content of their character.”¹²⁴

No good deed goes unpunished.

We protect the vulnerable, the poor, the helpless because they are most in need of protection and we may be in that same position someday.

Tolerance must be a two-way street or it is nothing.

Busy doctors (or other professionals) make mistakes.

You shouldn't criticize something simply because it is not perfect.

The insurance agent promised one thing and delivered another.

For a variety of reasons, an organization can develop a toxic work atmosphere.

The fruit of the poisonous tree must set even the guilty man free.

Self-defense is not about murder, it is about the irresistible human impulse to survive.

Themes can also be built out of a single word or concept. Think of how the following words or phrases lead to themes:

Fairness: —fair play; fair chance; level playing field.

Reasonable doubt: “What is ‘reasonable doubt’? When I turn off the lights to go to bed, I sometimes wonder if I set the alarm clock. I probably did so. But, if I have to get up to see if I DID set it, that's ‘reasonable doubt.’”¹²⁵

Trust: He trusted her words.¹²⁶

Reliance: Don't change the rules in the middle of the game.

Equality: All men are created equal.¹²⁷

Bias: You can't blame his mother for taking his side, but you don't have

the beginning.” Winston Churchill, *quoted in VESPER, supra* note 6, at 701 (reflecting on the Battle of Egypt).

123. *Ecclesiastes* 3:1.

124. Dr. Martin Luther King, Jr., “I Have a Dream”, Speech in Washington, D.C. (August 28, 1963), available at <http://www.americanrhetoric.com/speeches/mlkihaveadrea.htm>.

125. Gerry Spence, *quoted in VESPER, supra* note 6, at 357.

126. *Cf. Aesop, quoted in VESPER, supra* note 6, at 1049 (“Never trust the advice of a man in difficulties.”).

127. See the great summation by Atticus Finch in HARPER LEE, *TO KILL A MOCKINGBIRD* (1960).

to accept her version as true.

Risk: If you take the risk, you shouldn't complain about the consequences.¹²⁸

Reward: The law does not require you, the jury, to reward the [dishonest, greedy, lazy, etc.].

Reasonableness: We agree that the defendant is liable, but only for the payment of reasonable damages.

Credibility:

Credibility was the very foundation of this case, as it is in every case. Credibility in a trial is what a compass is to a ship, an altimeter to an airplane, a sight to a gun, and a scale to a customer in a butcher shop. Without a standard for measuring direction, height, accuracy, or weight, how does one know what is true or not true? How can we determine negligence unless we first decide that we can believe the person who is telling the story of alleged negligence or non-negligence? Without credibility to back up any story told from the witness stand, the witness' testimony is as meaningless as a sack of feathers thrown to the winds.¹²⁹

Honesty: "Honesty is the best policy"¹³⁰

"The surest way to remain poor is to be an honest man."¹³¹

"No legacy is so rich as honesty."¹³²

"Once you lose your integrity, the rest is easy."¹³³

Responsibility: Don't play with fire unless you are willing to take responsibility for the consequences.

The theme will be the canon (the measuring rule) by which both selection and discard of the available evidence will be conducted. Facts do not have relevancy in the abstract. Like a guitar string, facts will not resonate unless they have a sounding board against which to vibrate and thereby establish their place in the case. The theme will also dictate the sequence in which the facts are presented. The conventional wisdom is that one should start strong and finish strong. I agree with the conventional wisdom. This usually means that one puts the best argument first and the second best argument last, although one might choose to reverse this. But there must be a very good reason for doing so because the first argument should most clearly state the theme.

The theme should have an important impact on word choice. One should always have a thesaurus at hand when writing in order to make the correct word choices. "Correct" is shaped by the theme. If the theme is "promises should be

128. "This is a case about risk. A and B made their deal and allocated the risk concerning the potential success or failure of the reorganization. The consequences of the failure of the reorganization should remain with those responsible for the failure and not placed on innocent third parties."

129. Keough v. Republic Fuel & Burner Co., 116 A.2d 671, 675 (1955) (Musmanno, J., dissenting).

130. English proverb, *quoted in VESPER, supra* note 6, at 462.

131. French proverb, *quoted in VESPER, supra* note 6, at 462.

132. William Shakespeare, *All's Well that Ends Well*, Act III, v, *quoted in VESPER, supra* note 6, at 463.

133. J.R. Ewing (character on the television series "Dallas"), <http://www.bored.com/findquotes/cate642integrity.html>.

kept,” then the writer should look for words that advance that theme, as Jim McElhaney has suggested, like handshake, bargain and covenant and, less so, pact or deal.¹³⁴ Choice, a powerful word, is another key theme that will influence word choice:

You shouldn't complain about a problem that was created by your choice [or your actions].

The plaintiff [or defendant] made the choice, now he [or she or it] must live with the consequences.

People should be held responsible for the choices they make.

The plaintiff chose not to do what the doctor ordered.

The defendant chose to ignore these letters of complaint.

Another important theme with word choice implications is the word “rule”:

The judge will instruct you on the rules.

The plaintiff [or defendant] has always played by the rules.

Don't change the rules in the middle of the game.

Before the government may imprison someone, it must play by the rules.

When I advise on brief writing, I tell the writer to first identify the themes and then to tell the story without mentioning the themes. This should influence the right word choices, especially with the nouns and verbs. Adjectives and adverbs are okay, so long as one recognizes that they cannot carry the argument. Modifiers must remain in a supporting role.¹³⁵

Ultimately, advocacy is about storytelling.¹³⁶ Stories are primal. They bring order to the ordinary chaos of daily life. People use stories all the time to make sense out of what is going on. They relate to stories that speak to their own experience. In this regard, “[w]hoever tells the best story wins.”¹³⁷ A story that organizes and shapes the evidence will assist the jury to do the right thing. As Thomas Vesper's Uncle Anthony said: “You should never tell anybody what they're gonna find or decide . . . just help 'em make the right choices for the right reasons.”¹³⁸ Another way to put it is you help the jury to see the story your way: “It is not that the jury will believe it if they see it, instead it is if they believe it they will see it.”¹³⁹

134. MCELHANEY, *supra* note 59, at 556-74; *see also* Jim McElhaney, *The Right Words: The Language You Choose to Argue Your Case Can Help Make It a Winner*, ABAJOURNAL, Jan. 25, 2005, available at http://www.abajournal.com/magazine/article/the_right_words/.

135. *See* Van Patten, *supra* note 87, at 269.

136. For a masterful treatment of storytelling, *see* PERDUE, *supra* note 69. *See also* JOHN TRUBY, *THE ANATOMY OF STORY: 22 STEPS TO BECOMING A MASTER STORYTELLER* (2007).

137. John Quincy Adams, *quoted in* VESPER, *supra* note 6, at 589.

138. VESPER, *supra* note 6, at 517. *See also* Posting of Richard Fernandez, blogging as Wretchard:

One thing I learned from hard experience is you always start from where people are. Not from where you want them to start. You have to take people step by step, on the basis of their own experience, getting them to reflect on it to their own conclusions. Just because you “know” doesn't mean you can force what you “know” down people's throats. They have to figure things out for themselves. It's not a function of being unsure of your beliefs. Just an acceptance of the fact that people have to travel their own road to the same spot you may be standing on.

<http://pajamasmedia.com/richardfernandez/2008/11/04/the-death-of-a-brand/#more-786#33> (Nov. 5, 2008, 20:45).

139. Greg Cusimano, *quoted in* VESPER, *supra* note 6, at 1053.

In a brief, the theme or themes should be stated in the conclusion. The conclusion of a brief is a much missed advocacy opportunity. The conclusion should always state the concise substantive reasons why you should win. It is not boiler-plate as in “[f]or the foregoing reasons, the appellant respectfully requests” It is not a restatement of the arguments in the brief. If a theme has not already been articulated explicitly in the brief, it must be done so at this point. One example of an implicit theme being made explicit is: “If the law is to continue to command respect, it must make basic sense.” This makes a great beginning to the conclusion and I (and my students) have used it on more than one occasion.

V. CONCLUSION

Themes have a sense of moral urgency. The right theme will resonate with the decision maker. When carefully thought through, a theme can express in profound ways the essence of the case by tying it to the larger questions of life.¹⁴⁰ They can express a realistic view of what has transpired¹⁴¹ or articulate the petty frustrations that one feels in institutional settings.¹⁴² Themes help us to make sense of life.¹⁴³

140. See, e.g., the following use of a metaphor that leads to a reflection on good and evil:

It was very primal – like a dog to a bone. No instructions needed. What drives this ancient itch? Why some things and not others? Or, since all dogs seem to take to bones, why only some humans cursed with the primal weakness to alcohol, drugs, or sex? Each person, it seems, has their own personal “apple” in the Garden of Eden, where the “choice” between good and evil is played over and over again.

141. “You may beat the rap, but you won’t beat the ride.” Old cop saying, meaning you may not be found guilty, but you will have been through the process, validated by *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (describing that section 1983 action against city, police chief and arresting officer was dismissed because there was no violation of a motorist’s Fourth Amendment rights even though she was taken to jail for minor violations).

142. Reacting to yet another instance involving institutional grants of paltry sums and making people feel worse for the experience, my friend and colleague, Professor Chris Hutton stated at a faculty meeting: “It offends me that they give us so little money and then expect us to fight over it.”

143. See, e.g., Bill Simmons, Tiger Woods mailbag, ESPN Page 2 (Dec. 10, 2010) <http://sports.espn.go.com/espn/page2/story?page=simmonsflpicks/091211>:

Did we underestimate the effects of fame in his formative years on Tiger [Woods]? Become famous at an early age and invariably you “mature” into someone who can’t remember anything other than being famous. Most (if not all) of your interactions are with people who are impressed by you or want something from you. You don’t have to win anyone over. You don’t have to work on being a better person, or funnier, or nicer, or anything. You don’t want to make new friends because you can’t tell if any prospective friends want to be friends because you’re who you are, so you end up gravitating toward other famous people, most of whom are just as messed up as you. You can get away with almost any indiscretion and be forgiven. Your only responsibility is to stay yourself, but you became this twisted, self-aware version of you without even knowing it. And that’s when the trouble starts.

See also Posting of Richard Fernandez, blogging as Wretchard, to Bermont Club, <http://pajamasmedia.com/richardfernandez/2010/08/17/hung-jur/#more-10131> (Aug. 17, 2010, 5:41 p.m.):

Dealing with corruption is like moving one of those Ikea assembled tables. You have to lift all four corners at once. Otherwise the thing breaks up on you. In this case the only way you’re going to clean up Chicago is to get rid of about 90% of the politicians at once. Lift all four corners. Ditto Washington. In that way the people outside the investigation can’t cover for those who are swept up in it. Otherwise it’s like trying to fumigate the termites in just one

For the lawyer, it is my hope that this Article will stimulate increased interest in themes. Think about how to identify the moral center of the case. It may not come at the outset, but if one is vigilant, it will appear. I close with some sage advice from Dashiell Hammett's fictional detective, Continental Op: "Plans are all right sometimes . . . and sometimes just stirring things up is all right – if you're tough enough to survive, and keep your eyes open so you'll see what you want when it comes to the top."¹⁴⁴

corner. The bugs just scuttle around and come back. Fumigate the whole nest. Nothing else will do. And even then you only get temporary relief.

144. DASHIELL HAMMETT, *RED HARVEST* (1929).