October 2002

Court Review: Volume 39, Issue 3 - Trial by Metaphor: Rhetoric, Innovation, and the Juridical Text

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Trial by Metaphor:
Rhetoric, Innovation, and the Juridical Text

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> ***Socrates:*** Let's look at it this way. If we differed, you and I, about which of two things was more numerous, would our difference on these questions make us angry and hostile towards one another? Or would we resort to counting in such disputes and soon be rid of them?
> ***Euthyphro:*** We certainly would.
> ***Socrates:*** Again, if we differed about which was larger and smaller, we'd soon put an end to our difference by resorting to measurement, wouldn't we?
> ***Euthyphro:*** That's right.
> ***Socrates:*** And we would decide a dispute about which was heavier and lighter, presumably, by resorting to weighing.
> ***Euthyphro:*** Of course.
> ***Socrates:*** Then what sorts of questions would make us angry and hostile towards one another, if we differed about them and were unable to reach a decision? Perhaps you can't say offhand. But consider my suggestion, that they are questions of what is just and unjust, honourable and dishonourable, good and bad…
>
> Plato's *Euthyphro*, 7b-d.

The judicial decision-making process is not one for which resolution arises from counting, measuring, or weighing. Rather, the courtroom is a field for debate about the interpretation and application of values as embodied in or reflected by the law. Decisions reached in court are judgments and not mathematical conclusions in that the inherently contestable nature of the issues at stake precludes an outcome that is self-evident to all. As such, although there is an element of fact-finding that emerges in a judicial opinion, there is also always a subjective valuation of the principles at stake; to draw on Socrates, there is always an assessment "of what is just and unjust, honourable and dishonourable, good and bad." Most often, the process of judicial decision making involves an intermediate process in which fact-finding and subjective evaluative efforts intermingle and end up informing one another. So the judicial decision is both explanatory and explorative, revealing facts and drawing principled conclusions that tell a story about what is just and why it is so. In this way, the judicial opinion straddles the worlds of science and fiction—concerned as it is with uncovering facts, but always normatively concerned with the story that emerges.

These qualities make the judicial opinion, the product of this ambivalent hermeneutic, an extremely complex literary genre. The difficulties arise not only from the disparate processes of fact-finding and value judgment, but from the various functions that a judicial opinion serves once it has been rendered. There is the immediate conflict between or among litigants that the courts must resolve. It is necessary for the court to arbitrate the discrete matter of concern to the parties involved. But the judicial text is also a synthesizer. It filters the body of existing law into a series of well-defined propositions that are then applied to the case at bar. These propositions are then looked to and interrogated in subsequent cases. As such, each judgment assumes a place within the jurisprudence and stands as precedent for future decisions. Throughout each of these functions, the judicial opinion carries out a symbolic role as well. The judgment must stand as an example of the proper functioning of the justice system and, in so doing, reflect the health and vigour of the process. A given judgment must persuade a reader both that a fair resolution has been effected and that the decision is a correct application of the rule of law. Thus, the judicial opinion is not just a reflection of an opinion and a representation of authority, but also a device that must persuade while maintaining the legitimacy of the legal system.

An additional challenge emerges when the court decides that there must be a change in the law. To this list of disparate purposes is added a further persuasive need—the judgment must demonstrate why what was once good or true or just (or, indeed, lawful) is no longer adequate. It is at these turning points in the law that the rhetorical nature of judgments becomes most apparent. While there is always an element of persuasion and argument in the judicial opinion, it is at these moments of change that the need for effective language is most exigent. I will argue that a critical component of the judge's linguistic toolbox is metaphor and that this device is most necessary and effective at these turning points in the law. A metaphor has the ability to bridge the abstract and the concrete, using elements of similarity to effect a seemingly natural appeal to common sense, and to mold the future development of jurisprudence. This critical role for the metaphor in legal judgments emerges from a consideration of the structure and functions of a judicial opinion and the complementary functions of metaphor. This relationship between the judicial decision and metaphor is confirmed by an examination of key metaphors in the development of Anglo-Canadian jurisprudence.

THE JUDICIAL OPINION

The Canadian judicial opinion assumes an organized form and structure. This particular form becomes a kind of template for decisions to which legal professionals become accustomed. Although there can be variance among the precise structures adopted by a particular judge, there is nevertheless a common form that can be discerned. This form is the means by which the content of legal decisions is communicated to and, subsequently, understood by the community, broadly defined. As such, this structure is not just an organizational form, but is the locus for community debate on the topic at hand as well as the paradigm of legal reasoning that configures the ensuing conversation. The conventional form of the decision constitutes a structuring of legal knowledge and thought in a communicative social document and, as such, can be understood as the foundation for a legal rhetoric. J. B. White recognizes that this rhetorical character has implications for the social and cultural functions of law:

> ...[T]he fact that the law can be understood as a comprehensibly organized method of argument, or what I call a rhetoric, means that it is at once a social activity—a way of acting with others—and a cultural activity—a way of acting with a certain set of materials found in the culture. It is always communal, both in the sense that it always takes place in a social context and in the sense that it is always constitutive of the community by which it works.[1]

Canadian judgments generally begin with a statement of the facts of the case. The conflict, crime, or dispute is described in a sort of narrative that is ultimately aimed at delineating the main issue at trial or on appeal. A distilled statement of the critical legal point in question generally follows this narrative. This final section sets the scene for the legal argumentation that will follow.

The next portion of the judgment characteristically consists of the history of the case. An appellate court will recount the arguments and reasoning offered in the lower courts and describe the manner in which the law and facts were interpreted at these stages. Next, the court sets out what it sees to be the relevant law used to decide the issue under consideration. This description will likely include a presentation of relevant statute law and a survey of the case law, both of which will inform the reasoning of the court. Essentially, this process is the assemblage of all sources of authority that the judge or judges will have to consider while coming to a decision. Often, the judgment will include excerpts from past decisions and will extract what the court understands to be the critical principles that will affect the judges' determination in the case. At this point, the judicial opinion has laid out the facts, the history of the case, and the critical law. The essential component of the decision follows, in which the court turns its attention to the application of the law to the facts. Here the judgment crystallizes and the court draws its final conclusions as to the appropriate disposition of the case in light of the applicable principles of law.

"The authority of the judicial system substantially depends upon the appearance that it has conformed to the rule of law."

This structure, briefly outlined, demonstrates that the judicial opinion involves a series of tasks. A judgment must successfully delineate facts, canvass legal history, assemble and assess the applicable law, and arrive at an appropriate conclusion. From this constellation of tasks, one can discern a number of purposes for the judgment. Importantly, it is not the purpose of the judicial opinion to act as a *means* of reaching a decision. Rather, once the opinion is written, "the judge's intellectual effort has already been achieved, his deliberation finished, and there remains only the question of form."[2] Indeed, C. Perelman argues that "the important thing is not the passage from premises to conclusion but the way the judge justifies his premises both in fact and law."[3] This process of justification is achieved by accomplishing three objectives. First, the judgment must maintain the authority and integrity of the legal process. Second, the opinion must attract authority for the discrete point of law that the court has decided. Finally, and particularly in cases where the court departs from established law, the decision must persuade the reader that justice has been carried out.

The authority of the judicial system substantially depends upon the appearance that it has conformed to the rule of law. The rule of law demands, among other things, that decisions are reached through a reasonable and transparent process. The law must not appear capricious or arbitrary in the deployment of its power. As well, the courts must apply the duly constituted laws of the country as enacted by the democratic legislature. "The older (primarily Judaic and Christian) tradition saw the law as a set of authoritative commands, entitled to respect partly from their antiquity, partly from their concordance with the law of nature and of God."[4] To the extent that these sources are no longer regarded as the fount of authority in a modern liberal state, the judicial opinion must garner its legitimacy from the reasoned manner of its application. By conforming to the due process of law, including both transparent and equitable reasoning as well as the application of the legitimate laws of the nation, the judicial opinion asserts the legitimacy of the *processes* of justice and, in so doing, argues for its own authority.

The judgment also asserts the legitimacy of the *law* to which it appeals. The courts operate on the principle of *stare decisis*, which dictates that previous decisions made on a similar topic ought to be binding on subsequent courts. This doctrine, also

Footnotes

1. J. B. White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life* 52 U. Chi. L. Rev. 684, 691 (1985).
2. C. Perelman, Justice, Law, and Argument: Essays on Moral and Legal Reasoning 150 (D. Reidel Publishing Company 1980).
3. *Id.*
4. *Supra* note 1, at 685.

"[A]n additional persuasive burden is imposed when the court decides that the law should change or be reconceptualized."

known as the doctrine of "precedent," ensures a degree of predictability and transparency to the application of law. The past history of the common law affects the manner in which present issues of law should be decided; indeed, the use of precedent "is the invocation of the authority of prior texts to shape and constrain what should be done in the present."[5] This principle provides the law with a legitimacy derived from the history and collective experience of the law. James Boyd White imagines what a system without judicial opinion would be like:

> One's first reaction might be to think that in such a system there would be no precedent, no argument from precedent, and in this sense no law: every question would be argued as an original matter, without the advantage of the collective experience over time that the judicial opinion provides. We would be deprived of a crucial method of learning from the past, indeed, of a way of making ourselves over time.[6]

When a judicial opinion appeals to past law, it at once justifies the interpretation that the court is about to adopt and affirms the weight and significance of the principle of *stare decisis*. It is for this reason that some have commented that "a judicial system relying on precedents requires by its very nature citation from prior opinions. . . ."[7] Through the use of precedent the writer is able to claim authority for the law itself. In addition, the affirmation of *stare decisis* in a judgment ensures that it, too, may be relied upon in the future for its own precedential value. The effect of precedent is to affirm past law, legitimize present rulings, and to mold the future development of the law. As such, each decision has a circular authoritative effect or "self-legitimizing" nature in addition to a prospective impact.

Both of these functions (ascribing authority to the justice system and to the law itself) rely on an element of persuasion in judicial opinions. Judges face a number of persuasive tasks. They must convince the reader that the system has operated properly, that the law is itself legitimate, and that the court has arrived at a just resolution as between the litigants. This persuasion requires the judge to use language in a rather literary fashion: "without persuasion, law could not be law, and without fiction, there would be no persuasion."[8] The judge is effectively constructing a "story" of the case—a story that will be more or less convincing, commensurate with the consistency and coherence of its internal structure and arguments. Again, the social nature of the judicial opinion emerges from an appreciation of its persuasive elements. A judgment is written with an audience, or audiences, in mind and it is the child of the legal system, which is itself a cultural institution. So while a judicial decision is always invested with certain inertia toward clarity, the argumentative nature of the text invests it with an element of uncertainty—will the argument be successful, will the reader be persuaded? As P. Goodrich observes,

> While the law is undoubtedly invested with a peculiarly "concrete" force or function, its argumentative method and justificatory rhetoric encode a relation to the social in a manner that can never be either verified or falsified.[9]

But an additional persuasive burden is imposed when the court decides that the law should change or be reconceptualized. Suddenly, the court must justify its departure from the weight of precedent but must not, in the process, throw into question the legitimacy of law or the justice system. To meet this task, all tools in the judge's linguistic toolbox must be employed. The balance of this paper will argue that recourse to metaphor is an essential technique used in judicial opinion to discharge the judge's persuasive burden and that metaphor is particularly used where the court sets out to alter the law.

THE METAPHOR

The metaphor has attracted the concerted and sustained attention of philosophers, philologists, linguists, rhetoriticians, and semioticians for much of written history. This seemingly simple linguistic trope has proven to be a touchstone for intense debate regarding the nature of language and of thought. With Nietzsche, the metaphor became a modern philosophical problem of language that has carried forth into 20th century. The structuralists, represented by Jakobson, Saussure, and Barthes, forwarded a theory of metaphor that focused on the semiotics of language and thought. The mass of literature that has accreted around the concept of metaphor is complex and intriguing. However, for the purposes of this analysis, the starting point for understanding the basic functioning of metaphor is Aristotle:

> Metaphor consists in giving the thing a name that belongs to something else; the transference being either from genus to species, or from species to genus, or from species to species, or on grounds of analogy.[10]

At core, the metaphor is a linguistic means of drawing together two objects, items, or concepts. The metaphor "des-

5. J. B. White, From Expectation to Experience: Essays on Law and Legal Education 40 (Univ. of Mich. Press 1999).
6. *Id*. at 35-6.
7. H. Bosmajian, Metaphor and Reason in Judicial Opinions 34 (S. Ill. Univ. Press 1992).
8. L. H. LaRue, Constitutional Law as Fiction: Narrative in the Rhetoric of Authority 11 (Pa. State Univ. Press 1995).
9. P. Goodrich, Legal Discourse: Studies in Linguistics, Rhetoric, and Legal Analysis 123 (Macmillan Press 1987).
10. Aristotle, The Basic Works of Aristotle 1457 b6-9 (Richard McKeon trans., Random House 1941).

"The metaphor is the vehicle that carries the reader from a world of common objects, and their attendant qualities, to the realm of ideas."

ignates a verbal/symbolic relationship (usually based upon similarity) between two concepts or images which mutually describe or enhance each other."[11] This conceptual relationship consists of describing one thing with reference to another, thereby linking particular features of the two. As such, metaphor is "both a peculiar or aberrant form of naming things and is also a potentially logical act of predication attributing a resemblance. . . ."[12]

But this tension between peculiarity and logic is precisely what affords the metaphor its rhetorical force. The semblance of absurd equivalence is followed by a realization of similarity and this conceptual progression effects a number of purposes, particularly when the metaphor is used to communicate or interpret an abstract idea. First, when a metaphor is used to describe a concept in terms of a familiar object, the realm of the abstract and the concrete are bridged. Second, to the extent that the metaphor refers to the qualities of this everyday object, this trope makes an appeal to "common sense." Finally, once established, the ultimate logic of the equivalence drawn can have the effect of shaping the manner in which the abstract concept is ultimately understood. These selected functions of metaphor have particular resonance in legal discourse. Each serves a function in communicating legal reasoning and gaining authority for judicial decisions.

The metaphor is particularly apt as a means of explaining complex or abstract ideas. By drawing the idea together with a familiar item or phenomenon, the metaphor provides a conceptual bridge for the reader to follow:

> The metaphor provides the "abstract," imageless thought with an intuition drawn from the world of appearances whose function is 'to establish the reality of our concepts' and thus undo, as it were, the withdrawal from the world of appearances that is the precondition of mental activities.[13]

The metaphor is the vehicle that carries the reader from a world of common objects, and their attendant qualities, to the realm of ideas. By effecting this link, the metaphor acts to "guarantee the unity of human experience"[14] in that even the most conceptual and theoretical ideas find explication through analogy to common phenomena. The metaphor is the agent by which a reader is invited to understand a complex idea by assigning to it qualities found in a familiar or simple object.

Legal thought often operates in the realm of the abstract and complex. Indeed, law has its own language of specialized and artificial terms assigned meanings particular to the legal world. These terms are functional and instructive in the legal realm and for the purposes of analysis, but when the courts must present their findings to the public, these abstract constructions will not suffice. Perelman recognizes this use of metaphor arising from the need for communication:

> From artificial languages are excluded vagueness, imprecisions and analogic and metaphoric uses of notions. . . .As soon as the strict rules imposed artificially by language yield to the hermeneutic requirement, the same words will no longer have the same meaning; a significance given in one context can no longer be valid in all others; the use of analogy and metaphor can no longer be denied, but, on the contrary, imposed by the desire for communication and comprehension.[15]

Thus, while for the purpose of analysis the courts can refer to the constitutional division of power by use of special terms such as "interjurisdictional immunity," "paramountcy," and "double aspect fields," they consistently resort to the term "watertight compartments" to convey the strict segregation of provincial and federal powers. The metaphor carries with it an explicative power that inheres in its ability to bridge the concrete and conceptual worlds. As such, the metaphor acts as more than a mere linguistic flourish or stylistic embellishment —it is a mode of thought that concretizes and, in so doing, communicates abstract or peculiar concepts. Thus, "through incorporation of tropes into legal opinions, what is abstruse and obscure becomes concrete and comprehensible."[16]

Attendant upon this communicative clarity is the ability of the metaphor to make an appeal to common sense. Through the equation of the abstract with the everyday, what is alien and novel is rendered familiar and, in some sense, obvious. H. Arendt reflects that

> The simple fact that our mind is able to fund such analogies, that the world of appearances reminds us of things non-apparent, may be seen as a kind of "proof" that mind and body, thinking and sense experience, the invisible and the visible, belong together, are "made" for each other, as it were.[17]

Once the reader accepts the equivalence or "link" between the abstract concept and the everyday, the implications of these common qualities become apparent. A set of "obvious" inferences flows from the familiar characteristics highlighted by the metaphor. For example, the notion that love is precious or must be treated with care is self-evident—common sense—once it is accepted that "love is like a rose." As Lakoff and Johnson note:

> Because so many of the concepts that are important to us are either abstract or not clearly delin-

11. Barry, Thomas F., *Metaphor*, *in* ENCYCLOPEDIA OF LITERARY CRITICS AND CRITICISM (Chris Murray, ed., Fitzroy Dearborn Publishers 1999).
12. *Supra* note 9, at 105.
13. H. ARENDT, THE LIFE OF THE MIND 103 (Harcourt Brace Jovanovich 1981).
14. *Id.* at 109.
15. *Supra* note 2, at 156.
16. *Supra* note 7, at 47.
17. *Supra* note 13 at 109.

> eated in our experience (the emotions, ideas, time, etc.), we need to get a grasp on them by means of other concepts that we understand in clearer terms (spatial orientations, objects, etc.).[18]

This appeal to common sense is of critical importance to the juridical metaphor. If the court is arguing that a particular idea must be interpreted in some fashion and can draw a metaphorical link to an analogous situation in common experience, artificial judicial reasoning can appear to be simple common sense. Returning to the division of powers example, a court arguing that legislative powers must be tightly constrained within particular bounds makes an apt analogy to the "watertight compartment." If legislative powers are "watertight compartments," then it is common sense, or obvious, that there should be no overflow between powers. Thus, legal discourse can use the metaphor to afford the legitimacy of common sense to its own reasoning. This use of the metaphor is apropos, given that cases arise from common experience and the principles arising from judicial opinion must, ultimately, be used in common experience: "since the story both begins and ends in ordinary language and experience, the heart of the law is the process of translation by which it must work, from ordinary language to legal language and back again."[19]

Finally, the metaphor functions to shape subsequent thought about the concept that it modifies. Any metaphor emphasizes certain qualities while hiding others, thereby focusing subsequent attention on only those common features upon which it depends. This is particularly true where a "fresh" metaphor is introduced because this newly revealed relationship is immediately defined in terms of the qualities that its creator has stressed.

> New metaphors, like conventional metaphors, can have the power to define reality. They do this through a coherent network of entailments that highlight some features of reality and hide others. The acceptance of the metaphor, which forces us to focus *only* on those aspects of our experience that it highlights, leads us to view the entailments of the metaphor as being *true*. Such "truths" may be true, of course, only relative to the reality defined by the metaphor.[20]

Once the relationship is accepted, future discussion about the abstract element of the metaphor is shaped, limited, and constrained by the conceptual definition that the trope has created. Consider the spatial metaphors associated with the concept of "control." Control is associated with the spatial concept "up" as in "I have control over him." Once this association is accepted, the tendency is for this formative relationship to guide future conceptualizations of control: "he is under my power," "I'm on top of the situation," "I have it under control," etc. This pattern does not preclude other constructions of the concept, but the metaphorical association between "control" and "up" is a very powerful one.

"For the law to retain its legitimacy, its audiences must be convinced that legal institutions are arriving at just and appropriate conclusions."

The same dynamic takes place when metaphors are used in legal opinions. Once a legal concept is imbued with the "spark of imagination"[21] of metaphor, this linguistic relationship exerts a substantial coercive and constraining effect on future thought about the law. Certain aspects of legal problems are drawn out by metaphors and subsequent thought focuses upon these highlighted characteristics. As such, the use of metaphor in judicial decision making is a means for the court to extend its approach to a legal principle or concept beyond the particular case by fixing upon particular dimensions or qualities of the law in question. These metaphorically centralized qualities become the lens through which the problem is seen in the future while other dimensions of the problem not captured by the metaphor fade into the rhetorical background. This constraining effect is heightened by virtue of the principle of *stare decisis* (itself a metaphor—to "stand" by a decision), discussed earlier. The doctrine of precedent and the very language employed by the judge combine to create metaphorical limits upon judicial reasoning.

Ultimately, each of these uses of metaphor in judicial opinions contributes to the overall project of a set of judicial reasons—to persuade. For the law to retain its legitimacy, its audiences must be convinced that legal institutions are arriving at just and appropriate conclusions. Robert Gordon comments as follows:

> . . .[T]he power exerted by a legal regime consists less in the force that it can bring to bear against violators of its rules than in its capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live.[22]

This need to persuade is heightened where the courts attempt to make a substantial change in the law. In these cases, the judicial opinion must convince the reader that the just resolution to a case requires a departure from the weight of historical interpretation as well as a reformation of the way in which the law ought to deal with a given issue. To the extent that it is able to render the complex simple, appeal to common sense, and structure thinking about a particular issue, the metaphor can be seen as a powerful tool to be used in this task

18. G. Lakoff, *et al.*, Metaphors We Live By 115 (Univ. of Chicago Press 1980).
19. *Supra* note 1, at 692.
20. *Supra* note 18, at 157-8.
21. P. Ricoeur, The Rule of Metaphor: Multi-Disciplinary Studies of the Creation of Meaning in Language 303 (Robert Czerny trans. Univ. of Toronto Press 2001).
22. R. W. Gordon, *Critical Legal Histories*, 36 Stan. L. Rev. 57, 109 (1984).

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of persuasion. The final section of this paper will offer three examples of instances in Anglo-Canadian jurisprudence in which metaphor was used in the manner outlined above to justify a fundamental change in the law.

THE LIVING TREE AND THE GOLDEN THREAD

Anglo-Canadian jurisprudence is replete with metaphorical constructions of the law: estoppel is a "shield, not a sword;" judges fear that their decisions will have a "chilling effect" on commerce or will open the "floodgates" to litigation; some arguments are mere "sidewinds" while others are "foundations" of the law; and for the purposes of freedom of speech analyses, society is a "marketplace of ideas." As argued above, these figurative devices are not merely ornamental additions to judicial opinions but, rather, are rhetorical tools used to preserve and enhance the legitimacy of the law through their persuasive power. Two examples will focus this argument on particular instances in the history of Anglo-Canadian jurisprudence when the metaphor was used to argue for a significant change in the law. First, in the *Edwards*[23] case, which established that the legal term "persons" includes women, the Canadian Constitution was called a "living tree." Secondly, the presumption of innocence was called the "golden thread" of the criminal law when, in *R. v. Woolmington*,[24] the court asserted that the Crown must prove the guilt of an alleged murderer beyond a reasonable doubt.

Also called the "Persons Case," *Edwards*, an appeal to the English Privy Council from the Supreme Court of Canada, was a landmark case for first-wave feminism. The appellants argued that s. 24 of the *British North America Act, 1867*, Canada's constitution at the time, should be interpreted so as to allow women to hold office as a senator. The Supreme Court of Canada had earlier concluded that the drafters of s. 24 did not intend to include women as "persons" eligible to serve as senators. As such, the Supreme Court felt constrained to interpret this section in an exclusionary manner. The English Privy Council agreed that this was likely the intent of the drafters. However, the English court also remarked that "customs are apt to develop into traditions which are stronger than law and remain unchallenged long after the reason for them has disappeared."[25] On this basis, the Law Lords argued that the Canadian law should adapt to changing social values and that women should be eligible to act as senators. In coming to this conclusion, the court famously declared the following: "The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits."[26]

This decision was controversial and bold. Yet by using this metaphor of the Constitution as a "living tree," the court achieved a number of important persuasive effects. First, it reduced a complex and abstract discussion about the rules of statutory interpretation to a simple, common symbol—everyone can conceive of a tree and the natural properties that it possesses. Secondly, the court appealed to common sense—if, indeed, the Constitution is a living tree, it naturally follows that it must grow and change. Finally, the court shaped future thought about the way in which the Canadian Constitution should be interpreted. As a document whose very nature involves growth and transformation, this metaphor suggests that judicial interpretation of the Constitution should allow for change.

Although, once accepted, there are a series of common-sense propositions that follow from this metaphor, note that there is nothing self-evident about the association itself. Indeed, the Privy Council could just as easily have argued that the BNA Act is a non-animate rock, set down in writing and not to be reshaped, only to be discarded and replaced. But by seizing upon certain characteristics of the written document—namely, its adaptability and capacity for change—the Privy Council affected the future development of Canadian constitutional jurisprudence. Since 1930, Canadian courts have consistently returned to this metaphor when describing the Constitution and arguing that it should adapt to changing social circumstance.

Decided in 1935, *Woolmington* remains a starting point for the analysis of Anglo-Canadian criminal law. It is read in first-year criminal law courses to teach students the fundamental concept that an accused is presumed innocent until proven guilty beyond a reasonable doubt. Yet, when decided, there was nothing self-evident about this assertion of principle. Rather, many held fast to the notion that once the Crown proved that the deceased died at the hands of the accused, it was the accused's responsibility to rebut the presumption that he possessed the intent to kill. At trial, the judge in *Woolmington* charged the jury in the following way:

> In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him: for the law will presume the fact to have been founded in malice until the contrary appeareth.[27]

But, having surveyed the English criminal law, the House of Lords reversed the decision of the trial judge and asserted a new fundamental principle:

> Throughout the web of the English Criminal Law *one golden thread is always to be seen*, that it is the duty of the prosecution to prove the prisoner's guilt. . . . If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether

23. Edwards v. A.G. Canada, [1930] A.C. 124 (P.C.) (appeal taken from Canada).
24. Woolmington v. D.P.P., [1935] A.C. 462 (H.L.).
25. *Edwards*, A.C. 124 (P.C.) at 134.
26. *Id.* at 136.
27. *Woolmington,* A.C. 462 (H.L.), at 472.

> the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal.[28]

The impact of this declaration cannot be overestimated. Modern Canadian jurisprudence has remained faithful to this notion and the presumption of innocence is now considered a hallmark of trial fairness.

How does one account for the ascendancy of this principle articulated in *Woolmington*? Surely the consonance of the presumption of innocence with certain principles of natural justice is somewhat explanatory. But another aspect of the enthusiastic adoption of this concept is the persuasiveness with which its importance was argued. The court's choice of metaphor played no small role in this rhetorical victory. Once again, this case demonstrates that the metaphor can bridge the gap between the abstract and the concrete. Lord Sankey, the author of this judgment, was able to explain the complex interconnectedness of principles in the criminal law as well as the central importance of the presumption of innocence in this system by using the simple metaphor of a single golden thread within a web. In this construction, the "golden thread" is the most valuable element in the web. It will not tarnish. If severed or removed, the beauty and value, if not the integrity, of the web as a whole would be diminished.

Once accepted, this metaphor leads to the natural, or commonsense, conclusion that this singular thread must be protected and valued above all other tenets of criminal law. But additionally, the invocation of a beautiful and treasured metal appeals to an aesthetic and emotional sense in the reader. The combined impact of the metaphor is to counsel for the careful treatment of this precious principle. Indeed, this was precisely the effect of the judgment. Future jurisprudence incorporated and repeated this trope such that, even in modern Canadian criminal jurisprudence, no principle is so fundamental and cherished as the notion that the Crown must prove a defendant's guilt beyond a reasonable doubt.

"Once again, this case demonstrates that the metaphor can bridge the gap between the abstract and the concrete."

Though both serve similar explicative and rhetorical functions, these two example metaphors do so, in at least one respect, in very different ways. The "living tree" metaphor includes a generative aspect. That is, the metaphor itself invokes and invites future thought about the implications of the image upon the interpretation of that which it embodies. While

28. *Id*. at 481 (emphasis added).

bounded by the limits of the metaphor, debate can continue as to what precisely it means to say that the Constitution is a "living tree." In contrast, the metaphor of the "golden thread" effectively ends the creative-interpretive discussion. More than providing boundaries and guiding thought, this image fixes a single approach to the concept that it explains and concretizes. This distinction demonstrates that it is not sufficient to recognize simply that legal metaphors shape thought. The choice of metaphor—in this case, the choice between one that is generative and one that is constrictive—can profoundly affect the manner in which legal thought is affected.

METAPHORS IN JUDICIAL OPINION—CONCLUDING REMARKS

This article has focused upon the explanatory and persuasive powers of the metaphor when used in judicial decision making. It is important to recognize, however, that alongside its positive rhetorical uses, the juridical metaphor also has the potential to mislead, distort, obscure, and distract. The process of simplification can remove complexities that ought to be explored. An appeal to common sense, though rhetorically powerful, is open to abuse, particularly where justice and the majority view diverge. While seizing upon certain qualities of a particular idea by means of a carefully crafted metaphor can shape future thinking, it can equally constrain the fluidity and creativeness of jurisprudential thought.

As such, the argument advanced in this paper is not a normative claim as to the desirability of metaphors in judicial opinion. Rather, it is an investigation into and reflection of the rhetorical nature of the judgment—a character in which metaphor participates. A judgment is not a declaration of fact—it is an assertion of the just. The metaphor is an instrument used in the persuasive project of judicial decision making, an undertaking to arbitrate disputes and interpret legal principles while maintaining and asserting the legitimacy of the law.

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Works Cited:

Edwards v. A.G. Canada, [1930] 1 D.L.R. 98 (P.C.).

Woolmington v. Director of Public Prosecutions, [1935] A.C. 462 (H.L.).

H. Arendt, *The Life of the Mind* (New York: Harcourt Brace Jovanovich, 1981).

Aristotle, *The Basic Works of Aristotle*, trans. Richard McKeon (New York: Random House, 1941).

Thomas F. Barry, "Metaphor," in Chris Murray, ed., *Encyclopedia of Literary Critics and Criticism* (London: Fitzroy Dearborn Publishers, 1999).

H. Bosmajian, *Metaphor and Reason in Judicial Opinions* (Carbondale: Southern Illinois University Press, 1992).

W. E. Conklin, *The Phenomenology of Modern Legal Discourse: The Juridical Production and the Disclosure of Suffering* (Brookfield, VT: Ashgate Publishing Company, 1998).

L. Fuller, *Legal Fictions* (Stanford, CA: Stanford University Press, 1967).

P. Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric, and Legal Analysis* (London: Macmillan Press, 1987).

R. W. Gordon, "Critical Legal Histories," 36 *Stanford Law Review* 36 (1984): 57.

G. Lakoff and M. Johnson, *Metaphors We Live By* (Chicago: University of Chicago Press, 1980).

L. H. LaRue, *Constitutional Law as Fiction: Narrative in the Rhetoric of Authority* (University Park, PA: Pennsylvania State University Press, 1995).

J. E. Murray, "Understanding Law as Metaphor," *Journal of Legal Education* 34 (1984): 714.

J. T. Noonan, Jr., *Persons and Masks of the Law: Cardozo, Holmes, Jefferson, and Wythe as Makers of the Masks* (New York: Farrar, Straus and Giroux, 1976).

C. Perelman, *Justice, Law, and Argument: Essays on Moral and Legal Reasoning* (London: D. Reidel Publishing Company, 1980).

P. Ricoeur, *The Rule of Metaphor: Multi-disciplinary studies of the creation of meaning in language*, trans. Robert Czerny (Toronto: University of Toronto Press, 2001).

J. B. White, "Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life," *University of Chicago Law Review* 52 (1985): 684.

J. B. White, *From Expectation to Experience: Essays on Law and Legal Education* (Ann Arbor: University of Michigan Press, 1999).