

Mercer Law Review

Volume 58
Number 3 *Symposium: Using Metaphor in Legal
Analysis and Communication*

Article 3

5-2007

The Centrality of Metaphor in Legal Analysis and Communication: An Introduction

David T. Ritchie
Mercer University School of Law, ritchie_d@law.mercer.edu

Follow this and additional works at: https://digitalcommons.law.mercer.edu/jour_mlr



Part of the [Legal Profession Commons](#), and the [Legal Writing and Research Commons](#)

Recommended Citation

David T. Ritchie, *The Centrality of Metaphor in Legal Analysis and Communication: An Introduction*, 58 Mercer L. Rev. 839 (2007).

This Article is brought to you for free and open access by the Journals at Mercer Law School Digital Commons. It has been accepted for inclusion in Mercer Law Review by an authorized editor of Mercer Law School Digital Commons. For more information, please contact repository@law.mercer.edu.

Using Metaphor in Legal Analysis and Communication

A Symposium of the Mercer Law Review

November 10, 2006

The Centrality of Metaphor in Legal Analysis and Communication: An Introduction

by David T. Ritchie*

Law, as a domain of human enterprise, is fundamentally discursive in nature. As such, understanding the elements of legal discourse, both analytical and communicative, is vital to understanding the nature of the enterprise. Metaphorical reasoning, and the communication of that reasoning, is one such element. Perhaps metaphor is one among many

* Associate Professor of Law, Mercer University, Walter F. George School of Law. Cleveland State University (B.A., 1991); Howard University School of Law (J.D., 1995); Beasley School of Law, Temple University (LL.M., 2001); University of Oregon (Ph.D., 2004). Member, State Bar of Oregon.

elements of legal discourse. In this view, metaphor theory would take its place alongside logic, narrative theory, rhetoric, and so on.

Some would suggest, however, that metaphor is more central than this account would suggest. In particular, the groundbreaking work of philosopher Mark Johnson and cognitive linguist George Lakoff makes the case that metaphor is absolutely central to human understanding and communication.¹ This claim, which is called “cognitive or conceptual metaphor theory,” has had profound influence in many fields of human intellectual endeavor over the past twenty-five years or so. As law is a human discourse community, the claim can be applied in the context of legal analysis and communication.² This was the inspiration for the development of the Mercer Law Review symposium on “Metaphor in Legal Analysis and Communication,” held November 10, 2006 in Macon, Georgia.

The initial idea, conceived by Michael Smith and myself, was to bring together key figures to discuss how cognitive metaphor theory works and what its specific application to legal analysis and communication might be. With the aid and support of the members of the Mercer Law Review and with help from several members of the faculty and administration of the Mercer University School of Law (particularly Linda Edwards, Daisy H. Floyd, Hal Lewis, and Jack Sammons), Michael Smith and I were able to plan and develop a program that accomplished this goal. The symposium brought together important representatives of the fields of cognitive science, legal communication, legal theory, philosophy, and religion to discuss the nature of metaphor and its application to the field of law. The presentations and the discussion that followed were innovative and breathtaking in their scope. The members of this panel brought home, in a real and profound way, the recognition that we “live by”³ certain metaphors; in law and in life.

The well-known philosopher and cognitive theorist Mark Johnson, one of the fathers of cognitive metaphor theory, started the symposium by explaining the cognitive theory of metaphor.⁴ His explanation left little doubt about the central nature of metaphor in our cognitive and analytical processes. According to Mark Johnson, everything that we think and communicate is formed, at some level, by metaphorical constructs that give us context and intellectual reference points upon which to attach our understanding. Drawing on his work with George

1. See generally GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* (1980).

2. See generally STEVEN L. WINTER, *A CLEARING IN THE FOREST: LAW, LIFE, AND MIND* (2001).

3. See LAKOFF & JOHNSON, *supra* note 1.

4. Mark L. Johnson, *Mind, Metaphor, Law*, 58 *MERCER L. REV.* 845 (2007).

Lakoff, Johnson set out the relationship between a superficial understanding of metaphor as a mere literary device and a deeper cognitive understanding that impacts the very nature of human reasoning. By discussing the embodied effects of certain metaphorical constructs he illustrated the profound interests that are often at stake if we fail to recognize this deeper conceptual understanding. The domain of law is particularly relevant in this regard.

This point was further developed by legal theorist Steven Winter, who has built upon the work of Mark Johnson and George Lakoff and developed a robust conception of cognitive legal reasoning.⁵ His presentation set out this conception, utilizing well known examples of metaphorical constructs in legal opinions by Oliver Wendell Holmes, Charles Evan Hughes, and others. Winter amply illustrated the breadth of the impact cognitive metaphor has on legal reasoning by discussing cases from areas as diverse as commerce, free speech, and labor relations. By drawing on this wide variety of examples, Winter proved—for many of us at least—that in the law we “live by” important metaphors that have a direct and lived impact on millions of people in the United States. His illustrations showed the depth of cognitive metaphors in legal analysis and discourse, thus providing further evidence for Johnson and Lakoff’s point that metaphor theory is fundamental to our understanding.

The religious philosopher and social critic Michael Goldberg picked up these themes, discussing the metaphorical construct behind the Eighth Amendment’s⁶ ban on cruel and unusual punishment.⁷ This construct, captured largely by the metaphor of “acting humanely,” truly shows how existential and important metaphors can be. By discussing this one example, Goldberg illustrated the stark and troubling implications of the framework developed by Mark Johnson and Steve Winter. Narratives surrounding the debate over capital punishment employ metaphors that are perhaps misplaced and contradictory. Goldberg also brought to the fore one important consideration about metaphor that deserves acknowledgment; the idea that when we adopt one metaphorical construct (“acting humanely” by executing criminals using quasi-medical procedures, for example), we cover over other possible metaphors that would completely change the nature of the discourse. Political and legal debates are, then, contingent and situated. These debates are dependent on the metaphors embedded in the discourse used. Changing the metaphors can change the debates. Constructing new metaphors to

5. Steven L. Winter, *Re-Embodying Law*, 58 MERCER L. REV. 869 (2007).

6. U.S. CONST. amend. VIII.

7. Michael Goldberg, *Against Acting ‘Humanely’*, 58 MERCER L. REV. 899 (2007).

replace the old metaphors can have a powerful impact on the way we see the world and how we engage in discourse. Indeed, it can mean the difference between life and death.

This was addressed squarely by our last two presenters: Michael Smith and Linda Berger—both experts in legal writing and communication. Michael Smith discussed the relationship between superficial linguistic conceptions of metaphor and the deeper cognitive conception.⁸ His presentation, an application of his groundbreaking work on understanding and developing metaphors,⁹ showed the power of legal professionals to construct discourse and use that discourse to explain existential problems and persuade others. Linda Berger's presentation, which flows from her innovative work on metaphor theory,¹⁰ drew upon Smith's views by showing how the construction of certain metaphors in the context of corporate personhood and commercial speech have far-reaching implications in the U.S. political and economic system.¹¹ Taken together, these two contributions to the Symposium show most clearly the practical and pragmatic application of cognitive metaphor theory to legal professionals and practitioners.

Cognitive metaphor theory opens a whole host of concepts and perspectives that can help us understand our discourse communities. For those in the legal profession, the work represented in this Symposium volume of the Mercer Law Review is a wonderful nutshell explaining how cognitive metaphor theory can—and does—have a profound impact on our conception of law and legal practice. The contributions contained in this volume give both an introduction to the basic theoretical perspectives on metaphor and law, and provide a sustained discussion of how these perspectives can impact the work of legal professionals. Many of the same things could be said about views on logic, narrative theory, and rhetoric. Those arguments, though, will have to await another day and other forums. The contributors to this volume as well as the participants and attendees of the Mercer Law Review Symposium have seen firsthand, however, how central cognitive

8. Michael R. Smith, *Levels of Metaphor in Persuasive Legal Writing*, 58 MERCER L. REV. 919 (2007).

9. See generally MICHAEL R. SMITH, *ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING* (2002).

10. See generally Linda L. Berger, *What is the Sound of the Corporation Speaking? How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law*, 2 J. ASS'N LEGAL WRITING DIRECTORS 169 (2004).

11. Linda L. Berger, *Of Metaphor, Metonymy, and Corporate Money: Rhetorical Choices in Supreme Court Decisions on Campaign Finance Regulation*, 58 MERCER L. REV. 949 (2007).

metaphor theory is to human understanding and especially to legal analysis and communication.
