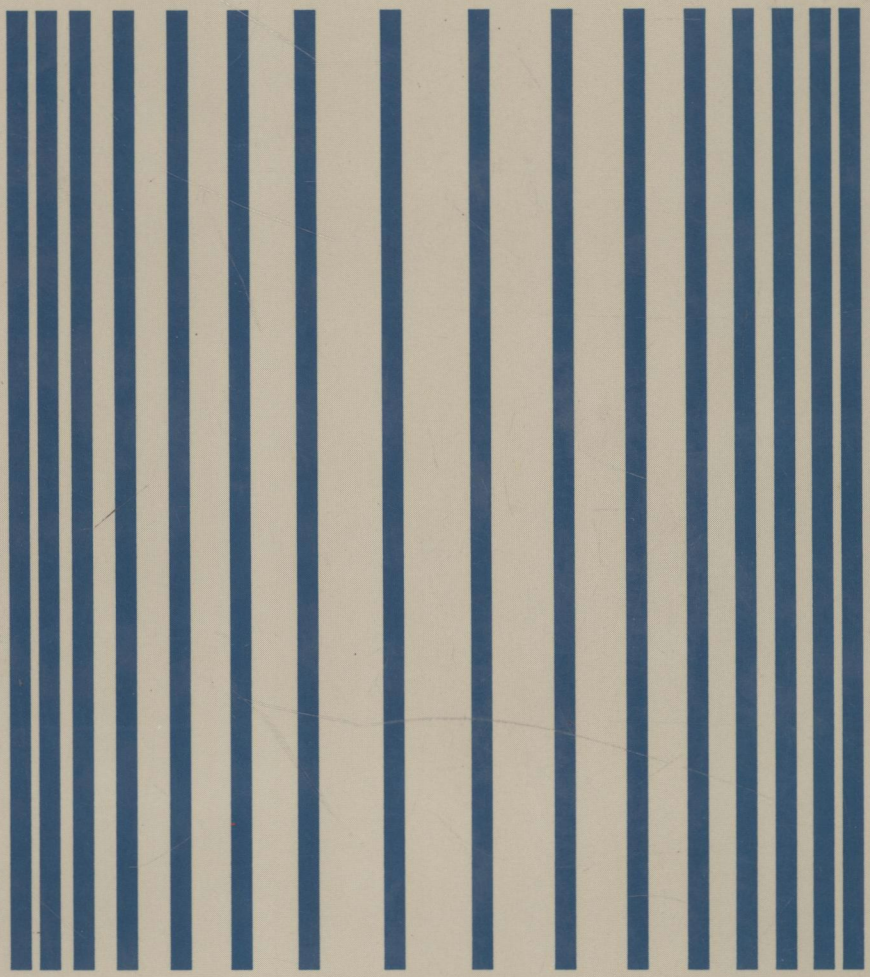
Metaphor and Reason in Judicial Opinions



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Preface

In his autobiographical *Of Men and Mountains*, Justice William O. Douglas describes some of the experiences and relationships that influenced him as he was growing up in the Yakima, Washington, area and the Cascade country. At the outset of the book, Douglas observes: "The boy makes a deep imprint on the man. My young experiences in the high Cascades have placed the heavy mark of the mountain on me."

So that the reader can get a partial explanation of how I have come to write this book on language and style in the reasoning of judicial opinions, I take Douglas's "The boy makes a deep imprint on the man" as a starting point. At least on the intellectual level, it probably began in 1945 when as a student at a California community college (then known as Reedley Junior College) I was introduced to the world of philosophy, psychology, sociology, and logic. This new world of ideas created new questions for me about knowledge, justice, and society that I had not been exposed to—not at least through reading John Stuart Mill, Karl Marx, Immanuel Kant, Arthur Schopenhauer, Thomas Jefferson, and others—and discussing them with a professor like Dr. W. Vincent Evans at a community college surrounded by the vineyards and orchards in the San Joaquin Valley. This new world of ideas made a deep imprint on a seventeen-year-old farm boy, who found this heady stuff. When I left Professor Evans's classes in 1947, I was not the same person who had entered two years earlier.

I was introduced in the fall of 1947 to the intellectual excitement at the University of California at Berkeley, where in the Department of Speech I was exposed to a discipline that focused on the analysis of discourse through the study of rhetoric, literature, philosophy, and language. There was Dr. Joseph Tussman, who discussed with us issues related to philosophy, language, and free speech; Dr. David Rynin, who expounded on logic, language, and semantics; Dr. Arnold Perstein, who had us read André Malraux, Richard Wright, Sinclair Lewis, Henrik Ibsen, Ernest Hemingway, Ignazio Silone, and others who had written about universal social, political, and religious issues and controversies.

But the controversies outside the classroom were making an equally significant impression on this eighteen-year-old who saw and heard professors defending their free-speech rights and academic freedom, for this was the frightening time of loyalty oaths and disclaimer affidavits required of tens of thousands of state and federal employees, including teachers. It was the time of McCarthyism, which brought with it investigating committees inquiring into the beliefs, expressions, and associations of professors, writers, artists, and others. In 1949, the year I graduated from the University of California, the state of New York was passing a statute that required teachers to sign a disclaimer affidavit as a precondition of employment. Those who did not sign, who took the position that it was none of the government's business what their beliefs were or whom they associated with, were either fired or not hired. One year later, the state of California required the following oath from its teachers: "I do not advocate, nor am I a member of any party or organization, political or otherwise, that now advocates the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means; that within the five years immediately preceding the taking of this oath, I have not been a member of any party or organization, political or otherwise, that advocated the overthrow of the Government of the United States or of the State of California by force or violence."

Out of this era of fear and repression came the "silent generation," which was "chilled" into silence as a "pall of

orthodoxy" spread over the nation. Principled professors who refused to sign the oath were dismissed. Writers were cited for contempt of Congress, some sentenced to jail terms, because they refused to reveal to government investigating committees their past associations and the names of people the committees labeled un-American. Inquiries were made into the political beliefs of labor leaders, educators, ministers, students, and a host of others. This young college student wondered what had happened to the guarantees of the First Amendment and the Fifth Amendment. Thus developed an interest in one aspect of this book—the freedoms of speech and association.

The other aspect of this work, language and style, developed further as I conducted my dissertation research at Stanford University on the techniques of persuasion used by Hitler and the Nazis. What became evident was that through the power of language, through the control of metaphors, through the power to define others, Hitler relabeled the Jews "bacilli," "vermin," "parasites," and "plague," language that led to a dehumanization of a people and to the "final solution." It did not take long to understand more fully than I had previously that this use of language to label, define, and dehumanize human beings had been used by Americans, individually and institutionally, to metaphorize blacks into "chattels," "savages," and "nonpersons," and "American Indians" into "barbarians," "heathens," and "the uncivilized." My interest and research in the anti-Semitic language of the Nazis, the language of white racism, the language of Indian derision, the language of sexism, and the language of war culminated in the publication of *The Language of Oppression* in 1974. Having seen how language can be and has been used to defend the indefensible (to use George Orwell's phrase), I was brought back to the issue of freedom of speech, for the question became: If language can be used to define people into submission, does such language deserve First Amendment protection? Thus these three interests came together—language, freedom of speech, and the law.

These interests converge again in this book on metaphor in the reasoning of court opinions. While I was teaching

several courses whose students were required to read judicial opinions related to First Amendment freedoms, it became evident that as students of rhetoric, we could not ignore the heavy reliance of the courts on the tropes, especially metaphor, metonymy, and personification. This tropology of the law is the focus of this book. However, it has also been my intent that the reader finish the book with a fuller appreciation of the First Amendment's role in this nation's survival as a people striving for "a more perfect union" and "freedom and justice for all." Hence, this is not a book devoted exclusively to identifying the crucial judicial tropes and their relevance and influence. While I have prepared a book directed to students interested in language, rhetoric, free speech, and the law, an effort has been made to keep the book free of legalese and academese, making the book accessible to the educated layperson. It is my hope that the reader, whether student or layperson, will learn not only something about how the tropes have been applied in judicial argument and decision making but also something about the power of figurative language and the centrality of freedom of speech to a nation that claims to be free and democratic.

I have looked at the court opinions not only through the eyes of the rhetorician but also through the mind of a civil libertarian. As I peruse the following passage from Justice William Brennan's opinion in *Keyishian v. Board of Regents* and see the impact of the tropes, I appreciate the arguments culminating in the Court's decision to strike down as unconstitutional New York's oath requirement of teachers:

> Our Nation is deeply committed to safeguarding freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . The classroom is peculiarly the "marketplace of ideas." The nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."

> We emphasize once again that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms," *N.A.A.C.P. v. Button* . . . ; "[f]or standards of permissible statutory vagueness are strict in the area of free expression. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificty." . . . New York's complicated and intricate scheme plainly violates that standard. When one must guess what conduct or utterance may lose him his position, one necessarily will "steer far wider of the unlawful zone. . . ." *Speiser v. Randall*. . . . For [t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions." . . . The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed.
>
> The regulatory maze created by New York is wholly lacking in "terms susceptible of objective measurement." . . . Vagueness of wording is aggravated by prolixity and profusion of statutes, regulations, and administrative machinery, and by manifold cross-references to interrelated enactments and rules.

The tropes in this passage—among others, "laws that cast a pall of orthodoxy over the classroom"; "classroom is peculiarly the 'marketplace of ideas' "; "discover[ing] truth 'out of a multitude of tongues' "; "precision of regulation must be the touchstone"; "First Amendment freedoms need breathing space to survive"; "steer[ing] far wider of the unlawful zone"; "the danger of that chilling effect"; and "the regulatory maze"—are an integral part of the argument that the Court has presented to reach its decision: "We therefore hold that § 3021 of the Education Law and subdivisions 1(a), 1(b) and 3 of § 105 of the Civil Service law as implemented by the machinery created pursuant to § 3022 of the Education law are unconstitutional." The tropes are not merely "rhetorical flourishes or ornaments," for as Charlotte Linde and others have reminded us, "People in power get to impose their meta-

phors" and hence must be paid attention, especially when they appear in the opinions of our judiciary, an institution composed of people in power who indeed get to impose their metaphors.

My examination of the tropology of the law is restricted to judicial opinions dealing with First Amendment issues because it is in that area of the law, and not contract law, property law, or environmental law, that I am most qualified to comment. I leave it to others to examine the tropology in judicial opinions in other areas. I leave it to others to make what they will of "yellow dog contracts," "wraparound mortgage," "ripe for adjudication," "at first blush," "floating capital," "heir of the blood," "negative pregnant," and "dead freight."

Further, this work is restricted to tropes and does not deal with that other group of figures of speech, schemes. While schemes (such as antithesis, asyndeton, anaphora, antimetabole, etc.) can be used effectively in adding to the persuasiveness of discourse, they do not have the impact on meaning or conceptualization that tropes do. This is not to say that schemes do not have an influence on our perceptions. While tropes rely for their effectiveness on the change of meaning of a word from its ordinary sense, schemes rely for their effectiveness on unusual sentence structure and word order.

When Lincoln said "and that government of the people, by the people, for the people, shall not perish from the earth," he was relying on the schemes *epistrophe* (repetition of the same word at the end of each successive clause), *asyndeton* (omission of a conjunction where it would ordinarily appear), and *tricolon* (the division of an idea into three harmonious parts, especially three with the same number of syllables). Through the use of schemes, Lincoln has affected our concept of government and its relation to the people. Had he simply said "government of, by and for the people shall not perish from the earth," the important role of people in government would not be impressed upon our thinking to such an extent.

When a speaker relies on *antithesis* (juxtaposition of contrasting or opposite ideas), the listener's perceptions are somewhat affected by the contrast. In his *Letter from Birmingham Jail*, Martin Luther King wrote: "We have waited for

more than 340 years for our constitutional God-given rights. The nations of Asia and Africa are moving with jetlike speed toward gaining political independence, but we still creep at horse-and-buggy pace toward gaining a cup of coffee at a lunch counter." Although the nonliteral, tropistic "horse-and-buggy" and "cup of coffee" contribute to the effectiveness of the passage, King has affected, through the antithesis, our perception of how slow progress in achieving civil rights has been in this country. However, important as they are in persuasive discourse, the schemes are not part of this study. I leave that for another day.

The first three chapters are intended to place the subject of the book into context. Why write judicial opinions? Why publish them? Is style important in judicial decision making? What are the functions of tropes, and why does the judiciary rely so heavily on them? The subsequent chapters focus on specific tropes that played important roles in judicial argument. Each of these chapters provides in varying degrees the background of the individual tropes, examples from court opinions to illustrate their widespread integration into judicial argument, and some observations about their appropriateness and effectiveness. What are the origins of these tropes? How have they been integrated into judicial opinions? Are the tropes useful in creating clearer perceptions, or do they confuse and mislead? It is my hope that as a result of being exposed to the role of tropes in judicial discourse, readers will become more critical "listeners" when they are confronted not only by the tropology of the law but also the tropology of politics, religion, advertising, and everyday discourse.

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Also, my thanks to my wife, Hamida Bosmajian, who as a friend and professor of English critically and patiently listened as I shared with her some of the ideas in this book.

Finally, a belated thanks to my professors of yesteryear, who introduced me to the world of ideas, orthodox and unorthodox.

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Introduction

In his commencement oration at Columbia College in 1889, future Supreme Court Justice Benjamin Nathan Cardozo directed his audience's attention to the importance of tropes in politics and religion: "The aphorism of Emerson, 'Churches have been built, not upon principles, but upon tropes,' is as true in the field of politics as it is in the field of religion."[1] It would have been appropriate for the future jurist, who later recognized and emphasized the nexus between style and substance, to apply Emerson's aphorism to the field of law, for tropes have played as important a role in the law as in religion and politics.

Implied in Emerson's claim that churches have been built not upon principles but upon tropes is the assumption that principles and tropes are distinctly separate and that what is built upon tropes is not built on principles. What needs to be recognized at the outset is that important and influential principles in religion, politics, and the law have often been expressed through tropes. At all judicial levels, metaphors, metonymies, personifications, and other tropes appearing in court opinions have attained permanence, have become institutionalized and relied upon as principles, standards, doctrines, and premises in arriving at judicial judgments.

In his 1963 concurring opinion in *Abington School Dist. v. Schempp,* Justice William Brennan, agreeing with the Court that Bible reading and religious prayer in the public schools were a violation of the First Amendment, designated the personfication "the law knows no heresy" as a "principle" that had "recently been reaffirmed in *Kedroff v. St. Nicholas Cathedral.*"[2] In 1966, U.S. District Court Judge Daniel Thomas, in deciding a freedom-of-religion case, asserted that an Arkansas Code section known as the "Dumas Act" violated "what

Jefferson termed the 'wall of separation between Church and State." . . . No constitutional principle is more firmly imbedded in our heritage than this separation."[3] The metaphoric "wall of separation" has achieved the status of a judicial "principle."

In 1972, Judge McGowan, in a case involving the rights to assemble and petition, concluded through personfication: "It is difficult to imagine a statute [prohibiting parades or assemblages on the capitol grounds] which could more plainly violate the principle that 'First Amendment freedoms need breathing space to survive [and] government may regulate in the area only with narrow specificity.'"[4] In 1977, Justice Thurgood Marshall, referring to the 1896 *Plessy* decision, declared in his *Bakke* opinion: "We must remember, however, that the principle that the 'Constitution is colorblind' appeared only in the opinion of the lone dissenter. . . . The majority of the Court rejected the principle of color blindness, and for the next 60 years, from *Plessy* to *Brown v. Board of Education,* ours was a Nation where, by law, an individual could be given 'special' treatment based on the color of his skin."[5]

Still other tropological "principles" have contributed to judicial decision making. In 1963, Justice Brennan, delivering the opinion of the Court in *Bantam Books, Inc. v. Sullivan,* argued metaphorically: "Our insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards . . . is therefore but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks."[6] Twenty-three years later, Justice Harry Blackmun began his dissenting opinion in another censorship case, *Meese v. Keene:* "The Court, in this case today, fails to apply the long-established 'principle that the freedoms of expression must be ringed about with adequate bulwarks.'"[7] The influence of Brennan's metaphorical argument becomes apparent.

If the judicial trope is not a "principle," it can be a "doctrine." When in 1987 the Supreme Court declared unconstitutional the Board of Airport Commissioners of Los Angeles resolution that banned all "First Amendment activities"

in the "Central Terminal Area" at the Los Angeles International Airport, Justice Sandra Day O'Connor, delivering the opinion of the Court, several times relied on the tropological "overbreadth doctrine":

> Under the First Amendment overbreadth doctrine, an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face "because it also threatens others not before the court—those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid." . . . The *Baggett* Court concluded that abstention would serve no purpose given the lack of any limiting construction, and held the statutes unconstitutional on their face under the First Amendment overbreadth doctrine.[8]

In a 1969 case involving draft deferments and war protesters, Judge Bazelon relied on still another tropological "doctrine": "*Mitchell* does, of course, antedate the discovery and development of the chilling effect doctrine."[9]

Some tropes in judicial opinions appear once or twice and are never heard from again. Others, however, have staying power, become institutionalized and integral to judicial reasoning and decision making. Some of the more permanent tropes, in addition to being labeled principles and doctrines, have become "central tenets" and "standards." Justice John Paul Stevens, delivering the Court's opinion in *F.C.C. v. Pacifica Foundation*, wrote in 1978: "But the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutal in the marketplace of ideas."[10] This constitutional "tenet" is based on the nonliteral marketplace of ideas, which in turn becomes an integral part of the judicial argument.

In 1943, Judge Learned Hand, in a case involving newsgathering and monopoly, discussing the public interest in "the dissemination of news from as many different sources,

and with as many different facets and colors possible," stated: "That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be folly; but we have staked upon it our all."[11] We have staked our all on the nonliteral metonymy "right conclusions are more likely to be gathered out of a multitude of tongues." This metonymy has subsequently appeared again and again in court opinions involving freedom of speech and the press. It has become one of the most repeated figures in the tropology of the law.

When in 1967 the Supreme Court declared unconstitutional New York's teacher loyalty oath, Justice Brennan, delivering the opinion of the Court, cited the following figurative line from the Court's 1963 *NAACP v. Button* opinion, an opinion Brennan had written: "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." "New York's complicated and intricate scheme [the oath requirement]," said Brennan, "plainly violates that standard."[12] The nonliteral "breathing space," a subsequently often-cited personification, had become a "standard." The personification became an integral part of a premise of an argument that led to the *Keyishian* decision.

In *NAACP v. Button* (1963), Justice John Harlan, dissenting, alluded to Brennan's "breathing space" in the following content: "It is true that the concept of vagueness has been used to give 'breathing space' to 'First Amendment freedoms,' see Amsterdam, Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. of Pa. L. Rev. 67, but is also true, as that same commentator has well stated, that '[v]agueness is not an extraneous ploy or a judicial deux ex machina.'"[13] The 1960 law-review article referred to by Justice Harlan does not include the "breathing space" personification but does rely on another trope; Amsterdam titles a section of the article "Clearance Space for Individual Freedoms" and then writes: "The primary thesis advanced here is that the doctrine of unconstitutional indefiniteness has been used by

the Supreme Court almost invariably for the creation of an insulating buffer zone of added protection at the peripheries of several of the Bill of Rights freedoms. With regard to one class of cases, those involving potential infringement of first amendment privileges, this buffer-zone principle has always been expressly avowed in the Court's opinions and recognized by the commentators."[14]

While the author of the article spoke of a "clearance space" and the "buffer-zone principle," Justice Brennan preferred the "breathing space" personfication. It is one thing to say that First Amendment freedoms need to be protected by creating a buffer zone; it is something else to say that "First Amendment freedoms need breathing space to survive." "Breathing space" brings with it the implications and power of breathing and suffocation, life and death. The importance of the First Amendment freedoms becomes much more crucial through Brennan's personficiation than through the metaphoric "buffer zone."

Other tropes have equally had their lasting influence and impact. Offensive speech receives constitutional protection because there was no "captive audience."[15] Speech may get constitutional protection because its suppression would have a "chilling effect."[16] Because there are "penumbral rights," we have a privacy right that legalized abortions.[17] These are all tropological arguments since they are all based on premises expressed through metaphoric language.

Where one judge argues that the metaphoric "wall of separation between Church and State" is a "constitutional principle," another argues at length that is a "misleading metaphor."[18] We have the anomaly of the public schools being seen as "marketplaces of ideas" while the students in those marketplaces are defined as "captive audiences," the anomaly of students in captivity participating in the "free trade in ideas."

Where one judge says of the Connecticut telephone harassment statute, "The possible chilling effect on free speech . . . strikes us as minor," another judge sees the statute having a "chilling effect" on irate citizens who might wish to tele-