

# Selected Primary Metaphorical Constructs In Legal Analysis

Philosophers have long debated the nature of knowledge, but it has been relatively recently that developments in cognitive science have provided biological explanations for what we know and how we come to know it.<sup>1</sup> Those theories suggest that our notions of “justice” or “fairness” and legal conclusions are not just out there in the ether, waiting to be discovered, but arise as a direct result of the way we categorize our environment and seek to understand and apply abstract concepts.<sup>2</sup> An important contribution to our understanding of how we reason is the description of our categorization process as largely (or entirely) metaphorical. The suggestion has significant implications when applied to legal analysis.

A metaphorical theory of how the mind works is not a simple linguistic or poetic device, but a short hand way of stating that the human mind is only capable of directly apprehending a few basic concepts. We can have no direct experience of abstract concepts (such as legal concepts) in the same way that we can experience our bodies, the movement of physical objects, the difference or similarity between differences in quantities, human desires, orientation, and a few other basic categories of concepts. Those basic categories lead to innumerable primary metaphors, which are used to understand abstractions. An understanding of the primary metaphors at work in legal analysis is useful in describing why a certain result has been reached, what legal result might be expected, or why a particular conclusion might seem intuitively correct.<sup>3</sup>

## PRIMARY LEGAL METAPHORS

In their popular books, Lakoff and Johnson describe the process of mapping primary metaphors from sensorimotor domain to subjective experience. For example, a metaphor for understanding a concept is “seeing” an object, as in “I see what you mean.” In this case, primary experience is obtaining information from seeing, the sensorimotor domain is vision, and the subjective experience is understanding. The metaphor “I see

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<sup>1</sup> See generally Daniel C. Dennett, *Consciousness Explained* (1991); Daniel C. Dennett, *Darwin’s Dangerous Idea* (1995).

<sup>2</sup> See generally George Lakoff and Mark Johnson, *Philosophy in the Flesh, The Embodied Mind and Its Challenge to Western Thought* (1999) (hereafter cited as “Lakoff and Johnson”).

<sup>3</sup> The analysis of metaphor in legal reasoning is not new. In his 65 year old article, Felix Cohen criticized the use of metaphor in legal reasoning. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Col. L. Rev. 809 (1935). See Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U.Pa.L.Rev. 1105, 1164 (1988) for a response to Cohen’s critique.

what you mean” follows naturally from that mapping.<sup>4</sup> This Article discusses a few common primary metaphors in legal reasoning and their ontologies.

Entity Metaphors. Entity metaphors exist throughout the law. Such metaphors describe an abstract concept as an entity. For example:

The accident was caused by defendant’s *negligence*  
The property passed to his *estate* upon death

A particular form of the entity metaphor is personification – the giving of human characteristics to non-human constructs. Personification is useful when the law treats a non-human on its own terms as an entity, for example, the imposition of criminal liability on a corporation. The recent indictment of Arthur Anderson for its role in the Enron matter is an illustration of the attribution of the human characteristic of intent (a complex metaphor for *desire*) to a business entity, in this case a limited liability partnership. As a juridical entity, and not an individual, Arthur Anderson cannot have a *desire*. Criminal intent in the case of such an entity only makes sense by thinking of Arthur Anderson as an individual, and thinking of *intent* as *desire*.<sup>5</sup>

Similarly, statutes must sometimes be granted the quality of human “intent” in order to be enforced, as in “the intent of the ADA is to prohibit discrimination against persons with disabilities.” The “intent” may instead be attributed to the enacting body (*e.g.*, “Congress intended that...”), which is itself a metaphor for an individual’s desire. This is only a metaphor, however, because neither the legislative body itself had a human *desire*, nor does the metaphor mean that the members of the body have a human *desire* for something. It only means that the members voted and passed a particular provision while thinking of a situation that bears some similarity to a given state of facts. Nevertheless, it is helpful in applying a statute to think of the group as *desiring* a certain result.

Container Metaphors. The container metaphor is one of the most common and useful in daily experience as well as in law. This metaphor appeals to our comprehension of bounded areas, and things being either within or without the bounded area. The phrase “he is *in* trouble” is a use of this metaphor, where “trouble” is the container and “he” is the object in the container. With the right lawyer, perhaps he can get himself *out* of the trouble container.

Similarly, consider the statement “the meaning of the statute can be found *within* the legislative history.” The “meaning of a statute” is not a physical object, and even if it

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<sup>4</sup> Lakoff and Johnson, at 54, 58. Competing theories of how this mapping actually happens are summarized at 46-47.

<sup>5</sup> An example of “personification” is offered by Felix Cohen’s criticism of the opinion in *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 115 N.E. 915 (1917) in Cohen, *supra* note 3. *Tauza* involved the question of a state’s jurisdiction over a corporation organized under the laws of another state. In reaching its decision, the court considered whether the corporation was “present” in the state, as a human being might be. Cohen criticized this “thingifying” of the corporation as metaphysics.

were, “legislative history” has no physicality to hold it. Nevertheless, we understand what is meant by this phrase, and we arrive at that understanding by envisioning a “pot” of legislative history, somewhere containing the “meaning” we seek.

Conduit Metaphors. The conduit metaphor is a container metaphor that has a special place in the law, since it is a container that carries a message, such as a letter or email message. For example, “the plain meaning of the statute” means that the statute carries words to the reader, like a vessel might carry an object. As discussed below, the conduit metaphor is one of the more mischievous metaphors, since rarely is a message in a writing as immutable as an object in a vessel.

Orientation Metaphors. At an early age, we understand where we are in relation to the rest of the world, and some of the most common metaphors are orientation: up is better (“a trustee has a *higher* standard of care”), down is bad (“the defendant is a man of *low* character”), “in front of” may mean earlier in time, behind may mean inaction (“he is *behind* in paying my legal bill”).

Resource or Substance Metaphors. The comprehension of physical substance is not particularly difficult, and the idea of substance forms the basis of understanding more abstract concepts. This metaphor is apparent in the high tech world, where intangibles are viewed as substances, and skill as a resource. In fact, intangibles and skill are substance-free by definition, but they are still exchanged for other substance-free “property” (a metaphorical possession concept), assessed based on their metaphorical mass, and valued based on their similarity to the masses of other metaphorically valued constructs.

Often stacked on a resource metaphor is an exchange metaphor, i.e. that we are exchanging one substance for another. For example, we can think of labor in terms of a thing or a resource (“My clients must pay me for my services”) and we conceptualize time in much the same way (“My clients must pay me for my time”). The “fairness” of the exchange is discussed below as a similarity metaphor.

## COMPLEX METAPHORS

Abstract concepts often require more than one metaphor for explanation, especially those alluding to action. The following are some examples of complex metaphors commonly used in legal reasoning.

Causation is Manipulation of Objects. Among the earliest experiences in human life is the realization that objects can be moved or physically manipulated, such as pushing a sled or pulling a rope. This manipulation of objects forms the basis of our concept of causation. The physical aspect of causation is evident in the phrases: “he *forced* me to ...”.

Different applications of this metaphor result in different standards of liability for casual acts, as illustrated in the case of negligence torts. Cases applying contributory

negligence, for example, place dominance on the manipulation of objects metaphor. For example:

“...the plaintiff *encountered* a *known risk* that was *imposed* by the defendant's *breach of duty*.”<sup>6</sup>

Comparative negligence cases rely on a quantity metaphor:

“...comparative negligence assesses liability in direct proportion to the *amount* of negligence of each of the parties.”<sup>7</sup>

Ownership is Possession. “Possession is 9/10 of the law” is more than a maxim, it is an insight to how we understand the abstract notion of ownership. Objects can be possessed, and when possessed they are under the control of the possessor, who is able to move the object or manipulate it free of the interference of the outside world. Ownership similarly involves power over an object, such as the power to consume it, improve it, or dispose of it. In the case of a metaphorical substitute for an object, such as an intangible property right, physical possession is not possible, but ownership entails similar rights to deal with the object in hopeful freedom from the interference of the world.

This construct is evidenced in the definition of ownership as consisting of the “benefits and burdens of ownership” where *burden* is a metaphor for the physical weight of an object. Another application of this metaphor expresses itself in “ownership is a bundle of sticks.”

Justice/Fairness is Similarity. Consider the following statements by various courts:

“excessive and unjust.”<sup>8</sup>

“This *difference* in result is unjust.”<sup>9</sup>

“[Plaintiffs] were subjected to unjust and unreasonable *differential* treatment...”<sup>10</sup>

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<sup>6</sup> See *Knight v. Jewell*, 3 Cal.4<sup>th</sup> 296, 11 Cal.Rptr. 2d. 2, 834 P.2d 696 (1992).

<sup>7</sup> See *Li v. Yellow Cab Co.*, 13 Cal.3d. 804 (1975). This is illustrated by the following quote:

"Assuming that a hundred percent represents the total negligence and wrongful conduct which was the cause of [Mizel's] injuries or damage, what percentage of this hundred percent is due to the contributory negligence of [Mizel] and what percentage of the hundred percent is due to the negligence and wrongful conduct of the defendant?" *Mizel v. City of Santa Monica*, 113 Cal.Rptr.2d 649 (2001).

<sup>8</sup> *People v. Kriss*, 158 Cal.Rptr. 420 (Cal.App. 1979).

<sup>9</sup> *Justus v. Atchison*, 126 Cal.Rptr. 150 (Cal.App. 2 Dist. 1975).

<sup>10</sup> *Scott v. Pacific Gas and Elec. Co.*, 33 Cal.Rptr.2d 357 (Cal.App. 1 Dist. 1994).

“...for us to reach any different result would be both unjust and unfair, and would do nothing more than provide an undeserved *windfall* to the losing party ...”<sup>11</sup>

What is justice, and how do we know it when we see it? Lakoff and Johnson define justice (and fairness) in terms of a metaphorical moral accounting system, where the lack of an equivalence is seen as injustice. Moral accounting is itself a metaphor, and can be mapped as follows:

Justice is Moral Accounting  
Accounting is Equivalence  
Equivalence is Similarity

Scientific studies of infants and higher primates show an inherent hard wired understanding of very basic mathematical concepts. When one object is placed near another object, they will expect to see two objects (and not one or three). From this very basic ability to distinguish between objects, the mind can discern that one group of objects may be fewer or more than others, or that one substance may be more or less than another. If one object were to be placed near one other object, and there were to suddenly appear to be three objects instead of two, it would violate our intuitive sense of how the world should work. It would be a *windfall* perhaps that caused this disparity. And if the two objects were removed from a box and placed in another box (the forerunner of the exchange metaphor), but there were only one object rather than two in that other box after the placement, the mind would perceive a dissonance. It is suggested that this dissonance is the metaphor for injustice, and the act required to cause the second box to contain two objects is the act necessary to remedy the injustice and *do* justice by restoring the boxes to equivalence.

#### APPLICATION OF EXPERIENTIAL METAPHORS IN TWO CONTEXTS

Because the truth or falsity of abstract legal concepts is not objectively verifiable, such concepts tend to rely heavily on metaphor for their definition. A list of all conceivable metaphors would fill a library, but a few applications and some suggested mappings of legal reasoning is set forth as follows:

Business Organization Metaphors. One of the best examples of the use, and misuse, of metaphor is the way we think about juridical entities, such as corporations and partnerships. Some common metaphorical mappings for business entities are as follows:

Company as container:

“Although he invested *in* the corporation, he did not take any money *out* of the company”

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<sup>11</sup> *Century City Medical Plaza v. Sperling, Isaacs & Eisenberg*, 103 Cal.Rptr.2d 605 (Cal.App. 2 Dist. 2001).

“The court *pierced the veil* of the corporation.”

Company as entity: “He was employed by the corporation”

Company as person: “The company entered into the contract”

More complex metaphors are sometimes needed when the primary metaphors fail to obtain the right result.

A company is a set of legal rights and relationships between the participants

Legal rights are obligations of fairness

Fairness is equality

Equality is similarity between objects or substances

The mixing of metaphors in the law of business organizations has resulted in contrasting views and sometimes ludicrous results in cases involving such entities. An excellent example the failure of conventional metaphors to resolve such legal issues can be found in the battle that currently rages in the tax bar between those who view a partnership as a single container (dubbed the “entity theory” of partnerships) and those who view it as a number of containers (the “aggregate theory”). Both theories are further underlied by object manipulation metaphors. For single container or entity advocates, a partnership that issues a partnership interest in exchange for services has given a piece of the entity, or container, for a substance (the “services”), and the tax consequences flow from the partnership’s basis in either the container or the assets that it is deemed to exchange for the services. For several container, or aggregate theory, proponents, the partnership has exchanged a little piece of each of its assets in exchange for the service substance. The tax stakes are high, and the Internal Revenue Service has been stymied in its efforts to arrive at a position, which will surely turn on which metaphor it chooses to apply.<sup>12</sup>

Contract Metaphors. Numerous metaphors are used to describe the various aspects of contracts and agreements. A few are as follows:

Containers:    The defendant was *out of* contract  
                    The contract *contains* an arbitration clause  
                    The court will look to the *four corners* of the contract  
                    A court will not *fill in* the terms of a contract

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<sup>12</sup> Under one metaphorical construct, a partnership should be viewed as exchanging a ratable portion of each asset for services. Under another view, the partnership should be view as exchanging zero basis partnership interest for services. See ABA Tax Section Comments in Response to Notice 2000-29 (January 28, 2002) and New York State Bar Association Tax Section, Report of the Taxation of Partnership Options and Convertible Securities (January 29, 2002). The metaphorical mapping does not end here, however, as another (and probably the dominant) metaphor treats a partnership as a person, and inquires, if the partnership can be viewed as exchanging a little piece of each of its assets (including appreciated assets, which would result in taxable gain) for the contributed services, why can it not also just as easily be viewed as having *chosen* to exchange high basis assets (i.e. cash) for the services.

His lawyer found a way *out of* the contract

Conduits: The contract speaks for itself

Personification: The agreement *states* as follows...

As a subset of metaphors for contracts generally, consideration is often viewed as substance or desire:

What is the consideration *supporting* the obligor's promise?  
What consideration was bargained for?

Generally, a strict application of the container construction will result in a strict construction of the contract. A term will either be *within or without* the clearly delineated contract container. Such a view may have been prevalent in early American jurisprudence, but commercial practice required new metaphors enhancing the enforceability of contracts. The contract doctrine of substantial compliance is an example of a complex substance, desire and similarity metaphor:

The plaintiff has *substantially* complied.

“Substantially” is most of the *substance desired* by the defendant.

The amount of *substance desired and received* by the defendant should be similar to the *amount of substance desired and received* by the plaintiff.

Other contract doctrines based on estoppel and unjust enrichment are also easily seen to rely on similarity or quantity metaphors.

Similarly, a conduit metaphor interpretation views the contract as being merely the device which *carries* a message (“the contract speaks for itself,” “the meaning is in the words used by the parties”). Cases applying a conduit metaphor might construe agreements strictly, referring only to the words used in a contract or, by layering a personification metaphor (“the intention of the parties as expressed in the contract was...), construe the contract liberally. Once again, the choice of metaphors is a predictor of the result.

## REASON AND METAPHOR IN TAX LAW

Legal result is predictable because it is based on reasoned analysis. That reasoned analysis, however, must draw from a metaphorical base. In such cases, reason will compel a result which has no real basis for verification other than that it is consistent with a particular metaphor. By deconstructing reason to its metaphorical basis, it is possible to understand why a certain result may seem compelling, and how a different metaphorical view might render a different result.

For example, the corporate entity metaphor can be helpful in understanding in some cases the relationship of a corporation (as an entity) and its shareholders, but

inadequate in other cases. In the tax world, the entity metaphor is dominant. Separate corporations are entities, and like an individual that is born in the US, a corporation that is incorporated in the US is taxable by the federal government on its worldwide income, wherever earned.

The tax law further personifies corporations by treating related (or commonly controlled) corporations similar to family members. Thus, transactions between “parent” and subsidiary, or “brother – sister” corporations are subject to special scrutiny, as are transactions between their corporeal counterparts (i.e. parents and children; and brothers and sisters).<sup>13</sup>

It does not necessarily have to be that way. Many states do not rely on the entity metaphors in taxing the income of a multi-state group. Instead, those states use a quantity metaphor that allocates the income of the group to a state based on the weight of its activities in that state. Under allocation principles, income is apportioned to a state (rather than a separate member of a group) based on their relative “amount” of payroll, property, and sales in the state, as if those economic activities could be placed on a scale and weighed.<sup>14</sup>

When reduced to the essential metaphors underlying each approach, reason will support, but is incapable of verifying the truth of, either approach – state apportionment or federal allocation. The relative merits of each approach has been debated in Congress for years with good arguments for both approaches. The dissent over the approaches can be traced to the differing metaphors thought dominant by their respective supporters. Reason will not resolve the issue without an understanding of the base metaphors.

## CONCLUSION

The forgoing discussion describes in general terms some common metaphors. The more abstract the concept, the more important metaphor becomes as a means of understanding it, until the metaphor defines the concept. Usually, that application of metaphor provides some necessary predictability – occasionally, when the metaphor is not a perfect fit, it may lead to ludicrous results. An understanding of where legal analysis starts can be helpful in knowing why it leads to a particular result, and why that result may not be necessary or appropriate.

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<sup>13</sup> Section 482 of the Internal Revenue Code allows the IRS to reallocate income among controlled taxpayers to more clearly reflect income. Under section 482 principles, as set forth in regulations, income is attributed to separate members of a group based on their relative assumption of economic function and risk. The statute is used primarily to prevent US corporations from shifting income to non-taxable foreign affiliates through the manipulation of intercompany prices charged in transactions between members of the group. Although section 482 imposes a dominant and overriding fairness or quantity metaphor, the statute respects the entity metaphor by treating each corporation as a separate taxpayer.

<sup>14</sup> See, e.g. 18 Cal. Code Regs. Sec. 25128 (explaining apportionment of income factors).