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A SUPREME BATTLE IN METAPHOR:
A CRITICAL METAPHOR ANALYSIS OF THE CULTURE WAR IN
LAWRENCE v. TEXAS

A Dissertation
Presented to
The Faculty of Social Sciences
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In Partial Fulfillment
Of the Requirements for the Degree
Doctor of Philosophy

by
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August 2009
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Title: A SUPREME BATTLE IN METAPHOR: A CRITICAL METAPHOR
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ABSTRACT

This work explores how metaphor, specifically conceptual metaphor, is used to create the argumentative context, carry meaning, supply the enthymematic structure of the arguments, and transform the sexual autonomy controversy within the U.S. Supreme Court's opinion in *Lawrence v. Texas*. Research questions that guide this work include:

Is there evidence that the metaphor of "culture war" drives the argumentative context in the *Lawrence* opinion and is carried by other metaphorical constructions?

How is the social controversy over sexual autonomy advanced by conceptual metaphors in this legal text?

What are the dominant metaphors used to argue for sexual autonomy? What are the dominant metaphors used to resist the advance of sexual autonomy?

Does Critical Metaphor Analysis add substantially to our understanding of the argumentative strategy of both sides in the controversy?

Theoretical assumptions made in this study are in line with George Lakoff and Mark Johnson's conceptual metaphor theory and the embodied nature of cognition. The methodology selected to analyze the conceptual metaphors used in *Lawrence v. Texas* to argue about sexual autonomy is a variant of the Critical Metaphor Analysis method practiced by Jonathan Charteris-Black.

The textual analysis of Justice Kennedy's majority opinion and Justice Scalia's dissent reveals that "liberty" functions as the chief metaphor. Although the metaphor

“culture war” is used explicitly by Justice Scalia only twice, and not at all used explicitly by Justice Kennedy, this metaphor as a descriptor of the nature of the argument of *Lawrence v. Texas* is indeed supported throughout the arguments by other related conceptual metaphors. Despite the absence of the “culture war” metaphor in Justice Kennedy’s argument, the critical analysis of metaphor makes transparent the way he actually waged a very sophisticated rhetorical battle through metaphor in order to advance sexual autonomy. It also demonstrates that Justice Scalia’s charge of the Court’s engagement in “culture war” is not arbitrary, but supportable.

This study demonstrates the theoretical and methodological synthesis possible in using Critical Metaphor Analysis on legal texts, and gives ample evidence of the impact cognitive metaphor theory has on advancing understanding of both how a text works and what a text means. Critical Metaphor Analysis facilitates a level of intellectual rigor, as it does not require adopting an *a priori* ideological stance. Instead the analysis is grounded in the cognitive workings of our shared human minds and bodily experiences as expressed in our use of conceptual metaphor.

This work is a synthesizing demonstration of the need for critical rhetorical analysis of important judicial texts that will clarify the on-going role the courts are playing in the interpreting and shaping of our corporate life as a Nation.

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Chapter One

The power of language and thought to help define the experience of other Americans was on display following the presidential election of 2008 when the culture war in American was declared to be both over and ignited on the same day. Peter Beinart, *Time* magazine contributor and senior fellow at the Council for Foreign Relations, argued that the election of Barack Obama shows that liberalism is no longer seen as threatening, but rather promises stability instead: “The culture war is ending because cultural freedom and cultural order—the two forces that faced off in Chicago in 1968—have turned out to be reconcilable after all.”¹

The same day that readers were digesting Beinart’s end of the culture war news, Bill O’Reilly, author and media host, began his evening *Fox News* program with a “Talking Points Memo” expressing surprise that “a nasty culture war battle has erupted so soon after the presidential election, this one over gay marriage.”² O’Reilly continued by recounting some of the confrontations of supporters of California’s Proposition 8 [defining marriage as between a man and a woman] by angry “pro-gay marriage activist[s].” Predicting other issues to surface in the days ahead, O’Reilly noted that the anger, fear, and even racial tension that was evident around the denial of same-sex

¹ Peter Beinart, “The New Liberal Order,” *Time*, November 13, 2008, <http://www.time.com/time/printout/0.8816.1858771.00.html> (accessed November 14, 2008).

² “Culture War Erupts in America,” Fox News Channel, November 14, 2008, http://www.foxnews.com/printer_friendly_story/0.3566.452007.00.html (accessed November 14, 2008).

marriage in California made it clear that the “gay marriage issue” was the ignition point in the current culture war.

These two political media elites, and the audiences who agree with them, have very different takes on the current relevance of the concept “culture war.”³ But both audiences will partially evaluate events in the culture in the days to follow through the lens that the culture war metaphor has provided, either to confirm or disconfirm its validity. With so much at stake in the political choices of Americans both domestically and internationally, the power of elites to promote their views of the world via the written and spoken word begs for critical awareness and understanding.

The metaphor of culture war is not used only in the media, of course; it has found its home in the highest circles of discourse and among the most influential institutions, even the highest court in the country. One U. S. Supreme Court justice has been particularly pointed in his characterization of the Court’s involvement in the culture wars. Justice Antonin Scalia has most recently made the charge in his *Lawrence v. Texas* dissent:

It is clear from this [the assertion by the majority that criminalizing homosexual conduct is an invitation to discrimination against homosexual persons in public and private] that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed.⁴

Some years earlier he was even more expansive on the point in his rebuke of Justice Kennedy’s majority opinion in *Romer v. Evans* (1996). First, Scalia sees the Colorado law at question as a response to a culture war battle rather than a mean-

³ A Google search on “culture war” produces similar conflicting conclusions during this period in American life. For example, The *L.A. Times* opinion “What ‘culture war?’” in August 2008 and the *Salon* feature “The culture war: It’s back!” in September 2008 presented very different views.

⁴ *Lawrence v. Texas*, 539 U. S. 558 (2003), 602.

spirited attempt to harm a group: “The Court has mistaken a Kulturkampf for a fit of spite.”⁵

In his closing remarks of the dissent, Justice Scalia again assumes the culture war metaphor as he attempts to give explanation sociologically for an opinion he finds constitutionally invalid: “When the Court takes sides in the culture wars, it tends to be with the knights . . . reflecting the views and values of the lawyer class from which the Court’s Members are drawn.”⁶

In both of these dissents, Justice Scalia has been at odds with Justice Kennedy’s opinions, characterizing them as advancing a culture war agenda rather than applying legal principles fairly. These are strong and confrontational claims. Are there reasons to take them seriously, as both substantive as well as alarming? Is it clear what he is evoking with the “culture war” metaphor?

The Culture War

The persuasive power of the “culture war” tag can be wielded without actually making explicit what the term means. While the context gives considerable information about the term’s meaning, its historical origin and developmental trajectory is essential to fully understand what is being implied. Historians agree that the term “Kulturkampf” (culture struggle), which later became the term “culture war” in the U.S., was first used to describe the general policy of sanctions designed by government authorities to liberate public life from the influence of the Roman Catholic Church in the New German Empire.

In 1872 the Chancellor of the new German Empire, Otto von Bismarck, joined with the liberal majority in the legislature to disentangle the authority of church and

⁵ *Romer v. Evans*, 517 U.S. 620 (1996).

⁶ *Ibid.*

state by initiating civil marriages,⁷ laws allowing individuals to dissociate themselves from the religious communities into which they were born, and from other laws extending state control over the church.⁸ Initially, Protestant Prussia supported the measures, but increasingly became critical as they saw the implications to their own Protestant Evangelical Church. The most enthusiastic supporters remained the Progressive party, who feared any special influence of the Roman Catholic Church in state affairs.⁹ It was in this environment that a Progressive party deputy, Rudolf Virchow, praised the anti-clerical vision of his party as a “Kulturkampf.” The designation endured, although support for the overall program eventually collapsed.

Similar dynamics were occurring in France during the Third Republic, as anti-clerical republican parties in the 1880’s attempted to gain control of education from the Catholic Church. At the same time in the United States President Ulysses S. Grant was proposing a constitutional amendment preventing the teaching of any “sectarian tenets” in schools receiving public money.¹⁰ The dynamics of the liberal state seeking to protect freedom and at the same time to limit religious opposition were present but not so designated “Kulturkampf” until twentieth-century America.

In the U.S. the first use of the term is attributed to James Davison Hunter in his 1992 book, *Culture Wars: The Struggle to Define America*. In his book, Hunter argued that the religious pluralism of America had become polarized into two opposing camps,

⁷ Civil marriage required governmental compliance instead of religious sanction.

⁸ Jeremy Rabkin, “A Supreme Court in the Culture Wars,” *Public Interest* 125 (Fall 1996), under “The first culture war,” <http://www.o-find.galegroup.com/biana.penlib.du.edu/itx/informark.do?prodlid=AONE> (accessed November 13, 2008).

⁹ Ibid.

¹⁰ Ibid., under “Negotiated settlements.”

progressive and orthodox/fundamental.¹¹ Hunter observed the nature of this realignment in political life in America and called it a culture war, opening an on-going debate about its nature and/or its reality. Central to Hunter's thesis was his observation that by the 1990's

[T]here had been a realignment in American public culture that had been and still is institutionalized chiefly through special interest organizations, denominations, political parties, foundations, competing media outlets, professional associations, and the elites whose ideals, interests, and actions give all of these organizations direction and leadership.¹²

There are critics that deny the culture war thesis, arguing there is much agreement on major issues. America is largely pragmatic and nonpartisan; thus, there is no "vast war over the moral and spiritual compass of the nation."¹³ These same critics also acknowledge that the extremists, both left and right, have a disproportionate voice. Although the highly partisan may be only 5 percent of the population on either side, they make up 10 to 12 million people on each side.¹⁴ The activists on both sides provide political and institutional leadership to support their respective views of American culture.

Hunter explains the importance of these cultural "warriors" in forming the culture through language:

The development and articulation of the more elaborate systems of meaning and the vocabularies that make them coherent is more or less exclusively the realm of elites. They are the ones who provide the concepts, supply the grammar, and explicate the logic of public

¹¹ Dick Meyer, "What 'culture war'?" *Los Angeles Times*, August 27, 2008.

¹² James Davidson Hunter, "Is There a Culture War? A Dialogue on Values and American Public Life," *Pew Forum Dialogues on Religion & Public Life*, (Washington, DC: Brookings Institution Press: 2005), 21.

¹³ Dick Meyer, "What 'culture war'?"

¹⁴ James D. Hunter, "Is There a Culture War?," 27.

discussion. They are the ones who define and redefine the meaning of public symbols and provide the legitimating or delegitimizing narratives of public figures or events. In all of these ways and for all of these reasons, it is they and the strategically placed institutions they serve that come to frame the terms of public discussion.¹⁵

With such a multiplicity of public voices it may sound as if there is a Hobbesian war of “all against all” instead of competing sides locked in combat for a definitive outcome. For all the diversity of strategies, the latter is a more accurate description, and an outline of the competing visions for a democratic society can be given. John Fonti’s study in *Policy Review* provides a brief intellectual history and grid for understanding the ideological struggle over democracy and its expression in Europe and America. Fonti bases his two categories on the thinkers most responsible for the worldviews generated and expanded by their ideas: Antonio Gramsci and Alexis de Tocqueville.

The Italian Marxist Antonio Gramsci, whose work was later taken up by Hegelian Marxists, argued that more than Marx’s economic revolution would be necessary to transform society. Before revolution could happen, a cultural transformation would have to be secured by changing society’s consciousness. Since the West was largely dominated by values and ideas borne by Christianity, in order to change the consciousness of the workers class, the West needed to be de-Christianized by what Gramsci called a “long march through the culture.”¹⁶

Two groups make up every society, Gramsci argued: the privileged and the marginalized. The marginalized are not necessarily aware of their oppression and often consent to their own oppression. Before revolution can be achieved, the marginalized must become aware of their subordination. Delegitimizing the dominant culture’s belief

¹⁵ Ibid., 28.

¹⁶ Linda Kimball, “Cultural Marxism,” *American Thinker* (February 15, 2007), under “Birth of Multiculturalism,” http://www.americanthinker.com/2007/02/cultural_marxism.html (accessed December 02, 2008).

system can do this. The hegemonic power of the dominant groups must be reversed by creating a new system of “counter-hegemony” for the “economically oppressed, women, racial minorities and many ‘criminals.’”¹⁷ The assault on the old order must be done by both traditional and “organic”¹⁸ intellectuals, so that the subordinate groups can thoroughly reject its oppressive intellectual and moral values. True revolution can then be accomplished: transfer of power to the subordinate groups.

All cultural objects and places are appropriate battle sites for securing a change in consciousness, beginning with the family, and extending to the churches, schools, media, entertainment, civic organizations, literature, science, history and law.¹⁹ To begin with, according to Gramsci, the restructuring of the family is necessary in order to contest the accepted morality of the dominant belief system and its hegemonic power. To restructure the family it is advantageous to begin at its most vulnerable and basic point.

A colleague of Gramsci, Georg Lukacs, reasoned that sexuality was a particularly good site for de-Christianizing the culture. He perceived that if the Christian view of sex could be delegitimized first among the children, then the patriarchal family and the Church would be crippled.²⁰ His strategy as deputy commissar for Hungarian culture was to begin a sex education program in the schools that emphasized free love and sexual intercourse instruction, as well as the repudiation of all religious instruction.

¹⁷ John Fonte, “Why There is a Culture War,” *Policy Review* (December 2000 & January 2001), under “Refining class warfare,” <http://www.hoover.org/publications/policyreview/3484376.html> (accessed November 14, 2008).

¹⁸ The traditional intellectuals can be converted to the advocacy of the marginalized. The organic intellectual develops and leads in critical theory and pedagogy. See *The Paulo and Nita Freire International Project for Critical Pedagogy*, <http://www.freire.mcgill.ca/content/antonio-gramsci-1891-1937> (accessed December 2, 2008).

¹⁹ Linda Kimball, “Cultural Marxism,” under “Birth of Multiculturalism.”

²⁰ *Ibid.*, under “The Prototype.”

This particular experiment did not end well. Lukacs' strategy of what he called "cultural terrorism" frightened Hungarians and helped doom the Bela Kun Bolshevik government. Lukacs then left Hungary for Germany where his ideas were well received by the members of the Institute for Social Research in Frankfurt [later known as the Frankfurt School], who added them to their own programs for transforming traditional culture. With the replacement of the Weimar government by Hitler's Nazism, the Frankfurt School relocated in the United States, where many inroads in the culture were quickly made, through the schools, legal system and other governmental and civic institutions.

Leading thinkers like Theodor Adorno and Herbert Marcuse and the "Hegelian-Marxists" who believed that middle-class liberal democracy should be overthrown were successful in helping to supplant moral objectivism with a morality that is socially constructed. The truly moral society "is one in which the 'oppressed' or 'marginalized' ethnic, racial, and gender groups" are well served. This group-based morality will create a radical democracy in which any relation of subordination is replaced by "the democratic ideals of equality and liberty for all, ideals that are actually within the rhetoric of the dominate groups of modern capitalist states."²¹

Tocqueville and his followers have taken a different path to a democratic modern society from the Gramscians and Hegelian-Marxists. Tocqueville saw the young American democracy as robust but vulnerable to the rule of the mob if the impulse toward equality, and thus uniformity, was not checked by freedom for the individual. Tocqueville feared the "wild stallion" of equality that had produced the bloody French

²¹ Chantal Mouffe, "Hearts, Minds and Radical Democracy," *Red Pepper*, (December/January 2009): under "Considering that you do not privilege the class struggle, how do you define the goal of left-wing politics?" <http://www.redpepper.org.uk/Hearts-Minds-and-Radical-Democracy> (accessed January 28, 2009).

Revolution. Remarkably, he saw in America a democratic impulse that was fueled by a new moral framework, which was, as he saw it,

“the product of two perfectly distinct elements which elsewhere have often been at war with one another but which in America it was somehow possible to incorporate into each other, forming a marvelous combination. I mean the spirit of religion and the spirit of freedom.”²²

Rather than interpreting the Enlightenment ideals as necessitating the divorce of religion and political life, Tocqueville believed that religious ideas could provide a tempering influence on both order and freedom.²³

Tocqueville affirmed American exceptionalism, and contemporary Tocquevillianism has attempted to advance these traits as normative values. John Fonti’s report for the Hoover Institute described the values as dynamism, religiosity, and patriotism:

dynamism (support for equality of individual opportunity, entrepreneurship, and economic progress); religiosity (emphasis on character development, mores, and voluntary cultural associations) that works to contain the excessive individual egoism that dynamism sometimes fosters; and patriotism (love of country, self-government, and support for constitutional limits).²⁴

This trinity of normative traits are given recent expression in one of the Tocquevillian manifestos: “A Call to Civil Society: Why Democracy Needs Moral Truths.” Signed by many Tocquevillian intellectuals, the document endorses a view of civic life that are “those of Western constitutionalism, rooted in both classical understandings of

²² Alexis de Tocqueville, *The Old Regime and the Revolution*, quoted in John Kyl, “A Tocquevillian Anniversary,” *Real Clear Politics.Com*, (October 03, 2006) http://realclearpolitics.com/articles/2006/10/a_tocquevillian_anniversary.html (accessed December 03, 2008).

²³ John Kyl, “A Tocquevillian Anniversary.”

²⁴ John Fonti, “Why There is a Culture War,” under “The Tocquevillian counterattack.”

natural law and natural right and in the Judeo-Christian religious tradition.”²⁵ These moral ideas, supporters claim, are foundational to the American experience and an “exceptional contribution to the idea of ordered liberty.”²⁶

Tocquevillianism and Gramscianism are clearly opposing political and cultural ideologies, with different conceptions of democracy to instantiate. The Tocquevillians work at the renewal and transmission of the culture, viewing it to be founded on religious and moral democratic values grounded in revelation and natural law. The Gramscians work at the critique and transformation of the culture, viewing it as it could be if equality and liberty were valued enough to allow negotiation among interests and even conflict of values.²⁷ Fonti summarizes the extent of the difference: “Tocquevillians and Gramscians clash on almost everything that matters.”²⁸

These political projects in diametrical opposition give substance to the American version of the “Kulturkampf.” In addition to the original insight of Georg Lukacs that sexual autonomy is one of the most powerful wedges to be used to break down hegemonic cultural systems, the expression of culture war is found in areas outside the sexual and family arenas. For example, a recent study viewed the moral rhetoric of the culture wars to be part of the public reaction to Ward Churchill’s invitation

²⁵ “A Call to Civil Society: Why Democracy Needs Moral Truths,” *Council on Civil Society*, 1998. Quoted in Fonti, “Why There is a Culture War,” under “Tocquevillianism as praxis.”

²⁶ Fonti, “Why There is a Culture War,” under “The Tocquevillian counterattack.”

²⁷ Chantal Mouffe, “Hearts, Minds, and Radical Democracy,” under “How do you define democracy if not as consensus?”

²⁸ Fonti, “Why There is a Culture War,” under “The Tocquevillian counterattack.”

(subsequently rescinded) to speak at Hamilton College.²⁹ The author rightly noted the history of accusations against the part higher education plays in the culture wars:

Although higher education has long been under fire for its purported liberal bias, making it a key site in the culture wars, since 9/11, academics and public intellectuals have become increasingly suspect, visible targets for reactionary forces intent to extend a neoconservative program³⁰

Although any arena of public life can be claimed as a site for battle in the culture war, the legal controversies generated over sexual autonomy have been particularly intense and have a sustained narrative. Justice Scalia certainly interprets the move toward greater sexual autonomy in the Court's decisions as judicial advocacy for one side in the culture war, and he is not the only one to do so. In his 2008 William E. Simon Lecture, George Weigel described a Supreme Court decision as the beginning of the American culture war: "For in terms of our legal culture, *Griswold* was the Pearl Harbor of the American culture war, the fierce debate over the moral and cultural foundations of our democracy that has shaped our politics for two generations."³¹

Weigel's observation about the origin of the culture war interestingly squares with the judicial lineage of the "right of privacy" cited by Justice Kennedy in *Lawrence v. Texas*, declaring that the "substantive reach of liberty under the Due Process Clause" must find its most pertinent beginning point in *Griswold v. Connecticut* (564). Justice Kennedy clearly grounds his concept of liberty in the right to privacy lines of arguments

²⁹ C. Richard King, "Some Academics Try to Push Back: Ward Churchill, the War on Truth, and the Improbabilities of Interruption," *Cultural Studies & Critical Methodologies* 9, no. 1 (February 2009, Sage Publications): 31-40.

³⁰ *Ibid.*, 34.

³¹ George Weigel, "The Sixties, Again and Again," *First Things*, no. 182 (April 2008): 34.

beginning with *Griswold*, but does he also acknowledge a “culture war” as described by Scalia?

Justice Kennedy does not directly take up Justice Scalia’s accusation of partisanship in the culture war. He never uses the term even to deny its relevance. It is possible that the Justices are talking past each other, not engaging in the same argument but advancing two essentially different arguments based on incompatible views of the Constitutional issues. There is also another possibility.

Conceptual metaphor theory reminds us that a ready dismissal of the presence of similar concepts because similar words are not used can be a mistake.³² An analysis of the conceptual metaphors that are used in Kennedy’s argument may reveal him to be quite aware of his part in the waging of this battle. With the use of conceptual metaphor analysis, the rhetorical analyst may also discover him to be an astute combatant, employing metaphor in his arguments with great subtlety.

In either case, rhetorical analysis of the argument in *Lawrence* between Justices Kennedy and Scalia will be revealing of the deep fissures in American culture. The rhetorical critic can certainly play a role in the analysis of texts, especially of these two influential societal wordsmiths, working for clarity in public discourse to ensure that social controversy and the arguments that sustain it are not enshrouded in a haze but laid bare for examination and understanding. A careful analysis will require the insights of traditional rhetorical criticism, especially as it is trained on argumentative strategies within social controversies, as well as the emerging insights from cognitive rhetorical criticism.

³² Edward Slingerland, “Conceptual Metaphor Theory as Methodology for Comparative Religion,” *Journal of the American Academy of Religion* 72, no. 1 (2004b): 5.

Olson and Goodnight have provided a now rather famous definition of controversy and its place in argumentation. Far from viewing controversy as a communicative failure, controversy takes its place as a type of communication. They say it is:

“an extended rhetorical engagement that critiques, resituates, and develops communication practices bridging the public and personal spheres. . . . flourish[ing] at those sites of struggle where arguers criticize and invent alternatives to established social conventions and sanctioned norms of communication.”³³

Controversy is sustained by the engagement of oppositional arguments that break into the traditional consensus of values and communicative practices to challenge social conventions.

Traditional or commonplace assumptions are often sustained by persuasive arguments built on the enthymeme. Oppositional arguments serve to undermine these arguments through objections that call into question “traditional patterns of influence.” In their study on the controversial use of fur in the fashion industry, Goodnight and Olson draw attention to the way oppositional argument functions by underlining the use of the enthymeme in persuasion.

The enthymeme as described by Aristotle functions to involve the audience in the process of persuasion by inviting the audience to supply one part of the argument that is unspoken or unexpressed by the speaker. The listeners are counted on to provide the missing piece of the argument out of their shared experiences and view of the world, and so be part of the process of persuading themselves. Oppositional argument, driven by

³³ Kathryn M. Olson and G. Thomas Goodnight, “Entanglements of Consumption, Cruelty, Privacy, and Fashion: The Social Controversy Over Fur,” *The Quarterly Journal of Speech* 80, no. 3 (August 1994): 249.

the objection, blocks this process of making “enthymematic associations and so disrupt the taken-for-granted realm of the uncontested and commonplace.”³⁴

The objection as a contra-positive statement of rebuttal can be directed within a shared context of understanding to refute claims or, additionally, “to challenge the legitimacy or appropriateness of communication practices.”³⁵ So, rather than signaling a failure to achieve resolution to conflict, oppositional argument can be directed at the truth claims at issue, or setting aside the truth of the claims, can be directed at the appropriateness of the communicative context in which these claims are made. Goodnight points out that this second function of oppositional argument raises the issues of, specifically:

“who gets to talk, what counts as proof, whose language is authoritative, what reasons are recognized, which grounds are determinative, along what lines contexts are invoked, and whether penalties should be attached to making objections. Such controversy is no mere failure of agreement, rather it is an achievement of sustained and mindful opposition.”³⁶

While Goodnight and Olson elaborate the examination of controversy as a site productive of further discussion instead of something to be avoided or lamented as evidence of the negation of reason in their study of the anti-fur controversy, there is potential for further research in analyzing the enthymematic associations that are assumed to be blocked by oppositional argument. What is not adequately addressed in their assessment of the reasoning employed in the controversy they examined is the role played by metaphor, both in the construction of the enthymeme and in the blocking process used in oppositional arguments.

³⁴ Ibid., 250.

³⁵ Ibid., 251.

³⁶ G. Thomas Goodnight, “Argument in Controversy,” 6.

Goodnight acknowledges that some evidence shows that “where there are cooperative contexts, controversy strengthens the quality of argumentation and decision making; where there are competitive contexts, the reverse is true. But these findings cannot explain how context definitions themselves are imbricated and transformed by controversy.”³⁷ To carry forward an analysis of how controversy impacts the way the contexts in which it occurs are defined, another rhetorical element, metaphor, needs to be examined.

The Question

The question I wish to explore in this paper is how metaphor, specifically conceptual metaphor, is used to create the argumentative context, carry meaning, supply the enthymematic structure of the arguments and transform the sexual autonomy controversy within the U.S. Supreme Court’s opinion in *Lawrence v. Texas*. Research questions that guide this work are the following:

Is there evidence that the metaphor of “culture war” drives the argumentative context in the *Lawrence* opinion and is carried by other metaphorical constructions?

How is the social controversy over sexual autonomy advanced by conceptual metaphors in this legal text?

What are the dominant metaphors used to argue for sexual autonomy? What are the dominant metaphors used to resist the advance of sexual autonomy?

Does Critical Metaphor Analysis add substantially to our understanding of the argumentative strategy of both sides in the controversy?

The focus of this work will be to analyze the conceptual metaphors used in *Lawrence v. Texas* to argue about sexual autonomy, exploring the way the arguments by the majority and by the dissent advance or avoid the culture war metaphor and its implications.

³⁷ Ibid., 8.

Chapter One examines the culture war as it is conducted in the arena of sexual autonomy, claiming that a rhetorical analysis that uses Conceptual Metaphor Analysis can make a substantive contribution to understanding this legal text. It will proceed in the following way: a précis of the sexual autonomy-related, U. S. Supreme Court “right of privacy” cases from *Griswold to Lawrence*; the use of the concept “culture war” in *Lawrence* and the puzzle over the concept of liberty that emerges from the argument; and finally, some opening justification for the use of Conceptual Metaphor Analysis as a method for illuminating how the argument in *Lawrence v. Texas* is impacted by the culture war motif.

Chapter Two explores the rhetorical approach to metaphor historically; gives an overview of the current state of cognitive, conceptual metaphor theory; examines the implications for cognitive metaphor theory in understanding legal argumentation in general, and looks at the application of Critical Metaphor Analysis to this particular legal document, *Lawrence v. Texas*.

Chapter Three is a close reading of Justice Kennedy’s majority opinion, using Critical Metaphor Analysis: identifying, interpreting and explaining the metaphors that are used to advance the arguments.

Chapter Four is the close reading of Justice Scalia’s dissenting opinion, and an identical use of Critical Metaphor Analysis will identify, interpret, and explain the metaphors used in his arguments against Justice Kennedy’s position.

Chapter Five explains the use of conceptual metaphors in the arguments in *Lawrence* relating to sexual autonomy as a battle site of the culture war. Conclusions regarding the efficacy of this method are drawn and some future lines of work in this area are suggested.

Sexual Autonomy and the Culture War

Proponents of traditional rhetorical studies contrast their approach to textual analysis with proponents of cognitive rhetorical studies in terms of their differing aims. Traditional rhetoric aims to illuminate a “fulcrum point for analyzing a particular argument,” usually from an “exemplary” text.³⁸ On the other hand, cognitive rhetoric works to illuminate the mental processes underlying conceptual metaphor, metonymy, and conceptual blending, usually in everyday language since “the everyday seems to hold the key to how the brain works.”³⁹ Rhetorical critics of both persuasions have long understood metaphor to be especially salient in presenting new ways of viewing the world, as metaphor can provide important and novel insights.

An equally world-shaping ability of metaphor is its flexibility. The flexibility of certain metaphors, cognitive metaphors for example, to structure whole arguments, while at the same time remaining below the level of critical awareness, can increase the argument’s persuasive force.⁴⁰ Taking into account the world shaping and the persuasive functions of metaphor allows rhetorical study to greatly expand its approach to persuasive texts.

The traditional rhetorical approach and the cognitive metaphor perspective both have value in analyzing everyday language use and exemplary texts. The combination of these two rhetorical perspectives is far superior to either one on its own if the culture war

³⁸ Eubanks, Philip, and John D. Schaeffer. "A Dialogue between Traditional and Cognitive Rhetoric: Readings of Figuration in George W. Bush's 'Axis of Evil' Address," *Rhetoric Society Quarterly* 34, no. 2 (2004): 68.

³⁹ *Ibid.*

⁴⁰ Jonathan Charteris-Black, *Corpus Approaches to Critical Metaphor Analysis* (Basingstoke and New York: Palgrave Macmillan, 2004). 9.

controversy in this decision is to be illuminated. A method of analysis that allows for this combination is Critical Metaphor Analysis.

Critical Metaphor Analysis is an approach similar to Critical Discourse Analysis in its goal to uncover the covert and perhaps even unconscious motivations of the producers of language texts.⁴¹ The pervasive use of the culture war metaphor in American public life makes justifying the selection of one text over another for study a challenge. However, a good choice of a text that is both exemplary as well as intended to enter into everyday life can be made and justified when the culture war is narrowed to a particular battle. Since one of the most crucial battle sites in the culture war is that of sexual autonomy -- its boundaries private and public -- and how sexual autonomy is related to marriage, the family, conception, childbearing, and childrearing, the controversy over sexual autonomy becomes an obvious choice.

A particularly important text that grapples with these issues, acknowledging previous skirmishes as well as setting some new battle lines is the United States Supreme Court opinion in *Lawrence v. Texas* (2003). One essential insight of contemporary scholarship in metaphor theory is that to properly understand the role of metaphor, the researcher must engage in metaphor analysis by using metaphor situated in its appropriate context, textually and socially/culturally. So before the analysis of *Lawrence* can begin, it is imperative to look at the narrative of sexual autonomy in the courts since the 1960's.

⁴¹ Charteris-Black, *Corpus Approaches*, 34.

Sexual Autonomy Since the Sixties in Supreme Court Decisions

The Birth and Childhood of Sexual Privacy: From *Griswold* To *Casey*

In 1965 the Supreme Court in *Griswold v. Connecticut* reviewed the convictions of an executive director and a medical director of a Planned Parenthood center for advising married couples on the use of contraception, and for prescribing contraception to them. The directors were arrested and charged as accessories in violating a Connecticut statute that makes it a crime to use any article or drug to prevent conception. Justice Douglas writing for the Court viewed this case in terms of the Due Process Clause of the Fourteenth Amendment.⁴²

While refusing requests to place this appeal in the line *Lochner*-style⁴³ arguments [“We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions,”⁴⁴] the Court nevertheless sees the issue of this case fitting its substantive due process review by locating it in another line of arguments.⁴⁵ Justice Douglas deems this case as appropriate for expanding the list of fundamental rights. He argues: “This law, however, operates

⁴² *Griswold v. Connecticut*, 381 U.S. 479, 482.

⁴³ *Williamson v. Lee Optical of Oklahoma* (1955) was the last of a string of decisions during what is now called the *Lochner* era. The decision in *Lochner* was used to invalidate many state and federal statutes regulating economic policies by appealing to the “substantive due process doctrine requiring the State to show a “compelling need.”

⁴⁴ *Griswold*, 483.

⁴⁵ Toni Lester, “Adam and Steve v. Adam and Eve: Will the New Supreme Court Grant Gays the Right to Marry?,” *American University Journal of Gender, Social Policy & the Law*, 14 (253): 280-84. The Fourteenth Amendment Due Process and Equal Protection Clauses were written to strike down laws that attempted to protect or promote racial discrimination. Subsequent applications of these clauses to issues other than race have expanded to issues other than race, such as religion, ethnicity and fundamental rights.

directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation."⁴⁶

The argument that follows points out that previous rulings affirming the right of association,⁴⁷ the right to educate one's children,⁴⁸ the right to study a foreign language,⁴⁹ are not specifically mentioned in either the First or Fourteenth Amendments, but are, nevertheless, peripheral rights that are necessary to secure the specific ones. The *Griswold* Court concludes that these and other cases show that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy."⁵⁰ (485). The Fourth Amendment, he adds, also creates a "right to privacy, no less important than any other right carefully and particularly reserved to the people" (486).

Douglas continues with a list of cases to support this "right to privacy" he believes is pressing for recognition, cases in which penumbral rights of "privacy and repose" (486) are centrally involved. He concludes with a paean to an association for "as noble a purpose as any involved in our prior decisions" (487) – marriage. Therefore, because of the notions of privacy surrounding the marriage relationship, the laws against conception for married couples are ruled unconstitutional. But despite its apparently unique status, the right to privacy in marriage is soon to be joined by another protected relationship.

⁴⁶ *Griswold*, 483.

⁴⁷ *NAACP v. Alabama*, 357 U.S. 449.

⁴⁸ *Pierce v. Society of Sisters*, 268 U.S. 510.

⁴⁹ *Meyer v. Nebraska*, 262 U.S. 390.

⁵⁰ *Griswold*, 485.

Soon after the decision in *Griswold*, the right to privacy is applied to couples that are not married and seek to use contraception. In *Eisenstadt v. Baird*,⁵¹ laws denying access to contraception for unmarried couples are ruled to violate the Equal Protection Clause of the Fourteenth Amendment since they apply dissimilar treatment to married and unmarried couples that are in similar situations. Justice Brennan writing for the majority notes that in *Griswold* the right to privacy was identified in the marriage relationship itself. Yet here he reasons:

[T]he marital couple is not an independent entity, with a mind and heart of its own, but an association of two individuals, each with a separate intellectual and emotional makeup. If the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child (405).

What appeared in *Griswold* as the right to privacy in the marriage relationship has been ruled in *Eisenstadt* to apply to the individual. The individual retains the right to privacy, in the choice to conceive a child inside or outside of a marital relationship, in keeping with the Equal Protection Clause. The following year the rationale that has been developing from *Griswold* and *Eisenstadt* is applied again, and to more controversial effect.

In *Roe v. Wade*⁵² Justice Blackmun writing for the Court, struck down Texas statutes prohibiting abortion. Primarily, the Court identified the right of privacy to be broad enough to cover the issue of a woman's choice to terminate her pregnancy (154). Acknowledging there is no explicitly rendered right of privacy in the Constitution, Blackmun cites a history of decisions that have found at least the "roots of that right" (153) in the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.

⁵¹ *Eisenstadt V. Baird*, 405 U.S. 38 (1972).

⁵² *Roe v. Wade*, 410 U.S. 113 (1973).

The right to privacy found in these decisions are clearly those that are “fundamental” or “implicit in the concept of ordered liberty,” (Ibid.) and are extended to “activities relating to marriage . . .⁵³; procreation . . .⁵⁴; contraception . . .⁵⁵; family relationships . . .⁵⁶; and childrearing and education . . .⁵⁷ (153-54). In short, the Court rules that Texas abortion statutes violate the Due Process Clause of the Fourteenth Amendment and are thus unconstitutional.

In keeping with the decisions in *Roe*, *Eisenstadt*, and *Griswold*, the Court extended the right to privacy regarding decisions of procreation to minors in *Carey v. Population Services International*.⁵⁸ Justice Brennan found here, as in *Eisenstadt*, that the State’s interest in deterring premarital intercourse by minors does not meet the compelling interest test that allows for fundamental rights to be abridged (694-96).

Roe is further anchored in the Court’s history by its decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁵⁹ Citing the importance of *stare decisis*, the Court upheld *Roe*, but added a new procedure for accommodating the State’s interest in potential life (22-27). In allowing four of the five provisions of the abortion control acts passed by the state to stand, Justices O’Connor, Kennedy, and Souter jointly applied the “undue burden standard” to assess if the provisions were designed to put an

⁵³ *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

⁵⁴ *Skinner v. Oklahoma*, 316 U.S. 535, 541-542 (1942).

⁵⁵ *Eisenstadt v. Baird*, 405 U.S. at 453-454; *id.* At 460, 463-465.

⁵⁶ *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

⁵⁷ *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925), *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

⁵⁸ *Carey v. Population Services*, 431 U.S. 678 (1977).

⁵⁹ 505 U.S. 833 (1992).

undue burden on the woman seeking abortion before the stage of fetal viability. Any provision which did so would be judged unconstitutional.

This deeply divided Court⁶⁰ illustrates the complexity of the sexual privacy holdings up to this point. But a backtrack in our chronology is required in order to pick up an anomaly in this steady progression of increased sexual liberty.

Sexual Privacy Comes of Age: *Bowers* and *Lawrence*

Almost a decade after *Casey* the Court heard a case challenging the constitutionality of Georgia's sodomy laws. A Georgia appeals court had ruled in favor of a Georgia man arrested for consensual sodomy in his home with another adult male. Citing Supreme Court opinions in *Griswold*, *Eisenstadt*, *Stanley v. Georgia*,⁶¹ and *Roe*, the Court of Appeals found the statute violated the respondent Hardwick's fundamental rights protected by the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment. Georgia Attorney General Bowers questioned the holding that the "sodomy statute violates the fundamental rights of homosexuals."⁶² Justice White delivered the Court's opinion that the statute does not violate their rights, and reversed the Georgia Court of Appeals' judgment.

Of great import to our sketch of the developing understanding of sexual liberty is the refusal of the *Bowers* Court to continue the line of cases from *Griswold*, *Eisenstadt*, *Roe*, and *Carey*. It was offered this option and directly objected to it:

⁶⁰ This is demonstrated not only by the 5-4 majority opinion on part of the statutes, but also by the many "concurring on the judgment in part, dissenting in part" filings within the Court.

⁶¹ 394 U.S. 557 (1969).

⁶² *Bowers V. Hardwick* 478 U.S. 186 (1986).

[W]e think it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent (191).

The *Griswold* “zone of privacy” had been expanded to include not only marriage and attendant decisions regarding childbirth and childrearing, but also to include the rights of the unmarried, of heterosexual couples, single women, and minors to contraception and abortion. Why the holding back by the *Bowers* Court? Compared to the controversial but constitutionally protected sexual freedom to abort millions of the unborn, sexual freedom for homosexual contact appears to be clearly implied, if not demanded.⁶³

Putting aside precedent, Justice White laid out the Court’s rationale as a pre-Roe, indeed pre-*Griswold* identification of “fundamental liberties that are ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if [they] were sacrificed’” (191-92). These rights, otherwise characterized⁶⁴ as “deeply rooted in this Nation’s history and tradition” (192), not only do not apply to homosexual sodomy, but White asserts that, to the contrary, laws proscribing such conduct “have ancient roots” (Ibid.).

White also closes the door to grounding new fundamental rights in the Due Process Clause, believing that way would require “redefining the category of rights deemed to be fundamental” (195). Further, White argues, the claim that the privacy of the home should cover homosexual conduct is met with the reminder that illegal activity

⁶³ Nelson Lund, and John O. McGinnis, "Lawrence v. Texas and Judicial Hubris," *Michigan Law Review* 102, no. 7 (2004), <http://o-find.galegroup.com.bianca.penlib.du:80/itx/start.do?prodId=LT>. (accessed April 3, 2008).

⁶⁴ *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977).

is not always immunized in the home: drugs, firearms, stolen goods, for example, are still illegal in the privacy of the home (195). Even legalizing all “voluntary sexual conduct between consenting adults” to include homosexual sodomy is not a possible strategy for it would also prevent criminalizing adultery, incest, and “other sexual crimes” committed in the home (196).

There is in the dissent of both Justice Blackmun and Justice Stevens (joined by Justice Brennan and Justice Marshall) a different valuation of the line of arguments from *Griswold* thru *Carey* concerning the fundamental right of privacy. There followed within the legal community and civil rights groups many years of struggle to redo *Bowers* and to continue the line of progress in sexual liberty: “The hurt, frustration, and anger elicited by his [White’s] contemptuous tone and message galvanized what Justice Scalia later disparaged as a ‘17-year crusade’ to undo the damage of the *Bowers* opinion.”⁶⁵

Thus it was with relief that many greeted the opinion in *Lawrence v. Texas* reversing *Bowers*, as well as reprimanding the *Bowers* Court’s reasoning.⁶⁶ The relief was fairly short-lived for most, however. Agreeing with the result was one thing, but agreeing with the way it was achieved is quite another, and many disagree with the argument, for a myriad of reasons. The particularities of those disagreements become very technical, but an analysis of *Lawrence* at a rather general level of specificity can yield interesting results in understanding the current status of sexual privacy law, and will also set the stage for projecting the future of sexual liberty in the U.S.

⁶⁵ "Unfixing *Lawrence*," *Harvard Law Review* 118, no. 8 (2005), <http://o-find.galegroup.com.bianca.penlib.du.edu:80/itx/start.do?prodId=LT>(accessed April 3, 2008).

⁶⁶ *Lawrence v. Texas*, 539 U.S. 58 (2003), 578.

The genesis of the now famous U.S. Supreme Court case *Lawrence v. Texas* (2003) evoked little notice at the time. Harris County sheriff's deputies in Houston, Texas were dispatched in response to a reported weapons disturbance. According to Officer Quinn's probable cause affidavits, the reportee, Roger Nance, claimed to the dispatcher that a "black male was going crazy in the apartment and he was armed with a gun."⁶⁷ When the officers arrived at the apartment building, they were met and directed by Nance, 41, to an upstairs apartment. Upon entering the unlocked apartment of John Geddes Lawrence, 55, to conduct a search for the suspected armed man, the officers "observed the defendant engaged in deviate sexual conduct namely, anal sex, with another man."⁶⁸

Both Lawrence and Tyron Garner, 31, were arrested for "deviate sexual conduct,"⁶⁹ a Class C misdemeanor punishable by a fine up to \$500. They were held overnight, charged and convicted before a justice of the peace court, and released on \$200 bail. The false report filed by Nance who had "apparently been with the men earlier the same evening"⁷⁰ earned Nance a 30-day jail sentence and, according to the sheriff's department, stemmed from "a personality dispute" between the two men and himself.⁷¹

⁶⁷ *Brief of Amici Curiae Texas Legislators, Representative Warren Chisum, Et. In Support of Respondent*, Supreme Court of the United States February 18, 2003, under "Petitioners Have Established No Constitutional Violation."

⁶⁸ *Ibid*, 5.

⁶⁹ The applicable Texas state law (Tex. Penal Code Ann. Sec. 21.06) defines "deviate sexual intercourse" as "any contact between any part of the genitals of one person and the mouth or anus of another person; or the penetration of the genitals or the anus of another person with an object." *Lawrence v. Texas*, 539 U. S. 563 (2003).

⁷⁰ Bruce Nichols, "Houston Case May Test Sodomy Law Lawyer Says His Clients' Privacy Invaded," *Dallas Morning News*, November 7, 1998.

⁷¹ Paul Duggan, "Texas Sodomy Arrest Opens Legal Battle for Gay Activists," *Washington Post*, November 29, 1998.

The unlikely circumstances that led to the arrest of Lawrence and Garner in a private home, proved to be just the right circumstances for advancing further legal challenges against anti-sodomy statutes which gay activists believed to be unconstitutional. The relative rarity of enforcement of these statutes did little to reassure opponents of them, since the very presence of such laws allowed the charge of criminality to hang over the heads of those who identified as homosexual.⁷² The District Attorney's Office could have chosen to drop the charges, of course, but D. A. John Holmes explained why he was going ahead with the case despite his ambivalence caused by the need to enforce a law that seems to intrude on privacy: "I've always said the best way to get rid of a bad law is to enforce it."⁷³

Lawrence and Garner asked for a trial *de novo* ⁷⁴ in order to challenge the constitutionality of the statute both under the Equal Protection Clause of the Fourteenth Amendment and a similar provision in the Texas Constitution, Art. 1, Sec. 3a. Entering a plea of *nolo contendere*⁷⁵ before a Harris County Criminal Court, they did not challenge the facts of the case or police conduct during the arrest, but instead contested the narrow issue of the constitutionality of Section 21.06. In November 1998 the court denied their legal challenges, and they were each fined \$125.

Their next step was to appeal to the Texas Fourteenth District Court of Appeals. This court ruled in a 2-1 decision that the state's anti-sodomy law was indeed

⁷² Andrew, Gumbel, "Activists Back Challenge to Texas Anti-Gay Laws," *The Independent*, November 17, 1998. A rather vivid illustration of the law's coercive effect even when not specifically applied was often cited during the ongoing legal challenges. A job with the Dallas, Texas police department was denied to Mica England, a self-identified lesbian, because she was committing crimes in her private life and was therefore unable to enforce the law in public.

⁷³ Ibid.

⁷⁴ *As if no trial had been held.*

⁷⁵ *I will not contest.*

unconstitutional because it violated Texas' Equal Rights Amendment guarantee of equality under the law by treating same-sex couples differently from heterosexual couples. The criminal case against Lawrence and Garner was thereby thrown out. The state asked the court to reconsider the case *en banc*,⁷⁶ so the full Fourteenth District Court of Appeals met in March 2001 to reconsider the case.

Against the appellants' claim that anti-sodomy statutes violate state and federal equal protection guarantees against discrimination according to sexual orientation, the court reasoned that since sexual orientation is not a "suspect class" (as, for example, are race and gender), it is permissible for the state to prohibit homosexual sodomy if it is rationally related to a legitimate state interest.⁷⁷

The court also rejected the claim that the law in question discriminated on the basis of gender. Arguing that, as this law does not impose a burden on one gender more than on the other, nor it does elevate one gender over the other, it therefore cannot be said to be discriminatory.

The court further rejected the right to privacy claims advanced by the appellants. Reasoning that since the Texas Supreme Court has declared that there are no "zones of privacy" that protect private heterosexual conduct from state interference, it is clear that there are no zones of privacy for homosexual conduct either.⁷⁸

Finally, the court cited the U. S. Supreme Court's decision in *Bowers v. Hardwick* to be controlling in the federal aspects of this case,⁷⁹ since that case had ruled on the

⁷⁶ *In full court.*

⁷⁷ No. 14-99-00109-CR & No. 14-99-00111-CR Court of Appeals of Texas, Fourteenth District, Houston, (2001), 3.

⁷⁸ *Ibid.*, 6.

⁷⁹ 41 S. W. 3d 349 (Tex. App. 2001).

constitutionality of anti-sodomy laws in 1986. The constitutional issues were denied; the criminal charges against Lawrence and Garner were affirmed. Thus, finally, the procedural goal of the appellants and their advocates had been attained: a chance to argue before the U. S. Supreme Court for the unconstitutionality of anti-sodomy laws.

The appeal to the U. S. Supreme Court was to consider three questions:

1. Whether petitioners' criminal convictions under the Texas "Homosexual Conduct" law – which criminalizes sexual intimacy by same-sex couples, but not identical behavior by different-sex couples – violate the Fourteenth Amendment guarantee of equal protection of the laws.
2. Whether petitioners' criminal convictions for adult consensual sexual intimacy in the home violate their vital interest in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment.
3. Whether *Bowers v. Hardwick, supra*, should be overruled? See Pet. for Cert. i.⁸⁰

The Puzzle of *Lawrence v. Texas*

There are a several puzzling things about the *Lawrence* opinion. Legal scholars are still working on what to conclude about its legal principles and thus its meaning for future constitutionally similar cases. Rhetorical scholars have much to add to the solution by helping to answer two questions: Why did Justice Kennedy choose to frame his argument the way he did? What kind of reasoning is Justice Kennedy using to construct his argument?

The following section will outline the criticisms of *Lawrence* from the legal community and the questions of interpretation those critiques have highlighted. Some interpretations with considerable credibility will be noted that attempt to give some order to the ambiguity, and as well as a defense of the ambiguity as really a dialectical tension at work. Finally a very large opening in the discussion of *Lawrence* that is

⁸⁰ *Lawrence v. Texas*, 564.

created by the unanswered questions regarding its meaning and how it works is noted by suggesting the need for a conceptual metaphor analysis.

The criticisms launched against the majority opinion in *Lawrence* have rarely been preoccupied with the actual holdings, as much as with the legal reasoning or perceived lack thereof that led to the holdings. Few regret the demise of anti-sodomy laws; many lament the legally unconventional route to their constitutional graveyard. A sampling of some of the critical responses gives a rather distinct sense that something unusual is going on in this Supreme Court opinion:

Justice Kennedy eloquently articulated a host of reasons for his ruling His rationale read like a history lesson in the jurisprudence of privacy rights, equal protection and due process law, especially as these three areas of constitutional law relate to a person's right to autonomy over their own body and sexuality."⁸¹

The *Lawrence* opinion is a tissue of sophistries embroidered with a bit of sophomoric philosophizing. It is a serious matter when the Supreme Court descends to the level of analysis displayed in this opinion, especially in a high-visibility case that all but promises future adventurism unconstrained by anything but the will of the judicial majority.⁸²

For Lester the opinion is eloquent and reasoned; for Lund and McGinnis, sophistic and shallow. Of course there are more critical perspectives.

Justice Scalia points out in his dissent that the opinion does not claim that "homosexual sodomy is a 'fundamental right' under the Due Process Clause," and accuses the Court of applying "an unheard-of form of rational-basis review."⁸³In contrast, Lawrence Tribe finds the standard of review to be quite obvious, despite the fact that the right protected in *Lawrence* is not denominated as "fundamental." He

⁸¹ Toni Lester, "Adam and Steve vs. Adam and Eve," 291.

⁸² Lund and McGinnis, "Judicial Hubris," under "The Costs and Benefits of *Lawrence*."

⁸³ *Lawrence*, 586.

points out that there are many passages in which the “talismanic verbal formula of substantive due process” is used:

[It] did so by putting the key words in one unusual sequence or another – as in the Court’s declaration that it was dealing with a “protection of *liberty* under the Due Process Clause [that] has a *substantive* dimension of *fundamental* significance in defining the rights of the person.”⁸⁴

The Justice says *Lawrence* uses the least strict form of review and the venerable trial lawyer says it is the strictest form of review for due process cases. And to them both, Randy Barnett argues that *Lawrence* jettisons the whole “fundamental rights” category and operates on a presumption of liberty, requiring the government to justify any incursion on rights, fundamental or otherwise.⁸⁵

To bring to a close this summary of conflicting interpretations, Cass Sunstein’s interpretive gloss should be noted. While there are several readings of *Lawrence* that are clearly sound, Sunstein argues that the real heart of the opinion is that of desuetude.

He argues that “the Court’s remarkably opaque opinion has three principal strands,” with each one supporting a different principle and understanding. First he summarizes the autonomy reading: “A criminal prohibition on sodomy is unconstitutional because it intrudes on private sexual conduct that does not harm third parties.”⁸⁶ This view assumes a fundamental right of consensual sexual behavior that the state may not intrude upon without showing a “least restrictive means of achieving a compelling state interest.”

⁸⁴ Tribe, “Fundamental Right,” 1917.

⁸⁵ Randy E. Barnett, “Justice Kennedy’s Libertarian Revolution: *Lawrence v. Texas*,” *Cato Supreme Court Review*, 21 (2nd ed. 2002-03): 35, quoted in David D. Meyer, “The Public and Private Faces of Family Law: Article: Domesticating *Lawrence*,” *The University of Chicago Legal Forum*, (2004): 453.

⁸⁶ Cass R. Sunstein, “What Did *Lawrence* Hold? Of Autonomy, Desuetude, Sexuality, and Marriage,” *The Law School, The University of Chicago*, (September 2003): 3.

The rational basis reading instead says that prohibition of sodomy is unconstitutional because it does not show a compelling state interest in interfering with consensual sex if “it is attempting to do so for only moral reasons, unaccompanied by a risk of actual harm.”⁸⁷

Professor Sunstein’s preferred reading identifies the principle as desuetude: prohibition against sodomy is unconstitutional because it does not have strong moral support in the state or nation for enforcement of the prohibiting laws.⁸⁸ Before arguing his case for this interpretation, Sunstein acknowledges another possible interpretation (the one advanced by Tribe): equality. In this understanding, “sodomy laws are unconstitutional because they demean the lives of gays and lesbians and thus offend the Constitution’s equality principle.”

With such an array of interpretations advanced by leading legal scholars it is clearly not possible that lower courts throughout the country will be able to apply *Lawrence* consistently until there is some growing agreement as to the preferred meaning. It would be intellectually flippant to simply dismiss the reasoning in *Lawrence* as incoherent or endlessly indeterminate, allowing for whatever applications lower courts may choose. Justice Kennedy certainly deserves more credit than this. And this acknowledgement leads us to search for understanding at a deeper level.

One intriguing question about the argument in *Lawrence* concerning the source of the ambiguity so many have observed in Justice Kennedy’s legal reasoning is related to why he ignored an obvious solution. As some have noted, there were clear lines of legal reasoning available to the majority that would have reached the same end of overturning *Bowers* and ending anti-sodomy legislation. Protection of sexual autonomy in the

⁸⁷ Ibid.

⁸⁸ Ibid., 4.

doctrine of “right to privacy,” which originated in *Griswold v. Connecticut* (1965), was further developed in *Eisenstadt v. Baird* (1972), and firmly, if controversially, established in *Roe v. Wade* (1973), was clearly available to the *Lawrence* court in its decision regarding the constitutionality of anti-sodomy laws.

Many astute legal commentators have puzzled over the failure of the Court to seize upon this obvious solution, since the right to privacy established in *Roe* clearly “implies a right of consenting adults to engage privately in whatever sort of sexual contact they like.”⁸⁹ Rather than rely on precedent, however, Justice Kennedy constructed an argument that became an interpretive puzzle, confounding many legal scholars who, as we have seen, tried to fit it into available legal categories.

There are a few clear results of the opinion, of course. The *Lawrence* opinion struck down anti-sodomy laws as unconstitutional, thus, decriminalizing homosexual sodomy and providing a clear victory for gay rights activists. And while it did not unambiguously declare a “fundamental right” to sodomy, the opinion made clear that moral disapproval by a majority is not sufficient reason to criminalize sexual behavior. Many initial responses to the opinion were positive,⁹⁰ even euphoric,⁹¹ as a long battle to end anti-sodomy laws was finally won.

⁸⁹ Lund and McGinnis, “*Lawrence v. Texas* and Judicial Hubris,” under “II. The *Lawrence* Opinion.”

⁹⁰ For more examples of the range of response see, P. Landon Perkinson, ed., “Eighth Annual Review of Gender and Sexuality Law: Constitutional Law Chapter: Sexual Privacy after *Lawrence v. Texas*,” *The Georgetown Journal of Gender and the Law*, 8: 203 (2007); Nan D. Hunter, “Sexual Orientation and the Paradox of Heightened Scrutiny,” *Michigan Law Review*, 102:1528 (June 2004); and Nancy C. Marcus, “Article: Beyond *Romer* and *Lawrence*: The Right to Privacy Comes Out of the Closet,” *Columbia Journal of Gender and Law*, 15:355 (2006).

⁹¹ Lawrence Tribe’s response could be described this way. See Laurence H. Tribe, “*Lawrence V. Texas*: The ‘Fundamental Right’ That Dare Not Speak Its Name,” *Harvard Law Review* 117 (2004), 0-
www.lexisnexis.com.bianca.penlib.du.edu/us/Inacademic/deli.

It may be true that *Lawrence* is, as one analyst put it, “a paragon of the most anticonstitutional branch of constitutional law: substantive due process . . . mak[ing] judges into unelected and unremovable superlegislators.”⁹² However, the legal incoherence often lamented in Justice Kennedy’s opinion may also be seen as “tension.” This tension is developed within *Lawrence* by Justice Kennedy’s use of two distinct views of liberty: that of the “zonally constrained and highly privatized” view of Blackmun in *Bowers* and of the “expansive, equal protection and dignity” approach of Stevens.⁹³

The former reading of the text yields the view that *Lawrence* is about ending the government’s intrusion into intimate conduct and decision-making; the latter, that the government is now conferring recognition on previously marginalized relationships.⁹⁴ The first reading interprets sexual autonomy as “freedom from” government intrusion. The second reading views sexual autonomy as “freedom to” be recognized with equal dignity and respect.

In part, the legal puzzle consists of this equivocation in the concept of liberty. Some try to resolve the dissonance by sounding only one note in this two-toned argument. A much more fruitful way of understanding the persuasive power of Kennedy’s argument will be to acknowledge the tension in the argument, especially as it opens up space for an interrogation of the role of conceptual metaphor in both establishing and maintaining the argument.⁹⁵

⁹² Lund, “*Lawrence v. Texas* and Judicial Hubris,” under “Introduction.”

⁹³ “Unfixing *Lawrence*,” under “An Echo of Dissents Past.”

⁹⁴ *Ibid.*, under “Quick Fixes.”

⁹⁵ In subsequent discussion the link between tension in the argument and the presence of conceptual metaphor will be addressed and developed.

To tease out this aspect a bit more, a good example of the tension at work within the argument can be taken from a part of the opinion in which Kennedy makes a comparison of the right to engage in same-sex intercourse with the right to engage in marital intercourse:

To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.⁹⁶

However, this appeal to an equality-dignity view of liberty shifts immediately to the rhetoric of a privacy⁹⁷ view of liberty. “It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.”⁹⁸ It is easy to agree with commentators who observe this dynamic in the argument as a “rhetorical maneuver [that] illustrates the *Lawrence* Court’s resort to privacy when equality- and dignity-oriented liberty discourse became too lofty or risky.”⁹⁹

Again Justice Kennedy returns to language of equality and dignity, further strengthening the interpretation that sodomy laws are “demeaning” of relationships and conduct that should have the State’s respect. He cites from his own opinion in *Casey* emphasizing the respect the Constitution “demands for the autonomy of the person in

⁹⁶ *Lawrence v. Texas*, 567.

⁹⁷ David Meyer declares that the case is “clearly a privacy case embrac[ing] a relational conception of privacy that anchors constitutional protection in the aspiration of persons to intimate association.” In “A Privacy Right to Public Recognition of Family Relationships? The Cases of Marriage and Adoption,” *Villanova Law Review* 51 (2006): 903.

⁹⁸ *Ibid.*

⁹⁹ “Unfixing *Lawrence*,” under “Two Views Stranded.”

making these choices: . . . At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life" (574).

But then immediately he continues with arguments about the stigma that criminalizing homosexual conduct induces and the decriminalization the wider civilization has undertaken (575-76). So perhaps we are to conclude that the respect owed by the government to homosexual conduct reaches only so far as to not be criminalized,¹⁰⁰ however a poor solution this seems.

The shift from Blackmun's privacy rhetoric to Stevens' equality-dignity rhetoric throughout the *Lawrence* opinion can reasonably be seen as a way Justice Kennedy both sustains and limits the conceptual reach of each of them to produce his opinion.¹⁰¹ What this push-pull dynamic accomplishes for sexual autonomy beyond decriminalizing homosexual sodomy committed in private by consenting adults is still being debated.

This novel mixture of two different kinds of liberty in Justice Kennedy's opinion creates legal ambiguities for future federal and state courts and legislatures. Why Justice Kennedy did not take the clearly demarcated line of argument suggested by others through the right to privacy cases underlines more heavily the importance of understanding the kind of argument strategy he did choose and the necessity for our democracy that we understand how this is achieved.

All of the above named ambiguities, seeming inconsistencies of legal principles, competing interpretations of meaning, and complex legal strategies leave us with a couple of important and unanswered questions:

Why did Justice Kennedy choose to frame his argument the way he did?

¹⁰⁰ Lund, "*Lawrence v. Texas and Judicial Hubris*," under "Exploring More Transcendent Dimensions."

¹⁰¹ "Unfixing *Lawrence*," under "Two Views Stranded."

What kind of reasoning is Justice Kennedy using to construct his argument?

The first question is one of motive and purpose; the second is one of method. Both, when answered, implicate the other.

What *Lawrence* means is certainly still undetermined at this point. Subsequent court decisions relying on *Lawrence* have mostly focused on what *Lawrence* does not mean, citing in much more detail the limitations the Court spells out than it appeals to what it does mean.¹⁰² One legal commentator argues that what *Lawrence* means has been interrogated to the neglect of trying to understand how *Lawrence* works.¹⁰³ A rhetorical critic could certainly contribute to balancing the uneven focus in this analytic corpus. More importantly, a rhetorical analysis of the conceptual metaphors in the argument could contribute a richer understanding of how *Lawrence* works, and in that process, come to some supportable conclusions about what it means.

With this interpretive puzzle in mind, we may return to the narrative of the sodomy cases and foreground the actual opinion in *Lawrence*.

From its memorable beginning, foreshadowing the often-decried ambiguities, obscurities, even contradictions that are to follow it, Justice Kennedy's majority opinion sets the stage for the arguments over its meaning that were to follow:

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief,

¹⁰² Landon P. Perkinson, ed., "Eighth Annual Review of Gender and Sexuality Law: Constitutional Law Chapter: Sexual Privacy after *Lawrence v. Texas*," *The Georgetown Journal of Gender and the Law* 8 (2007), <http://www.lexisnexis.com/bianca.penlib.du.edu/us/Inacademic/deli...> (accessed January 10, 2008).

¹⁰³ "Unfixing *Lawrence*," under "Introduction: The Mourning After *Lawrence*."

expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions (562).

Despite the arguments over this beginning, what is agreed upon by all to be a clear result is this: Texas's "Homosexual Conduct" law is struck down, thereby decriminalizing homosexual sodomy; *Bowers v. Hardwick* is overturned; and the *Bowers* Court stands reprimanded by the *Lawrence* Court.¹⁰⁴

The Court signals its resolve to determine the case before it by stating the question of "whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause . . ." (564). In order to do so, Kennedy deemed it necessary to interrogate the opinion in *Bowers*. The framing of the question by *Bowers* -- that the issue before them was whether the U.S. Constitution "confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time," -- belies, according to Justice Kennedy, a "failure to appreciate the extent of the liberty at stake (566-67).

As he sees it, the question should instead be framed to look at what consequences these laws entail, since they touch on what he characterizes as:

[T]he most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals (567).

Rather than being a question of whether a particular sexual act is prohibited or not, the real question is one of the right to enter a relationship of one's choosing in the privacy of one's home. The Court affirms the liberty homosexuals have to make this choice (567).

¹⁰⁴ "Unfixing *Lawrence*," under "Introduction: The Mourning After *Lawrence*."

Kennedy also challenges the claim of the *Bowers* Court that laws against homosexual sodomy have “ancient roots,”¹⁰⁵ arguing instead that sodomy laws have been aimed at nonprocreative sex, and sex with minors or by force (569). By contrast, laws specifically aimed at same-sex couples appeared in the last third of the 20th century (570). And even so, the proscriptions are often about conduct in public places, and only nine states used those laws for criminal prosecutions (Ibid.).

In short, the historical grounds in *Bowers* are said to be overstated at best, and in Justice Kennedy’s view a more relevant perspective is grounded in an “emerging awareness” in our culture of the liberty to choose the shape of our adult sexual relationships. Not only in American law but also in European law homosexual conduct is being decriminalized (572-3).

To further cast doubt on the validity of *Bowers*, two subsequent cases confirmed the liberty interests debated here. The *Casey*¹⁰⁶ decision again affirmed that the Constitution’s Due Process Clause affords protection of personal decisions regarding “marriage, procreation, contraception, family relationships, child rearing, and education” (574). Justice Kennedy adds a lengthy quotation from his joint decision in *Casey* to illustrate his point:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State (*Casey*, 851).

¹⁰⁵ *Bowers v. Hardwick*, 192.

¹⁰⁶ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

In addition to *Casey*, the decision in *Romer v. Evans*¹⁰⁷ affirmed that class-based legislation directed at homosexuals violated the Equal Protection Clause (574). Justice Kennedy writing for the majority argues that both “equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects”(575).

Kennedy further emphasizes the stigma that criminal statutes against homosexual conduct impose, the increasing criticism of *Bowers* in the U.S., the rejection by the European Court of Human Rights of the course taken in *Bowers*, and the fact that *stare decisis* is not an “inexorable command” (576-77). Citing the dissenting opinion of Justice Stevens in *Bowers*, Kennedy signals his agreement with Stevens’ two conclusions: the fact that a State’s majority believes a practice to be immoral is an insufficient reason to criminalize it, and that decisions by married persons concerning their intimate sexual relationship are a form of liberty protected by the Due Process Clause, with this protection extending to unmarried persons as well (577-78).

This analysis, Kennedy states, should have controlled the opinion in *Bowers* and should control in *Lawrence*. The petitioners are entitled to respect for their private lives and should not have their destiny controlled or existence demeaned by criminalizing their private sexual conduct (578).

Kennedy specifically limits the Court’s ruling by stating what it does not involve: minors, persons who could be injured or where consent may not be easily refused, public conduct or prostitution, or formal recognition by government of any relationship homosexuals may choose to enter. What the case does involve is the right of two adults to engage in sexual practices common to the homosexual lifestyle without intervention of the government (578).

¹⁰⁷ 517 U.S. 620 (1996).

It would seem that such a resounding affirmation of the petitioners' rights to sexual privacy, along with an equally resounding rebuke of the *Bowers v. Hardwick* decision, would pave a very straightforward trajectory for application to future cases where sexual privacy is involved. This has not been the result, however.

In post-*Lawrence* lower court cases, there have been two important trends noted. One is for courts to “deny heightened review” on the basis that *Lawrence* did not recognize a new fundamental right. The second is to apply the “what *Lawrence* isn’t” part of the decision and read the conduct as falling into one of the named categories.¹⁰⁸ To help understand these cautious, even narrow, interpretations of *Lawrence*, a brief examination of the dissenting opinions in *Bowers* and how they are then used in *Lawrence* may illuminate the complex conceptual cords used to construct the opinion in *Lawrence*.

The dissenting opinions in *Bowers* are of substantive importance to the argument in *Lawrence*. The dissenting opinions of Justice Blackmun (joined by Justice Brennan, Justice Marshall, and Justice Stevens) and of Justice Stevens (joined by Justice Brennan and Justice Marshall) agree that the majority opinion has ignored the sex-neutral character of the Georgia law against sodomy and made its case based on the “right to homosexual sodomy” solely. However, they both follow different understandings of the substantive right involved.¹⁰⁹

¹⁰⁸ Landon Perkinson, "Eighth Annual Review of Gender and Sexuality Law: Constitutional Law Chapter: Sexual Privacy after *Lawrence V. Texas*." under “Two Approaches to *Lawrence*-Based Challenges.”

¹⁰⁹ "Unfixing *Lawrence*." In this section I follow the argument of the Harvard Law Review, under “Fixing *Lawrence* Fixing *Bowers*.”

First Blackmun dissents. According to Justice Blackmun the fundamental right at stake here is not about the right to homosexual sodomy but “the right to be let alone.”¹¹⁰ The right to privacy has developed in Constitutional cases along two lines: recognition of the privacy interest in making certain decisions and the privacy interest related to certain places without reference to the activities engaged in by the individuals involved (204).

Decisions about the family, about marriage, whether to have a child for example, are protected because “they form so central a part of an individual’s life” (Ibid.) In the same way, sexual intimacy is “a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality.”¹¹¹ Not the specific sexual act, but the fundamental interest all individuals have in deciding the nature of their intimate associations is at issue here, according to Blackmun (206).

In addition to the decisional aspect of the right to privacy, Blackmun elaborates the spatial aspect as well. Special security is acknowledged for the individual in his home that is “expressly guaranteed by the Fourth Amendment;” this protection is at the “heart of the Constitution’s protection of privacy (208).” Intimate behavior considered illegal when in public is not necessarily to be sanctioned in private (marital intercourse on a street corner or a theater stage¹¹²); nor can religious values be imposed on the entire population: “The Constitution cannot control such prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”¹¹³

¹¹⁰ *Bowers v. Hardwick*. 199, quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

¹¹¹ Ibid., 205, quoting *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973).

¹¹² Ibid., 213, quoting *Paris Adult Theatre I*, at 66, n. 13.

¹¹³ Ibid., 212, quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

Then Stevens dissents. In addition to the constitutional right to privacy as outlined by Blackmun, Stevens is careful to direct his particular perspective in another direction. He would have decided the case according to an “even more fundamental concern”:

These cases do not deal with the individual’s interest in protection from unwarranted public attention, comment, or exploitation. They deal, rather, with the individual’s right to make certain unusually important decisions that will affect his own or his family’s destiny (217).

Stevens goes on to point out that these decisions have been considered to be “basic values,” “fundamental,” and under girded by history and tradition (Ibid.). Stevens ties this “due process right to liberty”¹¹⁴ perspective to the equal protection principles as well. Justice Stevens points out that Georgia has not justified a reason to apply its law regarding sodomy to only a portion of its citizens. Thus, he notes that from the “standpoint of the individual, the homosexual and the heterosexual have the same interest in deciding how he will live his own life, and more narrowly, how he will conduct himself in his personal and voluntary associations with his companions” (218-19). Furthermore, Georgia law has not made the distinction between heterosexual and homosexual sodomy; to apply different standards of treatment to one class of persons is unconstitutional (219-20).

Both Justice Blackmun and Justice Stevens have challenged the ruling of the majority in two different ways. One astute and metaphorically sophisticated observer puts it this way. They have both challenged the majority, “the former by putting same-sex sodomy behind closed bedroom doors; the latter by setting same-sex sodomy straight – that is, by eliding the distinction between homosexual and heterosexual.”¹¹⁵

¹¹⁴ "Unfixing *Lawrence*," under "Fixing *Lawrence* Fixing *Bowers*."

¹¹⁵ Ibid.

Some commentators analyzing the liberty arguments in *Bowers* and in *Lawrence* sort these differences into “autonomy” and “recognition” frameworks, or “negative” and “positive” rights;¹¹⁶ others into “act” and “identity”¹¹⁷ categories. For my purpose in giving an overview of the history of sexual autonomy in Supreme Court decisions, the dual conceptions of liberty used by Blackmun (privacy) and Stevens (equality), will suit nicely to illuminate the work that Justice Kennedy does by tying together these two strands in *Lawrence*,¹¹⁸ and the puzzle that arises as he does so.

Justification of A Conceptual Metaphor Approach

Perhaps it is counterintuitive to greet the suggestion of critical metaphor analysis in legal argument with enthusiasm, or even open-minded evaluation. Legal arguments in the courtroom will likely contain some metaphorical language, but in Supreme Court opinions the substantive issues before the courts require applying rules to facts so that laws remain constitutionally bound. Is there a legitimate and cognitively significant role for metaphors in this kind of discourse?

Current research by cognitive scientists has led researchers in many disciplines to acknowledge the ubiquity of metaphor. Even theorists who are cautious about the Lakoffian claim that cognition is largely, though not entirely, metaphorical are in agreement that metaphor is more than a figurative decoration, resting on top of the substantive claims and performances of language. There is mounting evidence in cognitive science and linguistics to argue for the essential cognitive role of metaphor.

¹¹⁶ Ibid.

¹¹⁷ Tribe, “The Fundamental Right,” 1898.

¹¹⁸ “Unfixing *Lawrence*,” under “An Echo of Dissents Past.”

Many affirm with Stephen Winter that “thought is not primarily linguistic or propositional, but embodied and imaginative; language is neither entirely arbitrary nor merely socially contingent, but grounded in our embodiment and motivated by our interactions with the physical and social world.”¹¹⁹

If it is true that thought, especially abstract thought, is largely metaphorical, legal thought will have its share of metaphor. Winter gives an illustration of a few legal terms that are structured by the conceptual metaphors purposes are destinations, combined with actions are motions, form the conceptual metaphor adjudication is movement along a path:

[L]itigation is a judicial *proceeding*; the parties cite supporting *grounds* for their *motions*; the plaintiff must *carry the burden* of proof; a presumption may shift the burden of *going forward*; and parties may decide to *forgo* (from the Old English *forgan* or *foregan*, “to pass by”) their procedural rights.¹²⁰

To further buttress the case for the presence and importance of conceptual metaphor in legal texts, Winter points out a few in the *Casey* opinion given in 1992 reaffirming *Roe v. Wade*.¹²¹ The majority rejected Justice Scalia’s belief that the constitutional text was a “means of *curbing* the discretion of federal judges.” And Chief Justice Rehnquist’s dissent charged that the majority opinion’s “undue burden” standard “will do nothing to prevent ‘judges from *roaming at large* in the constitutional field’ *guided only by* their personal views.” Justice Scalia’s called the standard a “rootless” attempt “to preserve some judicial *foothold* in this *ill-gotten territory*.”

¹¹⁹ Steven L. Winter, *A Clearing in the Forest: Law, Life, and Mind* (Chicago: The University of Chicago Press, 2001), 47.

¹²⁰ *Ibid.*, 17.

¹²¹ *Ibid.*, 18. References for each of the judges’ comments are given by Winter but not duplicated here.

Winter concludes that “[i]n each of these cases judicial action is conceptualized as self-propelled motion in need of some external legal constraint; the presumed alternative is conceptualized as movement according to desire or personal preference.¹²²

Metaphors are clearly present in legal texts; however, their importance may be underestimated or even deemed illegitimate by some interpreters of law. Winter refers to Judge Robert Bork take on this issue: “Many fear that if there are no constraints judges and other legal actors will be free to impose their personal values or political preferences.”¹²³

The traditional view of most legal scholars has been that metaphor is a useful rhetorical instrument, but is “perilous to reason.”¹²⁴ We are aware that politicians are seeking to persuade us in their speeches, but we may not be so accustomed to assuming that persuasion is integral to the arguments in a Supreme Court opinion. But, of course, if metaphor is present, its rhetorical function is operative, whether or not we are aware of it – in fact, more effectively if we are not aware of its cognitive logic.

Further, if we consider the importance of every Supreme Court decision being seen as a just decision by the citizens who have placed themselves under the rule of law, we would agree there is a crucial rhetorical aspect to each opinion. The governed need to be persuaded that this particular decision accurately reflects the principles of law we have agreed to in our form of democracy.¹²⁵ If the Court fails to convince a large number

¹²² Ibid., 18.

¹²³ Ibid., 7.

¹²⁴ ———, “A Clearing in the Forest,” *Metaphor and Symbolic Activity* 10, no. 3 (1995): 229.

¹²⁵ Winter argues that this aspect of positivism’s legal theory is one of its shortcomings, since it makes no provenance for the larger social world’s affect on law: “The ‘lawfulness’ of law is a function of cultural significance and social motivation.” Winter, *A Clearing in the Forest: Law, Life, and Mind*.

of people of the justness, at least the legality, of its ruling, as is the case, for example, with *Roe v. Wade*, there is a weakening of law.¹²⁶

Metaphor's persuasive function is only one of the essential parts it plays in reasoning, according to conceptual metaphor theory. Not only do metaphors drive persuasion, but they also "make possible comprehension, define patterns of inference, and enable semantic productivity."¹²⁷ How metaphor accomplishes all this is a fascinating and complex process.

Chapter Two will explore the history of the rhetorical use of metaphor, the current state of conceptual metaphor theory, how legal texts, specifically *Lawrence*, can be better understood from doing a conceptual metaphor analysis, and a brief foray into the kind of analysis this would be.

¹²⁶ Agreeing that there is a need to convince citizens of the "justness" of a decision is not foreclosing on the possibility that this persuasion ought not to work when the decision is actually not just. That is another question.

¹²⁷ Winter, "A Clearing in the Forest," 225.

Chapter Two

Conceptual Metaphor Theory: History, Application, and Method

Theories of conceptual metaphor have arisen from the convergence of several disciplines, and methodological applications to rhetorical analysis have followed along with the development of those theories. Certainly cognitive science and cognitive linguistics have been leaders in stimulating the study of metaphor from a new perspective, not merely as a figurative, rhetorical trope but as a constitutive part of the way the human mind works. A representative overview of prevalent theories of metaphor in rhetorical studies and of methodological applications arising out of those theories will allow us to better evaluate the advancement offered by consolidating the traditional and cognitive approaches to metaphor to be used in this study.

Prevalent Metaphor Theories

The burgeoning scholarship on metaphor makes assessing each theory according to the nature and function of metaphor it espouses and the philosophy of language that it assumes a task requiring careful categorization of prevalent theories. Not daunted by the complexity, however, Harvard's Steven Pinker briskly severs the theoretical field into two extreme positions for evaluation. Given the ubiquity of metaphors in all our language, "that even the airiest of our ideas are expressed ("pressed out") in thumpingly concrete

metaphors,”¹²⁸ he concedes that explaining what is going on with metaphor is essential to analyzing the “stuff of thought.” So he describes the “killjoy” theory on one end, and the “messianic” theory on the other, with a view to giving an interesting overview and to advancing a theory somewhere between them.¹²⁹

The “killjoy” theory, as Pinker dubs it, assigns metaphor the function of making an idea more understandable and memorable to its hearers. And over time, as it loses its attachment to the original referent, it becomes a “dead” metaphor, just common stock language with no particular resonance. The “messianic” theory on the other hand claims that all our abstract thoughts are metaphorical allusions to the concrete experiences we have had in our physical and social worlds. Since we think in metaphors, the key to understanding human cognition is to analyze the metaphors in our language.¹³⁰

While Pinker finds both extremes inadequate in accounting for metaphor, neither his critique nor his middle-way solution are themselves sufficiently detailed to adequately evaluate the currents in contemporary metaphor theory.¹³¹ I intend to use a more nuanced topology, (thus, a less flamboyant one than Pinker’s), that is generally acknowledged by metaphor scholars to be fairly comprehensive. Categories for theories of metaphor function and use fall into three sectors: the traditional or Aristotelian, the class inclusive or property attribute, and the conceptual metaphor theories.

¹²⁸ Steven Pinker, *The Stuff of Thought: Language as a Window into Human Nature* (New York, New York: Viking Penguin, 2007), 237.

¹²⁹ *Ibid.*, 238.

¹³⁰ *Ibid.*, 238.

¹³¹ To be fair to Pinker, a complete analysis is not part of his declared purpose.

My goal in this section is to present representative views from each of these sectors, illuminating the nature and function of metaphor and the view of language each of the theories posits. Critiques of each theory are interwoven in the discussion.

Comparison Theories

Aristotelian theory

Interest in metaphor has waxed and waned in the study of languages, often depending on the theory of language current at the time, but for the student of rhetoric the uses of metaphor have been viewed as essential to master. Aristotle defined metaphor as a comparison between two things, an analogy almost identical to the simile, but without the explicit comparison words “like” or “as.” In short, the metaphor is an elliptical simile.¹³² The simile that claims Achilles “leapt on the foe as a lion” is nearly identical to the metaphor used of him, “the lion leapt.”¹³³ Metaphors in the form of “X is a Y” are interpreted as we would an explicit comparison, “X is like a Y.” Despite the importance Aristotle put on using the appropriate metaphor in poetry or prose, he believed metaphor to be largely ornamental and ambiguous, if not deceptive.¹³⁴

Interaction theory

Max Black updated the comparison theory in the 1960’s. Black developed I.A. Richards’ critique of the comparison view. Richards rejected metaphor as a purely verbal

¹³² Dan L. Chiappe, and John M. Kennedy, "Literal Bases for Metaphor and Simile," *Metaphor and Symbol* 16, no. 3&4 (2001): 264.

¹³³ Aristotle, *Rhetoric*, trans. W. Rhys Roberts (Mineola, New York: Dover Publications, Inc., 2004), L1406, 20-26.

¹³⁴ Andrew Ortony, "Metaphor, Language, and Thought," in *Metaphor and Thought*, ed. Andrew Ortony (Cambridge: Cambridge University Press, 1993), 3.

process in favor of “a borrowing between and intercourse of *thoughts*, a transaction between contexts.”¹³⁵ Black elaborated this insight in his interaction theory. Retaining a view of metaphor as comparison, Black emphasized the conceptual shift produced by the interaction between the primary subject and the subsidiary or secondary subject. The metaphor works by “projecting upon the primary subject a set of ‘associated implications,’ comprised in the implicative complex, that is predicable of the secondary subject.”¹³⁶ One interpreter of his theory provides this gloss: “Metaphor involves a simultaneous manifestation of two ideas, interaction of two semantic fields and, as a result, a conceptual shift prompted by the new connotations acquired by the principal subject.”¹³⁷ This interaction between two ideas or thoughts gives metaphor its power and distinctiveness. The metaphor highlights preexisting but unnoticed similarities between the target and base (source) concepts and brings to the forefront new or creative ways of seeing both concepts.

Despite the long pedigree of the traditional, comparison view of metaphor, there are problems it seems not to address. One criticism of the theory given articulate amplification is the question of the selection of relevant properties held in common. Not all properties of one will be found as properties of the other; therefore, the question arises regarding what criteria are used to select relevant properties. Some cognitive theorists call this the frame problem:

The frame problem is the problem of explaining how people can access the relevant information in their knowledge base without engaging in the infinite task of checking everything they know (and the implications

¹³⁵ In Marina Grishakova, "Metaphor and Narrative," *Sign Systems Studies* 29, no. 2 (2001): 504.

¹³⁶ Max Black, "More About Metaphor," in *Metaphor and Thought*, ed. Andrew Ortony (Cambridge Cambridge University Press, 1993), 28.

¹³⁷ Grishakova, "Metaphor and Narrative," 505.

of what they know) for potential relevance to current processing concerns.¹³⁸

Further, some metaphors seem to have no properties in common to compare between the topic (target) and vehicle (base). For example, Sam is a pig¹³⁹ is a metaphor that is not understandable by matching properties common to both. Without knowing this particular Sam, there is no way to know what properties to match; having skin, eyes, being mammals, etc. hardly seems to be a meaningful comparison.¹⁴⁰

A second common criticism notes the asymmetry of many metaphor targets and their bases. If a metaphor is a comparison, then the terms should be reversible, but often they are not. "For example, whereas *Dew is a veil* is a meaningful figurative statement, *A veil is dew* seems nonsensical."¹⁴¹ To save the comparison theory from these critiques, Andrew Ortony has offered his salience imbalance explanation.

Salience imbalance

According to Ortony's analysis, the features of the base that are selected to apply to the target are those that are common to them both, but of higher salience to the base and lower salience to the target. *Encyclopedias are gold mines* is interpreted by selecting the high salience feature of gold mines of yielding great riches that is also shared as a

¹³⁸ Dan L. Chiappe, "Similarity, Relevance, and the Comparison Process," *Metaphor and Symbol* 13, no. 1 (1998): 27.

¹³⁹ The notation developed by Lakoff and Johnson for conceptual metaphors will be used in this essay even when the theorist referenced has not done so, except within direct quotations.

¹⁴⁰ Sam Glucksberg, Mary R. Newsome, and Yevgeniya Goldvarg, "Inhibition of the Literal: Filtering Metaphor-Irrelevant Information During Metaphor Comprehension," *Metaphor and Symbol* 16, no. 3&4 (2001): 279.

¹⁴¹ Brian F. Bowdle, and Dedre Gentner, "The Career of Metaphor," *Psychological Review* 112, no. 1 (2005): 194.

lower salient feature of encyclopedias.¹⁴² The comparison cannot be made in the other direction because the high salient features of encyclopedias, comprehensive information, etc. are not shared by gold mines. This solution seems to take care of both the issue of feature selection and that of irreversibility in the comparison. However, two issues remain unaddressed.

While Ortony's salience-imbalance analysis works on those metaphors whose features are held in common between the base and target, many metaphors are composed of features that are not held in common between the base and target, but are actually non-identical features from different semantic domains.¹⁴³ The metaphor Men are wolves is interpreted as meaning men are predatory like wolves; however, the way we arrive at this interpretation is not explained by Ortony's theory. The feature held in common by men and wolves is not of the same kind: social predation is distinct from carnivorous predation.¹⁴⁴

Further, feature-mapping explanations do not account for the selection from the base of distinctive properties that actually project new information onto the target, as "they do not explain how metaphors can lead to the creation of new similarities, either by establishing matches between nonidentical properties or by generating new inferences about their targets."¹⁴⁵ McGlone vividly illustrates this problem by using literal language. Telling a person who knows nothing about kumquats that a kumquat is like an orange will not activate a "match" between properties of the two domains, but will introduce

¹⁴² Andrew Ortony, "The Role of Similarity in Similes and Metaphors," in *Metaphor and Thought*, ed. Andrew Ortony (Cambridge: Cambridge University Press, 1993), 353.

¹⁴³ Bowdle, "The Career of Metaphor," 194.

¹⁴⁴ *Ibid.*, 194.

¹⁴⁵ *Ibid.*, 195.

new properties into a previously unknown domain.¹⁴⁶ It remains impossible to compare them, since there is no mental representation of the kumquat to match with the orange. Metaphorical statements display a similar dynamic and need to have a theory that explains the projection of new information.

Categorization Theories

Class-inclusion or property attribution models

Against the background of the objections to property comparison models, development of a property attribution approach seeks to address the foregoing critiques. In this model, a metaphor such as *My lawyer is a shark* works as a class inclusion assertion. The hearer is asked to put the topic (lawyer) and the vehicle (shark) into a common category – people and animals that are “vicious, aggressive, unpleasant, tenacious.”¹⁴⁷ The new category formed by this metaphor is a superordinate category (*shark*) that takes its name from the literal vehicle category (shark). This dual-reference function of metaphor distinguishes metaphorical categorization from literal categorization; the vehicle/base refers both to the literal concept and to the metaphorical category (an *ad hoc* category).

To avoid the frame problem, accounting for the selection of relevant properties to apply to the topic, Glucksberg claims the topic is active in the selection process by providing the dimensions that the topic can receive from the vehicle. In short, the

¹⁴⁶ Matthew S. McGlone, "Conceptual Metaphors and Figurative Language Interpretation: Food for Thought?," *Journal of Memory and Language* 35 (1996): 544.

¹⁴⁷ Glucksberg, "Inhibition of the Literal: Filtering Metaphor-Irrelevant Information During Metaphor Comprehension," 279.

metaphor topic “determines which properties of the metaphor vehicle are relevant.”¹⁴⁸ There are two kinds of knowledge required to make sense of a metaphor. Under this account one must know enough about the vehicle concept to know what kind of categories it can exemplify and know enough about the topic concept to assess to what attributive category it can “plausibly and meaningfully” belong.¹⁴⁹

The attributive categorization view of Glucksberg does have some empirical evidence to support it. In some studies it appears that people rely heavily on stereotypical properties of the vehicle concept in interpreting the meaning of a metaphor.¹⁵⁰ However, this account does require a rather demanding response by the hearer who is processing a metaphor. While assessing all the possible categories suggested by the base, the topic concept would have to be scanned to isolate the dimensions of applicability; then all the non-relevant competing categories would need to be suppressed.¹⁵¹ The difficulty or complexity of a cognitive process is not evidence by itself of its implausibility, but there may be more elegant explanations to appeal to in understanding the nature and function of metaphor.¹⁵² Indeed, Bowdle and Gentner believe that Gentner’s structure-mapping theory is just such an explanation.

¹⁴⁸ Ibid., 281.

¹⁴⁹ McGlone, "Conceptual Metaphors and Figurative Language Interpretation: Food for Thought?," 546.

¹⁵⁰ Ibid., 561.

¹⁵¹ Bowdle, "The Career of Metaphor," 195.

¹⁵² Michael S. C. Thomas, and Denis Mareschal, "Metaphor as Categorization: A Connectionist Implementation," *Metaphor and Symbol* 16, no. 1&2 (2001). These authors advance an explanation of how this difficult cognitive process works by outlining a distributed connectionist network depicting semantic memory operating in each individual act of metaphor comprehension.

Structure-mapping

In this model, and in other analogical accounts, the step of forming a metaphorical category from the base concept into which the topic concept is appropriately applied is cut out. Instead, property attribute selection is replaced by the comparison of *relational* structures between the base and topic concepts. It is not required that the objects compared are intrinsically similar, as long as the “system of relations holding among the base objects also holds among the target objects.”¹⁵³ In their “career of metaphor” hypothesis, novel metaphors are interpreted as comparisons, in which the target/topic concept is structurally aligned with the literal base concept. Conventional metaphors have both a literal base and an associated metaphorical category named by the base term, as in “A gene is a blueprint” - the literal base (architectural black and white print) and the metaphorical sense (anything that furnishes a plan).¹⁵⁴

Literal language base

Perhaps the most elegantly simple of all the explanations for metaphorical language comes from Chiappe and Kennedy. They do not believe it necessary to choose between comparison or categorization explanations of metaphor. Rather, their claim is that the figurative forms of simile and metaphor are modeled on literal forms of language.¹⁵⁵ And because these figures of speech are rooted in literal language, their nature and function is modeled on the literal forms of expression they are most like.

¹⁵³Bowdle, "The Career of Metaphor," 196.

¹⁵⁴ Ibid., 199.

¹⁵⁵ Chiappe, "Literal Bases for Metaphor and Simile," 249.

Literal language has a way of classifying (A *P* is a *Q*), and a way of expressing similarity (A *P* is like a *Q*). Figurative language is rooted in the literal forms: metaphor (A *P* is a *Q*) and simile (A *P* is like a *Q*). Since the forms of literal and figurative language are indistinguishable, identifying a figurative claim requires looking for another factor, the loosening of the rules that govern literal language: “In sum, expressions are figurative when the restrictions placed on their literal forms are temporarily eased.”¹⁵⁶ And since both metaphor and simile are claims about common properties, they follow the same surface rules as literal language, with relaxed constraints. Thus the metaphor form is preferred over the simile when similarities of the topic and vehicle are quite high (That is an apple – *Rumors are weeds*); the simile form is preferred when there are few common properties (That is like an apple – *Highways are like snakes*).¹⁵⁷

Chiappe and Kennedy dismiss the claims of Glucksberg and Keysar that the nonreversibility of similes requires a theory of class inclusion to account for this characteristic. Rather they are nonreversible when the relevant properties of comparison are not strongly associated with the topic, or are not obviously accessible from the vehicle. “This does not have to do with a subordinate-superordinate structure.”¹⁵⁸

Of all the theorists examined in both the comparison and categorization camps, Chiappe and Kennedy are the most explicit in their identification of a theory of language that underwrites their notion of figurative language. Nevertheless, a common feature of all these theories is their linguistic rather than cognitive emphasis. In fact, it is probably

¹⁵⁶ Ibid., 251.

¹⁵⁷ Ibid., 249.

¹⁵⁸ Ibid., 274.

not reductionistic to divide the approach to metaphor between the study of metaphor as a linguistic phenomenon and the examination of metaphor as a cognitive structure.¹⁵⁹

Theorists approaching metaphor as a linguistic phenomenon generally fall in the camp of those who assert the existence of literal meaning, and view metaphor as parasitic upon the literal (the literal/figurative distinction).¹⁶⁰ Ortony designates these theorists as nonconstructivists, as they view the goal of language to give a description of the world as it is; metaphor is a rhetorical device not a scientific one. In contrast to this nonconstructivist view, the constructivist approach fuses the metaphorical and literal in language's creative constitution of the world.¹⁶¹

The nonconstructivist view is well illustrated by Chiappe and Kennedy. Glucksberg and Black both assume some aspects of the constructivist approach, as they acknowledge the importance of interpretation in context¹⁶² and the creative power of metaphor. Although most of the contemporary theories of metaphor fall into the linguistic side of this division,¹⁶³ there is a growing interest in the cognitivist perspective. Primarily instigated by the work of Lakoff and Johnson, cognitive, conceptual metaphor theories claim that metaphor is essentially a matter of thought rather than chiefly a linguistic phenomenon.

¹⁵⁹ Betty J. Birner, "Metaphor and the Reshaping of Our Cognitive Fabric," *Zygon* 39, no. 1 (2004): 41.

¹⁶⁰ Marc L. Schnitzer and Mark A. Pedreira, "A Neuropsychological Theory of Metaphor," *Language Sciences* 27 (2005): 32.

¹⁶¹ Andrew Ortony, "Metaphor, Language, and Thought," 2.

¹⁶² For an illuminating discussion of how metaphor generates meaning, see Celeste M. Condit, Benjamin R. Bates, Ryan Galloway, Sonja Brown Givens, Caroline K. Haynie, John W. Jordan, Gordon Stables, and Hollis Marshall West, "Recipes or Blueprints for Our Genes? How Contexts Selectively Activate the Multiple Meanings of Metaphors," *Quarterly Journal of Speech* 88, no. 3 (2002).

¹⁶³ A brief taxonomy of these views is provided by Schnitzer and Pedreira, "A Neuropsychological Theory of Metaphor," 33–34.

Conceptual Metaphor Theory

Lakoff is careful to underline the nature of cognition as both conscious (the way philosophers & linguistics have traditionally understood cognition) and unconscious. Without unconscious cognition there would be no conscious thought, so Lakoff argues that we must allow cognitive theories to help shape our understanding of what the unconscious is doing. The cognitive unconscious operates all our automatic cognitive functions (auditory processing, attention, memory, emotion), shapes our implicit knowledge, our language, and provides the frames for our beliefs.¹⁶⁴

Given the evidence that 95% of our cognitive life is unconscious, we should expect to find empirical evidence that our conscious thought is shaped by it. Lakoff and Johnson believe that conceptual metaphors provide abundant evidence that both thought and the language that expresses it are structured, for the most part, by metaphors.

Making it clear that they acknowledge that some thought is literal, e.g. *The egg is white; I hurt my leg*, their theory claims that bodily experiences are systematized into basic structures or image-schemas that are the basis for conceptual metaphors. There is evidence that there are both in-born and learned image-schemas: “meaning comes, not just from ‘internal’ structures of the organism (the ‘subject’), nor solely from ‘external’ inputs (the ‘objects’), but rather from recurring patterns of engagement between

¹⁶⁴ George Lakoff, and Mark Johnson, *Philosophy in the Flesh: The Embodied Mind and Its Challenge to Western Thought* (New York: Basic Books, 1999), 11-13.

organism and environment.”¹⁶⁵ These experiential gestalts arise as we operate spatially and temporally in our world and direct our focus perceptually in varied directions.¹⁶⁶

Image-schema have internal structure, although they are more abstract than visual images, for example. They are permanent properties of our embodied experience and form the basis for many of our metaphors for abstract concepts. For example, the experience of momentum in our visual, auditory and kinesthetic interactions in daily life gives structure to the following abstract idea: “I was bowled over by that idea. We have too much momentum to withdraw from the election race. I got carried away by what I was doing. Once he gets rolling, you’ll never be able to stop him talking.”¹⁶⁷ Image-schema for MOMENTUM, as well as for BALANCE, PART-WHOLE, OBJECT, SOURCE-PATH-GOAL, FORCE-BARRIER, CONTAINER, give structure to thought and some unity and predictability in our interactions in the world.¹⁶⁸

Some sense of how this cognitive approach differs from the linguistic theories previously explored can be isolated by examining how each theory deals with the problem of the frame,¹⁶⁹ or to put it another way, the charge of circularity.¹⁷⁰ Richie has articulated the charge of circularity against all the theories of metaphor comprehension that rely on comparison, category assignment, or mapping of characteristics between

¹⁶⁵ Ibid., 248.

¹⁶⁶ Raymond W. Gibbs, Paula Lenz Costa Lima, and Edson Francozo, "Metaphor Is Grounded in Embodied Experience," *Journal of Pragmatics* 36 (2004): 1192.

¹⁶⁷ Ibid., 1193.

¹⁶⁸ Winter, *A Clearing in the Forest: Law, Life, and Mind*, 15.

¹⁶⁹ Chiappe, "Similarity, Relevance, and the Comparison Process," 27.

¹⁷⁰ David Richie, "Categories and Similarities: A Note on Circularity," *Metaphor and Symbol* 18, no. 1 (2003).

source and target. Each theory has the same problem in the final analysis: they only make sense after the underlying metaphor has already been identified.¹⁷¹

Chiappe defends the comparison theory in his exposition of the comparison process in interpretation of the metaphor *Jobs are jails*. He says one needs to look for the properties of the vehicle that either match properties of the topic, or that can be attributed to the topic after some process of ‘alignment’ has taken place, and that one is likely to infer that the relevant properties “include the predicates ‘constraining,’ ‘confining,’ and ‘where people are held against their will.’”¹⁷² Richie’s critical point is that this property search or alignment assumes a metaphorical understanding of jobs, since the “sense of confinement and constraint is wholly metaphorical.”¹⁷³

Glucksberg and Keysar’s superordinate category solution comes under the same criticism for its assumption of a metaphorical category that applies to the topic is required before the superordinate category can be identified.

The structure-mapping model solution to the comparison and categorization stalemate fares no better; it too depends on circularity. The system of relations that is said to hold between the target and base concepts is supposed to give rise to the metaphor. However, in the metaphor Richie selects to illustrate the problem, Men are wolves, *mapping* the relations *men prey on women* onto *wolves prey on animals* can only happen after “the metaphorical relation between [stalk, kill, eat] and [seduce, have sexual intercourse with, abandon] has been established (and there is nothing at all intuitively obvious about this relation).”¹⁷⁴

¹⁷¹ Ibid., 49.

¹⁷² Chiappe, "Literal Bases for Metaphor and Simile," 269.

¹⁷³ Richie, "Categories and Similarities: A Note on Circularity," 50.

¹⁷⁴ Ibid., 51.

In summary, the comparison of characteristics of the target to the base, the categorization of the target exemplified by the base, and the mapping of features or structures from the base to the target, all “assume a comparison that is already metaphorical.”¹⁷⁵ In order to avoid this circularity, the interpretation of a metaphor must depend on connecting the target to the base in a way that does not assume what it is trying to explain. Conceptual metaphor theories attempt to do this by grounding metaphors in experience. We experience the target concept in some way in terms of the base concept, and the conceptual metaphor is an instantiation of this.

Embodied realism

Mark Johnson and George Lakoff are unequivocal in their insistence on the necessity of a theory of embodied realism to give an accurate description of human cognition and language, in particular of metaphor: “You cannot simply peel off a theory of conceptual metaphor from its grounding in embodied meaning and thought.”¹⁷⁶ Their view of embodied realism is best developed in *Philosophy in the Flesh* (1999)¹⁷⁷ and will guide my brief outline of its essential features.

In its most essential formulation, embodied realism is most like the direct realism of the Greeks, with one important modification. Like Greek direct realism, embodied realism affirms that there is a material world; there is an account of how to function well in it; there is no mind-body gap. But unlike direct realism, Lakoff and

¹⁷⁵ Ibid., 53.

¹⁷⁶ Mark Johnson, and George Lakoff, "Why Cognitive Linguistics Requires Embodied Realism," *Cognitive Linguistics* 13, no. 3 (2002): 245.

¹⁷⁷ Lakoff, *Philosophy in the Flesh: The Embodied Mind and Its Challenge to Western Thought*. Chs. 3, 6.

Johnson's form of embodied realism denies that we can have a view of the world as an "absolutely" unique, objective structure that is "absolutely" objectively correct.¹⁷⁸

The relativism inherent in this view is a limited one. Unlike the social constructivist, post-modernist version of relativism that relegates all claims to knowledge to the category of power assumptive assertions, embodied realism is much more modest. It is relativist in that it acknowledges that concepts change over time, relative to cultures and social conditions. It also affirms that knowledge is relative to the nature of our bodies and brains. What keeps it a realist position, however, is its claim to give an account of real knowledge in the sciences and in our everyday world based on two sources: directly embodied concepts and on primary metaphors that extend the directly embodied concepts into the abstract, theoretical domains.¹⁷⁹

The traditional form of realism that has dominated much of Western philosophy since Descartes - and has been the view underwriting the analytic philosophy upon which much of our linguistic and metaphorical theories have rested - differs with Greek direct realism in that it posits a mind-body gap. This gap must be bridged in some way, of course, if we are to know the world correctly. This is attempted by the theory Lakoff and Johnson identify as "symbol-system realism," which posits a correspondence between our abstract symbols and what they refer to in the world. Stated simply, "*A statement is true when it fits the way things are in the world. It is false when it fails to*

¹⁷⁸ Ibid., 96.

¹⁷⁹ Ibid., 96.

*fit the way things are in the world.*¹⁸⁰ Problematically, the way this *fit* happens is never accounted for in any scientific, verifiable way.¹⁸¹

Contrast the symbol-system realist account of truth with the embodied realist version: “A person takes a sentence as ‘true’ of a situation if what he or she understands the sentence as expressing accords with what he or she understands the situation to be.”¹⁸² Embodied realism, say Lakoff and Johnson, provides a more robust account by designating the three levels of concepts in human understanding that cognitive scientists have identified, which correspondence theories fail to do. The three levels of embodiment of concepts are categorized as the neural, the phenomenological, and the cognitive unconscious.

The neural level embodiment of concepts and cognitive structures is described as built up from the inherent properties of neurons.¹⁸³ In mind-brain studies, Hebb described how these structures can be built up. The Hebb Rule, an essential formulation of this process, states:

When an axon of cell A is near enough to excite B and repeatedly or persistently takes part in firing it, some growth process or metabolic change takes place in one or both cells such that A’s efficiency, as one of the cells firing B, is increased.¹⁸⁴

¹⁸⁰ Ibid., 98.

¹⁸¹ Ibid., 99. The Fregean theory that abstract entities which are independent of both body and mind pick out the correct referents, or the Kripke–Putnam theory that historical individuals point out the referent and give it a name that continues over time, are both assuming a gap between the world and the mind, and never give an account of how either of the assumed processes is done.

¹⁸² Ibid., 106.

¹⁸³ Marc L. Schnitzer, and Mark A. Pedreira, "A Neuropsychological Theory of Metaphor," *Language Sciences* 27 (2005): 36.

¹⁸⁴ Quoted by Schnitzer in Ibid., 37.

This process which Hebb calls synaptic bonding is the basis for the assembly of cells that continue to persist together after the “triggering event” and becomes the “neuropsychological representation of that event.”¹⁸⁵ This is a description of a basic metaphorical structure. It is nonconceptual but cognitive. It is thought to explain the formation process of four fundamental metaphors (perceptual-perceptual, cross-modal, movement-movement, and perceptual-affective relations)¹⁸⁶ that connect one domain of experience to another domain of experience.

Much empirical evidence is accumulating for these early metaphor structures. Recent experiments, for example, have demonstrated that both real and imagined body movements consistent with metaphorical phrases “facilitate people’s immediate comprehension of these phrases.”¹⁸⁷ One researcher in political science and psychology, Jay Seitz, has no hesitancy in joining some geneticists in proposing “that humans have specialized neural subsystems for metaphoric understanding and production that are fine-tuned by experience and continuously modulated by underlying genetic mechanisms (Marcus, 2004).”¹⁸⁸

The second level of embodiment of concepts according to Lakoff and Johnson is the phenomenological. This level includes all we are consciously aware of: our own mental and emotional states; the movement of our body and its interactions with the environment; our social interactions with others, including intellectual or cognitive

¹⁸⁵ Ibid. , 37.

¹⁸⁶ Jay A. Seitz, "The Neural, Evolutionary, Developmental, and Bodily Basis of Metaphor," *New Ideas in Psychology* 23 (2005): 75.

¹⁸⁷ Nicole L. Wilson, and Raymond W. Gibbs, Jr., "Real and Imagined Body Movement Primes Metaphor Comprehension," *Cognitive Science* 31 (2007): 721.

¹⁸⁸ Seitz, "The Neural, Evolutionary, Developmental, and Bodily Basis of Metaphor," 76.

undertakings; colors, tastes, smells, visual and auditory experiences. It also assumes the next level of embodiment, the cognitive unconscious, in order to make possible its conscious experience.¹⁸⁹

The third level of embodiment of concepts is that of the cognitive unconscious. In traditional philosophy and linguistics, *cognitive* refers to the conceptual, propositional structures or the rule-governed operations performed on these structures. Also, as we have seen, in the traditional view the understanding of *cognitive* meaning is “truth-conditional” meaning, that is, based on reference to things in the external world.

In contrast, cognitive science uses *cognitive* in a much broader sense, describing the mental structures and operations involved in “language, meaning, perception, conceptual systems, and reason,” as well as the sensorimotor system that supports these structures and operations.¹⁹⁰

The cognitive unconscious is believed to constitute 95% of all thought, unnoticed and indeed inaccessible to conscious thought. Beneath our conscious awareness and control of our thoughts and feelings, for example, is the cognitive unconscious operating like, as Lakoff and Johnson’s metaphor calls it, “a ‘hidden hand’ that shapes how we conceptualize all aspects of our experience.”¹⁹¹

This “hidden hand” of the unconscious shapes how we automatically and unconsciously understand what we experience; it is our unreflective common sense. And

¹⁸⁹ Lakoff, *Philosophy in the Flesh: The Embodied Mind and Its Challenge to Western Thought*, 103. An especially persuasive example of the interactions between conscious domains is provided by a study prompted from one of Neruda’s love poems on the connection between hunger and desire. See Gibbs, “Metaphor Is Grounded in Embodied Experience.”

¹⁹⁰ Lakoff, *Philosophy in the Flesh: The Embodied Mind and Its Challenge to Western Thought*, 12.

¹⁹¹ *Ibid.*, 13.

importantly for application to my study, Lakoff and Johnson claim that much of our traditional view of reason as an autonomous faculty must be recast in light of the part the cognitive unconscious plays in shaping our conscious thought. Our bodies, brains and interactions in the world combine to give us a mostly unconscious foundation for our sense of what is real.¹⁹²

All three levels of description and explanation of our embodied mind, the neural, phenomenological, and cognitive unconscious, are required to give a comprehensive account of how cognition works, although in particular instances only one level may be required. This understanding of embodied cognition allows conceptual metaphor theory its unique power in understanding texts, and especially in analyzing persuasive texts.

Critical responses.

Critics of conceptual metaphor theory observe that there are conceptual metaphors that seem to have no obvious experiential correlations. One such metaphor commonly cited is theories are buildings. McGlone uses this metaphor to point out the supposed circularity of Lakoff's claim that metaphors transcend their linguistic manifestation. *How* do we know, McGlone asks, that people think of theories in terms of buildings? "Because they use building-oriented terminology to talk about theories. *Why* do people think about theories in terms of buildings? Because they use building-oriented terminology to talk about theories."¹⁹³ He charges that only linguistic evidence is used to support the CM theory and is therefore circular.

¹⁹² Ibid., 17.

¹⁹³ M.. McGlone, "What Is the Explanatory Value of a Conceptual Metaphor?," *Language & Communication* 27, no. 2 (2007): 115.

But there is evidence that complex metaphors like theories are buildings are not the most basic level metaphors; rather, they are built up from more primary metaphors that *are* grounded in our bodily experience. From strong correlation of experiences in everyday life, primary or ‘primitive’ metaphors are created in thought. The innovator of this theory of primary metaphors explains:

Primary metaphoric associations stored in memory, which are ultimately based on correlations in experience, provide a means of linking objects in source and target spaces, which would otherwise not be mapped onto one another.¹⁹⁴

There is no circularity here, because the source domain for the metaphor is the body’s sensorimotor system. Gibbs explicates the process by which the primitive metaphors can combine to make the complex metaphor. Combining two primitive metaphors, persisting is remaining erect and structure is physical structure, enables a compound theories are buildings that “nicely motivates the metaphorical inferences that theories need support and can collapse, etc, without any mappings such as ‘that theories need windows.’”¹⁹⁵

Predictably there are both in-house modifications and skeptical dismissals of the conceptual metaphor theory. The great advantage to date that it has over the others is the mounting evidence from various cognitive sciences that the mind is embodied in ways just beginning to be calculated.¹⁹⁶ The bodily basis of metaphor has much evidence to support its reliability in grounding the connections between direct experiences, literal and figurative thought, and language.

¹⁹⁴ Joseph Grady, "Primary Metaphors as Inputs to Conceptual Integration," *Journal of Pragmatics* 37 (2005): 1603.

¹⁹⁵ Gibbs, "Metaphor Is Grounded in Embodied Experience," 1198.

¹⁹⁶ For example, accounting for the affective component of metaphor is easily done in CM theory. See Pradeep Sopory, "Metaphor and Affect," *Poetics Today* 26, no. 3 (2005a).

Further, even its critics who are not ready to grant the scientific studies due weight, are quick to acknowledge the practical benefits that are accruing from the theory. Specifically, McGlone points out the importance of CM theory for human communication studies. He agrees that conceptual metaphor is a “principle device of lexical innovation” and that abstract concepts and emotions can be analyzed from some complex conceptual metaphors, such as love is a journey.¹⁹⁷

So as evidence grows to support the theory, there is no reason to caricature it as a saving explanation for everything about language. It seems that the conceptual metaphor theory provides enough grist for the mill of understanding thought and communication as it is. And more seems to be coming.

Comparison of Metaphor Studies

To set off conceptual metaphor’s superiority to more traditional approaches, several remarkable studies by excellent rhetorical critics will be helpful in contrasting methods and theoretical assumptions. Three studies rarely ignored when discussing metaphor in rhetorical analysis are Osborn’s elaboration of the family of light-dark archetypal metaphors,¹⁹⁸ Ivie’s analysis of metaphor as the key rhetorical invention of the Russian “threat,” during the Cold War,¹⁹⁹ and Condit, et. al’s explanation of why replacement of the “blueprint” metaphor with the “recipe” metaphor did not achieve the

¹⁹⁷ McGlone, "What Is the Explanatory Value of a Conceptual Metaphor?," 123.

¹⁹⁸ Michael Osborn, "Archetypal Metaphor in Rhetoric: The Light-Dark Family," in *Readings in Rhetorical Criticism*, ed. Carl R. Burgchardt (State College: Strata Publishing, Inc., 1967).

¹⁹⁹ Robert L. Ivie, "Metaphor and the Rhetorical Invention of Cold War 'Idealists'," in *Readings in Rhetorical Criticism*, ed. Carl R. Burgchardt (State College: Strata Publishing, Inc., 1987).

expected results in genetic discussions.²⁰⁰ As useful and rhetorically sophisticated as these studies are, they all share the same assumption: metaphor is a rhetorical tool, and as such can be studied semantically.²⁰¹ And if Lakoff and Johnson are right about the defects of symbol-system realism, this assumption causes them to miss the embodied cognitive underpinnings of the metaphors they study.

Ivie's Idealists

Concepts are evaluated and compared, of course. However, a level of analysis is missing that affects the work significantly. A brief look at the study by Ivie illustrates what the absence of embodied realism's view of language (metaphor) produces.

After an elegant cataloguing of three Cold-War idealists' failed attempts to recast the American negative image of Russia into a favorable one, Ivie is able only to conclude that their metaphors were "self-defeating largely because they have promoted a reversal, rather than transcendence of the conventional image of a barbarian threat to civilization."²⁰²

He sees their failure as a strategic error; they failed to keep up the image of America as the righteous one and the Russians as the enemy, attacking the image of America instead. "Although the time for rhetorical transcendence has arrived, the mechanism of invention has yet to be discovered. . ." ²⁰³ This failure has occurred because

²⁰⁰ Condit, "Recipes or Blueprints for Our Genes? How Contexts Selectively Activate the Multiple Meanings of Metaphors."

²⁰¹ Philip Eubanks, and John D. Schaeffer, "A Dialogue between Traditional and Cognitive Rhetoric: Readings of Figuration in George W. Bush's "Axis of Evil" Address," *Rhetoric Society Quarterly* 34, no. 2 (2004): 57.

²⁰² Ivie, "Metaphor and the Rhetorical Invention of Cold War 'Idealists'," 362.

²⁰³ *Ibid.*, 365.

they extended self-defeating metaphorical concepts without “sufficient awareness of their operational significance.”²⁰⁴ It seems we are expected to conclude with him that if they had just been smarter about how metaphors are to be used, they would not have failed to convince their audience.

Ivie’s conclusion appears to follow from symbol-system realism’s notion of language and its relation to the world as one of correspondence. The three cold war idealists are thought to have failed because they applied words and metaphorical concepts to the world in a way that trapped them into a position that offended others. An embodied realist’s conceptual metaphor analysis would have, at the very least, enabled the analyst to acknowledge and interrogate the metaphors the three idealists used in their arguments for the essential link between the experiences that underwrote them, both socially and physically, and the experiences informing their audiences. But Ivie is left looking for the yet-to-come “mechanism of invention”²⁰⁵ that would be able to help Americans see Russians as friends instead of enemies, pretty much ignoring the experience of Americans to the contrary (however much that experience is to be decried as limited, short-sighted, manipulated, etc.).

Another way of identifying what is missing in Ivie’s traditional rhetorical analysis is that it ignores the “deep grammar”²⁰⁶ of human experience in its search for the right

²⁰⁴ Ibid., 365.

²⁰⁵ In comparative religions research one method of looking for the equivalent concept in another religion is to take a term in the source religion and look for its equivalent in the target one. Slingerland calls this “word fetishism.” In Edward Slingerland, “Conceptual Metaphor Theory as Methodology for Comparative Religion,” *Journal of the American Academy of Religion* 72, no. 1 (2004b): 5.

²⁰⁶ Slingerland uses Deutsch’s insight that the comparative religionists who seek commensurability from one culture to another by searching for specific terminology or similar philosophical concepts miss this important level in between. In Slingerland, ———, “Conceptions of the Self in the Zhuangzi: Conceptual Metaphor Analysis and Comparative Thought,” *Philosophy East & West* 54, no. 3 (2004a): 323.

words. The conceptual metaphors that arise out of common human embodied experience allow us to connect with other cultures and with other ideological commitments within our own cultures; those rhetorical inventions are not difficult to find when sought.

Osborne's Light-Dark

Osborn's study of archetypal metaphors provides another illustration of how abstracted from a particular embodied experience traditional rhetorical approaches tend to be. Despite the origin of the light-dark family of archetypes in the world of nature and our human experience of them, when Osborn looks at the issue of motivational attachments that surround an archetype, he poses a question that ignores the context of that experience, cultural or individual: "Might one construct inductively from the study of archetypes a system of motives particularly relevant to rhetorical discourse, rather than adopting by authoritative warrant some general list of 'impelling motives'?"²⁰⁷

Certainly this criticism is not meant to denigrate an unusually fine rhetorical study, but rather to point out a limitation inherent in the assumptions brought to the study of metaphor in this tradition. The approach of conceptual metaphor theory would be to explain how, as Richie has observed, "the crucial, salient aspects of an experience (emotional, social, perceptual, etc.) associated with the target can be evoked by linking it to the source."²⁰⁸

Condit's Blueprint

Acknowledging the importance of experience, at least Condit and her research team's study of the metaphors "blueprint" and "recipe" in genetics discourse

²⁰⁷ Osborn, "Archetypal Metaphor in Rhetoric: The Light-Dark Family," 347.

²⁰⁸ Richie, "Categories and Similarities: A Note on Circularity," 53.

highlights, rather than backgrounds, the context of metaphor use. Their adoption of philosopher of language Josef Stern's analysis of metaphor grounds them in the symbol-system realist or analytic tradition in which metaphor is a semantic feature of language.²⁰⁹ A core assumption Stern makes in his analysis is the importance of context as a filtering process in the structure of metaphor. This assumption sets his theory apart from acontextual theories and allows Condit to assume that specificity of social context will strengthen the reliability of their study.²¹⁰

In fact, what seems to have happened in the study (as in real discourse produced on genetics) is that context was such a strong variable that it overrode all potential prior meanings:

Even relatively pedestrian metaphors such as "recipe" and "blueprint" have a broad range of potential meanings for audience members, and the activation of some of these meanings rather than others depends on complex contextual relationships.²¹¹

The acknowledgement that the formation of metaphor schemas is influenced by "valence, prior familiarities, and the availability of concrete images"²¹² only underlines the inadequacy of the method of metaphor analysis that ignores the importance of social and experiential context and its impact on and shaping by cognitive factors.

In the process of bringing this analysis of embodied realism's contributions to conceptual metaphor theory to a close, one more reference to a rhetorical metaphor analysis may help underline how easily Lakoff and Johnson's critics underestimate the

²⁰⁹ See Josef Stern, "Metaphor, Literal, Literalism," *Mind & Language*, 21, No. 3 (June 2006): 243-279.

²¹⁰ Condit, "Recipes or Blueprints for Our Genes? How Contexts Selectively Activate the Multiple Meanings of Metaphors," 304-305.

²¹¹ *Ibid.*, 321.

²¹² *Ibid.*

wide range and depth of cognitive understanding afforded by conceptual metaphor analysis. In a recent study of how creative and idiomatic political metaphors are related, authors Billig and MacMillan pay tribute to Lakoff's "notable contributions" to the field of metaphor theory. They then go on to suggest that his theory of metaphor is "too simple to account for the complex, rhetorical processes by which a metaphor might pass from a striking, novel comparison into an unthinking idiom."²¹³

They rightly understand the need to acknowledge the pragmatics of language use across time if one is to account for what some have called a "dead metaphor, and what they call an "idiom." They choose to use a model based on symbol-system realism, Glucksberg's property attribution model for their "complex" study, thinking they can explain the idiom "smoking gun," in its passage from metaphor to idiom. They understand this process to be driven not by experience but by pragmatics. As they see it, when there is no lexical term available for an idea, what was once a metaphorical term is used as a lexical one; in this case, a smoking gun.

In order to give a pragmatic account of this metaphor/idiom, the authors have subjected themselves to the criticism noted above: there is no reliable way of showing how some properties or characteristics of the base are selected to be transferred to the topic and not others. And we will see later in this chapter that it is not necessary to discount the experiential, embodied nature of metaphor in order to include the pragmatic and linguistic aspects of metaphor.

Legal Language and Metaphor

The topic of metaphor does not usually lead anyone to jump to the field of law for examples. Rather we assume one would find a more fecund ground for their discovery in

²¹³ Michael Billig, and Katie MacMillan, "Metaphor, Idiom and Ideology: The Search for 'No Smoking Guns' across Time," *Discourse and Society* 16, no. 4 (2005): 460.

poetry, speeches, good fiction writing. And perhaps that is so. However, legal language and metaphor have a rather deep connection to each other, not least because metaphor is an essential part of our cognitive process and our language.

A largely positivistic approach to the law may include an assumption that a legal opinion will have no or few metaphors, only good logic. A critical realist approach to law may react by denying any truth to a metaphor when it is found, only rhetorical power. Both approaches neglect the imaginative nature of reason and by extension of legal reasoning. The case for the use of conceptual metaphor analysis in legal texts is admirably made by Steven Winter. A few of his justifications for looking at the imaginative aspect of the law can reassure one of the validity of applying conceptual metaphor analysis to the opinion in *Lawrence*.

A base line assumption Winter makes is that the law is a product of the human mind, and as such, any knowledge we have of how the human mind works will improve our understanding how the law works.²¹⁴ Cognitive theory helps explain how the legal profession does what it does. It also makes possible a solution to the theoretical division in legal theory regarding the nature of the law.

The debate between conventional legal theory and critical legal theory has defined the past century in legal studies. The former argues that general concepts and rules can give a logical, reliable way to judge cases, and the latter perspective argues for a radical indeterminacy in finding the facts and in applying rules. The hope of finding some kind of restraint external to the judge's discretion was challenged by the skepticism of critical realist's like Duncan Kennedy.

As a federal district court judge and Harvard law professor Kennedy has applied the insights of empirical and social facts to find the law radically indeterminate. As he

²¹⁴ Steven L. Winter, *A Clearing in the Forest: Law, Life, and Mind*, xii.

baldly explained his judicial process, “I have to ‘move’ them (decided cases) by restating their facts and their holdings until they fit my new formulation of the general rule.”²¹⁵ He unapologetically embraces the act of judging as a political act: “It so happens that I see myself as a political activist.”²¹⁶

The debate between an analytic logic that promises determinate outcomes from correctly interpreted principles and subjective, political, and unconstrained (or minimally so) reasoning can be reframed. Cognitive theory requires us to look at human rationality as imaginative, associative and analogical.²¹⁷ It is not necessary to abandon all external restraints or try to unpack legal rules to get the right verdict if one is no longer enthralled by a rationalist model, either of the foundationalist variety or the anti-foundationalist reaction.²¹⁸ As a production of the human mind, law “displays all the regularities both of structure and of context-dependence predicted by cognitive theory.”²¹⁹ The constraints under which judges and other lawmakers operate include their own thought processes, the historical-cultural situation they are in, and most importantly of all, the persuasive purchase any particular decision has. Another way of putting this may start with acknowledging the critical realist’s insight that there is some contingency in every case. As Llewellyn saw it: “[I]f there is the slightest doubt

²¹⁵ Duncan Kennedy, “Freedom and Constraint in Adjudication: A Critical Phenomenology,” 36 *Journal of Legal Education*, 518 (1986): 531.

²¹⁶ *Ibid.*, 521.

²¹⁷ Winter, “A Clearing in the Forest,” 227.

²¹⁸ Steven Winter, *A Clearing in the Forest: Law, Life, and Mind*, 10.

²¹⁹ *Ibid.*, 314.

about the classification of the facts – though they be undisputed – the rule cannot decide the case; it is decided by the classifying.”²²⁰

But before the indeterminacy advocates declare victory, the constraint upon the judge that does not come from his or her own will or political bent must be acknowledged. As Winter reasons:

[T]he one thing judges cannot bracket is the vital elements of their own thought processes. Consequently, their thought processes will reproduce all the regularities of social categorization, including, most importantly, the phenomena of prototype effects, motivation, framing, and other gestalt processes.²²¹

Classification is grounded in physical and social experience, not plucked out of midair to suit the whim of the judge. Further, judges must also persuade, both their colleagues and the public who is enjoined to obey their rulings. Winter underlines the importance of persuasion in legal issues by pointing out that all along the process, participants are trying to persuade each other to take a particular action based on a particular interpretation of the events and the relevant legal norms.²²²

Persuasion is not the antithesis of reason, as its detractors charge, but it works only to the extent that it can appeal to the shared values and perspectives of those it seeks to persuade. This intersubjective process hardly leaves room for subjective and arbitrary decisions on the judge’s part, but depends on the public’s perception of the

²²⁰ Karl N. Llewellyn, “The Constitution as an Institution,” *34 Columbia Law Review*, 1, 8 (1934), quoted in Steven L. Winter, “Making the Familiar Conventional Again,” 99 *Michigan Law Review* 1607 (2001): 1635.

²²¹ Steven L. Winter, “Symposium Ideology and Adjudication I: The Politics of Constraint: The Next Century of Legal Thought?,” *22 Cardozo Law Review* 747 (2001): 755.

²²² Winter, *A Clearing in the Forest: Law, Life, and Mind*, 317.

fairness, the legality of the decision.²²³ For this reason, even Supreme Court Justices must “write like advocates.”²²⁴

If indeed Supreme Court Justices Kennedy and Scalia are advocating in the *Lawrence v. Texas* opinion and dissent, then understanding the rhetorical means that are employed, not only the legal rules and precedents, is essential. Legal analysis needs the addition of rhetorical analysis; the “what was decided” needs the “how it was decided.” So we turn to the method of analyzing the argument between the two Justices, exploring the promise of conceptual metaphor analysis.

Method

It is not immediately clear from the surface of the opening text in the *Lawrence* opinion why metaphorical analysis would be helpful in understanding the argument. If all one knows about metaphor is the traditional gloss on it, that it is an ornament, nonessential to the content but useful as a rhetorical device that makes it more memorable and persuasive, it would be easy to miss the metaphors. The Opinion of the Court in *Lawrence v. Texas* delivered by Justice Kennedy begins the argument to overturn the Texas 14th District Court of Appeals upholding as constitutional the Texas “Homosexual Conduct” law by the following assertions:

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.

²²³ *Ibid.*, 322.

²²⁴ Winter, “Making the Familiar Conventional Again,” 1636.

The Opinion concludes, in part, by making these applications:

The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Casey, supra*, at 847. The Texas statute furthers no legitimate state interest that can justify its intrusion into the personal and private life of the individual.

There appears to be no ornamental language in Justice Kennedy's argument to qualify as metaphor. Upon closer scrutiny, however, with the tools of cognitive metaphor theory in hand, a great many structural metaphors can be isolated.

The Court's opinion has been notoriously controversial because it seems to have no clearly defined line of constitutional reasoning that leads up to the final ruling. I hope to show that there is a trajectory of thought instantiated in the conceptual metaphors used to advance the arguments from *Bowers v. Hardwick* (1986) to *Lawrence v. Texas* (2003).

Conceptual Metaphor Analysis

There are helpful rhetorical studies that incorporate many aspects of what I envision my own study should include. One of the most comprehensive research projects done on the affect of metaphor in public discourse on the shape of public policy is Santa Ana's *Brown Tide Rising*.²²⁵

To illustrate the shift in public attitudes toward Latino's in the 1990's in California, Santa Ana chose texts on any topic from the *Los Angeles Times* from 1992-1998, specifically during public discussion of three propositions with the greatest impact

²²⁵ Otto Santa Ana, *Brown Tide Rising: Metaphors of Latinos in Contemporary American Public Discourse* (Austin: University of Texas Press, 2002).

on Latinos: #187, #209, & #227. The database he and his team compiled consisted of all the metaphors, with the exception of foundational metaphors,²²⁶ found in those texts. Teams who crosschecked each other's mappings of target and source domains did analysis guided by the conceptual metaphor theory developed by Lakoff and Johnson. The teams worked for consensus in their interpretations until the "typological dimensions of the source conceptual domains became clear."²²⁷

The team added to this synchronic corpus of texts method a diachronic study on race and affirmative action comparing the Civil Rights discourse of the 1960's to the period of the public discourse on Proposition 209, both from the *Los Angeles Times*. Metaphors were then grouped into two categories, one depicting the process of immigration and the other one the immigrant as subject. The dominant metaphor for immigration was immigration as dangerous waters; for the immigrant it was immigrant as animal. Dominant, secondary and occasional metaphors were grouped according to frequency of use as well as type. Using this conceptual metaphor analysis, Santa Ana was able to support his critical discourse analytic approach to presenting the public rebuke he believes the Latino community suffered in the 1990's.²²⁸

My own study does not require such an extensive gathering of textual data. Since the written opinion of the Court is in itself a self-contained text, it can be analyzed with or without comparison to contemporaneous texts (*amici curiae* briefs, e.g.) or to previous texts (earlier Supreme Court opinions), beyond references made to these texts within the opinion under scrutiny. Nor does the text require justification of its social

²²⁶ Ibid., 57. He omitted very general metaphors, purposes as destinations, states as locations, events as actions, etc., and orientational metaphors that could be found in all discourses.

²²⁷ Ibid., 58.

²²⁸ Ibid., 7.

significance and political influence. Every opinion of the Supreme Court has both significance and influence to be almost endlessly evaluated.

What can be emulated from Santa Ana's study is an approach to the text that expects to find cognitive metaphor operative in natural language use but does not assume particular metaphors *a priori*. In this approach, the text is allowed to speak its own language and is not a set-up by the analyst to prove her theory.

An *a priori* approach is not always unwarranted, of course. For instance, Alan Cienki puts Lakoff's political metaphors model to the test in an analysis of a 41,000-word corpus of televised debates between George W. Bush and Al Gore in the 2000 presidential race.²²⁹ Lakoff has proposed that left wing political values are expressed through an idealized model of the family called the "Nurturant Parent" (NP); similarly, right wing political values are consistent with the "Strict Father" (SF) model.

In the SF model, family is the traditional father-led nuclear family, with mother supporting his authority and children expected to respect their parents' authority and become self-reliant. Important metaphors in this model emphasize strength in a difficult world: morality is strength, being good is being upright, morality is purity.

In the NP model, the family is defined as preferably two parents, but possibly only one. The family works as a team and the most important values are about being cared for and cared about. Metaphors include morality is empathy, moral action is nurturance, moral growth is physical growth.²³⁰ According to Lakoff, both models are connected by a common metaphor nation as family.

²²⁹ Alan Cienki, "Metaphor in the 'Strict Father' and 'Nurturant Parent' Cognitive Models: Theoretical Issues Raised in an Empirical Study," *Cognitive Linguistics* 16, no. 2 (2005): 282. Cienki bases his understanding of these two metaphors on Lakoff's *Moral Politics: How Liberals and Conservatives Think*, 2nd ed. (Chicago: University of Chicago Press, 2002).

²³⁰ *Ibid.*, 281.

Cienki proposed that the debates would include many metaphors reflective of the NP and SF moral models. Lakoff's conceptual metaphor theory argues for the ubiquity of metaphor; and while he acknowledges that his model of the two family systems is theoretical and has little linguistic data to verify it, metaphors reflecting these two models should show up in political discourse between the leaders of the two opposing visions of applied moral action.²³¹

Cienki's study results did not support these assumptions. Metaphorical expressions that could be linked to either of these models were relatively scarce, although entailments of the metaphors were more apparent (including both metaphorical and non-metaphorical expressions).²³² Cienki concludes that the "paucity of expressions" in the debate that reflect the metaphors predicted by Lakoff's model may mean that conceptual metaphor should be looked at as "something which a cultural group ("supra-individual") has a mastery of,"²³³ rather than viewed in any one speaker within the culture.

Certainly I hope for more than a mere "paucity of expressions" in the Court's opinion that instantiate the influence of cognitive metaphor on public thought.²³⁴ But Cienki's acknowledgement that conceptual metaphor should be viewed within the language of a culture group rather than through one speaker I believe will be born out in

²³¹ Cienki appends a list of Lakoff's SF and NP metaphors used in his analysis to this article, 305-307.

²³² Cienki, "Metaphor in the 'Strict Father' and 'Nurturant Parent' Cognitive Models: Theoretical Issues Raised in an Empirical Study," 303.

²³³ *Ibid.*, 305.

²³⁴ I believe a focus on identifying primary metaphors that are used to construct the more complex blends will foreclose the experience Cienki describes. For an analysis of this process, see Grady, "Primary Metaphors as Inputs to Conceptual Integration."

analyzing a Supreme Court opinion. And there is some precedent in anticipating this outcome; Eubank's 2005 study of globalization texts assumes that a broad consideration of conceptual metaphors is necessary. He acknowledges that cognitive metaphor theory is showing that "cognitive figures may operate tacitly; that they are conceptual, independent of particular expressions; and that they are rooted in bodily and cultural experience (Lakoff & Johnson, 1980, 1999)."²³⁵

Eubanks approaches his study looking for metaphors that support the phrase "*corporate rule*" as it occurs in globalization discourse. He collected texts that "broadly illuminated" this rhetorical motif, with the aim of understanding the conversation that was taking place around globalization. Eubanks distinguishes his study from most rhetorical ones in his addition of cognitive structures to the traditional topics (logos, pathos, ethos, style, identification). He considers the texts in a three- way analysis of the conceptual figures' structure, entailments, and systematicity; of the figures' rhetoricity; and of their discursive environment.²³⁶

An analysis of this kind, Eubanks believes, can only be done by a sustained reading of the texts, and depends on the sense-making abilities of the analyst who is committed to reporting on the "understandings of participants in a discourse" rather than emphasizing the insights of the interpreter.²³⁷ For example, Justice Scalia has certainly invited the interpreter to inspect the use of "culture war" in his discourse, and thereby has opened the door to critique the discourse of his rhetorical opponent, Justice

²³⁵ Philip Eubanks, "Globalization, "Corporate Rule," And Blended Worlds: A Conceptual --Rhetorical Analysis of Metaphor, Metonymy, and Conceptual Blending," *Metaphor and Symbol* 20, no. 3 (2005); 174.

²³⁶ *Ibid.*, 176.

²³⁷ *Ibid.*, 195.

Kennedy. The interpreter has no fear of imposing this reading on the text, only the challenge of carefully argued support for observations and conclusions drawn.

Another aspect of Eubank's method that is especially compelling, and applicable to my own study, is his intentional focus on and use of "licensing stories" that he argues are necessary to ground conceptual metaphor in personal and cultural experience. In the instant case, the narratives of globalization's exploitation of the poor underwrite the metaphor corporations are governments. In applying this to my own study of legal texts, some additional justification may be in order.²³⁸

Licensing stories as described by Eubanks are "narratively structured representations of an individual's ideologically inflected construal of the world."²³⁹ While various mappings of a metaphor may be possible, only those mappings that seem congruent with how we believe the world works will seem apt.²⁴⁰ Eubanks claims his studies support the notion that metaphors always come with "ideological freight."

The analysis of *Lawrence* will assume that legal texts are not exempt from "ideological freight, and a rhetorical analysis of the cognitive metaphors that are part of the persuasive logic of the Court's opinion will help make clear, as Eubanks claims, the

²³⁸ Generative metaphor has been identified by Schon as the metaphors that underlie the stories people tell in problem-setting in public discourse. See Donald A. Schon, "Generative Metaphor: A Perspective on Problem-Setting in Social Policy," in *Metaphor and Thought*, ed. Andrew Ortony (Cambridge: Cambridge University Press, 1993), 138.

²³⁹ Philip Eubanks, "The Story of Conceptual Metaphor: What Motivates Metaphoric Mappings?," *Poetics Today* 20, no. 3 (1999a): 437.

²⁴⁰ An important warning about exempting our own viewpoints from critique is delivered to the academic community. See Zev Bar-Lev, "Mrs. Goldberg's Rebuttal of Butt Et Al.," *Discourse & Society* 18, no. 2 (2007).

“intertextual connections, recurrent patterns of persuasion, and logical or thematic links between localized expressions and surrounding discourse.”²⁴¹

As pioneers in the field of conceptual metaphor theory, George Lakoff and Mark Johnson have influenced most metaphorologists. One particularly notable weakness of their work, however, is that the conceptual metaphors chosen to illustrate their theory are not taken from natural language discourse, but rather all are constructed to explicate the point in question. Although Santa Ana, Cienki and Eubanks correct this deficiency in their studies, they do not provide a procedure of analysis that seems replicable for other scholars. Recent work by Jonathan Charteris-Black addresses this need.

Critical Metaphor Analysis

Charteris-Black (2004, 2005) makes an improvement to Lakoff and Johnson’s conceptual metaphor theory by adding to their cognitive focus both the semantic and pragmatic aspects of metaphor experienced in natural language use. His definition of metaphor expands the dictionary definition as a “figure of speech in which a descriptive term is transferred to some object to which it is not properly applicable,” to one that includes not only the linguistic, but also the pragmatic and cognitive aspects of metaphor. The term ‘metaphor’ refers to all or any of these characteristics that may be present, depending on the context.²⁴²

To understand Charteris-Black’s theory of metaphor and his method of analysis it is expedient to quote extensively his criteria for defining these three metaphorical orientations:

²⁴¹ Eubanks, "Globalization, "Corporate Rule," And Blended Worlds: A Conceptual -- Rhetorical Analysis of Metaphor, Metonymy, and Conceptual Blending," 177.

²⁴² Charteris-Black, *Corpus Approaches to Critical Metaphor Analysis*, 21.

Linguistic criteria

A metaphor is a word or phrase that causes semantic tension by:

1. Reification – referring to something that is abstract using a word or phrase that in other contexts refers to something that is concrete.
2. Personification – referring to something that is inanimate using a word or phrase that in other contexts refers to something that is animate.
3. Depersonification – referring to something that is animate using a word or phrase that in other contexts refers to something that is inanimate.

Pragmatic criteria

A metaphor is an incongruous linguistic representation that has the underlying purpose of influencing opinions and judgements by persuasion; this purpose is often covert and reflects speaker intentions within particular contexts of use.

Cognitive criteria

A metaphor is caused by (and may cause) a shift in the *conceptual system*. The basis for the conceptual shift is the relevance of, or psychological association between, the attributes of the referent of a linguistic expression in its *original* source context and those of the referent in its *novel* target context. This relevance or association is usually based on some previously unperceived similarity between the referents in those contexts.²⁴³

Charteris-Black gives his most general definition of metaphor based on these criteria:

A metaphor is a linguistic representation that results from the shift in the use of a word or phrase from the context or domain in which it is expected to occur to another context or domain where it is not expected to occur, thereby causing semantic tension. It may have any or all of the linguistic, pragmatic and cognitive characteristics that are specified above.²⁴⁴

The specific types are also defined:

²⁴³ Ibid.

²⁴⁴ Ibid.

A *conventional metaphor* is a metaphor that is frequently used and is taken up in a language community, thereby reducing our awareness of its semantic tension.

A *novel metaphor* is a metaphor that has not previously been taken up and used in a language community, thereby heightening awareness of its semantic tension.

A *conceptual metaphor* is a state that resolves the semantic tension of a set of metaphors by showing them to be related.

A *conceptual key* is a statement that resolves the semantic tension of a set of conceptual metaphors by showing them to be related.²⁴⁵

Charteris-Black has given us an important vocabulary of metaphor with which to analyze texts. The method he uses grows out of the belief he shares with Critical Discourse Analysis (CDA) about the place of language in “the production, maintenance, and change of social relations of power.”²⁴⁶ Sharing the goals of CDA to bring to the surface of consciousness the relations of hegemony for critical inspection and change, Charteris-Black argues that analysis of metaphor is a primary way to make explicit political and ideological motivations.

Critical Metaphor Analysis is the method he uses to look for the “covert (and possibly unconscious) intentions of language users.”²⁴⁷ His methodology also is more consistent with a theory of conceptual metaphor that stresses the importance of metaphor to cognitive operations that are both embodied and imaginative. And unlike the often-used Five-Step procedure for metaphor identification developed by Gerard Steen,²⁴⁸ Charteris-Black’s Critical Metaphor Analysis method is richly layered and carefully articulated at every step.

²⁴⁵ Charteris-Black, *Corpus Approaches to Critical Metaphor Analysis*, 21-22.

²⁴⁶ *Ibid.*, 29.

²⁴⁷ Charteris-Black, *Corpus Approaches to Critical Metaphor Analysis*, 34.

He provides a clarified²⁴⁹ three-stage procedure for metaphor analysis: metaphor identification, metaphor interpretation, and metaphor explanation. Metaphor identification is concerned with what he calls “ideational meaning.” The researcher is looking for the tension that arises between the literal source and the metaphorical target domains. In metaphor interpretation one looks for the “interpersonal meaning,” that is, the social relations that are constructed through the metaphors. Finally, in metaphor explanation the researcher is concerned with “textual meaning.” This stage looks at the way the metaphors are “interrelated and become coherent with reference to the situation in which they occur.”

Stage one of metaphor identification is composed of two parts. During the first part a close reading of the text to identify possible metaphors is done. These are then evaluated according to the definition of metaphor, looking for incongruity or semantic tension (at the linguistic, pragmatic or cognitive levels) that arises from a shift of domain

²⁴⁸ Steen’s “Five-Step Procedure” for identifying metaphor is in Gerard J. Steen, “Identifying Metaphor in Language: A Cognitive Approach,” *Style* 36, no. 3 (2002), <http://o-find.galegroup.com.bianca.penlib.du.edu:80/itx/infomark.do?&contentSet=IAC- Documents&type=retrieve&tabID=To002&prodId=EAIM&docId=A94775622&source=gale&srcprod=EAIM> (accessed January 5, 2007).

For an example of the CMA’s superiority, a brief contrast between the two can be done by examining the first step in Steen’s procedure, where we at once see a problem for the analyst. Steen’s first step is to begin with metaphorical focus identification. This is an identification of the metaphorically used word as it stands out against the literal frame. Perhaps this identification process works well with novel metaphors or linguistic-oriented metaphors, but for conventional metaphors there is no criteria given for identifying when a word is being used metaphorically. The other four steps follow logically from the first (identification of metaphorical idea, metaphorical comparison, metaphorical analogy, and metaphorical mapping), but with an unreliable way of identifying the metaphor in the first place, the procedure seems incomplete.

For two good examples of Steen’s procedure applied, see both Federica Ferrari, “Metaphor at Work in the Analysis of Political Discourse: Investigating a ‘Preventive War’ Persuasion Strategy,” *Discourse & Society* 18, no. 5 (2007). Also Condit, “Recipes or Blueprints for Our Genes? How Contexts Selectively Activate the Multiple Meanings of Metaphors.”

²⁴⁹ He acknowledges the work of Cameron and Low (1999), Fairclough (1995), and Halliday (1985) in developing a three-staged methodology from which he has drawn, 34.

use.²⁵⁰ Words that fit the criteria are further analyzed. Words that are typically used metaphorically are categorized as metaphor keywords.

The second part of the metaphor identification stage is to examine the context in which metaphor key words occur to see if they are used in a literal or metaphorical sense. Charteris-Black emphasizes that key words will be words that have a “tendency” to be used as conventional metaphors, not “always” used as metaphors: “This is because if they were used as metaphors in every instance this would erode the semantic tension that is a required criterion for the classification as metaphor in the first place.”²⁵¹

During stage two – metaphor interpretation – the relationship between “metaphors and the cognitive and pragmatic factors that determine them”²⁵² is established, and conceptual keys are identified if possible. Charteris-Black considers this stage to be an important one in considering how metaphor choices may be constructing “a socially important representation.”²⁵³

The third stage – metaphor explanation – requires the researcher to identify the social agency involved in the production of the metaphors and their persuasive function. Charteris-Black observes: “In a sense, then, it is identifying the discourse function of metaphors that permits us to establish their ideological and rhetorical motivation.”²⁵⁴ The intuition of the evaluator is not what establishes the ideological and rhetorical motivation of the metaphors, but evidence from within the text leads the analyst to draw conclusions about the ideological and rhetorical purposes.

²⁵⁰ Ibid.

²⁵¹ Charteris-Black, *Corpus Approaches to Critical Metaphor Analysis*, 37.

²⁵² Ibid., 37.

²⁵³ Ibid., 38.

²⁵⁴ Ibid., 39.

To underline again the rhetorical importance of metaphor: metaphor links the consciously formed (logos) ideological beliefs with the unconsciously held (pathos) beliefs and emotions to form a moral approach to life (ethos).²⁵⁵

With this in mind, a brief explication of the CMA process using the first paragraph of the majority opinion in *Lawrence* helps make the case for the efficacy of this method. For sake of discussion the sentences will be numbered:

1. Liberty protects the person from unwarranted government intrusions into a dwelling or other private places.
2. In our tradition the State is not omnipresent in the home.
3. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence.
4. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.
5. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.

Stage one - metaphor identification

In beginning this first stage of analyzing the use of metaphor in *Lawrence*, one would certainly mark the first word as a candidate for metaphor. Under linguistic criteria, “liberty” causes semantic tension by reification or personification of liberty as a protector. As one commentator pointed out, “[u]nless one supposes that liberty is a divinity like Nike or Eros, the reification or personification of liberty in sentence [1] accomplishes nothing except to dodge the obligation to say what exactly it is that protects against the (unspecified) unwarranted intrusions.”²⁵⁶

This commentator’s gloss on the word “liberty” is actually a more colorful and direct way of stating the pragmatic criteria that Charteris-Black gives for metaphor as

²⁵⁵ Jonathan Charteris-Black, *Politicians and Rhetoric: The Persuasive Power of Metaphor* (Basingstoke and New York: Palgrave Macmillan, 2005), 13.

²⁵⁶ Lund, "Lawrence V. Texas and Judicial Hubris." under "The Court's Ascent into More Transcendent Dimensions."

“an incongruous linguistic representation that has the underlying purpose of influencing opinions and judgements by persuasion; this purpose is often covert . . .”²⁵⁷

Having identified “liberty” as a metaphor in the first sentence, the analyst can now go on to examine the remainder of the text to determine how “liberty” is used in other contexts, literally or metaphorically. In sentence 4, liberty again appears to be personified as the one that “presumes the autonomy of self.” In sentence 5, the use of “liberty” in this context appears on one hand to be literal: liberty in its spatial dimensions. This satisfies the requirement that metaphorical keywords are not “always” used metaphorically. But the tension that signals metaphor use remains in the cognitive dimension with the addition of Justice Kennedy’s qualifier of liberty in its “more transcendent dimensions.”

Of course in order to determine the conceptual metaphor that ties together individual uses of the “liberty” metaphor, a careful reading and analysis of the entire text, not just the first paragraph, will be required.

Stage two - metaphor interpretation

The researcher now examines the use of the metaphor “liberty” in light of the pragmatic and cognitive factors that created the semantic tension. In sentence 4, “Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct,” the cognitive shift identifiable here is between the source domain of the First Amendment religious and political freedoms and the target domain Liberty. Of the included freedoms in this sentence, only freedom of expression is contained in the source domain of the First Amendment. The other three inclusions, thought, belief, and certain intimate conduct, replace the original freedoms of

²⁵⁷ Charteris-Black, *Corpus Approaches to Critical Metaphor Analysis*, 21.

religion, peaceable assembly, and right of redress of grievances. The semantic tension created by this replacement is both cognitive and pragmatic in nature.²⁵⁸

The cognitive criteria claim that a metaphor is caused by a conceptual shift. In this case the conceptual shift is created by the tension between the attributes of the freedoms in the First Amendment and the attributes of the freedoms in Justice Kennedy's description of liberty. It meets the pragmatic criteria in its persuasive function of expanding the common understanding of liberty to a more novel one.

This second stage is the appropriate place to make explicit the conceptual metaphor systems that are at work in the discourse. Here is where we most need to look for where the unconscious is at work through the expression of bodily experience in cognitive life. For example, our experience of freedom is metaphorically understood as freedom of movement.²⁵⁹ In sentence 1 "liberty" is not understood as movement, but as protection against some kind of exertion of force, as the government is portrayed as intruding into our private space.

This cognitive tension alerts us to a metaphor, and more interestingly to a metaphor that may not be conventional, but perhaps a key to other metaphors. The interpretation of the liberty metaphor must wrestle with the pragmatic function of this evocation of liberty as a protector, and reconcile it with other liberty metaphors.

Once the conceptual metaphor that resolves the semantic tension set up between metaphors of liberty has been identified, the interpretation will help explain the ideological and rhetorical motivation of the metaphors.

²⁵⁸ Definition of cognitive and pragmatic criteria given above at 47.

²⁵⁹ Lakoff and Johnson, *Philosophy in the Flesh*, 305.

Stage three - metaphor explanation

The final stage of the analysis focuses all the conceptual metaphors and conceptual keys related to the liberty metaphor on an explanation of why these metaphors can be persuasive. The many questions raised by this paragraph, while not answered by the Justice himself, perhaps can be answered with some assurance when the ideological and rhetorical motivation of the metaphor use is uncovered.

For example, we have already noticed the generality and vagueness of the claim about liberty in sentence 1. The claim in sentence 2 is perhaps more general and lacking in apparent applicability, since it is apparent that the State is not “omnipresent” in the home. Is the reader to assume that the State is in some parts of the home but not others?²⁶⁰ Perhaps sentence 3 is meant to clear up this ambiguity, giving us a clue that “omnipresent” may be redefined here as “dominant presence.”

Still questions remain in this statement that cloud the reasoning. For example, are “spheres of our lives” in a different category than spheres of our ‘existence?’ Does anyone claim that the State should be a dominant presence in our lives? Can any of these questions (and more from the next sentences) be answered? If not, why are these statements being made?

Metaphor explanation addresses the reasons these statements, though not obviously answerable, may be persuasive by illuminating the discourse function of the metaphors at work both here and throughout the text of Kennedy’s majority opinion and Scalia’s dissent. Since conceptual metaphors arise out of our embodied experience, both physically and socially, it is possible to take Justice Kennedy’s use of “Liberty protects” as

²⁶⁰ Many of these questions are posed by Lund and McGinnis in “*Lawrence v. Texas and Judicial Hubris*,” under “The Court’s Ascent into More Transcendent Dimensions.”

a metaphorical window into his understanding of the meaning of metaphor without assuming to read his mind. He, like we have, has a bodily basis for mind,²⁶¹ for his cognition, and we can use that shared embodied cognitive apparatus to understand each other in our public discourses.

A Critical Metaphor Analysis of the *Lawrence* text will reveal many metaphors: novel and conventional, conceptual metaphors, and conceptual keys. The interpretation and the explanation of these metaphorical elements will open a window on the “social agency that is involved in their production and their social role in persuasion,”²⁶² the U.S. Supreme Court, the legal community that directly interacts with it, and the American culture in which they are embedded.

The following chapters will be devoted to conducting this analysis and drawing conclusions based on my findings. As outlined in the Introduction, Chapter Three will be the three-stage analysis – metaphor identification, interpretation and explanation – of Justice Kennedy’s arguments. Chapter Four will be the three-stage of analysis Justice Scalia’s arguments. Chapter Five will summarize the findings and draw substantive and methodological conclusions for further research.

²⁶¹ I am, of course, playing with the title of Mark Johnson’s *The Body in the Mind: The Bodily Basis of Meaning, Imagination, and Reason*, a work I will return to in the following chapters.

²⁶² Charteris-Black, *Corpus Approaches to Critical Metaphor Analysis*, 39.

Chapter Three

Critical Metaphor Analysis: Justice Kennedy's Majority Opinion

In Chapter One the ongoing puzzle of Justice Kennedy's legal argumentation in *Lawrence* is reviewed. Chapter Two explores the method of Critical Metaphor Analysis and its possible applications to this legal case. In both chapters a central goal is to explain the reasons *Lawrence* is so important to examine rhetorically. I also defend my choice of this text to showcase the power of Critical Metaphor Analysis to reveal ideological and political motivations in public discourse.

The questions legal scholars have posed regarding why Justice Kennedy did not use the obvious choice before him to follow the "right to privacy" doctrines developed since *Griswold* to extend sexual autonomy to another form of sexual contact remain mostly unanswered. The ambiguous standard of review he uses and his shift from a view of liberty as zonally constrained and highly privatized to expansive, dignity and equality-based further complicate the opinion's clarity in the legal community.

These questions have been compounded by Justice Scalia's charge against the opinion that it is an instance of engagement in the culture wars. If true, this is a momentous truth and requires interrogation and understanding. In any case, at least one of the Justices on the Supreme Court believes the Court is engaged in such a battle, and is responding with this in mind.

In the face of so much dispute about what the opinion means is it possible to answer the questions about why Justice Kennedy chose to frame his arguments the way

he did, and why he reasoned as he did? The question of motive is notoriously difficult to answer, of course, absent the explicit assertion of the Justice. One question that can be answered, however, that may lead us to a stronger assumptive stance about the rhetorical motivation is this one:

What work does metaphor do in Justice Kennedy's framing of his majority opinion?

And a second question follows: How does metaphor structure the reasoning Justice Kennedy is using to advance his arguments?

The following Critical Metaphor Analysis of his argument is designed to address these two questions and will proceed in the following way:

First, I will begin the analysis by isolating Justice Kennedy's opening paragraph from the body of the argument. I will conduct all three stages of analysis -- metaphor identification, metaphor interpretation, and metaphor evaluation -- before moving on to the body of his argument. Moreover, these three stages of analysis will be done in two parts. The first time through I will focus on identifying the metaphors that meet the linguistic, pragmatic and cognitive criteria.

The second time through will be the interpretative and explanatory stage of the analysis of the metaphors, specifically focusing on the work done by the image schematic structures and source domains that shape them. The interpretation and explanation of the metaphors and image schemas will reveal the structure of Justice Kennedy's introductory argument and provide a frame for the ongoing analysis of the remainder the opinion.

Despite my attempt to make each of these steps in the process as distinct from the others as possible so that the analysis is translucent, there is slippage between all the stages. It is especially difficult to neatly separate the interpretive and the explanatory

stages. The interpretive looks for the types of social relations that are constructed; the explanatory, the ideological and rhetorical motivations that are instantiated. Of course, these two aspects of the work produced by metaphor are often internally related to one another. I will often draw attention to which stage of analysis I am discussing in order to disentwine them where possible.

My purpose in partitioning the text in this way is to capitalize on Justice Kennedy's use of this paragraph to give rhetorical structure to the substantive arguments that follow in remainder of the opinion. In the main body of the opinion, it will not be feasible to reproduce more of the text than an occasional block of the argument. I will try to tend the fragile balance between citing enough of the argumentative text to verify the analysis and sustaining the narrative and structure of the argument. For the introductory paragraph of Justice Kennedy's opinion reproduction of the entire text is appropriate. It is reproduced below and the sentences numbered for easy reference.

1.0 INTRODUCTION

1. **Liberty** protects the person from unwarranted **government** intrusions into a dwelling or other private places.
2. In our tradition **the State** is not omnipresent in the home.
3. And there are other spheres of our lives and existence, outside the home, where **the State** should not be a dominant presence.
4. **Freedom** extends beyond spatial bounds.
5. **Liberty** presumes an **autonomy of self** that includes **freedom** of thought, belief, expression, and **certain intimate conduct**.
6. The instant case involves **liberty** of the person both in its spatial and more transcendent dimensions.²⁶³

²⁶³ **Metaphors** designated in bold.

1.1 Metaphor identification of Introduction

In this stage of analysis metaphors that are used to examine this topic are collected, with a focus on “ideational meaning.”²⁶⁴ The ideational aspect requires finding the tension between a literal source domain and a metaphorical target domain. This tension confirms the use of the word as a metaphor.

The words marked above in bold are the metaphors initially identified by the semantic tension produced as a result of the shift from the domain we expect to find them in to another, unexpected, domain. The linguistic criteria for a metaphor is identified by Charteris-Black as a word or phrase that causes semantic tension by any of the following:

- a. Reification – referring to something that is abstract using a word or phrase that in other contexts refers to something that is concrete.
- b. Personification – referring to something that is inanimate using a word or phrase that in other contexts refers to something that is animate.
- c. Depersonification – referring to something that is animate using a word or phrase that in other contexts refers to something that is inanimate.

Liberty meets the linguistic criteria of metaphor. The inanimate source domain is a concept of unconstrained movement or activity, often political. The target domain becomes, however, not a concept but a protective and intimately active person. The reader is led to shift from the concept of unfettered movement or behavior to a personification of the ability to self-govern. In this metaphor **liberty** is evoked as a protective person defending us against the government (1), and as a self-reflective person taking for granted the self rule that includes the ability to think, believe, express and act on unspecified but definite intimate behavior (5).

In sentence 6 **liberty** is first used in its usual domain as a concept of unrestricted movement in space, and then in an unusual domain as a being capable of operating in a

²⁶⁴ Charteris-Black’s gloss on this stage.

dimension that goes beyond the spatial. The use of “liberty” in both a literal²⁶⁵ and metaphorical sense in this paragraph allows us to identify **liberty** as a metaphor keyword, as it is used mostly in its metaphorical sense. Liberty’s synonym, ***freedom***²⁶⁶, also deploys this same linguistic tension, as it is used in its original domain as indicating the absence of spatial or behavioral control or constraint, and also to a realm that is beyond spatial bounds (4,5).

The next metaphor, **the State**, is identified, as is **Liberty**, as animate. Rather than as an object composed of a collection of regulatory and legal entities, **the State** is described as having the god-like attribute of omnipresence (2), an *intrusive* attribute not to be used in some cases, to be sure (1,2,3), even in its restricted form of mere dominant presence (3). This metaphor keyword satisfies the linguistic criteria for metaphor at the least, and will be shown, like **liberty**, to meet the pragmatic²⁶⁷ and cognitive criteria as well.

The following metaphor is a prime example of one that meets the cognitive criteria: **autonomy of self**. The tension arises in the redundancy of terms, producing an odd translation: “the self rule of self.” The cognitive criteria state that a metaphor is caused by (and may cause) a shift in the *conceptual system*. The basis for the conceptual shift is the relevance of, or psychological association between, the attributes of the referent of a linguistic expression in its *original*

²⁶⁵ That is, used in its usual domain.

²⁶⁶ ***Freedom*** is written in both bold and italics to show its connection to the keyword metaphor **Liberty** as a synonym. A similar device is used for ***government***’s connection to the metaphor **the State**.

²⁶⁷ Pragmatic criteria: A metaphor is an incongruous linguistic representation that has the underlying purpose of influencing opinions and judgments by persuasion; this purpose is often covert and reflects speaker intentions within particular contexts of use.

source context and those of the referent in its *novel* target context. This relevance or association is usually based on some previously unperceived similarity between the referents in those contexts. In the instant case, **autonomy of self** becomes cognitively dissonant because of the association of the two terms as identical in meaning, and thereby evocative of some novel meaning.

The final metaphor from this opening paragraph to qualify as a metaphor keyword is a phrase: **certain intimate conduct** (5). The cognitive criterion is fulfilled because the metaphor in the instant case is caused by (or causes) a shift in the conceptual system. The word “**conduct**” comes from the domain of *physical movement*; the word “intimate” comes from the domain of *personal relationship* and identifies the action as private; the word “**certain**” gives it a particular but unnamed character. All together these words signal a shift to the domain of sexual behavior of a type yet to be given form. Whether **certain intimate conduct** is a metaphor keyword is undetermined; more of the textual evidence will be needed to confirm the initial identification.

1.2 Metaphor interpretation of Introduction

Interpreting metaphors requires the analyst to show the relationship between the metaphor keywords and the pragmatic and cognitive factors that determine them. The further goal is to find the conceptual keys that show the connections among the conceptual metaphors. Here we are concerned with interpersonal meaning, looking for the “type of social relations that are constructed through them.”²⁶⁸

The paragraph under study is again reproduced with the additional types of metaphorical elements marked.

²⁶⁸ Charteris-Black, *Corpus Approaches*, 35.

- 1a. **Liberty** *protects* the person from *unwarranted government intrusions* into a dwelling or other private places.
- 2a. In our tradition **the State** is not *omnipresent* in the home.
- 3a. And there are other spheres of our lives and existence, outside the home, where **the State** should not be a *dominant presence*.
- 4a. **Freedom** *extends* beyond spatial bounds.
- 5a. **Liberty** presumes an **autonomy of self** that includes **freedom** of thought, belief, expression, and **certain intimate conduct**.
- 6a. The instant case involves **liberty** of the person both in its spatial and more *transcendent* dimensions.²⁶⁹

We can begin to see the central actor or protagonist in this paragraph, **Liberty**, take on substance in a few evocative sentences through the cognitive metaphors that create the context of **Liberty's** person and actions. In the West a typical representation of liberty has been as a feminine figure. In Jasinski's study of the feminization of liberty in the context of political power he claims the first examples are located in Roman antiquity. Liberty was represented as a Roman matron (*Libertas*), and this representation persisted in various forms throughout the centuries and into the eighteenth century.²⁷⁰

American representations of liberty continued the feminized form, changing her from a matron to a young woman, or to "Goddess Liberty."²⁷¹ For the colonial radicals the major attributes of "Liberty" that required emphasis were her "purity" and her "fragility." These two qualities allowed the colonists to cry for the protection of "Liberty's" purity against the seduction of the British and to mount increasing pleas for armed defense against the violence of the British. Does Justice Kennedy's depiction of **Liberty** follow in this tradition?

²⁶⁹ *Italicized words* indicate metaphor source domains; underlined words mark the image schemas.

²⁷⁰ James Jasinski, "The Feminization of Liberty, Domesticated Virtue, and the Reconstitution of Power and Authority in Early American Political Discourse," *Quarterly Journal of Speech*, 79, May 1993: 148.

²⁷¹ *Ibid.*

Liberty remains feminized but rather more subtly drawn than the earlier version. Kennedy's **Liberty** is not an aggressive figure, but rather a protective one. She seems to stand guard at the door of the vulnerable person's dwelling to prevent the entrance of **the State**. She is also endowed with the immaterial quality of extension (scale image schema)²⁷² into *nonspatial* and *transcendent dimensions* (scale image schema), with a rich subjective life of thought, beliefs, and expressions. Even the **certain intimate conduct** to which she is given is linked essentially to her rich interior life.

There is little to suggest "Goddess Liberty" here, although her ability to *transcend* spatial categories suggests a larger than life being. We may find as we go further in the argument that **Liberty** functions as a powerful and benign mother who, if not omniscient and *omnipresent* as a deity, certainly seems to *transcend* the normal boundaries of mere mortals, and is evocative of the domain of *spirit*.

In sentence 4a **Freedom** is described as an object or entity that has extension in space as well as *beyond* (*spirit* source domain) the boundaries (container image schema) of *space* (*spirit* source domain). And while both the image schemas and the source domain come from physical experience, the qualifying target word here is *beyond*. Justice Kennedy is clearly not talking only of geometrical or measurable space; it seems that **freedom** gets its nature from the *beyond*, thereby evoking the *spirit* source domain again.

Liberty's character is described more deeply in sentence 5a. Not only can **Liberty** *protect*, but **Liberty** also *presumes*. **Liberty** assumes as true the attribute of self-government in thinking, believing, expressing, and acting on the products of these processes. The action at issue for Justice Kennedy involves **Liberty** operating in space

²⁷² Mark Johnson describes this image schema as "the 'more' or 'less' aspect of human experience," *Body in the Mind*, 122.

and in the *beyond* or *transcendent* realms (6a). The source domain of *spirit* certainly may include a kind of civic religion that is *transcendent*, either in an ontological sense, or in an axiological or ethical one.

Justice Kennedy is explicit in including in that *transcendent* dimension the product of **Liberty's** thinking, believing, expressing: the action addressed in the case before the Court. The action characterized by Justice Kennedy as **certain intimate conduct** appears to be a part of **Liberty's** essential **self** (5a), and as such cannot legitimately be threatened by **the State**.

The nature of this **conduct** has not yet been clarified in the text, although some interpretation of the use of the word “conduct” rather than another, such as “action,” or “activity,” or “acts” may be called helpful. Whereas the definitions for “act” include “anything done,” a “deed,” or “to do something,” definitions for “conduct” arise out of the concept “to lead.” **Conduct** carries with it the ideas of personal behavior, a way of acting, deportment, and a direction in management. There is no emphasis on a particular act, but rather on the way one behaves or comports oneself in general. The word “conduct” also draws from the domain of *personal character*, an interior world rather than merely a domain of *acts*.

In contrast to benign and relational **Liberty**, **the State** is drawn as a more traditionally masculine figure, and a rather antagonistic one at that. Kennedy's **State** or **government** is one that may intrude on peoples' private life and dominate others in the process. By drawing on words such as “*omnipresent*” and “*dominant presence*,” Kennedy situates the potential intruder in authoritative or even powerful *transcendent* realms. Both religious and secular powers have been associated with the claim to *omnipresence*. The source domain of *spirit* allows for either interpretation.

1.3 Metaphor explanation of the Introduction

In the explanation stage the analyst is concerned with textual meaning. The metaphor source domains, the image schemas that have operated to give coherence to the referenced experiences, and the metaphor keywords all allow the analyst to begin the identification of the ideological and rhetorical motivation of Justice Kennedy's argument. It is here that the cognitive aspects of metaphors can most effectively be isolated and examined. In laying bare the image schemas that are operative in constructing the argument, we can see the way metaphor is used in constructing and rhetorically situating the opening statement of Justice Kennedy's opinion.

- 1b. **Liberty** protects the person from *unwarranted government intrusions* into a dwelling or other private places.
- 2b. In our tradition **the State** is not *omnipresent* in the home.
- 3b. And there are other spheres of our lives and existence, outside the home, where **the State** should not be a *dominant presence*.
- 4b. **Freedom** extends *beyond spatial bounds*.
- 5b. **Liberty** presumes an **autonomy of self** that includes **freedom** of thought, belief, expression, and **certain intimate conduct**.
- 6b. The instant case involves **liberty** of the person both in its *spatial* and more *transcendent dimensions*.

This part of the analysis must look at how the experiential basis of our cognition is manifest through the construction of the metaphors identified so far. Cognitive theory has been proposing and providing evidence to substantiate the claim that the nature of rationality is inextricably tied to our embodied experience. In analyzing this argument by Kennedy it is essential to acknowledge that the logical inferences he makes are not instances of "inexplicable structures of rationality (of *pure* reason)."²⁷³ Rather, as Mark Johnson points out, the logical inferences are rooted in the "preconceptual schemata that give comprehensible order and connectedness to our experience."²⁷⁴

²⁷³ Mark Johnson, *Body in the Mind*, 99.

²⁷⁴ *Ibid.*, 100.

The preconceptual schemata that Johnson is talking about are called image schemas, and are identifiable here in their relationship to the metaphors in use in this paragraph, and that are constraining logical inferences and defining meaning. Out of many possible image schemas that reflect our embodied experience in the world, there are five that are important in understanding the opening paragraph reproduced for analysis: Force, Container, Link, In-Out, and Balance. (The latter image schema will not be apparent until the interpretive stage.)

The most obvious image schema in this opening sentence comes from patterns of interaction with our environment as we act on other objects or as they act us on. This Force image schema includes several features that must be noted to make the most of the following analysis.²⁷⁵

First of all, force is experienced as interaction – either with us or with other objects in our perceptual field. Second, force often involves movement of some object through space in a direction. Directionality is a typical quality of force. Third, there is usually a single path of motion. Fourth, we experience an origin or source of force, and that force can be directed to targets as well. The fifth aspect is the degree or intensity of force. And finally, as a consequence of the interactivity of force, we experience a structure or sequence of causality.

These six aspects of the Force gestalt structure operate to construct our experience of force structures, the most common of which are for our purposes: compulsion, blockage, counterforce, diversion, removal of restraint, enablement, and attraction.

²⁷⁵ The following aspects of the Force schema are outlined by Johnson in *Body in the Mind*, 42-47.

In sentence 1 the image schema of Force provides the structure for understanding the meaning of liberty's action: "**Liberty** *protects* the person from *unwarranted government intrusions* into a dwelling or other private places." The words *protects*, *intrusions*, *dominant* come from the source domain of "*conflict*" structured by the Force image schemas for blockage and compulsion. **Liberty** is the agent of blockage against the compulsive force of the **government**. From this we know that **Liberty** is at the very least a force equal to the **government** and capable of providing a barrier to *intrusive* power. There may be more than a defensive role to play for **Liberty**, but so far that is not clear.

In sentence 4b **Liberty's** alternate, and perhaps androgynous, identification as **Freedom** gives us a more definitive characterization through another image schema, this one from our experience of containers. The container image schema first shows up in sentence 1b; homes or other private places are conceptualized as containers, into which one can forcefully enter.

Here in sentence 4b the container is a bounded space, *beyond* which it is possible for **Freedom** to go. It travels by extending itself in some way. We know from our experience that the way an object travels *beyond spatial boundaries* is for that object to be itself not spatially bounded, that is, contained. Thus in the case of **Freedom** and **Liberty** its extension happens by a nonphysical linkage, temporal or conceptual, with other objects.

The link image schema makes it possible for us to recognize similarity between objects. Johnson reminds us that that linkage happens in abstract ways also:

Two or more objects are similar because they share some feature or features. Those shared features are their cognitive links in our understanding. Here, obviously, we have a highly abstract notion of linkage, in which the "third thing" that binds or relates two objects is a perceptual or logical feature. The link schema must be metaphorically

interpreted to apply to abstract objects or connections, since there is no actual physical bond of the required sort to relate the objects.²⁷⁶

The awareness of the link schema allows us to know how to identify important elements the following sentence: “**Liberty** presumes an **autonomy of self** that includes **freedom** of thought, belief, expression, and **certain intimate conduct.**” Here the linkage of abstract objects of thought, belief, and expression to the **self** by the word includes tells us much about the nature of **Liberty**. Importantly, there is another link made here by the word and. This link is between three abstract aspects of **Liberty**: thought, belief, expression; and an object in the physical realm: **certain intimate conduct.**

The classic formulation of liberty in the American tradition is to identify it with the freedoms in the First Amendment of the U.S. Constitution: freedom of religion, freedom of speech, freedom of the press, freedom of peaceful assembly, freedom to petition the government for redress of grievances. Justice Kennedy includes two of these liberties, freedom of speech and of the press, as “**freedom** of expression.” And **perhaps** a generous reading of “belief” could stand in for the Constitutional freedom of religion. But a careful analyst would need to ask how the freedom to believe (a solitary and interior state) could really equate to the Amendment’s anti-establishment of religion or the “free exercise thereof” that constitutes freedom of religion in practice. One could legitimately ask why the freedom of belief is listed at all, instead of the freedom of religion.

Justice Kennedy also includes “**freedom** of thought” to his list; a freedom not easily related to the Constitutional freedoms at all. The linkage of “thought” to “expression” allows him to transfer the respect for the latter to the former as well. It also

²⁷⁶ Ibid., 119.

sets up the linkage of the three undisputed freedoms to the one that is here under dispute: **certain intimate conduct**.

The final sentence (6b) of the paragraph reiterates the linkage among the abstract, the *spirit*, and the physical, between the *spatial* and the *transcendent dimensions* of **Liberty** with the use of involves, in, and: “The instant case involves liberty of the person both in its *spatial* and more *transcendent dimensions*.” There is added assurance of the accuracy of the image schematic identification in this compounding use of linkages.

Moving from **Liberty** to the identification of the logical structure surrounding the metaphor of **the State** in 2b, the container schema presents itself immediately, and along with it the in-out schema: “In our tradition, **the State** is not *omnipresent in* the home.” Our tradition is a container in which we experience boundaries for the way **the State** expresses its actions, so that it may not be everywhere in the home, (another container).

Furthermore, in 3b there are spheres (containers) that are linked to our homes through our lives and existence (all three are containers), but are outside the home in which **the State** also may not be a *dominant presence*. The growing number of container schemas begins to feel a bit like the nesting Chinese boxes. The argumentative purpose of this elaborated structure will soon be examined as we go on in the interpretive process.

In summary, in the identification of image schemas that support the logical structure of Justice Kennedy’s argument, four main ones have been found: force (compulsion and blockage), link, container, and in-out. How they structure and advance the argument is also essential to this part of the analysis.

The image schemas that determine the metaphors in this argument reveal considerable information about how Justice Kennedy is constructing his argument. Initially, the Justice's acknowledgement of the competing forces at play may seem a rather obvious statement of a political truth about balancing powers. The force image schema does the work behind the scenes of allowing us to understand the dynamics of force between **Liberty** and **the State** and to feel the weight of power shifting toward **Liberty** and away from **the State** relative to the person situated between them.

The balance image schema in which we experience, for example, carrying an equal load in each of our hands, allows the abstract load or weight of power held by these two entities to be evaluated this way. They are unequal thus unbalanced forces. It is of interest to note that the balance image schema is not obvious until the interpretation stage reveals its dynamic at work.

Not only is the intensity of one greater than the other, the nature of the force is also different. **Liberty's** force protects; **the State's** force intrudes. The normative comparison is obvious and is reinforced in other ways. For example, the container image schema structures our understanding of much of what Justice Kennedy identifies as objects of these two forces' interest. Dwellings, homes, private places, our tradition, spheres of our lives and existence, spatial and transcendent dimensions are all depicted as containers into which **Liberty** is welcome to come and go as she pleases.

The State has a boundary (container) in which to operate, and may not enter any of the other containers at will. The specified containers are limited in number, however, and the possibility for the force of **the State** to expand in other areas is not precluded. **The State** is not to go into "dwellings, or other private places" (1b), homes (2b), or other places "outside the home" (3b). But clearly here, the boundaries possessed

by **the State** are contrasted with their absence for **Liberty**. **Freedom** is said to extend, that is to link to, by going *beyond boundaries* (4a) into transcendent dimensions (6a).

The centrality and superiority of **Liberty** having been established, the next argument made through metaphor is to connect **Liberty** to the object of dispute in the *Lawrence* opinion. This connection is made by the image schema link, which not only connects but also shows similarity between things. The **freedom** of thought, belief, and expression is shown to be of the same kind as the **freedom of certain intimate conduct**. And this freedom is double linked to **Liberty** in its *spatial* and *transcendent dimensions*. Thus is **certain intimate conduct** tightly folded up into the very person of **Liberty** and to the **liberty** of the person (6b).

The relationship of force that links these entities is focused on **the State's** contestation of **Liberty's** autonomous behavioral choice, identified as **certain intimate conduct**. Justice Kennedy's arguments to justify the Court's *holding* (force image schema and source domain of *physical movement*) in *Lawrence* will likely retain the same focus: **Liberty's** expansive boundaries holding back **the State's unwarranted intrusions** in the realm of **certain intimate conduct**.

A strong presumption of **Liberty** as a person is justified by the characterization of *protective* strength, extension beyond space boundaries, the **autonomy of self** to think, believe, express those thoughts and beliefs, and to act on them in **certain intimate conduct**. The personal aspect of **Liberty** provides a rhetorical edge to Kennedy's pastel coloring of **Liberty** in contrast to the darker aspect of **the State**. Although both of these entities have power to make their presence known, **Liberty's protective, personal, and intimate conduct** is clearly a more benign way of acting in the world than the *intrusive, dominating presence* of **the State**. We clearly know which is the protagonist and which the antagonist of the unfolding argument.

The explanation of how metaphor is constructing and guiding the argument so far is not complete without tying this paragraph under scrutiny into the larger narrative that has been developed around this case. It will help contextualize this analysis if we examine what Justice Kennedy has to do in this opinion to bring resolution to the legal questions. To do this, I will make the following observations about what he appears to want and how he perceives the legal situation he finds himself in to either help or hinder his goals.

First, we can assume that the conclusion Justice Kennedy desires is the one he arrives at: 1) no governmental restrictions on adult consensual sodomy and 2) no moral disapproval expressed by the state toward homosexuals.

To get to this outcome, Justice Kennedy appears to be constrained in several ways. One, he cannot use the Equal Protection Clause to overturn Texas' sodomy laws on the basis of its selective focus on homosexual acts. He cannot use this route, as Justice O'Connor wants to do, because it does not accomplish either of his goals. The state could write constitutionally valid laws restricting heterosexual and homosexual sodomy, expressing disapproval of sodomy of any kind equally.

Secondly, it appears he cannot straightforwardly use the Due Process Clause. That is to say, he cannot unless he is willing to frame the case as a "fundamental" right to sodomy, which would require coming to terms with the criterion developed in *Glucksberg* that it be a right "deeply rooted" in our history.

He cannot take the route of precedent either, using the right to privacy cases in the line of *Griswold* to *Roe* to secure sexual autonomy for an additional form of sexual behavior because it would not address the dignity and equality requirements he desires.

In addition, he needs something from both of the Fourteenth Amendment Clauses. From the Equal Protection Clause he will need to draw a conception of liberty as

the freedom to enjoy respect and dignity for the people who engage in the contested behavior. From the Due Process Clause he will want the heightened scrutiny basis of review, despite the fact that the people impacted do not meet the requirement of being in a protected class.

One route suggests itself here. If he were able to somehow join the two conceptions of liberty, freedom from government intrusions and freedom to equal dignity and respect, into one conception of **Liberty**, it may be possible to have both the freedom from the intrusion of **the State** and the freedom to engage in **certain intimate conduct** with dignity of the person preserved. The only hazard remaining comes from the time-honored standards of review under the Due Process Clause that requires a fundamental right not already constitutionally enumerated to be one with “ancient roots.” Justice Kennedy will need to address this satisfactorily in order to resolve the case under Due Process.

As we anticipate where Justice Kennedy is headed in this opinion, the unfolding of the argument in the first paragraph is predictive of his overall strategy. An expansive and winsome **Liberty** provides both protection and equal dignity to people who want to engage in **certain intimate conduct**, people who were previously vulnerable to the intrusion of **the State**. How Justice Kennedy accomplishes his goal through the complex interweaving of these four metaphors and the conceptual structures supporting them is the subject of the continuing analysis of his majority opinion.

2.0 Justice Kennedy’s Four Arguments

The body of the opinion can be accurately divided into four major arguments. The first argument establishes as the basis upon which the Court will decide the case as the Due Process Clause: The resolution of *Lawrence v. Texas* depends on “whether the

petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution.”²⁷⁷

The second argument tackles the claims of the *Bowers* Court that disqualified proscriptions against sodomy from being reviewed under the heightened scrutiny standard of the Due Process Clause: “Having misapprehended the liberty claim there presented to it, and thus stating the claim to be whether there is a fundamental right to engage in consensual sodomy, the *Bowers* Court said: ‘Proscriptions against that conduct have ancient roots.’”²⁷⁸

The third argument addresses the issue of *stare decisis* and the reasons the court is not compelled to uphold precedent: “*Bowers* itself causes uncertainty, for the precedents before and after its issuance contradict its central holding.”²⁷⁹

The final argument is tersely summed up: “The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”²⁸⁰

The metaphors, literary, pragmatic and cognitive, that constitute these arguments will be analyzed in the three-part manner established above, with a slight adjustment. After the identification stage, the interpretive and explanatory process will be presented together. Again, the logic of the argument driven by the cognitive structures that depend on image schemas will be examined during this interpretation and explanation.

²⁷⁷ *Lawrence v. Texas*, 565.

²⁷⁸ *Ibid.*, 567.

²⁷⁹ *Ibid.*, 577.

²⁸⁰ *Ibid.*, 578.

2.1 Argument One: Freedom Under Due Process Clause

Justice Kennedy in this argument is to show that the case falls under the Due Process Clause of the Fourteenth Amendment. He must show that the petitioners' exercise of liberty to engage in the "private conduct" for which they were arrested is like the exercise of liberty engaged in by petitioners in other cases before the Court and held to be protected. He concludes that the petitioners' liberty to engage in the personal relationship of their choice is protected in the same way as the liberty rights of those in the previous cases cited by the Court.

2.1.1 Metaphor identification of Argument One

The opinion begins with a statement of the facts and the points under dispute. This part of the text is mostly unremarkable rhetorically, the exception being the varied characterizations of the metaphor identified in the introductory paragraph, **certain intimate conduct**.

Before stating the facts of the case, Kennedy gives his overview of the question before the Court as "the validity of the Texas statute criminalizing **certain intimate sexual conduct** between persons of the same sex."²⁸¹ Following the statement of fact, he reviews the questions considered in *certiorari*; the same offense is here designated as "sexual **intimacy** by same-sex couples," "adult consensual sexual **intimacy**," and "**conduct** . . . in private and consensual."²⁸²

²⁸¹ Ibid., 562.

²⁸² Ibid., 564.

In contrast to these designations, the criminal complaint at issue describes the crime as “deviate sexual intercourse, namely anal sex, with a member of the same sex (man).”²⁸³

The Court begins its first argument by stating the Constitutional basis for its decision as the Due Process Clause, and again states the offense at issue as “private **conduct**.”²⁸⁴ To pursue whether the petitioners were free to engage in this, the Court finds it necessary to “reconsider the Court’s holding in *Bowers*.”

In arguing for the applicability of the Due Process Clause Kennedy needs to both cast the *Bowers* use of Due Process as wrong-headed and to reforge an understanding of Due Process that will now include under its protection the offense that was excluded under *Bowers*. The rights under dispute here come from Section 1 of the Fourteenth Amendment to the U.S. Constitution:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

He begins this process by using four cases he believes shows the “substantive reach of **liberty**” that began as early as 1925, but has recently begun in earnest in 1965. He signals his intent to highlight the extension of **Liberty** by immediately using the following phrases to describe the development of the right to privacy in cases beginning in *Griswold*: “the exercise of their **liberty**,”²⁸⁵ “the exercise of her **liberty**,” “the protection of **liberty**,”²⁸⁶ all under the Due Process Clause.

²⁸³ Ibid., 563.

²⁸⁴ Ibid., 564.

²⁸⁵ Ibid.

²⁸⁶ Ibid., 565.

The State does not make an appearance in this part of the argument, except indirectly as the agent of an “*unwarranted governmental intrusion*.”²⁸⁷ Nor does **autonomy of self** reappear. Identifiable metaphors are consistent with the source domains already in use from the initial paragraph.

From the domain of *conflict* comes “*protected* interest as a right of privacy,”²⁸⁸ *protected* space of the marital bedroom,²⁸⁹ “*protect* spatial freedom,”²⁹⁰ “*protection* as an exercise of her liberty,”²⁹¹ “*confined* to the *protection* of rights,”²⁹² “*intrusion*,”²⁹³ “*challenge*,”²⁹⁴ “*confronted*,”²⁹⁵ “*forbidding*,”²⁹⁶ and “*confined*.”²⁹⁷

From the domain of *building* come words associated with base, ground, or foundation: “*unwarranted*,” “*established*,” “*fundamental* proposition,” “*fundamental* human rights,” “*fundamentally* affecting,” “*fundamental* decisions,” “*fundamental* significance.”²⁹⁸

²⁸⁷ Ibid.

²⁸⁸ Ibid., 564.

²⁸⁹ Ibid., 565.

²⁹⁰ Ibid.

²⁹¹ Ibid.

²⁹² Ibid., 566.

²⁹³ Ibid., 565.

²⁹⁴ Ibid.

²⁹⁵ Ibid., 566.

²⁹⁶ Ibid.

²⁹⁷ Ibid.

²⁹⁸ Ibid., 565.

Both “*beyond*” and “*destiny*” readily connect us to the domain of *spirit* in its broadest conception of the realm of the *transcendent*, both spatially and temporally.

Several new actors appear in this section of the argument, drawing some slight attention to themselves, but perhaps appearing later to be of great consequence: The Court, the law, the person.

2.1.2 Metaphor interpretation and explanation of Argument One

Variations on the metaphor **certain intimate conduct** become striking as the argument progresses. Justice Kennedy will not use the designation in the law of the criminal offense as “deviate sexual intercourse” anywhere in his opinion. In its place he uses here various combinations of the words **intimate** and **conduct**, leaving out altogether “deviate” and “intercourse” in order to pair “sexual” with other conditional words: “by same sex couples,” “adult consensual,” “in private and consensual.” The object of the criminal statute, “deviate sexual intercourse,” is totally effaced and replaced with **certain intimate conduct** and its cognates.

The importance of Justice Kennedy’s replacement of “deviate sexual intercourse” will be well developed in Chapter Five of this work, where the rhetorical and ideological implications of the metaphors used will be brought together in a summary, evaluative analysis. What is important for the rest of this chapter is to note this replacement, and in Chapter Four to anticipate that Justice Scalia will have a very different approach to the use of “deviate sexual intercourse” to describe the criminal statutes.

Liberty’s characterization remains consistent with what we know of her personage from the first paragraph. Her *exercise* and her *reach* (the domain of physical bodily movement) are both substantial, especially in the area of personal rights, secured under the Due Process Clause. She appears to have a champion now who does most of

her heavy lifting: the Court. It is the Court that invalidates laws prohibiting the use of contraception for married persons, unmarried persons, less than 16 years of age persons, and prohibiting abortions.

The State has receded from sight, along with **Liberty**, as ‘the law’ takes on its function as intruder into *fundamental* matters: “the *fundamental* proposition that the law impaired the exercise of their personal rights,” “the law to be in conflict with *fundamental* human rights,” “governmental intrusion into matters so *fundamentally* affecting a person,” “certain *fundamental* decisions affecting her destiny,” and the *fundamental* significance of defining the rights of the person.²⁹⁹ The ubiquity of the descriptor “*fundamental*” calls for some attention before the analysis moves on.

As noted above, “*fundamental*” comes from the *building* source domain. A more primary domain of the word is actually from the word “fundament,” meaning the “buttocks” or “anus.” The Latin origin in “fundamentum,” as where one sits, underlies its use as the lowest part of something, the base or foundation. The source domain of the *physical body* obviously connects “*fundamental*” to the sexual conduct at issue as well.

In all these battles for personal rights “the Court” is **Liberty’s** champion and “the law” is **the State’s** executor. And perhaps **autonomy of self** is not really missing, but also has stand-ins as a “right to privacy,” “*fundamental* human rights,” “right of privacy,” “right to make certain *fundamental* decisions affecting her destiny,” “rights of the person.”³⁰⁰ The explanation of the function of these emissaries may be found in analyzing their cognitive function as metaphor.

The “substantive reach of **liberty**” is traced by Kennedy through *Griswold*, *Eisenstadt*, *Roe*, and *Carey*. She stretches out her arm from the beginning point (path

²⁹⁹ Ibid.

³⁰⁰ Ibid., 564-565.

image schema) in *Griswold* to protect the “marriage relation” (link) and the “*protected space* (container) of the marital bedroom,” forward to acknowledging personal rights of the unmarried to bear or beget a child in *Eisenstadt*, and then to rights to abortion in *Roe*, culminating in enforcing the contraceptive privacy rights of children under 16 years of age in *Carey*.

Kennedy links all these cases to show that **Liberty** (under the Due Process Clause) has been the “substantive (scale image schema) dimension (container) of *fundamental* significance in defining the rights of the person. **Liberty** in her own person contains the rights of the person. As proclaimed in the first paragraph, inherent in **Liberty’s** person is her **autonomy of self** that is linked in both *spatial* and *transcendent* dimensions to the right to engage in **certain intimate conduct**,

The cognitive shift that is made from **Liberty** to “the Court” allows the attributes of the source domain **Liberty** to be attached to the target domain “the Court,” revealing novel or unnoticed aspects of it. Thus “the Court” now can *exercise* itself and *reach* into personal and intimate areas in order to protect the person’s rights. “The Court” defends now against “the law,” who has taken up the *intrusive* attributes of **the State** through a similar cognitive shift, as the two domains become associated with each other. “The law” is *intruding* on and *threatening* to the rights of the person and needs to be stopped in its course.

To craft this adversarial relationship between ‘the Court’ and ‘the law’ is a delicate work, requiring great subtlety and the persuasive power of metaphor. An important part of this analysis is the identification of how this happens as Kennedy continues his arguments. Of course, Justice Scalia will be attempting in his dissent to break what he sees as an ‘unholy’ alliance and to redirect the conflict and repopulate the categories of “antagonists and protagonists.”

Autonomy of self is now contributing its associated characteristics to the “rights of the person,” “right of privacy,” “*fundamental* human rights,” etc. **Autonomy’s** link to the freedoms of thought, belief, expression, and **certain intimate conduct**, allows “rights” to contain these freedoms as well.

The gain in the argument at this point from using these metaphorical extensions of his chief metaphors, **Liberty, the State, Autonomy of Self, certain intimate conduct**, seems to be the ability it gives Justice Kennedy to make both himself as “the Court,” and the “**Liberty**” of the petitioners to engage in “**certain intimate conduct**,” the protagonists in the narrative. The antagonists in the battle are clearly marked, as are the objects of dispute. The following diagram may be helpful in seeing how his argument has been drawn with the help of metaphor structures:

Kennedy’s Narrative Frame		
<u>Chief Actor</u>	<u>Aide</u>	<u>Narrative Role</u>
Liberty	‘the Kennedy Court’ ³⁰¹	Protagonists
The State	‘the Law’	Antagonists
Autonomy of self	right to certain intimate conduct	Disputed Region

His first argument is his justification for reviewing the case under the Due Process Clause, making clear that **Liberty** contains both the **autonomy of self** and the **certain intimate conduct** at issue.

Since the precedent against which he takes his position came to the contrary opinion, the next argument must address that opinion reached in *Bowers*.

³⁰¹ As opposed to “the Court in *Bowers*.”

2.2 Argument Two: Misapprehension by Bowers

Despite the similarity of the cases in *Bowers* and in *Lawrence*, Justice Kennedy needs to show why the decision in *Bowers* cannot be applied to the *Lawrence* petitioners. He concludes that *Bowers* wrongly categorized the issue in the case as a fundamental right to sodomy, when it was really a fundamental right to decide on what kind of personal relationship to enter.

There are several parts of Justice Kennedy's argument here. Briefly he proceeds in the following way to argue against *Bowers*:

1) He compares the two cases. 2) He follows the comparison by challenging the argument in *Bowers* that anti-sodomy laws have "ancient roots" in American history. 3) The third prong of his skewer of *Bowers* is the acknowledgement of a history of moral condemnation of homosexual conduct but also the importance of the question of whether the majority can enforce their views on the whole society. 4) The *Casey* and *Romer* cases decided after *Bowers* are shown to cast doubt on its rationale. 5) Equality of treatment and due process right to demand respect must be joined to undo the stigma created by criminalization.

2.2.1 Metaphor identification: (1) Comparison of the cases

First, there are similar criminal conduct charges at issue, described by *Bowers* as "sodomy," and by Kennedy as **intimate sexual conduct**. They are dissimilar relative to the scope of the statutes at issue. The *Bowers* case involved a statute criminalizing "sodomy" whether or not it is between same-sex couples; a statute against same-sex "sodomy" is the issue in *Lawrence*.

More substantively, Kennedy declares in what way the question is wrongly categorized in *Bowers*; the issue was presented as a question whether the Federal

Constitution “confers a fundamental right upon homosexuals to engage in sodomy . . .”³⁰²
This categorization Kennedy believes “discloses” how great the failure “to appreciate the extent of the **liberty** at stake”³⁰³ really is. **Liberty’s** reach is much longer than *Bowers* would acknowledge, as that Court “demeans the claim” of the petitioner by making his complaint only about the right to “engage in **certain sexual conduct.**”

While exalting the extension of **Liberty**, Justice Kennedy allows that there is another actor here that has a long reach: ‘the laws’ that “purport” to prohibit only a “particular sexual act.” Their purposes have, rather, “far-reaching (scale image schema) consequences, *touching* (*body* source domain) upon (surface image schema) the most private human conduct, sexual behavior, in the most private of places, the home.” They also try to *control* “a personal relationship” that is “within the **liberty** of persons to choose without being *punished* as criminals.”³⁰⁴

Kennedy concludes that since this personal relationship choice is contained within liberty, the State or a court should not attempt “to define the meaning of the relationship or to set its boundaries [A]dults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain (removal of restraint) their dignity as free persons.”

2.2.2 Metaphor interpretation & explanation: (1) Comparison of the cases

Justice Kennedy crafts his challenge of *Bowers* carefully in terms of the placement of his metaphorical contrasts. Immediately after quoting the Court in its framing of the issue as a “fundamental right to sodomy,” he substitutes for the word

³⁰² *Lawrence*, 566.

³⁰³ *Ibid.*, 567.

³⁰⁴ *Ibid.*

“sodomy” his metaphorical translation, “the right to engage in **certain sexual conduct.**”³⁰⁵ By not allowing the word “sodomy” to be the descriptor, Kennedy advances his position that the **liberty** here is a relational **freedom**, rather than the freedom to commit an act.

He has already given content to this relational **freedom** in his introductory paragraph, linking **Liberty** with the **autonomy of self** that contains the attributes of **freedom** of “thought, belief, expression and **certain intimate conduct.**” This relational autonomy does not separate the attributes of persons from their acts. Justice Scalia will tangle with this understanding of **freedom** in his dissent and come up with a much more behaviorally isolated understanding of it in the law.

Most of the rhetorical advance in this part of the argument is done by the comparison of the “reach” of two of the principal actors, **Liberty** and ‘the law.’ Justice Kennedy has already associated **Liberty** and ‘the Court’ in a positive if not identical melding of traits, so the introduction of a Court that has only a few members that can identify so completely with his Court and **Liberty** does not pose an insurmountable problem for him. **Liberty is** at the “*stake*” here, but her persecutor is not Kennedy’s Court. ‘The law’ provides the foil here, so that the intrusive power of **the State** is felt here in ‘the law,’ not from the courts.

‘The law’ is disingenuous in “purporting” to be reaching into our lives to prohibit acts, Justice Kennedy suggests. No, rather ‘the law’ has a longer reach than that. The long arm of the law enters “in the most private of places, the home.” Within this home, “the law” goes about “touching upon” our *human bodies* [“ in our private places,” (not “private parts” but close), “most private human **conduct**, sexual behavior”³⁰⁶]. This is

³⁰⁵ Ibid.

³⁰⁶ Ibid.

quite a chilling portrait of ‘the law’ as an abuser. The power standing in its way is **liberty**, and her agent ‘the Court.’

2.2.3 Metaphor identification: (2) The “ancient roots” debated.

After the *Bowers* Court missed the real target of **Liberty’s** protection, it constructed an argument that would disqualify “sodomy” from the category protected as a fundamental right by stating and defending the claim that laws against sodomy “have ancient **roots**.” Justice Kennedy recommends against “*adopting (personal relationship source domain) the definitive conclusions upon which Bowers placed such reliance.*”

Kennedy advances several premises to support his suspicion of the “ancient **roots**” claim. First, he claims there is no longstanding history of laws that are “*directed at homosexual **conduct** as such.*” A partial explanation of this is that “the concept of the homosexual as a distinct category of person did not *emerge* until the late 19th century.” Thus the early laws “sought to *prohibit* nonprocreative sexual activity more generally.”

Second, the infrequency of prosecutions could be explained by the evidence rules that “*imposed a burden (balance image schema) that would make a conviction more difficult to obtain . . . since a man could not be convicted of sodomy *based* upon testimony of a consenting partner, because the partner was considered an accomplice.*”³⁰⁷

Additionally, the “laws *targeting* same-sex couples” actually developed more recently, in the 1970’s, when only nine of the **States** “singled-out same-sex *relations* for criminal *prosecution*.”³⁰⁸ And after *Bowers* “even some of these **States** did not adhere to

³⁰⁷ Ibid., 569.

³⁰⁸ Ibid., 570.

the policy of *suppressing* homosexual **conduct**,” and some are now moving toward *abolishing* (*conflict* source domain) “same-sex prohibitions.”

2.2.4 Metaphor interpretation & explanation: (2) The “ancient roots” debated.

His basic argument is that ‘the laws’ were not *directed, targeted* at “homosexual **conduct**.” Acts were the target of laws, and they applied to anyone. It was not until the late 19th century that a conception of the homosexual as a “distinct category of person” *emerged*. Until that time the behavior under siege was “nonprocreative sexual activity.” And when laws did *target* homosexuals, not all states were *glued to* (“*adhered to*”) the policy of “suppressing (compulsion) homosexual **conduct**,” read as “holding down homosexual compartment or character.”

Most of the work of metaphor in this argument is to underline the *conflict* and compulsion aspects of these “ancient laws,” and to identify these laws as *targeted* at “*predators*” (source domain of *wild animals*) rather than “consenting adults.”³⁰⁹

2.2.5 Metaphor identification: (3) Ancient roots are religious roots.

The *Bowers* Court was making, according to Justice Kennedy, “a broader (scale image schema) point”:

[F]or centuries there have been powerful *voices* to *condemn* homosexual **conduct** as immoral. The *condemnation* has been *shaped* by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family.”³¹⁰

These factors are not to be used to make the decision before the Court, however, as to “whether the majority may use the *power* of **the State** to *enforce* these views on

³⁰⁹ Ibid., 569.

³¹⁰ Ibid., 571.

the whole society through *operation* (source domain *physical health*) of the *criminal* (source domain of *conflict*) ‘law’.” The point Chief Justice Burger made in his concurring opinion is a claim Justice Kennedy argues should be challenged:

Decisions of individuals relating to homosexual **conduct** have been subject to state *intervention* throughout the history of Western civilization. *Condemnation* of those practices is firmly *rooted in* Judeo-Christian moral and ethical standards.³¹¹ (compulsion, *conflict*, *plant*, container).

According to the Justice, scholarship challenges this statement, but of more relevance anyway are the more recent laws and traditions: “These references show an *emerging* (*plant* source domain) awareness that **liberty** gives substantial (scale image schema) *protection* to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”³¹² The *religious container* of the “Judeo-Christian moral and ethical standards” has been emptied in the last decades. Now many states have abolished or have not enforced anti-sodomy laws for decades.

Furthermore, Kennedy argues that the “sweeping references” (scale) by the Chief Justice to the history of Western civilization and Judeo-Christian moral and ethical standards ignore evidence “*pointing* (*physical movement* source domain) in the opposite direction.” The British Parliament in 1967 repealed anti-sodomy laws, and the European Convention on Human Rights invalidated anti-sodomy laws in all countries that are members of the Council of Europe.³¹³

³¹¹ Ibid.

³¹² Ibid., 572.

³¹³ Ibid., 573.

2.2.6 Metaphor interpretation and explanation: (3) Ancient roots are religious roots.

In his opening description of the “broader point” being made by **Bowers**, Justice Kennedy evokes spectral *voices* from the centuries past raised in *religious condemnation* of “homosexual **conduct**.”³¹⁴ It is not necessary to refer to “witch hunts” in order to tap into the energy contained in these words carefully linked to access the source domain of *religious persecution*. Even the visual image of “ancient *roots*,” supplied initially by the *Bowers* Court, fits into the context Kennedy constructs, taking its appointed place in an archetypal darkened, medieval landscape dominated by a gnarled overhanging tree and its protruding root system.

The force of **the State** (*power, enforce*) joins with these religious images to depict **the State’s** agent, ‘the law’, (sword or knife raised) *operating* on the body of the “whole society.”³¹⁵ But against the combined force of religion and state, ‘The Court’s’ “obligation is to define the **Liberty** of all.”³¹⁶

Kennedy even questions whether the Chief Justice’s claim about laws condemning homosexual practices being *rooted in standards* derived from Judeo-Christian religion are valid. He shifts to a more relevant container, (“standard,”) of the more recent “laws and traditions.” This container holds “laws and traditions” that he characterizes as coming from an “*emerging* awareness.” This suggests an awareness that was once submerged in the “ancient” darkness, entangled in a medieval *root* system that has now been freed by modern institutions, both at home and in Europe, to “*point* in the opposite direction.”

³¹⁴ Ibid., 571.

³¹⁵ “The issue is whether the majority may use the *power* of **the State** to *enforce* these views on the whole society through **operation** of the *criminal* ‘law.’” Ibid., 571.

³¹⁶ Ibid.

The institutions he refers to by name are the American Law Institute, British Parliament, the European Court of Human Rights, the European Convention on Human Rights, and the Council of Europe. They are all leaders in *pointing* away from the direction of “the Judeo-Christian moral and ethical standards.”³¹⁷

Justice Scalia will not ignore the emptying of the Judeo-Christian morals and values container, and the refilling it with “*emerging* awareness.” This will become part of what he characterizes as evidence of a “culture war.”

2.2.7 Metaphor identification: (4) *Casey* and *Romer* cast doubt.

In *Casey* the Court “reaffirmed the substantive (scale) force of the **liberty** *protected* by the Due Process Clause”³¹⁸ in decisions concerning marriage, procreation, contraception, family relationships, child rearing, and education. Kennedy reaffirms their decision and quotes their famed “mystery of life”³¹⁹ passage to support what he believes “the Constitution *demands* for the **autonomy of the person** making these choices:”

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the **liberty** protected by the Fourteenth Amendment. At the *heart* of **liberty** is ‘the right’ to define ‘one’s own’ concept of existence, of meaning, of the universe, and of the mystery of *human life*. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of **the State**.³²⁰

The “matters” are linked by the word “involving” to “personal choices” that are “central” (center-periphery image schema) to “personal dignity” and to

³¹⁷ Ibid., 572.

³¹⁸ Ibid., 573.

³¹⁹ Justice Scalia will refer to this passage as the “sweet mystery of life” passage in his dissent.

³²⁰ Ibid., 574.

“Liberty.” Her “heart” (*human body* source domain and center-periphery image schema) contains “the right to define ‘one’s own’ concept” that is linked by “of” to the following conceptual objects: “existence, meaning, the universe, the mystery of human life.” The “matters” here listed are all contained within **Liberty’s** person; **the State** cannot force (compulsion) someone to “form beliefs” about these concepts.

Therefore, Justice Kennedy reasons, “persons in a homosexual relationship (container) may *seek* **autonomy** for these purposes, just as heterosexual persons do.” Earlier in this analysis, **autonomy of self** has been identified with ‘rights’ language. Here again ‘the right’ and a companion phrase, ‘one’s own,’ advance the embodied and self-ruling **self**.

In the second case, *Romer*, the decision was based on the Equal Protection Clause, which Kennedy does not want to use in the instant case. He reasons that the Due Process Clause is comprehensive enough to include both:

Equality of treatment and the due process right to demand *respect* for **conduct** *protected* by the substantive (scale image schema) guarantee of **liberty** are linked in important *respects*, and a decision on the latter point advances both interests. If *protected* **conduct** is made criminal and ‘the law’ which does so remains *unexamined* for its substantive validity, its *stigma* (*religion* source domain) might remain even if it were not *enforceable* as drawn for equal protection reasons.³²¹

In the first of the two sentences just quoted, the source domain of *mental health* is tucked in between the image and source domains of compulsion and *conflict* in the words referring to **certain intimate conduct**: “demand” and “*respect*” and “*protected*.” In the second sentence **conduct** is flanked on one side by “*protected*” (*conflict* source domain), and on the other side by “*stigma*” (*religion* domain).

³²¹ Ibid., 575.

2.2.8 Metaphor interpretation and explanation: (4) *Casey* and *Romer* cast doubt.

Linking metaphors are critical to Justice Kennedy's arguments about the decisions in *Casey* and *Romer*. In *Casey* the Court does the work of linking the personal decisions protected by the Due Process Clause: marriage, procreation, contraception, family relationships, child rearing, and education. Justice Kennedy then links these already protected decisions to "matters" involving "beliefs" about "existence, meaning, the universe, the mystery of human life." Then he links the rights of "heterosexual persons" to believe whatever they wish about these things to the "**autonomy**" of a "person in a homosexual relationship" to seek the same rights.³²²

In actuality, what has been linked together are the *protected* rights of the previous court decisions surrounding personal decisions about specific issues to the "matters" of beliefs about "existence, meaning, the universe, the mystery of human life." This is not actually groundbreaking judicial insight, nor is it authoritative explication of unenumerated rights. There are no laws forbidding anyone to hold particular beliefs about these "matters." What the linking process has accomplished rhetorically is the illusion that, since beliefs about homosexual relationships are not regulated by any laws, homosexual behavior and/or relationships are also not to be regulated, that is, are to be *protected* by the Due Process Clause.

Kennedy also makes explicit his linkage of the two aspects of **Liberty's** character, "equal treatment" and "due process right to demand respect for conduct." His linkage elaborates on the connections he made in his opening paragraph, where **certain intimate conduct** is part of **liberty's autonomy of self**, and connected to her "**freedom** of thought, belief, and expression" as well. Kennedy argues that since equality and due process are thus linked, it is not necessary to use the Equal Protection Clause in

³²² Ibid., 574.

order to assure equality of treatment and *respect*. That can be achieved through the Due Process Clause just as well.

It is important to note also how Justice Kennedy characterizes the Due Process Clause protections. The Clause under scrutiny says, “nor shall any State deprive any person of life, liberty, or property, without due process of law.” His gloss on this Clause includes this phrase: “the due process right to demand *respect* for **conduct** *protected* by the substantive guarantee of **liberty**.”

From the protected triumvirate of “life, liberty, property,” **Liberty** is said to contain ‘the right’ to “demand *respect* for **conduct**.” What kind of conduct is described as “**conduct** *protected* by the substantive guarantee of **liberty**?” The claim here seems to be that **liberty** protects and demands respect for any conduct she protects. While this is clearly not an informative statement, the linkage of *protect* and *respect* to **conduct** is quite effective for ideological and rhetorical purposes, despite or because of its vacuity.

2.2.9 Metaphor identification: (5) Stigma by criminalization

Given the linkage of “equality of treatment and due process right to demand *respect* for **conduct** *protected* by the substantive guarantee of **liberty**,”³²³ Justice Kennedy warns that criminalization of “*protected* conduct makes discrimination against the persons who engage in it possible. It “*exposes*” (*survival* source domain) them to the **state** ‘laws’ that require registration of sex offenders, and “other collateral consequences always following (link image schemas) a conviction.”³²⁴

Justice Kennedy adds to his point that the “*stigma* (*religion* source domain) of criminalization is not trivial” with this conclusion: “This underscores the consequential

³²³ Ibid., 575.

³²⁴ Ibid., 576.

(scale image schema) nature of the *punishment* (*conflict* source domain) and **state-sponsored condemnation** (*mental health* source domain) attendant (link image schema) to the criminal *prohibition* (*conflict* source domain).”³²⁵

2.2.10 Metaphor interpretation and explanation: (5) Stigma by criminalization

Justice Kennedy uses the link image schema to emphasize again **the State’s** power to harm through ‘the law.’ Linking these two agents is a reminder of their collusion in *Bowers* against homosexual persons: “Its [*Bowers*] continuance as precedent demeans the lives of homosexual persons.”

With the use of the *stigma* we are back in a premodern and religious world. The domain of *stigmata* is one in which the marks of Jesus are sustained by his faithful follower, setting him or her apart and also identifying one with Jesus’ sufferings. In this target domain, the *stigma* carries only the negative part of being set apart and of suffering. Here there is no purpose for good; it is part of the **State’s** collusion with the *religious* world in *condemning* by criminalizing. In this case, no one even has to raise a *voice* to speak against the sufferer; she automatically is stamped, to be viewed with contempt as she moves about in the world.

2.3 Argument Three: Stare Decisis Not Inexorable

This argument is designed to move a legal doctrine out of the way for those who may stumble at the notion of overruling a rather recent Supreme Court decision. He will need to show that there has not been the kind of individual and societal reliance on *Bowers* that would prevent overturning it. He concludes that *stare decisis* is “a principle of policy” and “not an inexorable command.”

³²⁵ Ibid.

2.3.1 Metaphor identification of Argument Three

Justice Kennedy's argument here flows from his assessment of the impact of *Casey* and *Romer*: "The *foundations* of *Bowers* have *sustained* (*survival* source domain) serious *erosion*" (*disaster* source domain) from them, and "*weakened*" (*disaster*) their precedent. In this atmosphere, he believes criticism from other sources is "of great significance." In the U.S. it has been both "substantial" and "continuing (scale source domains)." ³²⁶ In addition, courts from five different states have not followed its reasoning in their own state constitutions.

Not only in the U.S. but also in international circles the "reasoning and *holding*" (force image schema and *physical movement* source domain) in *Bowers* has been "*rejected*" (*conflict* source domain). Other nations have acted in "affirmation of the *protected* 'right' of homosexual adults to engage in **intimate, consensual conduct.**" And Justice Kennedy does not see, ("*there has been no showing*"), that there is any "legitimate or urgent" reason for our country's "**governmental** interest in circumscribing (container image schema) personal choice."

Thus, even though the doctrine of *stare decisis* is "essential (center-periphery image schema) to the *respect* accorded to 'the Court' and to the stability (balance image schema) of 'the law'," it is not "an inexorable command (blockage and compulsion image schemas)." ³²⁷ Kennedy's rule in *Casey* called for resistance to overruling a precedent concerning a "**liberty** interest" if there has developed an individual or societal reliance on that precedent. In that case, it was appropriate to say the following: "**Liberty** finds no *refuge* in a jurisprudence of doubt." And now it is appropriate only to quote it.

³²⁶ Ibid.

³²⁷ Ibid., 577.

In the case of *Bowers* he says there has been no individual or societal reliance “of the sort that could *counsel* (domain of *mental health*) against *overturning* its *holding* once there are *compelling* (*compulsion* source domain) reasons to do so.” The precedents *before* it and *after* (*path*) it actually “contradict its central *holding*.”

2.3.2 Metaphor interpretation and evaluation

The source domain of *building* provides Justice Kennedy with the conceptual framework to portray the arguments in *Bowers* as the *foundation* of a building that is being *continually* and *substantially eroded* by the waters of the arguments in *Casey*, *Romer*, courts of five states, and some international courts. The *scale* of criticism against *Bowers* is great, making *survival* unlikely. Clearly it makes no sense to try to stand on this crumbling *foundation* of *Bowers* to keep ‘the law’ *stable*. Even **Liberty** herself can find “no *refuge*” or place to dwell in the shaky “jurisprudence of *doubt*” (source domain of *mental health*) that *Bowers* has since become.

Justice Kennedy argues that the place of good *mental health* in this case *counsels* for overturning *Bowers* since it is in the *path* of *conflict* over its ruling anyway: “*Bowers* itself causes uncertainty, for the precedents before and after its issuance contradict its central holding.”³²⁸

2.4 Argument Four: *Bowers* Cannot Withstand Analysis

This final argument is a summary of his previous findings, and a closing circumscribing of the extent of the majority’s ruling. Justice Kennedy softens the blow of overturning a recent decision by some of his colleagues with the inclusion of Justice Stevens’ dissenting opinion prominently displayed in his closing rationale.

³²⁸ Ibid.

2.4.1 Metaphor identification of Argument Four

The dissent in *Bowers* by Justice Stevens summed up for Justice Kennedy his own conclusions. The illegitimacy of upholding a law “*prohibiting the **practice***” that most people think is immoral is clear. And the decisions of married and unmarried people regarding “the **intimacies** of their physical relationship . . . are a form (part-whole) of ‘**liberty**’ *protected* by the Due Process Clause of the Fourteenth Amendment.”

Justice Stevens was right, and his “analysis . . . should have been controlling (compulsion image schema) in *Bowers* and should control here. *Bowers* was not correct . . . not correct today . . . ought not to remain binding (blockage image schema) . . . *Bowers v. Hardwick* should be and now is overruled.”

2.4.2 Metaphor interpretation and explanation of Argument Four

If there was any doubt before that **Liberty** included in her essence the right to decide what kind of sexual intimacy one can practice, there is no ambiguity now: “the **intimacies (certain intimate conduct)** of their physical relationship . . . “ are a part of the whole of **Liberty**, and, as such, “*protected* by the Due Process Clause of the Fourteenth Amendment.”

The “binding” (blockage) of **liberty** by *Bowers* is over now; the illegitimate “control” (compulsion) by that court is replaced by the legitimate “control” of the analysis of that court’s dissent, and now by the majority in *Lawrence*.

2.5 Coda: What Lawrence Is Not and Is

In the not-so-distant background of this decision is the question of same-sex marriage. Justice Kennedy needs to supply for future courts some sense of how to

adjudicate the boundaries he has drawn relative to the protection given “homosexual conduct.” He catalogues what issues do not fit into the circumscribed container of freedoms, and affirms again those that do.

He reminds the Court’s readers what have not been issues in the decision. “It does not involve (link image schema) minors . . . persons who might be *injured* (*physical health*) or coerced (compulsion image schema) or who are situated in relationships (container) where consent might not easily be *refused* (*conflict*). . . . public **conduct** or prostitution. . . . whether the **government** must give formal recognition to any relationship that homosexual persons seek to enter.”³²⁹

It does involve: “[T]wo adults who, with full and mutual consent from each other, engaged (link) in sexual practices (container) common (link) to a homosexual lifestyle.”

They are “entitled to *respect* for their private lives.”

“**The State** cannot *demean* their existence or *control* their destiny by making their **private sexual conduct** a crime.”

“Their ‘right’ to **liberty** under the Due Process Clause gives them the full ‘right’ to engage in their **conduct** without *intervention* of the **government**.”

“It is a promise of the Constitution that there is a *realm* of personal **liberty** which the **government** may not enter.” *Casey*

“The Texas ‘statute’ furthers no legitimate **state** interest which can justify its *intrusion into* the personal and private life of the individual.”

Further, Justice Kennedy explains that those who drafted the Due Process Clauses of the Fifth and Fourteenth Amendments could not know “the components (part-whole) of **liberty** in its manifold (scale image schema) possibilities,” and thus were not specific enough. “They did not presume to have this *insight*.” They knew that “*times*

³²⁹ Ibid., 578.

(*journey* source domain) could *blind* (*vision* source domain) us to certain truths and later generations can *see* that ‘laws’ once thought necessary and proper in fact *serve* only to oppress (blockage image schema).”³³⁰

2.5.1 Metaphor interpretation and explanation

Metaphors of compulsion are linked to mark those who are not bound by this ruling because they are in circumstances that are “coercive.” The **government** is also not to be compelled by this ruling to “give formal recognition to any relationship that homosexual persons seek to enter.” However, the **government** may not use the law against homosexuals to “control their destiny” or “*intrude*” upon their private lives.

Unlike justice, who must be blindfolded, **Liberty** is not *blind*. In Justice Kennedy’s view, even though *times* (*journey* source domain) can keep truths hidden, the “component” parts of **liberty** that those who drew up the Fourteenth Amendment could not “see” can now be seen by others who have better sight. ‘The Court’ as **Liberty’s** agent has acknowledged these *insights* now in the *Lawrence* decision.

The narrative achieved by Justice Kennedy regarding **liberty** and the *Lawrence* Court’s application of its protection to the sexual relationships of homosexual persons is robustly, even vehemently, challenged by Justice Scalia in his dissenting opinion. The analysis of Scalia’s dissent follows in the next chapter. The narrative of Kennedy’s argument will not be left to stand alone as it has been here presented. The following schematic presents his argumentative structure in terms of the major actors and the dispute in which they are engaged:

³³⁰ Ibid., 580.

Kennedy's Narrative Frame

<u>Chief Actor</u>	<u>Aide</u>	<u>Narrative Role</u>
Liberty	'the Kennedy Court'	Protagonists
The State	'the Law'	Antagonists
Autonomy of self	right to certain intimate conduct	Disputed Region

Chapter Four

Critical Metaphor Analysis: Justice Scalia's Dissent

Justice Scalia's dissent is, of course, a response to the majority opinion and is thereby structured to address the issues that Justice Kennedy has established as important. There is, therefore, no question about the motivation of this Justice in framing the argument as he does. The identical questions of rhetorical purpose we have posed regarding Justice Kennedy's majority opinion can also be posed about Justice Scalia's dissent:

What work does metaphor do in Justice Scalia's framing of his dissenting opinion?

And a second question: How does metaphor structure the reasoning Justice Scalia is using to advance his own arguments?

The following Critical Metaphor Analysis of his argument is designed to address these two questions and will proceed in the following way: First, I will begin the analysis by isolating Justice Scalia's introductory paragraphs from the body of the argument. I will conduct all three stages of analysis -- metaphor identification, metaphor interpretation, and metaphor evaluation -- before moving on to the body of his argument. Moreover, these three stages of analysis will be done in two parts. The first time through I will focus on identifying the metaphors that meet the linguistic, pragmatic and cognitive criteria.

The second time through will be the interpretative and explanatory stage of the analysis of the metaphors, specifically focusing on the work done by the image schematic structures and source domains that shape them. The interpretation and explanation of the metaphors and image schemas will reveal the structure of Justice Scalia's introductory argument and provide a frame for the ongoing analysis of the remainder the dissent.

Like Justice Kennedy's introduction in his majority opinion, Justice Scalia's dissenting opinion in *Lawrence* begins with the word "liberty": "Liberty finds no refuge in a jurisprudence of doubt."³³¹ The divergence in their presentation of liberty increases from this point, however, as Scalia's approach to liberty is differentiated from Kennedy's, point by point. Analysis of the metaphors, literary, pragmatic and cognitive, in his arguments will reveal a very different positioning of liberty and of all of the other actors in Justice Kennedy's majority arguments.

3.0 Metaphor identification of Introduction

1. "**Liberty** finds no *refuge in* a jurisprudence of *doubt*."
2. That was the Court's *sententious* response, *barely* more than a decade ago, to **those** seeking to *overrule* *Roe v. Wade*.
3. The Court's response today, to **those** who have *engaged in* a 17-year **crusade** to *overrule* *Bowers v. Hardwick* is very different.
4. The need for *stability* and *certainty* presents no *barrier*.

The central agent of focus in Scalia's opening paragraph is not liberty; it is instead 'the Court.' Quickly he begins to draw in characteristics of 'the Court' he wants to be the readers' focus: *sententious*, *overruling*, *crasher* of *stable* and *certain barriers*.

"*Sententious*" describes the Court's aphoristic response to its role in providing a *refuge* (building domain) for **Liberty in** (container) its *stable* (*balance* image schema)

³³¹ Ibid., 586, quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 844, (1992).

and *certain* (domain of *mental health*) jurisprudence. This attribute also has another register of meaning which is likely operative in this context as well: “given to or abounding in excessive moralizing,” often attributed by some to the domain of *religion*.

The following two attributes are from the source domain of *conflict*. To “rule” on a point of law both marks the correct lines (as by a ruler) and exercises dominion or authority. To *overrule* is to re-mark the boundary lines, the *conflict* source domain adding the valence.

The word “*barrier*” comes from the domain of *building* and, in conjunction with the insinuation of breaking down a *barrier*, it pulls from the *conflict* or *battle* domain.

The other agents Justice Scalia identifies are “**those seeking to *overrule***” and “**those engaged** (link image schema) in a **crusade to *overrule***.” The literal meaning of “crusade” refers to any one of the military expeditions advanced by 11th, 12th, and 13th century Christians in order to take back the Holy Land from the Muslims. In this context it is used in a metaphorical sense referring to any vigorous and aggressive movement for the defense or advancement of an idea or cause. The source domain is *religion*; the target domain is political.

Unable to duplicate the brevity of Justice Kennedy’s opening statement, Justice Scalia makes up for this lack by a rapid-fire delivery of all the things that are wrong with the majority opinion. He asserts that most of the remaining majority opinion is irrelevant to the holding (*physical movement* source domain and force/containment image schema): “that the Texas statute ‘furthers no legitimate state interest which can justify’ its application to petitioners under rational-basis review.”

Scalia follows this charge with another one. He points out the language of “strict scrutiny” that Kennedy uses (*fundamental* propositions[s], *fundamental* decisions,

fundamental right (3 uses),³³² and the inconsistency of his never actually applying this standard of review. Thus, Scalia sees the irony of the *Lawrence* Court *overruling* the outcome of *Bowers* and at the same time “leav[ing] strangely *untouched* (domain of *physical movement*) its central legal conclusion: ‘[R]espondent would have us announce ... a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do.’³³³

Instead of the *Lawrence* Court declaring a *fundamental* right, Scalia says it makes an “unheard-of” move:

[T]he Court simply describes petitioners’ conduct as ‘an *exercise* of their liberty’ - which it undoubtedly is – and proceeds to apply an unheard-of form of rational-basis review that will have *far-reaching* implications *beyond* this case.”

The Court will not *touch* (*physical movement* source domain) the central legal conclusion of *Bowers*, but its own conclusion will *touch* much *beyond* (*spirit* source domain) the instant case, with its “*far-reaching* (*scale* image schema and *physical movement* source domain) implications.”

3.1 Metaphor interpretation and explanation of the Introduction

Starting out on Justice Kennedy’s rhetorical ground is not a bow of respect. **Liberty** reappears for just a moment to be immediately replaced by a central actor of darker demeanor: ‘the Court.’ Kennedy’s personified **Liberty** and her gallant, ‘the Court,’ are no longer the protagonists of this legal drama. It is clear that for Scalia ‘the Court’ here is to be understood as the source of *conflict*: a haughty moralizer, inconsistent, reckless rather than certain, heedless of stabilizing and reliable *barriers*.

³³² Ibid.

³³³ *Bowers*, 191, in *Lawrence*, 586.

Furthermore, ‘the Court’ does not serve ‘liberty’ now, but is aligned with other supporters, “**those engaged** in a **crusade** to *overrule*.” Those in the **crusade** are by definition ‘**crusaders**,’ linked to an aggressive ideological or religious movement. Justice Scalia determinedly positions the antagonists, ‘the Court’ and ‘the **crusaders**,’ center stage. Here the conceptual metaphor political conflict is religious conflict captures the connection between these metaphors.

What of the protagonists? If liberty is to be a protagonist again it is not yet apparent. The focus is on the disputed region, now signaled by the repetition of *fundamental*, (from the source domains of *building* and of the *physical body*): propositions, decisions, right(s). The *fundamental* right to homosexual sodomy appears to be the obvious arena of disputation in *Bowers*, but it is not yet clearly named by Scalia as the place of disputation he will occupy against Justice Kennedy’s argument.

Justice Scalia says that Justice Kennedy has ignored making a case based on declaring a *fundamental* right to homosexual sodomy, and has substituted instead for the disputed region these three linked agents: the right to **certain intimate conduct**, **autonomy of self**, and **Liberty**.

Scalia does not duplicate Kennedy’s assignation of “**certain intimate conduct**” to “sodomy.” His three references to “Georgia’s anti-sodomy statute” and the discussion around it are accomplished by the designation “homosexual sodomy.” He also ignores the phrase “**autonomy of self**.” The mention of “**Liberty**” is both times in the context of a quotation from Justice Kennedy. Clearly, Justice Scalia is constructing a very different frame for this opinion in his dissenting argument.

Comparing the table prepared for Kennedy’s argument in the last chapter to one for Scalia, we see the lacunae in these opening paragraphs, waiting to be filled in:

Kennedy's Narrative Frame

<u>Chief Actor</u>	<u>Aide</u>	<u>Narrative Role</u>
Liberty	'the Kennedy Court'	Protagonists
The State	'the Law'	Antagonists
Autonomy of self	right to certain intimate conduct	Disputed Region

Scalia's Narrative Frame

<u>Chief Actor</u>	<u>Aide</u>	<u>Narrative Role</u>
-----	-----	Protagonists
'the Kennedy Court'	crusaders	Antagonists
-----	<i>fundamental</i> right to -----	Disputed Region

Justice Scalia takes a bit longer than Justice Kennedy to position all the players in his argument, but they soon are identified.

4.0 Justice Scalia's Four Arguments

Justice Scalia answers the four arguments advanced by Justice Kennedy, although he does not address them in the same order as they were first presented.

Initially he engages the issue of *stare decisis* and the inconsistency of the Justice in his stance toward it.

His second argument challenges the majority's assertion that the case involves the right to liberty under the Due Process Clause.

Third, he examines the state of anti-sodomy laws at the time of *Bowers* and challenges the Court's interpretation of them.

Fourth, he challenges Kennedy's fourth argument in support of its holding that there is no legitimate state interest to justify the anti-sodomy laws.

In similar fashion to Justice Kennedy's Coda that ends his opinion, Justice Scalia adds a list of items that either did not fit into his other arguments or need to be clarified and emphasized.

Each argument will be analyzed with the same procedure as utilized in Chapter Three's analysis of Justice Kennedy's arguments. Metaphor identification will be followed by metaphor interpretation and explanation for each argument.

4.1 Argument One: Manipulating Stare Decisis.

Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* [,] ... its decision has a dimension that the resolution of the normal case does not carry.... [T]o overrule under fire in the absence of the most compelling reason ... would subvert the court's legitimacy beyond any serious question. *Planned Parenthood v. Casey*, 866-867. Justice O'Connor, Justice Kennedy, Justice Souter.³³⁴

In this argument Justice Scalia examines each of the criterion for overruling a previous Court opinion and puts on display the fluctuating standards applied by Justice Kennedy. Scalia gives the decision in *Roe* and the need to preserve precedent claimed by Kennedy (in the *Casey* decision quoted above) special attention as an illustration of its inconsistency. He concludes that the *Lawrence* opinion spells the end of rational-basis review, if not the "rule of law."

4.1.1 Metaphor identification of Argument One

Justice Scalia begins by remarking on "the Court's surprising readiness" to look at a case it had decided a "mere" 17 years before (scale image schema), noting that he believes it necessary to be consistent rather than manipulative in "*invoking* the

³³⁴ Ibid., 587, quoting *Casey*, 505 U.S. 833 (1992).

doctrine.”³³⁵ In the *Lawrence* decision, Scalia points out that the Court does not mention the “*paeon*” to *stare decisis* that three members of the Court coauthored. Both “*invoke*” and “*paeon*” are drawn from the *religion* source domain.

The above reproduced quotation from *Casey* is what Justice Scalia has in mind as a song of praise or triumph, not to the Greek god Apollo, but rather to a precedent that preserved “judicially *invented* abortion rights.”³³⁶ While one cannot actually *invent* a right, the use of this word from a source domain of the innovative – or the fabricated – object, produces a cognitive shift from the source domain of *natural* to the *constructed* object, (in this case the object is rights).

He observes that in *Casey* “the widespread criticism of *Roe* was a strong reason to *reaffirm* it” but “the widespread opposition to *Bowers*” is now a reason to overrule it. Indeed, the criteria for overruling advanced by Kennedy today, Scalia observes, applies equally as well to *Roe* as reasons to *overturn* it, a move they certainly have “no disposition” to do. “Widespread” draws from our experience of scale; “*overturn*” joins “overrule” from the source domain of *conflict*.

He takes each criterion for overruling and examines how it applies to the instant case. The majority opinion allows a court to overrule an “erroneously decided precedent” if: “(1) its foundations have been ero[ded] by subsequent decisions . . . (2) it has been subject to ‘substantial and continuing’ criticism . . . (3) it has not induced ‘individual or societal reliance’ that counsels against overturning.”³³⁷

³³⁵ Ibid., 587.

³³⁶ Ibid., 587.

³³⁷ Ibid.

To counter criterion (1), Justice Scalia examines what decisions actually have *eroded*, “*eaten into*,” (source domain of *disasters*) the *foundations* of a precedent. *Casey* did not *erode Bowers*, since it provided a “less expansive right to abortion than *Roe* in its holding. That is, it did not expand autonomy in private relationships. If the Court is referring not to its holding in *Casey* but to its “famed sweet-mystery-of-life passage” (“At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life”), Scalia is even more skeptical of, if not alarmed by, its *eroding* power:

I have never heard of a law that attempted to restrict one’s “right to define” certain concepts; and if the passage calls into question the government’s power to regulate *actions based on* (his emphasis) one’s self-defined “concept of existence, etc.,” it is the passage that **ate** the rule of law.³³⁸

While he does not think *Casey* “*eroded*” the “*foundations*” of *Bowers*’s rational basis holding, Scalia agrees that *Romer* did. But, he protests, both *Roe* and *Casey* have been “equally ‘*eroded*’ by *Washington v. Glucksberg*.” The *Glucksberg* decision set the “heightened scrutiny” standard to cover “*only* fundamental rights which are ‘deeply rooted (scale image schema, domain of *plants*) in this Nation’s history and tradition.”³³⁹

“Equally” and “heightened” are from the scale image schema – the “‘more’ or ‘less’ aspect of human experience”³⁴⁰ - and “*scrutiny*” is from the source domain of vision (Lat. *scrutari* – to pick through; vision is physical touching).³⁴¹ Justice Scalia also points out that neither *Roe* nor *Casey* attempted to meet this “deeply rooted” standard, but still used the “heightened scrutiny” standard anyway in deciding the cases.

³³⁸ Ibid., 588.

³³⁹ Ibid.

³⁴⁰ Johnson, *Body in the Mind*, 122.

³⁴¹ Johnson, *Body in the Mind*, 108.

In addressing the second requirement for overturning a precedent (2), that it is subject to “substantial and continuing (scale image schemas) criticism,” Justice Scalia adds a few more illustrations of this kind of criticism of *Roe* “(and by extension *Casey*).” “Extension” too is from the scale image schema.

The third requirement that is left “to distinguish the *rock-solid*, unamendable disposition of *Roe* from the readily *overrutable Bowers*” is the presence of “societal reliance.”³⁴² The foundations of *Roe* are not *eroded*; they are solid as a rock and unchangeable, while *Bowers* can easily be ruled over. Contrary to Justice Kennedy’s characterization of no “societal reliance” on the principles in *Bowers*, there have been “countless (scale image schema) judicial decisions and legislative enactments” relying on the “ancient proposition” that a rational basis for regulation is the majority’s moral beliefs surrounding appropriate sexual behavior. He selects a decision from 1998 in which a Federal court affirms this proposition: “[T]he *crafting* (*building* source domain) and *safeguarding* (*conflict* source domain) of public morality ... indisputably is a legitimate government interest under rational basis scrutiny.”³⁴³

Justice Scalia lists a number of these laws regulating the following behavior: sale of sex toys, military service by those engaging in homosexual conduct, no constitutional right to adultery. He adds that state laws against “bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity” are “*sustainable* (*survival* source domain) only in light of *Bowers*’ validation of laws *based* (*building* domain) on moral choices. Since the majority opinion makes no effort to “**cabin** the scope of its decision,” (*building* source domain, scale image schema), all of these laws are liable to be invalidated under the Due Process Clause.

³⁴² *Lawrence*, 589.

³⁴³ *Ibid.*

Furthermore, Justice Scalia points out and offers case evidence that, even though the Court did not overrule the *Bowers*' holding that homosexual sodomy is not a fundamental right, the "societal reliance" on that part of the decision has been "substantial (scale) as well."

Given all of this, there will be "*massive disruption* (source domain of *disasters*) of the current social order" as a result of overruling *Bowers*.³⁴⁴ While overruling *Roe* would merely have returned the issue of availability of abortion to the state legislatures, Scalia observes, the overruling of *Bowers* opens all morals legislation to challenge in the courts.

4.1.2 Metaphor interpretation and explanation of Argument One

Justice Scalia remains on the track he began in his opening paragraphs, lighting the legal stage with spotlights on Justice Kennedy's chief actor, 'the Court' and its characteristics. He adds to the ones drawn in his introduction characteristics born of the *conflict* domain that aid the *attack* against 'liberty' rather than its *protection*. He suggests 'the Court' is "using its own hands" by being "*manipulative*," and "*inventing*" (*fabricating*) rights. To achieve justice this way is in contrast to the *religious* or *spirit* realm it positions itself in by "*invoking*" and singing its praise ("*paean*") of *stare decisis*. 'The Court' also is in league with the "**crusaders**" who link in their personas both the *conflict* and *religion* domains.

To add another negative character trait, Scalia highlights the hypocrisy inherent in 'the Court's' support of *stare decisis* in one case and not in the other. Justice Kennedy vows not to overrule *under fire* in the case of *Roe*, - which "would *subvert* the court's

³⁴⁴ Ibid., 591.

legitimacy”³⁴⁵ – and is all too “ready” to *overrule* *Bowers*. Scalia portrays ‘the Court’ as a very unsteady, unreliable protector. In a war that has many battles it keeps changing sides.

Justice Kennedy portrayed **Liberty** and her aide, ‘the Court,’ as expansive in character and the court decisions protecting sexual autonomy as *eating into*, “*eroding*,” the foundations of erroneously decided cases. In contrast, Scalia charges that ‘the Court’ is the agent of *erosion* of something far more portentous; not of a particular case but of the “rule of law.” Since ‘the law’ has a legitimate purpose of *crafting* (domain of building) and *safeguarding* (domain of conflict), to eat away at the *roots* (plants) of this proposition regarding the use of ‘the law’ is to do damage of a more fundamental character. ‘The Court’ has made no attempt to narrowly focus its ruling, “to **cabin** the *scope*,” so he predicts social disaster as a consequence.

Explanation of Scalia’s employment of metaphorical structures in this argument certainly includes noting the way they are used to keep the dynamic of *conflict* always in the foreground, e.g. “*overruling*, *overturning*, *safeguarding*.” The more subtle use of the image schemas, however, which are so seamlessly threaded throughout the argument, is a key factor in determining the construction of his dissent. Notice the use of the image schema for scale in the following words: “mere, widespread, expansive, equally, heightened, deeply, substantial, continuing, extension, countless, scope.” A few of these words are used more than once, but we would be unlikely to notice any repetition. There is clearly a repetition at work in the use of the scale image schema, however.

Scalarity is, as Johnson observes, an image schema that does seem to “permeate the whole of human experience,” as we view our world as “more” or “less” or the “same”

³⁴⁵ *Ibid.*, 587.

in both quality and quantity.³⁴⁶ Justice Scalia is able to make use of this deep cognitive structure without calling attention to any particular strategy or word. He can emphasize the “less” in terms of time between the decision in *Bowers* against *fundamental* rights and the decision in *Lawrence* for them; and the “more” in terms of the reliance (substantial) upon the decision in *Bowers* and the criticism (“relentless”) against *Roe*.

The normative character of scalarity is built in, “more” is good or desirable in some cases, bad or undesirable in others, but there is a normativity nonetheless.³⁴⁷ Thus, Scalia is able to weave into his argument below the surface of logical awareness the constant suggestion of normative assessments. This is, of course, in addition to the obvious normative argumentative moves he makes, and serves to intensify them.

4.2 Argument Two: No Due Process Right to Liberty.

Even after presenting its justification for its choice not to “adhere” to the doctrine of *stare decisis*, the Court has to show that *Bowers* was wrongly decided and that the Texas anti-sodomy statute is unconstitutional. According to Justice Scalia using the Due Process Clause upon which to build its case was its first mistake, for there is only an assurance of due process in depriving citizens of their liberty. He concludes that the majority opinion actually applies a rational basis test in its holding.

4.2.1 Metaphor identification

Stipulating that there is a “constraint” (blockage image schema) on ‘liberty’ imposed by the Texas statute under question, Scalia links that constraint to many others on liberty from laws we accept, like those against prostitution, heroin abuse, and working

³⁴⁶ Mark Johnson, *Body in the Mind*, 122-23.

³⁴⁷ *Ibid.*, 123.

60 hours a week in a bakery.³⁴⁸ But more importantly, he argues, “there is no right to ‘liberty’ under the Due Process Clause, though today’s opinion repeatedly makes that claim. ... (“³⁴⁹The liberty protected by the Constitution allows homosexual persons the right to make this choice; These matters ... are central to the liberty protected; Their right to liberty under the due Process Clause gives them the full right to engage in their conduct”).³⁵⁰

After these illustrations from Kennedy’s argument he makes clear the reason for his opposition to it:

The Fourteenth Amendment *expressly allows* States to deprive their citizens of ‘liberty,’ *so long as ‘due process of law’ is provided*: ‘No state shall ... deprive any person of life, liberty, or property, *without due process of law.*’ Amdt. 14 (emphasis his.)

Scalia continues to explain the “substantive due process” doctrine that allows the states to infringe fundamental liberty interests only if the “*infringement (conflict source domain)* is narrowly *tailored (clothing source domain)* to serve a compelling (compulsion image schema) state interest.”³⁵¹ He associates himself with the application of this doctrine: “We have held repeatedly, in cases the Court today does not overrule, that *only* fundamental rights qualify for this so-called ‘heightened scrutiny’ protection ...” (his emphasis).

‘The liberty’ has to be both “*fundamental*,” that is, “traditionally protected by our society,” and “essential to the orderly pursuit of happiness by free men.” He summarizes: “All other liberty interests may be abridged (scale image schema) or abrogated

³⁴⁸ An obvious reference to *Lochner v. New York* 198 U.S. 45 (1905) in which the right to free contract was said to be covered by the Due Process Clause.

³⁴⁹ *Lawrence*, 592.

³⁵⁰ *Ibid.*

³⁵¹ *Ibid.*, 593.

(counterforce image schema) pursuant to a validly enacted state law if that law is rationally related to a legitimate state interest.”³⁵²

It follows from these criteria that laws that are not rationally related to a legitimate state interest may not infringe a ‘liberty’ interest even if it is not a *fundamental* right or ‘liberty’ interest. It is this principle, the rational basis test, that the *Lawrence* majority applies to the anti-sodomy statute in *Bowers* and in the instant case.

Justice Scalia again underlines the fact that *Bowers* did not use “heightened *scrutiny*” to examine the anti-sodomy law because they “do not implicate a ‘*fundamental* right’ under the due Process Clause.” Furthermore, he continues, the *Lawrence* Court does not “overrule this *holding*. Not once does it describe homosexual sodomy as a ‘*fundamental right*’ or a ‘*fundamental* liberty interest,’ nor does it subject (compulsion image schema) the Texas statute to strict (scale image schema) *scrutiny*.”³⁵³ It subjects it, rather, to the rational basis test and finds that the Texas statute “furthers no legitimate state interest that can justify its *intrusion* into the personal and private life of the individual.”

And even though ‘the Court’ does not *overrule* the *holding* of *Bowers* regarding homosexual sodomy not being a “*fundamental* right,” Scalia believes they “*cast* (*conflict* source domain) aspersions” on the *holding*, and this he wants to address. This leads him to his third argument regarding the state of ‘the law’ at the time of *Bowers*.

4.2.2 Metaphor interpretation and explanation of Argument Two

Two notable pragmatic and cognitive aspects of metaphor are at work in Justice Scalia’s second major argument. While he does not use “liberty” as a literary metaphor,

³⁵² Ibid.

³⁵³ Ibid., 594.

as does Justice Kennedy, his reiteration of ‘liberty’ in this section plays off the metaphorical treatment given by Justice Kennedy throughout his opinion. After an almost complete neglect of the word,³⁵⁴ ‘liberty’ is used by Scalia 16 times in this part of his dissent. He is deliberately shifting from Kennedy’s “Lady **Liberty**,” expansive in her reach, to a ‘liberty’ constrained by due process of law (both adjectives are scale image schemas).

Another striking aspect of Justice Scalia’s argument here is his continued use of *fundamental* as he develops his instruction in the “substantive due process” doctrine that he believes ‘the Court’ has misapplied. Clearly this is instruction in the *basics*, (the *building* source domain) of justice. Substantive due process (the notion of weight is part of the balance image schema; or scale as viewed in terms of more or less) is obviously a basic doctrine to ‘the Court’ that is as well-schooled as Justice Scalia. Still he repeats the word “*fundamental*.” It occurs throughout his dissent, but in this second argument he uses it 10 times, making his emphasis on this concept unmistakable. Something in addition to the notion of *building* is present perhaps.

Along with using “*fundamental*” in tandem with ‘liberty,’ Scalia focuses his use of “*fundamental*” in conjunction with the phrase “homosexual sodomy,” as used in *Bowers* and ignored by the majority opinion in *Lawrence*. As noted previously, the initial source domain for *fundamental* is from the *physical body*: the buttocks or anus. The dispute over whether the right to homosexual sodomy is *fundamental* or “deeply rooted” draws also on the *plant* source domain, referring to the *physical bottom* or *base* of the plants. Since, Scalia argues, the behavior at issue, related to the *bottom of the physical body*, is not claimed by ‘the Court’ to be a right that is a *fundamental* one, *rooted* in the soil of

³⁵⁴ “Liberty” is used only 3 times previously, in the opening paragraphs and the first argument.

American history and *built* on the *foundation* of tradition, it cannot be *protected* by ‘liberty’ under the Due Process Clause.

The function of the repetition of *fundamental* is not only to support Scalia’s instructive agenda, it also is to reinforce the need to have the right “deeply rooted,” by appealing to knowledge we have attained through our embodied experience, and is thus “deeply rooted” in us, his audience.

More of the table for Justice Scalia’s argument can be added now that the role of ‘liberty’ is known to be in dispute, as is the “*fundamental* right to homosexual sodomy.”

Scalia’s Narrative Frame

<u>Chief Actor</u>	<u>Aide</u>	<u>Narrative Role</u>
-----	-----	Protagonists
‘the Kennedy Court’	crusaders	Antagonists
‘liberty’	<i>fundamental</i> right to homosexual sodomy	Disputed Region

4.3 Argument Three: State of the Law.

As soon as Justice Kennedy had declared the basis of ‘the Court’s’ ruling to be the Due Process Clause, his next argument was to give an overview of the state of the law at the time of the *Bowers* decision in order to show that his own view of due process is in line with precedents. Justice Scalia believes another look at the state of the law is in order. As a result he concludes that, in keeping with even Justice Kennedy’s assertions, throughout our history ‘the law’ has criminalized homosexual sodomy, and thus has functioned as a social force against this practice.

4.3.1 Metaphor identification of Argument Three

First, Justice Scalia argues, the string of cases used by Justice Kennedy to support fundamental liberty rights that are derived from the Due Process Clause actually do not do the work he says they do. *Griswold* “grounded the so-called ‘right to privacy’ in *penumbras* (source domain of *fire/light*) of constitutional provisions *other than* (emphasis his) the Due Process Clause.” *Eisenstadt* also had “nothing to do with ‘substantive (scale) due process,’” as it actually used the Equal Protection Clause to decide the matter. Its use of the “right to privacy” language also was derived from *penumbral* rights, not substantive due process rights.

The next case in the linkage, *Roe*, recognized a “*fundamental (building)* right” from the Due Process Clause to abort an unborn child, but it did not argue that it was a right “deeply rooted” (scale, plant) in our history or tradition. Nor did *Casey* describe abortion as a “*fundamental right*.”

Secondly, he argues that the history of anti-sodomy laws as described by the Court does not undermine the fact that laws prohibiting “*sodomy in general*” (emphasis his)³⁵⁵ were part of our Nation’s history and tradition. The only relevant point is that the anti-sodomy laws prove that homosexual sodomy is not a right “deeply rooted” in our Nation’s history and tradition.

Third, Scalia points out that the claim that the laws were not enforced against those “acting in private” is unsupported by the evidence. Evidence is available that *prosecution (conflict)* of consenting adults happened in some cases. The *prosecution* was infrequent because of the private nature of the behavior. This is not a basis for establishing a “*fundamental right* deeply rooted.”

³⁵⁵ *Lawrence*, 596.

Fourth, even with “*emerging (plant source domain)*” awareness, Scalia notes that there are still States that *prosecute* “all sorts of crimes by adults ‘ in matters pertaining to sex,” including sodomy by consenting adults.³⁵⁶

Finally he argues, “*emerging awareness*” is by its very definition not “deeply *rooted*” as “*fundamental* right status requires.” Rights do not *spring (plant domain)* into existence because some states lessen or drop criminal sanctions against a behavior. He adds: “Much less do they *spring* into existence, as the Court seems to believe, because *foreign nations* decriminalize conduct” (his emphasis).³⁵⁷

4.3.2 Metaphor interpretation and explanation of Argument Three

This argument functions as a platform for the protagonists of his narrative to be foregrounded. ‘The law’ now, as an aide to ‘the states,’ appear clearly as the protagonists, locked in battle with Kennedy’s antagonists, ‘the Court’ and the **crusaders**. Again he uses Kennedy’s strategy of linking image schemas and source domains, with cases and the concepts they employ to do much of his own work here. Scalia argues that the court cases linked together actually show not only that there is no “*fundamental* right” to sodomy derived through the Due Process Clause, but also they show the character of ‘the law’ that Scalia believes to be relevant here; that is, the “prohibiting” (blockage) aspect of ‘the law’ relative to sodomy.

He argues, with the Court in *Bowers*, that ‘the states’ from the original 13 had criminal statutes against sodomy. When the Fourteenth Amendment was ratified “all but 5 of the 37 States in the Union had *criminal sodomy laws*”³⁵⁸ (emphasis his). He shows

³⁵⁶ Ibid., 598.

³⁵⁷ Ibid.

³⁵⁸ Ibid., 596.

‘the law’ to be an essential actor in the disputed arena of *fundamental* homosexual sodomy rights. He argues that the law’ has actually functioned as a social force against the practice of sodomy.

Justice Kennedy’s approach to the “state of the law” has been turned on its head by Scalia to become an approach to “the law of the state.” He argues that the States have created and supported laws designed to prohibit sodomy, a fact that no one, including ‘the Court,’ denies. Thus he establishes ‘the law’ in a supporting role of aide to ‘the states’ in their attempt to protect ‘liberty,’ especially in the disputed arena of *fundamental* rights to homosexual sodomy.

The filled in diagram of Justice Scalia’s argument makes visible the shift he has made in the framing of the argument laid out by Justice Kennedy:

Scalia’s Narrative Frame		
<u>Chief Actor</u>	<u>Aide</u>	<u>Narrative Role</u>
‘the states’	‘the law’	Protagonists
‘the Kennedy Court’	crusaders	Antagonists
‘liberty’	<i>fundamental</i> right to homosexual sodomy	Disputed Region

There is an immediately noticeable change from Justice Kennedy’s placement of **Liberty** in center stage as the powerful protagonist against the *intruder State*. Justice Scalia’s ‘liberty’ is now in a much reduced state as the object of dispute, rather than its resolver. The ‘liberty’ Justice Scalia represents can no longer be presented as the basis of the decision in *Lawrence*, for ‘liberty’ itself is now in doubt.³⁵⁹

³⁵⁹ I am in debt to Dr. Darrin Hicks for this insight into liberty’s remapped role here.

Kennedy's Narrative Frame

<u>Chief Actor</u>	<u>Aide</u>	<u>Narrative Role</u>
Liberty	'the Kennedy Court'	Protagonists
The State	'the Law'	Antagonists
Autonomy of self	right to certain intimate conduct	Disputed Region

'The Kennedy Court' is no longer **liberty's** aide, but is promoted in Justice Scalia's argument to a more starring role as the lead antagonist, in league with the **crusaders** who battle for the *fundamental* right to homosexual sodomy to be recognized.

Scalia's protagonist is 'the state' as promoter and defender of 'the laws' of the people, in the face of opposition from the **crusaders** and their collaborators in 'the Kennedy Court.' For Scalia *fundamental* rights are trees in an old growth forest of law. They are "deeply rooted." He portrays Kennedy's "right to **certain intimate conduct**" as a right that springs into existence, perhaps out of foreign soil: fundamental rights are mushrooms in a newly seeded forest of law.

Neither Justice uses such inelegant metaphors, of course. Rather, they are there as image schemas and source domains out of which their arguments are constructed and advanced. And now that all of the players are arranged in their roles in the legal drama, Justice Scalia will come to the heart of the matter: "the ground on which the Court squarely rests its holding."³⁶⁰

³⁶⁰ Ibid., 599.

4.4 Argument Four: End of All Morals Legislation.

Interestingly, Justice Scalia acknowledges only one “ground” of the Court’s ruling, while ‘the Court’ claimed to use two “grounds.” One is the right of married and unmarried persons to make decisions about their physical intimacies as a “form of ‘liberty’ protected by the due Process Clause of the Fourteenth Amendment.”³⁶¹ The second “ground” is the claim here referenced by Justice Scalia: that there is no rational basis for the anti-sodomy law under attack in this case.³⁶² Justice Scalia believes this claim to be so “out of accord” with American jurisprudence that he will have little to argue.

4.4.1 Metaphor identification of Argument Four

Justice Scalia characterizes the “*ground* (source domain of *building*) on which ‘the Court’ *squarely* (*building*) *rests* its *holding*” as to be so “*out of accord* (domain of *personal relationship*) with our jurisprudence – indeed with the jurisprudence of *any* (emphasis his) society we know – that it requires little discussion.”³⁶³ Instead of adhering to (connection image schema) “our jurisprudence,” ‘the Court’ “*embraces* (source domain of *personal relationship*) instead Justice STEVENS’ declaration in his Bowers dissent ...” Stevens’ memorably concluded there: [T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law *prohibiting* the practice.”

³⁶¹ Ibid., 578.

³⁶² Ibid., 599

³⁶³ Ibid.

Scalia presses the point that ‘the Court’s’ agreement with Justice Stevens’ dissent in *Bowers*’ “effectively decrees (image schema of compulsion) the end of all morals legislation.” And if this is true, says Scalia, that “the promotion of majoritarian sexual morality is not even a *legitimate* (emphasis his) state interest, none of the above-mentioned laws can survive (survival image schema) rational-basis review.”

4.4.2 Metaphor interpretation and explanation of Argument Four

‘The law’ figures prominently in these two paragraphs. Here again ‘laws’ that criminalize certain forms of sexual behavior,” that “*prohibit* a particular practice” are shown to be “under *attack*,” and not able to “*survive* (*disaster* source domain) rational basis review” as a result of the *Lawrence* Court’s *holding*.³⁶⁴

The Texas law in dispute in *Bowers* “undeniably seeks to further the belief of its citizens ...” about forms of sexual behavior the majority agree are “immoral and unacceptable.”³⁶⁵ The *Bowers* Court “*held* (compulsion image schema and *physical movement* source domain) that this *was* (emphasis his) a legitimate state interest. When Scalia says that ‘the Court’ of Justice Kennedy “embraces” instead of “*holds*,” he is isolating for notice the two courts’ very different approaches to jurisprudence.

“*Embraces*” (*personal relationships*) in contrast to “*holds*” (compulsion and *physical movement*) highlights Scalia’s view that ‘the Kennedy Court’ prefers the judicial realm of “emerging awareness” to that of the “deeply rooted.” Justice Scalia describes Kennedy’s construction of the Court into a more personal, warm, affectionate, and newly forming court. It is now a court that is content to turn its back on the stodgy old *Bowers* Court it sees as willing to bully (“hold”) those with whom it does not agree.

³⁶⁴ Ibid., 599.

³⁶⁵ Ibid.

‘The law’ as Scalia knows it, as an aide to the goals of the people of ‘the states,’ has met with *disaster* under the “attack” of ‘the Court.’

5.0 Coda

After his final argument directed at Justice O’Connor’s equal protection challenge, which is not analyzed here, Justice Scalia adds a much more extensive list of comments to the end of his dissent than does Justice Kennedy. He also now becomes even more explicit in his challenges to ‘the Court’s’ majority opinion.

His comments can be made into four organizing aphorisms:

1. The law-profession culture has a homosexual agenda.
2. The Court has taken sides in the culture war.
3. Judgments are to be made by the people, not imposed by a governing caste.
4. Now there are no logical distinctions between heterosexual and homosexual unions.

5.1 Metaphor Identification of the Coda:

The law-profession culture has a homosexual agenda.

According to Justice Scalia’s first challenge, the homosexual agenda is “*directed at eliminating (conflict source domain) the moral opprobrium that has traditionally attached (link image schema) to homosexual conduct.*” He notes that the American Association of Law Schools excludes (blockage image schema) from membership any schools that *refuse to ban* (source domain of *conflict*, force image schema) “from its job-interview facilities” any law firm that “does not wish to hire” as a partner anyone who openly “engages (link image schema) in homosexual conduct.”³⁶⁶

³⁶⁶ Ibid., 602.

The Court has taken sides in the culture war.

His second challenge is in response to what he characterizes as ‘the Court’s “grim warning” that laws criminalizing homosexual conduct are really an “invitation to subject (compulsion image schema) homosexual persons to discrimination both in the public and private spheres.’” Scalia thinks it is “clear from this that the Court *has taken sides* in the **culture war**, departing from its role of assuring, as *neutral observer* (source domain of *U.N. Peacekeepers*), that the democratic *rules of engagement* (*conflict* source domain and connection image schema) are observed.”³⁶⁷

He places ‘the Court’ on one side against “many Americans” on the other side. These are Americans who do not want “persons who openly engage in homosexual conduct” as “partners ... scoutmasters ... teachers ... boarders in their homes.” What they see as “*protection*” for their families against an “immoral and *destructive* (*disaster* source domain)” lifestyle, ‘the Court’ calls “discrimination” to be “deterred”³⁶⁸ (blockage image schema). Instructively, Scalia notes, most States see this discrimination as legal. He gives for examples Title VII, Employment Non-Discrimination Act of 1994, Armed Forces, and the Boy Scouts.

Judgments are to be made by the people, not imposed by a governing caste.

His third point is to call attention to the distinction between the right of citizens to persuade (attraction image schema) “one’s fellow citizens” of the morality of their position and need for change, and the will to impose (compulsion image schema) views without democratic agreement. Texas’ “*hand should not be stayed*” (*human body* source domain and compulsion image schema) from criminalizing (or decriminalizing if it should democratically choose) homosexual acts through “the *invention* (source domain

³⁶⁷ Ibid.

³⁶⁸ Ibid.

of *human fabrication, construction*) of a brand-new ‘constitutional right’ by a Court that is *impatient (mental health domain)* of democratic change.”

Now there are no logical distinctions between heterosexual and homosexual unions.

And finally, Scalia says that “after having *laid waste (disaster source domain)* the *foundations* of our rational-basis jurisprudence,” we should not believe ‘the Court’s assurance that its opinion has nothing to do with giving “formal recognition to any relationship that homosexual persons seek to enter (container image schema).”³⁶⁹ He believes the opinion “dismantles (removal of restraint image schema) the structure of constitutional law” that has made possible the distinction between heterosexual and homosexual “unions” (merge image schema) with regard to marriage law.

Two factors join in ‘the Court’s’ decision that make it unreasonable to deny marriage to homosexual couples, despite ‘the Court’s’ disclaimers. Scalia constructs this conditional as follows:

“If moral disapprobation of homosexual conduct is ‘no legitimate state interest’ for purposes of proscribing that conduct, ... and if, as the Court *coos (casting aside all pretense of neutrality)*, ‘when sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring,’”³⁷⁰ **then** there is no reason to forbid homosexual marriage.

Justice Scalia use of proscribing is from the blockage image schema, and *coos* is from the *personal relationship* source domain.

5.2 Metaphor interpretation and evaluation of the Coda

The law-profession culture has a homosexual agenda.

³⁶⁹ Ibid., 604.

³⁷⁰ Ibid., 605.

His argument in support of this assertion draws its energy from the source domains of *conflict* and, more deeply from our experiences of force (blockage, counterforce): “*eliminating, refuse, excludes, ban.*” Both *conflict* and force are exerted by those whom he says has a “homosexual agenda.” He traces the source of the *Lawrence* opinion by linking it first as a “product” of the Court, which is a “product” of the “law-profession culture,” which is linked by “signing on” to the “so-called homosexual agenda,” that is linked to the agenda of homosexual activists who wish to *eliminate* the moral judgment “attached” (linked) to “homosexual conduct.”³⁷¹

The assembling of a crusader class by linking activists to the Court through the “law-profession culture” is described by Justice Scalia from image schema that are doing what they are describing – linking.

The Court has taken sides in the culture war.

After linking the Court’s opinion directly to the agenda of homosexual activists, and trying to establish the source of the *conflict* and force as well as the target, Justice Scalia makes explicit what he sees to be happening. The conflict and the forces stirred up around the opinion are part of a “**culture war**.” And instead of being a peacekeeper by seeing that the “*rules of engagement* are observed,” ‘the Court’ identifies ‘the laws’ against homosexual conduct as the source of the *conflict*, because they are said to extend an “invitation” to “subject” homosexuals to discrimination.

The combatants in the battle are, on one side, ‘the Court’ and those to whom it is linked – both attacking the state laws that prohibit sodomy. on the other side are the ‘many Americans’ who view these same laws as protective of their moral and ethical values.

³⁷¹ Ibid., 602.

Judgments are to be made by the people, not imposed by a governing caste.

The force that citizens should use with each other is one that “persuades” (attraction), not one that “imposes (compulsion). ‘The Court’ is characterized as a “governing caste,” (metaphor for ‘the Court’ as an oligarchy) that is compelling ‘the states. ‘The law’ (Texas’ *hand*) should not be blocked by ‘the Court’ (‘the Court’s “*invention*,” a product of its “hand”).

Now there are no logical distinctions between heterosexual and homosexual unions.

The result of this battle in the **culture war** is, according to Justice Scalia, a *disaster*, as the *foundations* of rational-basis jurisprudence are “*laid waste*.” The opinion is the removal of restraint provided by constitutional law, and there is now no distinction that can be drawn between heterosexual and homosexual “unions.” The distinction is collapsed and the categories merged, as the couples are merged.

It is fitting to Justice Scalia’s perspective that he ends his dissent with metaphors of disaster, conflict, compulsion, blockage, and war.

Scalia’s Narrative Frame

<u>Chief Actor</u>	<u>Aide</u>	<u>Narrative Role</u>
‘The law’	‘the states’	Protagonists
‘the Kennedy Court’	crusaders	Antagonists
‘Liberty’	no <i>fundamental</i> right to homosexual sodomy	Disputed Region

CHAPTER FIVE

Summary, Analysis and Implications for Research

There are three essential questions raised throughout this Critical Metaphor Analysis: 1.) What are the primary points of dispute between Justices Kennedy and Scalia, and why do they matter? 2.) Is this an example of a battle in the culture war? Can we see it through an analysis of metaphor, and is the culture war led by the role of the Court as Justice Scalia asserts? 3.) What does my work add to what we know about doing rhetorical analysis?

Summary: Primary Points of Dispute – The Four Arguments

The primary points of dispute in *Lawrence v. Texas* are encapsulated in the four major arguments framed by Justice Kennedy in his majority opinion. The first argument answers the question: Is the issue before the Court a liberty covered by the Due Process Clause of the Fourteenth Amendment? Justice Kennedy argues that it is; Justice Scalia that it is not.³⁷²

³⁷² Justice Kennedy's first argument establishes as the basis upon which the Court will decide the case as the Due Process Clause. He says that the resolution of *Lawrence v. Texas* depends on "whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution."

Justice Scalia responds to this argument in his second argument. He denies the majority's assertion that the case involves the right to liberty under the Due Process Clause, and asserts they actually decided the case by applying the rational basis test.

The second argument answers two questions: 1) How does the issue before the Court get categorized? That is, is the issue the right to homosexual sodomy or the right to a sexual relationship of one's choice? Justice Kennedy frames the issue as a right to an intimate relationship of one's choice. Justice Scalia categorizes the issue as the right to homosexual sodomy. 2) Also does the issue before the Court qualify as a "fundamental" right worthy of "heightened scrutiny" review? Justice Kennedy answers that the relationship in which the act occurs does qualify as a fundamental right. Justice Scalia answers that the act does not.³⁷³

The third argument answers the question: Does the doctrine of *stare decisis* protect the decision in *Bowers* from being overturned and allow anti-sodomy legislation to be ruled anti-constitutional? Justice Kennedy argues that *Bowers* has been sufficiently eroded, and Justice Scalia disagrees on every point.³⁷⁴

The final argument answers the question: Is the moral disapproval of the majority a legitimate reason for a state to enact anti-sodomy laws? "No," says Justice Kennedy. "Yes," it always has been before, according to Justice Scalia.³⁷⁵

³⁷³ Kennedy's second argument tackles the claims of the *Bowers* Court that disqualified proscriptions against sodomy from being reviewed under the heightened scrutiny standard of the Due Process Clause. He rejected the classification of the issue by the *Bowers* Court's as a fundamental right to engage in consensual sodomy, and then he challenged their evidence that laws against that conduct have "ancient roots." Justice Scalia in his third argument addresses this latter argument. He examines the state of anti-sodomy laws at the time of *Bowers* and charges that the real state of the law was as a social force against the practice of sodomy.

³⁷⁴ Kennedy's third argument addresses the issue of *stare decisis* and the reasons the Court is not compelled to uphold precedent: "*Bowers* itself causes uncertainty, for the precedents before and after its issuance contradict its central holding." Justice Scalia takes up this argument first by charging the Court with manipulating the doctrine of *stare decisis*. He then warns that the result of overturning *Bowers* will be to open up all morals legislation to court challenges, signaling the end of rational-basis review.

³⁷⁵ Kennedy's final argument is tersely summed up: "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual. Justice Scalia's response to this claim is that if true, it would put an end to all morals legislation, bringing about socially disastrous consequences.

These four arguments provide the Justices' their framework for the legal points of dispute, but there are more basic and thus more comprehensive issues in dispute that are surfaced by the Critical Metaphor Analysis (CMA) conducted on each argument. The use of the metaphors that set up the narrative framework used by Justice Kennedy and responded to by Justice Scalia expose the more essential issues of dispute beneath the surface of the opinion and dissent.

CMA reveals in vivid detail the nature of the four central actors in the narrative. It also helps to expose the portrayal throughout the opinion and dissent of the conflicting visions of the role of each of the four actors: the court, the law, the state, and liberty. In addition, this analysis also uncovers the dynamic of these conflicting visions of liberty, the state, the law, and the court, as they react in dynamic relationship to each other as constructed through cognitive metaphors.

Finally, when the conflicting visions of roles and the dynamic among these four actors is clarified, the disputed region can be seen to be constituted rhetorically as well. The Justices' select different categories into which they put the issue in the case; their selection of a category can be seen to do ideological and rhetorical work throughout the opinion and dissent.

The Four Actors: A brief metaphorical analysis.

A brief review of what the analysis of metaphor revealed of these four actors will underline the primary points of dispute between them, as well as the focal point of dispute within the opinion, the categorization of "deviate sexual intercourse," both legally and rhetorically.

To begin with the four actors in the narrative: Kennedy characterizes **liberty** as *expansive, protective, feminine, personal, subjective, and spiritual*. Scalia portrays 'liberty' as *constrained*, and historically *grounded*.

Kennedy's metaphors suggest that **the State** is an *intruding, dominating, masculine spirit*. Scalia's metaphors cast 'the state' as having "interests" that may allow it to "*infringe*" liberty, to *prohibit* certain behaviors the majority of the people judge to be immoral.

Kennedy associates 'the law' with **the State** in its propensity to *intrude, to reach* into the private places of peoples' lives, even '*touching on*' peoples' bodies. Scalia portrays 'the law' as a victim of *attack* by 'the Court,' and as a social force against sodomy that upholds the moral sense of the majority and has consistently provided these legal boundaries.

Kennedy's 'Court' assumes the role of **liberty's** champion, as it invalidates laws that *prohibit* her exercise in the realm of intimate personal relationships and in abortion. Scalia's view of the 'Kennedy Court' is as a source of *conflict, a moralizer, inconsistent, reckless, unstable, manipulative, a fabricator of rights, and hypocritical*.

Analysis: Why the Primary Points of Dispute Matter.

The characterization of these four actors allow each Justice to support his arguments in favor of the categorization of the legal issue before them and how it should be decided. It has been noted here previously that the ability to categorize the legal issue is the ability to win the argument. Justice Kennedy immediately categorizes the issue in dispute as the freedom to engage in **certain intimate conduct**.

The criminal statute under which the petitioners Lawrence and Garner were charged describes their crime as "deviate sexual intercourse." Kennedy designates the

crime as **certain intimate conduct** in his introductory paragraph. In the body of the opinion the designation varies, but he never reverts to the original wording of the criminal charges. During his review of the history of the relevant laws, he uses the word “sodomy” frequently, a total of 14 times.³⁷⁶

However, when not constrained by legal or historical texts, Justice Kennedy’s choice of words to characterize the charged offense most often includes at least one of the three words from the phrase “**certain intimate conduct**.” There are 35 uses in the text of variations on this initial metaphor by Justice Kennedy to characterize “deviate sexual intercourse.” In addition to these two categories, “sodomy” and variations on **certain intimate conduct**, there are 23 additional references to “sodomy” that use another word or phrase as its designation.

Justice Scalia also does not use the phrase “deviate sexual intercourse” to reference the criminal offense. His most used designation is “homosexual sodomy,” employed 34 times in the text. The next most frequent choice (9 times) is a phrase with “homosexual” as a modifier, such as “homosexual acts.” He uses a phrase that contains one or more words from Justice Kennedy’s **certain intimate conduct** metaphor 21 times, 19 of those simply “conduct.”

Do these numbers tell a story? I think that they do, with a little help from their friends, the metaphors. We expect many references to the criminal issue in the case, of course. What one finds in Justice Kennedy’s 72 references to “deviate sexual intercourse” are not only the total avoidance of that designation but a studied substitution of a great variety of phrases. **Certain intimate conduct** and its derivatives (35 times) account for more than twice the number of his uses of “sodomy” (14), the next most often used reference.

³⁷⁶ See the Table of Designations for “Deviate Sexual Intercourse” in Appendix.

It is not the case that Justice Kennedy avoids the literal for the metaphorical designation of the criminalized behavior. Certainly “deviate sexual intercourse” is itself metaphorical. Both “deviate” and “intercourse” depend on the Path image schema and the *Journey* source domain for their meaning. Sexual activity is characterized through these conceptual metaphors as a physical journey of a female and male body that, in the course of that journey, intersect at a designated place on each body. This place is so designated by design, either God or nature as its source, and at that intersection of body parts there is sexual intercourse. To go off the path and arrive at another undesigned destination is characterized as “deviating” from the correct path. Thus “deviate sexual intercourse” enters the criminal code as a metaphor for sexual contact that does not place the male external sexual member inside the female internal sexual container.

The replacement of “deviate sexual intercourse” by **certain intimate conduct**, “sodomy,” “acts,” “particular,” “relations,” and other combinations of these words achieves a complete break with the Path image schema and *Journey* source domain used in the criminal law to describe sodomy. Even the 14 uses of “homosexual sodomy” by Justice Kennedy, despite its resonance with the biblical story of sexual violence against strangers in Sodom, also breaks with the Path and *Journey* embodied experiences.

Much more do the other words and phrases chosen by the Justice to reference the issue in this case move away from the embodied experience of physical movement along a path toward a destination traditionally attached to sexual intercourse. For example, the first three phrases listed in Table One: Designations for “Deviate Sexual Intercourse” are not part of a journey process, but a discrete event: “a particular sexual act,” “acts in question,” and “acts of homosexual character.” Even the relationship words chosen, such as “relations,” “same-sex relations,” “this relationship,” are abstractions compared to the

very bodily and concrete images contained in the jettisoned phrase, “deviate sexual intercourse.”

Justice Kennedy’s choice of this designation and a multiplicity of derivatives and alternatives is made for ideological and rhetorical purposes. This conclusion cannot be ignored in favor of explanations of stylistic or intellectual virtuosity, chiefly because of the work metaphor is doing to link this particular family of metaphors with others. This linkage is part of driving the arguments throughout the opinion, and is clearly revealed in the introductory paragraph: “**Liberty presumes (link) an autonomy of self that includes (link) freedom of (link) thought, belief, expression, and (link) certain intimate conduct.**”³⁷⁷

Once the image schemas have allowed the linking of all these metaphors to each other, each contains the other or is contained by the other metaphors, and none can be disengaged from the others. In this way, Justice Kennedy makes his case that the American ideal of **liberty** contains the imperative of **autonomy of self**, which holds in the self **freedom** to engage in (link to) **certain intimate conduct** (that at least includes homosexual sodomy). The rest of the opinion is a presentation to the legal community and the public of a defense showing how this is, indeed, the case constitutionally.

Justice Kennedy’s inclusion of homosexual sodomy within the container of **certain intimate conduct** allows him to distance himself from the ruling in the *Bowers* Court that found homosexual sodomy to be excluded from the “fundamental rights” covered by the Due Process Clause. This move gives him a distinct rhetorical advantage. Essentially, it is consistent with his choice to obscure the bodily associations and images of the act of homosexual intercourse by resort to more abstract or

³⁷⁷ See above Section 2.1.1 and 2.1.2.

relationally indefinite words. As noted above, “fundamental” comes from the experience of building, and more originally from the experience of the bottom of the body. To minimize “fundamental” is to minimize the “fundament” from which it comes, in favor of words that have different experiences attached to them, or, perhaps even no bodily experiences at all.

If the liberty at issue here is characterized as “deviate sexual intercourse” or “homosexual sodomy,” there is the very real chance that images of misdirected, even forceful sexual movement are what those who hear those words will automatically experience. In the case of male homosexual sodomy this image of progress along a path toward the end of a sexual penetration of the anus is deeply embedded in historical experiences, social, legal, and religious. There is force associated with this penetration even when there is no coercion involved, by nature of the body’s composition. The social, legal and religious resistance to acceptance of this kind of sexual journey is part of the hurdle that Justice Kennedy must overcome in his defense of liberty in this area. To minimize experiences that reinforce resistance to a changed evaluation of homosexual sodomy is a wise rhetorical strategy; thus, the minimal use of the word “fundamental” with all its associated resonances.

Now he does not have to address the question of whether homosexual sodomy is indeed a “fundamental right” in order to overturn the *Bowers* ruling. Because he has so tightly linked the **freedom** of certain **intimate conduct** (and thus homosexual sodomy that is contained within this designation) to **autonomy of self** that is an essential part of **liberty**, he has only to establish that *Bowers* has “misapprehended the claim of **liberty**”³⁷⁸ to begin to unravel that opinion.

³⁷⁸ *Lawrence*, 567.

In this way **liberty**, as Justice Kennedy conceives her, acts as a “Trojan horse” filled with the rhetorical soldiers of **autonomy of self, freedom of certain intimate conduct** and its 72 variations and iterations, and is opened up to entirely transform the battle over the case before the ‘Kennedy Court.’

It is apparent so far in the review of the critical metaphor analysis of Justice Kennedy’s argument that he uses metaphor to accomplish his goal of putting the issue in dispute under the Due Process Clause without characterizing it as an act of homosexual sodomy. He succeeds by using metaphor in recasting the act into a relationship. All that is left for him to do is to establish that this relationship is part of those that are already contained within the “right to liberty under the Due Process Clause.”

The puzzle of *Lawrence* as constitutional reasoning is clarified and perhaps dissolved by the information given through Justice Kennedy’s use of metaphor. The critiques of the opinion reviewed in Chapter One brought to the forefront the confusion about which standard of review Justice Kennedy was using, if he was using any recognized standard at all. It could not be “heightened scrutiny” since he did not claim homosexual sodomy to fit the requisite category of “fundamental right.”

An additional observation about his standard of review makes ruling out the “heightened scrutiny” standard problematic. Although he decided the case on a “rational basis” standard, he argued throughout the opinion using variations on “fundamental rights” language. This ambiguity regarding the standard of review he applied, in addition to the question of why he did not pursue the “right to privacy” line of argument already available to him, can now be productively addressed from the perspective gained in the Critical Metaphor Analysis of the text.

Taking the latter issue first, we can safely surmise that Justice Kennedy is aware that the “right to privacy” cases that he cites do not provide a clear legal line of reasoning

through the Due Process Clause. This knowledge leads him to attempt the task of marrying the two strands of liberty found in *Griswold*, *Eisenstadt*, *Roe*, *Casey*, and *Romer*. As Justice Scalia points out in his dissent, the Due Process Clause is not the basis of all of these decisions.³⁷⁹The option of using the Equal Protection Clause or penumbras from other constitutional provisions is not adequate for his purposes because neither sufficiently address Justice Kennedy's conception of liberty. What he clearly chooses to do is to intertwine the conception of liberty that is available to him from both of these Clauses.

To do this, he characterizes **Liberty** through the use of metaphor in such a way as to make clear how extensive her reach is. **Liberty** is depicted as *expansive*, *protective*, *feminine*, *personal*, *subjective*, and *spiritual*. This **Liberty** cannot be kept in only one room of the legal house, defending against the assault on enumerated rights. Rather she is a defender of negative rights (not to be intruded upon in the home), and a proactive protector of positive rights (to be respected and treated with dignity).

This depiction of **Liberty** allows Justice Kennedy to apply heightened scrutiny to the protection of intimate relationships, since they are included in our private and personal **autonomy**. He is also able to apply rational basis review to **certain intimate conduct** as an act that the majority's religious and moral values have no right to proscribe. In this way he intertwines the two strands of liberty usually separately protected under the Due Process and the Equal Protection Clauses.

So one can say, "yes," to his many critics: its both Due Process and Equal Protection reasoning without being orthodox legal reasoning in either case. He appeals

³⁷⁹ Justice Scalia's third argument begins with a discussion of the basis of these opinions, many of them from "penumbras of constitutional provisions," or the Equal Protection Clause. It is reasonable to assume that Justice Kennedy was well aware of the constitutional distinctions he is pointing out. See *Lawrence*, 595.

to a new or expanded conception of **Liberty** and concludes by cutting off the old conceptions with his depiction of **the State** as an interloper in **Liberty's** personal life.

For his part, Justice Scalia is not willing to cede to Justice Kennedy the right to characterize 'liberty' as he wills. To stand in Kennedy's way here requires him to dismantle the narrative force of Kennedy's argument that is centered in the 'person' of **liberty**. He does so by immediately attacking her vaunted defender, 'the Kennedy Court,' as in fact an imposter. In the face of Kennedy's rhetorically, metaphorically constituted **liberty** Scalia constructs a rhetorical mirror that reflects Kennedy's Court back to him. The Court drawn by Scalia's hand is not the champion of 'liberty,' but actually a collaborator with those who "have engaged in a 17-year crusade to overrule"³⁸⁰ a Court that Kennedy has now chastised and indeed, overruled.

The suggestion of betrayal lodged in this charge against the Kennedy Court in the Introduction of Justice Scalia's dissent is of one piece with his closing, explicit accusations against the same Court of participating in a **culture war**.

The Court as Culture Warrior

One of the privileges inherent in the process of rhetorical analysis is that there is a built-in reminder to value what is "actually" said, rather than what one wishes were being said. For example, some critics have lamented Justice Kennedy's introductory prose as flowery and worthless as legal reasoning. Similarly, Justice Scalia's charge of culture war can be dismissed as reactionary, paranoid, or originalist rantings. But the rhetorical critic foregoes that kind of judgment and examines what is actually being said, how it is being said, and to what effect. In the case of the culture war charge by Justice

³⁸⁰ Ibid., 586.

Scalia, rhetorical analysis reveals that there are at least two people who are engaged in it. The evidence of this is found in the use of metaphor.

Justice Scalia recognizes Justice Kennedy's **Liberty** as a "Trojan Horse" and designs his defense to combat the attack he thinks is being made on 'liberty' as he understands it to be. His first argument, designed to expose what he perceives as inconsistent applications of *stare decisis*, also exposes to view the nature of 'the Kennedy Court' as hypocritical, a collaborator with **crusaders** whose overturning of the decision in *Bowers* would bring social disaster.³⁸¹ Certainly he sees Justice Kennedy's Court as a combatant leading the attack on other court decisions that provide social and cultural stability.

His second argument confronts Kennedy's claim that the Due Process Clause contains the "right to liberty." According to Scalia, even the container into which Kennedy smuggles all the other challengers to 'liberty' is a falsely constructed one. His portrait of **Liberty** is falsely constructed as an expansive offspring of the Due Process Clause, Scalia argues. Actually 'liberty' is not a product of the Fourteenth Amendment Due Process Clause at all, but has been a protected companion of the States and constrained by 'the law' throughout the Nation's history.³⁸²

Scalia's third argument challenges Kennedy's gloss on the application of the Nation's laws regarding sodomy. He argues that 'the law' has not been equivocal regarding homosexual sodomy but has been a supporter of the States in prohibiting it. He re-characterizes the role of 'the state' here, leaving only 'the law' to be properly (in his estimation) formulated.

³⁸¹ See Section 4.1.2.

³⁸² See Section 4.2.2.

The reformulation is accomplished in his fourth argument. Scalia recapitulates his defense of ‘the law’s’ historical role in instantiating the moral opprobrium of the States’ majorities against sexual practices they find offensive. He sees ‘the Kennedy Court’s’ decision as an attack against the people’s right to make laws that uphold their moral and religious values. This he calls “taking sides in the **culture war**.”

In Chapter One, the historical arc of the concept of **culture war** was drawn. **Culture war** is a metaphor that depends on the conceptual metaphors that are used for argument. For example, Lakoff and Johnson give extensive illustrations of how deeply entrenched in our language the metaphor argument is war is: “Your claims are *indefensible*.” He *shot down* all of my arguments.” “His criticisms were *right on target*.”³⁸³ We experience arguments in terms of war, we conceive of arguments in terms of war, and we use the language of war for arguments.

In the case of the **culture war** metaphor, it is not the case that someone in the distant past arbitrarily plucked this literary metaphor out of thin linguistic air. We know that he experienced the arguments as war between cultures, and described it as such. Not only do metaphors arise out of our experience, but they also structure our experience. Just so, the **culture war** metaphor structures Justice Scalia’s understanding of Justice Kennedy’s argument and position, as well as his own argumentative presentation.

To recount, the **culture war** metaphor is rooted in the historical experience of attack on Judeo-Christian morality, especially sexual morality. From the original replacement of laws regarding marriage in the New German Empire, through Lukacs’ attack on Christian sexual morality in Hungary, up through the Hegelian-Marxists and Gramscian moral and social constructivists of the modern West, the use of the **culture**

³⁸³ Lakoff and Johnson, *Metaphors We Live By*, 4.

war metaphor has not been consistent, but the arguments out of which it arose continue to be evident.

To review, the operative Gramscian insight here is that, in order to have a transformation of society in which the marginalized are no longer subservient to the privileged, there must be awareness on the part of the marginalized that they are oppressed. To bring about this awareness requires that the dominant culture's belief system is weakened, delegitimized, and ultimately replaced in a transfer of power to the marginalized. The metaphor of **culture war** encapsulates this cultural, political, and ideological argument that is typically focused in the realm of the sexual.

When Justice Stevens declares in the *Bowers* dissent that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice,”³⁸⁴ he is articulating Justice Kennedy's identical belief that a moral code that condemns homosexual conduct cannot be “enforce[d] on the whole society through operation of the criminal law.”³⁸⁵

It is this conviction that Justice Scalia sees as ‘the Kennedy Court's’ collaboration with **crusaders** to overturn *Bowers*, and reconfigure the view of the role of liberty, the law, the State, and the Court as it relates to the moral and religious convictions of the majority regarding sexuality. This is a clear volley in the battle of the **culture war**, as Justice Scalia understands it.

It is certainly not imperative that Justice Kennedy verbally acknowledges the **culture war** in order for the rhetorical critic to know that he is engaged in one. To note Slingerland's insight regarding comparing apparently “incommensurable” concepts, cultures, or worldviews, we do not have to find the same words or the identical

³⁸⁴ *Lawrence*, 577.

³⁸⁵ *Ibid.*, 571.

philosophical concepts at work in differing conceptions of the world to be able to make comparisons.³⁸⁶ He argues in part:

Conceptual metaphor and metaphoric blend analysis can serve as a bridge to the experience of “the other,” because they function as linguistic “signs” of otherwise inaccessible, shared, deep conceptual structures.³⁸⁷

In the instant case, we also do not need the identical words uttered by both Justices to find the “bridge” from one conception of the nature of the actors and the issue at stake to the conception of “the other” regarding the identical actors and issue. Justice Scalia certainly did not create the **culture war** metaphor, but he believes that he has identified the components that constitute it, and he chooses to use it as a tactic in his argument against Justice Kennedy’s conception of **liberty**. In the process, Justice Scalia calls attention to their shared deep conceptual structures as human beings, as Americans, as jurists and members of the legal profession from which their jurisprudence is formed, and also to their “licensing stories”³⁸⁸ used to construct their individual arguments regarding the law in this case.

The licensing stories that surround and sustain the credibility of the metaphorical structures chosen to propel the narrative for both Justices are not difficult to identify. The four actors and their roles assign value and lead the plot line to its final destination: the role of religious and moral values in the legal prohibitions surrounding sexual autonomy.

³⁸⁶ Slingerland, “Conceptual Metaphor Theory as Methodology for Comparative Religion,” 5,6.

³⁸⁷ Edward Slingerland, Eric Blanchard, and Lyn Boyd-Judson, “Collision with China: Conceptual Metaphor Analysis, Somatic Marking, and the EP-3 Incident,” *International Studies Quarterly* 51, (2007): 70.

³⁸⁸ See above, 82.

In both of their narratives the emotive-normative functions of the metaphors underscore the readers' individual, social, and political alliance with 'liberty.' But in Kennedy's narrative **Liberty** wears a different dress than the historical garb of Justice Scalia's 'liberty,' and one can imagine her engaging in different sexual activities than those of Justice Scalia's tradition-constrained 'liberty.' Again the power of the words and phrases chosen to identify "deviate sexual intercourse" by both Justices can be witnessed in the exercise of their ability to key us into the respective "licensing stories" that make the entire argumentative narrative convincing.

The 35 different words or phrases used by Justice Kennedy to designate the criminal offense at issue witness to the multiform characterization of the offense, making it difficult to isolate the offense into one, singular kind of act. His words beckon us to imagine relationships instead. In doing so, the audience uses its own experiences to give meaning and color to the concept, and a bridge is built between his conception of liberty and relational freedom and the audience's experience of that relational freedom. It becomes less easy to imagine a world in which homosexual sodomy is not allowed, despite the history and traditions of the laws proscribing it.

In contrast, Justice Scalia designates the offense with only 11 different words or phrases, consistent with his portrayal of the offense as an isolatable act. It is part of his rhetorical strategy to remind his audience that the issue in the case is similar to behavior legally proscribed throughout our history. Thus he uses "homosexual sodomy," "homosexual conduct," "conduct," etc. to reinforce this continuity. Liberty has not protected this act previously, and he appeals to the audience's experience of the law and the culture to affirm his claims.

Justice Scalia also notes the experiential background of the Court and the part it plays, he believes, in the majority's opinion. Its background is a "law-profession culture"

that has “largely signed on to” the homosexual agenda that promotes the discarding of “moral opprobrium traditionally attached to homosexual conduct.”³⁸⁹ Justice Kennedy may not challenge the details of this assessment, although Justice Scalia’s tone of disapproval is not likely welcome.

The following conclusions Justice Scalia draws, however, are out of character with how Justice Kennedy views and presents the work of his Court. Scalia’s charge that ‘the Court’ has “taken sides in the culture war” follows ‘the Court’s’ “grim warning” that the criminalizing of homosexual sodomy invites public and private discrimination against them.³⁹⁰

He continues by explaining who constitutes the two sides in the battle: the “anti-homosexual culture” positioned against those who view what ‘the Court’ calls ‘discrimination’ as legitimate ways of protecting themselves and their families from a lifestyle that they believe to be immoral and destructive.”³⁹¹ Justice Scalia seems to be ‘outing’ the Court in its linking of constitutional protection for heterosexual marriage to its decision that “persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.”³⁹² He scorns Justice Kennedy’s disclaimer that the opinion “does not involve” homosexual marriage, since the constitutional right of the state to show “moral disapprobation” toward homosexual conduct has been “dismantle[d].³⁹³

³⁸⁹ *Lawrence*, 602.

³⁹⁰ *Ibid.*

³⁹¹ *Ibid.*

³⁹² *Ibid.*, 604.

³⁹³ *Ibid.*

Scalia's use of the **culture war** metaphor and his exposure of the linkage image schema at work in Kennedy's reasoning are sophisticated rhetorical devices for blocking the enthymematic associations in Justice Kennedy's arguments. He does not want the audience to be lulled into supplying the unstated premises of his opponent's arguments in this controversy. He asks the audience to notice that their experiences of liberty, the state, the court, and the law are being reframed by the withdrawal of the place of moral and religious values from the legislative process. The process by which this withdrawal is occurring is called the **culture war**. It is a metaphor for the ideological clash that is being conducted rhetorically and judicially through the use of metaphor.

The ways in which this battle in the culture war is waged in *Lawrence v. Texas* are not exhausted by this analysis. A goal of this work, however, is to establish the power of Critical Metaphor Analysis in demonstrating that there is a culture war battle occurring in this opinion and that its workings can be exposed by a rhetorical analysis that looks at the role of metaphor in legal reasoning.

Implications for Further Research

I think this current work demonstrates the possibility that Critical Metaphor Analysis can be added to the other methods currently employed by rhetorical analysts to supply a fruitful methodology for examining legal texts. In short, this work is a synthesizing demonstration of the need for critical rhetorical analysis of important judicial texts that will clarify the on-going role the courts are playing in the interpreting and shaping of our corporate life as a Nation.

Like this work, further research on judicial texts must incorporate as many aspects of conceptual metaphor analysis, both theoretical and methodological, as possible. The incredible complexity of human cognitive processes pleads for a complex

approach to rhetorical analysis, and particularly to metaphor analysis. The insights and work of the following theorists are essential to a full-orbed method of analysis:

Lakoff and Johnson's insights into the embodied nature of cognition are foundational. Without the grounding of cognition in the body, the rhetorical analyst can always be chided for merely bringing her own "licensing stories" to the analysis and thus having nothing more than "interesting" takes on the text at hand - so much for the building up of our knowledge or "exposing" to the light what is being hidden in public discourse. But the grounding of cognition and, in this case, metaphorical instantiations of this cognition, in our bodies allows for a measure of commensurability between minds as well as cultures. We can make tentative and humble claims to knowledge based on our common embodied experiences, and we can challenge each other's applications of those experientially based concepts with reasonable hope of finding some way of judging the better arguments.

Grady's addition of primary metaphors that are built up from the image schemas that Johnson so carefully illuminates are invaluable in tracing the workings of cognition below the surface of the literal words. This present analysis has leaned heavily on the work of Mark Johnson and Steven Winter in analyzing and displaying the ubiquity of image schemas in our cognitive life. So much of the effectiveness of Justice Kennedy's arguments have been revealed by laying bare his use of image schemas in his arguments. Winter's careful application of conceptual metaphor theory and particularly the importance of image schema in legal thinking has inspired both the selection of a legal text for analysis and the confidence that there would be fruitful results.

While Winter highlights the metaphorical in the legal, Lakoff applies his knowledge of cognition as largely metaphorical to the political realm.³⁹⁴ Charteris-Black joins a critical discourse analytic approach to a rich methodology for examining political texts with Critical Metaphor Analysis.

Slingerland reminds us that there are no incommensurable cultures. Eubanks challenges any notion we may have that analysis can be done without ideology playing a part either in the analyst or the text; there will be a licensing story underneath the narrative that both tell. Santa Ana shows us the power of the corpus to let the metaphors surface the ideological at work; and a host of neuroscientists will not let us forget the incredible, indelible stamp of the body on the mind.

Equally important to this study's demonstration of the theoretical and methodological synthesis possible in using Critical Metaphor Analysis on legal texts is the study's demonstration of cognitive metaphor theory's impact on advancing understanding of both how a text works and what a text means. It is not too much to claim that the analysis done in this study allows for a modicum of intellectual rigor that, say, a purely Critical Discourse Analysis would not provide. This is no claim about the merits of the analyst. Rather it is to underline the inherent power of a metaphor analysis that is grounded in the cognitive workings of our shared human minds and bodily experiences.

To take an example from this present work, it seems likely that a CDA approach to *Lawrence v. Texas* would require adopting an a priori ideological stance toward the metaphor **culture war**. Such a stance may allow for effective analysis in terms of achieving a preconceived end, such as appropriate political or social change, but is

³⁹⁴ George Lakoff, *Don't Think of an Elephant! Know Your Values and Frame the Debate*, (Chelsea Green Publishing Company, White River Junction, VT, 2004).

debatable as analysis of the text that is purporting to uncover that which is hidden, wherever it may occur. Through the lens of metaphor the analyst can come to the text without pre-judging what she is to find and examine what metaphorical structures are there and how they are used.

Of course, the analyst brings a predisposition to grant credibility to some licensing stories over others. This method is not an attempt to reconstitute some ideologically unbiased place to stand in the world. What is achieved is a legitimate grounding of the analysis in the text under scrutiny, and the opportunity to be an honest interpreter of the narratives constituted through metaphor.

The combination of a conceptual metaphor theory grounded in embodied experience and Critical Metaphor Analysis that includes in-depth analysis of image schema as well as metaphor source domains takes from the previous theorists and practitioners in this field and brings powerful insight to workings and meaning of this important legal text.

I envision further research in this area can make a tremendous impact on both the legal community and the communicating elites by unveiling how legal decisions are being made and argued. Much legal analysis is already done; it attempts to make clear the meaning of a decision and implications for future court rulings. Rhetorical analysis in which Critical Metaphor Analysis is well-utilized can tell the story of how we are being persuaded to accept or contest important decisions, thereby giving participants in the democratic process deepened understanding of the ideological forces at play. Critical Metaphor Analysis assists the rhetorical analyst in telling the truth to all kinds of powers,³⁹⁵ high and low. This is very worthy endeavor indeed.

³⁹⁵ This is a course of rhetorical action that Zev Bar-Lev endorses in “Mrs. Goldberg’s Rebuttal of Butt et al.,” 183.

Bibliography

- Aristotle. *Rhetoric*. Translated by W. Rhys Roberts. Mineola, New York: Dover Publications, Inc., 2004.
- Bar-Lev, Zev. "Mrs. Goldberg's Rebuttal of Butt Et Al." *Discourse & Society* 18, no. 2 (2007): 183-96.
- Beinart, Peter. "The New Liberal Order." *Time* November 13, 2008
<http://www.time.com/time/printout/0,8816,1858771,00.html> (accessed November 14, 2008).
- Billig, Michael, and Katie MacMillan. "Metaphor, Idiom and Ideology: The Search for 'No Smoking Guns' across Time." *Discourse and Society* 16, no. 4 (2005): 459-80.
- Birner, Betty J. "Metaphor and the Reshaping of Our Cognitive Fabric." *Zygon* 39, no. 1 (2004): 39-48.
- Black, Max. "More About Metaphor." In *Metaphor and Thought*, edited by Andrew Ortony, 19-41. Cambridge Cambridge University Press, 1993.
- Bowdle, Brian F., and Dedre Gentner. "The Career of Metaphor." *Psychological Review* 112, no. 1 (2005): 193-216.
- Charteris-Black, Jonathan. *Corpus Approaches to Critical Metaphor Analysis*. Basingstoke and New York: Palgrave Macmillan, 2004.
- . *Politicians and Rhetoric: The Persuasive Power of Metaphor*. Basingstoke and New York: Palgrave Macmillan, 2005.
- Chiappe, Dan L. "Similarity, Relevance, and the Comparison Process." *Metaphor and Symbol* 13, no. 1 (1998): 17-30.
- Chiappe, Dan L., and John M. Kennedy. "Literal Bases for Metaphor and Simile." *Metaphor and Symbol* 16, no. 3&4 (2001): 240-76.
- Cienki, Alan. "Metaphor in the 'Strict Father' and 'Nurturant Parent' Cognitive Models: Theoretical Issues Raised in an Empirical Study." *Cognitive Linguistics* 16, no. 2 (2005): 279-312.
- Condit, Celeste M., Benjamin R. Bates, Ryan Galloway, Sonja Brown Givens, Caroline K. Haynie, John W. Jordan, Gordon Stables, and Hollis Marshall West. "Recipes or Blueprints for Our Genes? How Contexts Selectively Activate the Multiple Meanings of Metaphors." *Quarterly Journal of Speech* 88, no. 3 (2002): 303-25.

- Eubanks, Philip. "Globalization, "Corporate Rule," And Blended Worlds: A Conceptual -
-Rhetorical Analysis of Metaphor, Metonymy, and Conceptual Blending." *Metaphor and Symbol* 20, no. 3 (2005): 173-97.
- . "The Story of Conceptual Metaphor: What Motivates Metaphoric Mappings?" *Poetics Today* 20, no. 3 (1999a): 419-42.
- Eubanks, Philip, and John D. Schaeffer. "A Dialogue between Traditional and Cognitive Rhetoric: Readings of Figuration in George W. Bush's "Axis of Evil" Address." *Rhetoric Society Quarterly* 34, no. 2 (2004): 53-70.
- Ferrari, Federica. "Metaphor at Work in the Analysis of Political Discourse: Investigating a 'Preventive War' Persuasion Strategy." *Discourse & Society* 18, no. 5 (2007): 603-25.
- Gibbs, Raymond W., Paula Lenz Costa Lima, and Edson Francozo. "Metaphor Is Grounded in Embodied Experience." *Journal of Pragmatics* 36 (2004): 1189-210.
- Glucksberg, Sam, Mary R. Newsome, and Yevgeniya Goldvarg. "Inhibition of the Literal: Filtering Metaphor-Irrelevant Information During Metaphor Comprehension." *Metaphor and Symbol* 16, no. 3&4 (2001): 277-93.
- Grady, Joseph. "Primary Metaphors as Inputs to Conceptual Integration." *Journal of Pragmatics* 37 (2005): 1595-614.
- Grishakova, Marina. "Metaphor and Narrative." *Sign Systems Studies* 29, no. 2 (2001): 503-17.
- Gumbel, Andrew. "Activists Back Challenge to Texas Anti-Gay Laws." *The Independent* November 17, 1998.
- Hunter, James Davison. "Is There a Culture War? A Dialogue on Values and American Public Life." *Pew Forum Dialogues on Religion Public Life* (2005), <http://site.ebrary.com/lib/udenver/Doc?id=10139864&ppg=1>.
- Ivie, Robert L. "Metaphor and the Rhetorical Invention of Cold War 'Idealists'." In *Readings in Rhetorical Criticism*, edited by Carl R. Burghardt, 349-66. State College: Strata Publishing, Inc., 1987.
- Johnson, Mark, and George Lakoff. "Why Cognitive Linguistics Requires Embodied Realism." *Cognitive Linguistics* 13, no. 3 (2002): 245-63.
- Kamiya, Gary. "The Culture War: It's Back!" *Salon.com*, September 15, 2008, http://www.salon.com/news/feature/2008/0915/palin_interview/print.html (accessed November 14, 2008) September 15, 2008.
- Kimball. *American Thinker* February 15, 2007 http://www.americanthinker.com/2007/02cultural_marxism.html (accessed December 02, 2008).

- Kyl, John. "A Tocquevillian Anniversary." *Real Clear Politics* (October 03, 2006), http://www.realclearpolitics.com/articles/2006/10/a_tocquevillian_anniversary.html (accessed December 03, 2008).
- Lakoff, George. *Don't Think of an Elephant: Know Your Values and Frame the Debate: The Essential Guide for Progressives*. White River Junction: Chelsea Green Publishing Company, 2004.
- Lakoff, George, and Mark Johnson. *Philosophy in the Flesh: The Embodied Mind and Its Challenge to Western Thought*. New York: Basic Books, 1999.
- Lester, Toni. "Adam and Steve V. Adam and Eve: Will the New Supreme Court Grant Gays the Right to Marry?" *American University Journal of Gender, Social Policy & the Law* 14, no. 253 (2006): 254-311.
- Lund, Nelson, and John O. McGinnis. "Lawrence V. Texas and Judicial Hubris." *Michigan Law Review*, no. 7 (2004), <http://ofind.galegroup.com/bianca.penlib.du:80/itx/start.do?prodId=LT> (accessed April 3, 2008).
- McGlone, M.. "What Is the Explanatory Value of a Conceptual Metaphor?" *Language & Communication* 27, no. 2 (2007): 109-26.
- McGlone, Matthew S. "Conceptual Metaphors and Figurative Language Interpretation: Food for Thought?" *Journal of Memory and Language* 35 (1996): 544-65.
- Meyer, Dick. "What 'Culture War'?" *Los Angeles Times*, August 27, 2008 2008. <http://www.latimes.com/news/opinion/la-oe-meyer27-2008aug27,0,6947949.story> (accessed November 14, 2008).
- Mouffe, Chantal. "Hearts, Minds and Radical Democracy." *Red Pepper* (December/January 2009), <http://www.redpepper.org.uk/Hearts-Minds-and-Radical-Democracy> (accessed January 28, 2009).
- Olson, Kathryn M. and G. Thomas Goodnight. "Entanglements of Consumption, Cruelty, Privacy, and Fashion: The Social Controversy over Fur." *The Quarterly Journal of Speech* 80, no. 3 (August 1994).
- Ortony, Andrew. "Metaphor, Language, and Thought." In *Metaphor and Thought*, edited by Andrew Ortony, 1-16. Cambridge: Cambridge University Press, 1993.
- . "The Role of Similarity in Similes and Metaphors." In *Metaphor and Thought*, edited by Andrew Ortony, 342-56. Cambridge: Cambridge University Press, 1993.
- Osborn, Michael. "Archetypal Metaphor in Rhetoric: The Light-Dark Family." In *Readings in Rhetorical Criticism*, edited by Carl R. Burghardt, 338-49. State College: Strata Publishing, Inc., 1967.
- Perkinson, Landon P., ed. "Eighth Annual Review of Gender and Sexuality Law: Constitutional Law Chapter: Sexual Privacy after Lawrence V. Texas." *The*

Georgetown Journal of Gender and the Law (2007), <http://o-www.lexisnexis.com.bianca.penlib.du.edu/us/Inacademic/deli...> (accessed January 10, 2008).

- Pinker, Steven. *The Stuff of Thought: Language as a Window into Human Nature*. New York, New York: Viking Penguin, 2007.
- Rabkin, Jeremy. "A Supreme Court in the Culture Wars." *Public Interest* 125, no. Fall 1996 (1996): 24.
- Richie, David. "Categories and Similarities: A Note on Circularity." *Metaphor and Symbol* 18, no. 1 (2003): 49-53.
- Santa Ana, Otto. *Brown Tide Rising: Metaphors of Latinos in Contemporary American Public Discourse*. Austin: University of Texas Press, 2002.
- Schnitzer, Marc L., and Mark A. Pedreira. "A Neuropsychological Theory of Metaphor." *Language Sciences* 27 (2005): 31-49.
- Schon, Donald A. "Generative Metaphor: A Perspective on Problem-Setting in Social Policy." In *Metaphor and Thought*, edited by Andrew Ortony, 137-63. Cambridge: Cambridge University Press, 1993.
- Seitz, Jay A. "The Neural, Evolutionary, Developmental, and Bodily Basis of Metaphor." *New Ideas in Psychology* 23 (2005): 74-95.
- Slingerland, Edward. "Conceptions of the Self in the Zhuangzi: Conceptual Metaphor Analysis and Comparative Thought." *Philosophy East & West* 54, no. 3 (2004a): 322-42.
- . "Conceptual Metaphor Theory as Methodology for Comparative Religion." *Journal of the American Academy of Religion* 72, no. 1 (2004b): 1-31.
- Slingerland, Edward, Erin M. Blanchard, and Lyn Boyd-Judson. "Collision with China: Conceptual Metaphor Analysis, Somatic Marking, and the Ep-3 Incident." *International Studies Quarterly* 51, no. 1 (2007): 53-77.
- Sopory, Pradeep. "Metaphor and Affect." *Poetics Today* 26, no. 3 (2005a): 433-58.
- Steen, Gerard J. "Identifying Metaphor in Language: A Cognitive Approach." *Style*, no. 3 (2002), <http://o-find.galegroup.com.bianca.penlib.du.edu:80/itx/infomark.do?&contentSet=IAC-Documents&type=retrieve&tabID=TOO02&prodId=EAIM&docId=A94775622&source=gale&srcprod=EAIM> (accessed January 5, 2007).
- Stern, Josef. "Metaphor, Literal, Literalism." *Mind & Language* 21, no. 3 (June 2006): 243-79.

- "The Paulo and Nita Freire International Project for Critical Pedagogy." no. December 2, 2008, <http://www.freire.mcgill.ca/conent/antonio-gramsci-1891-1937> (accessed December 2, 2008).
- Thomas, Michael S. C., and Denis Mareschal. "Metaphor as Categorization: A Connectionist Implementation." *Metaphor and Symbol* 16, no. 1&2 (2001): 5-27.
- Tribe, Laurence H. "Lawrence V. Texas: The 'Fundamental Right' That Dare Not Speak Its Name." *Harvard Law Review* (2004), 0-
www.lexisnexis.com.bianca.penlib.du.edu/us/Inacademic/deli.
- "Unfixing Lawrence." *Harvard Law Review*, no. 8 (2005), <http://o-find.galegroup.com.bianca.penlib.du.edu:80/itx/start.do?prodId=LT>(accessed April 3, 2008).
- Wilson, Nicole L., and Raymond W. Gibbs, Jr. "Real and Imagined Body Movement Primes Metaphor Comprehension." *Cognitive Science* 31 (2007): 721-31.
- Winter, Steven L. "A Clearing in the Forest." *Metaphor and Symbolic Activity* 10, no. 3 (1995): 223-45.
- . *A Clearing in the Forest: Law, Life, and Mind*. Chicago: The University of Chicago Press, 2001.

APPENDIX

Table One: Designations for “Deviate Sexual Intercourse”

Terms Used by Justice Scalia

Word	Page	# Times
certain sexual behavior	18	1
conduct	17	1
conduct	22	1
conduct	24	6
consensual conduct	26	1
homosexual activity	19	2
homosexual acts	18	1
homosexual acts	19	1
homosexual acts	25	4
homosexual conduct	18	1
homosexual conduct	22	1
homosexual conduct	25	3
homosexual conduct	26	2
homosexual sodomy	17	3
homosexual sodomy	21	5
homosexual sodomy	22	20
homosexual sodomy	23	4
homosexual sodomy	24	1
homosexual sodomy	26	1
"intimate conduct"	26	1
private homosexual acts	26	1
sexual relations	22	1
their/that conduct	21	2
their/that conduct	28	1

Terms Used by Justice Kennedy

Word	Page	# Times
a particular sexual act	7	1
acts in question	8	1
acts of homosexual character	8	1
certain intimate conduct	5	1
certain intimate sexual conduct	5	1
certain sexual conduct	7	1
consensual acts	8	2
consensual sexual relations	9	1
homosexual conduct	7	1
homosexual conduct	8	2
homosexual conduct	9	4

homosexual conduct	10	3
homosexual conduct	11	1
homosexual sodomy	6	1
homosexual sodomy	7	2
homosexual sodomy	8	7
homosexual sodomy	9	1
homosexual sodomy	10	3
intimate choices	12	1
intimate conduct	7	1
intimate consensual conduct	12	1
intimate sexual conduct	6	1
nonprocreative sex	8	1
nonprocreative sexual activity	8	1
predatory acts	8	2
private acts	8	1
private conduct	6	1
private conduct	9	1
private consensual homosexual		
conduct	11	1
private sexual conduct	13	1
protected conduct	11	1
Relations	4	2
Relations	8	5
relevant conduct referenced in Bowers	10	1
same sex prohibitions	9	1
same-sex conduct	10	1
same-sex relations	9	1
sex practices common to homosexual		
lifestyle	13	1
sexual intimacy	5	2
that/their/the conduct	7	3
that/their/the conduct	11	1
that/their/the conduct	13	1
the offense	11	2
this particular form of conduct	8	1
this relationship	7	1
this type of private consensual conduct	10	1