

# Preface

Once again, the Journal of the Association of Legal Writing Directors (J. ALWD) hopes to enrich, enliven, and encourage the study and practice of legal rhetoric and writing with the publication of its Fall 2010 issue. This issue brings together articles on the theme of metaphor and narrative with general articles emerging from the discipline of legal writing.

J. ALWD Volume 7 includes twelve articles on subjects ranging from readers' reactions to persuasive storytelling in briefs to analysis of the rhetorical effects of oral argument questioning by the U.S. Supreme Court to document design that takes advantage of scientific and narrative principles; their authors include long-time leaders in the fields of legal writing and clinical teaching as well as practicing lawyers and academics from other disciplines. This issue truly provides a forum for conversation between the practice and the academy.

## Metaphor & Narrative

But for metaphor, which allows us to gather them up, group them together, and "contain" them, our perceptions would remain as scattered as marbles thrown on the ground.<sup>1</sup> But for narrative, which allows us to link discrete events together, place them into a story line with a beginning and an end, and thus compose a coherent account of what happened, our lives would be constructed of "One Damn Thing After Another."<sup>2</sup> In this issue, our authors show how better understanding of metaphor and story can help lawyers become more discerning as legal readers and more effective and persuasive as legal writers.

For concepts with such persuasive power, metaphor and narrative have bad reputations. In some circles, not much movement has occurred in the long treatment of metaphor and narrative as mere literary devices, language tricks that put a gloss on legal reasoning, but add little of substance to an argument. On the other hand, the theoretical resurgence

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<sup>1</sup> This concept draws on the metaphors that the mind is a container and ideas are objects. See e.g. George Lakoff & Mark Johnson, *Philosophy in the Flesh: The Embodied Mind and Its Challenge to Western Thought* 338 & 124-25 (Basic Books 1999).

<sup>2</sup> Anthony Amsterdam & Jerome Bruner, *Minding the Law* 30-31 (Harv. U. Press 2000).

of metaphor and narrative, and their connection with rhetoric, has not done much for their reputations in practical circles.

The reality should outweigh the reputation. Cognitive researchers and storytelling theorists have established that the stories and models we acquire from our culture and experience not only provide mental blueprints that help us sort through and understand new things, but also help us persuade others about the paths that events should follow and the frameworks into which things should fit. By studying the use of metaphor and narrative, we improve our understanding of how the law develops and how we might affect that development.

In the first article in this issue, Kenneth D. Chestek reports the results of his study into whether appellate judges are “actually influenced by the stories of the litigants who appear before them.” In *Judging by the Numbers: An Empirical Study of the Power of Story*, Professor Chestek evaluates his findings and suggests that the reason why stories have persuasive power is that they evoke emotional responses that make the legal claims of the parties more believable.

Moving from the courtroom to the classroom, Carolyn Grose writes about her use of narrative theory and storytelling techniques across the law school curriculum—in skills, clinical, and doctrinal courses. In *Storytelling Across the Curriculum: From Margin to Center, from Clinic to the Classroom*, the author illustrates how her students learn to identify story construction techniques and apply storytelling methods in their courses in Trial Advocacy, Family Law, and Trusts and Estates as well as in the Legal Planning Clinic.

Turning to the ethical implications of storytelling, Steve Johansen examines the concern that stories may not only be persuasively powerful, but may in fact be inappropriately powerful. After exploring three characteristics of story that prompt the concern that storytelling is unfairly manipulative, Johansen suggests that existing norms about ethical practice of law can address these concerns in *Was Colonel Sanders a Terrorist? An Essay on the Ethical Limits of Applied Legal Storytelling*.

Derek Kiernan-Johnson applies scientific and narrative principles to document design in *Telling Through Type: Typography and Narrative in Legal Briefs*. The article first explains the principles of typography that might be put to use by legal writers. Drawing on those principles, the author provides six case studies illustrating how typographic choices might reinforce, complement, and independently create narrative meaning in support of persuasion.

The next two articles focus on two of the best-known metaphors in the law. First, Julie Oseid examines Thomas Jefferson’s metaphor describing the First Amendment religion clause as “building a wall of

separation” in *The Power of Metaphor: Thomas Jefferson’s “Wall of Separation between Church & State.”* The author explores Jefferson’s probable understanding of metaphor, studies his reasons for using the wall of separation metaphor, considers how the metaphor developed into a doctrinal metaphor, and suggests lessons legal writers can derive from Jefferson’s experience.

Chris Rideout revisits an equally well-known metaphor in *Penumbra Thinking Revisited: Metaphor in Legal Argumentation*. The article explores Justice Douglas’s use of the penumbra metaphor in *Griswold v. Connecticut* within the context of the current cognitive theory of metaphor. The author suggests that better understanding of the strengths and shortcomings of the penumbra metaphor may be a way of learning how to use metaphoric reasoning more effectively in legal writing.

In *Conserving the Canvas: Reducing the Environmental Footprint of Legal Briefs by Re-imagining Court Rules and Document Design Strategies*, Ruth Anne Robbins suggests that redesign of lawyering documents not only can make our documents more readable but also may cut down on the environmental impact of our document design choices. The author offers three suggestions that do not involve going paperless, but will move toward the more modest goal of achieving sustainability.

Deborah A. Schmedemann describes her experiences representing a deaf teenager who was seeking adoption in *Voice: Speaking for a Deaf Boy in Foster Care*. This narrative essay presents the pro bono attorney’s perspective on representing children in the foster care system and on working with deaf clients.

In *The Lost Narrative: The Connection Between Legal Narrative and Legal Ethics*, Helena Whalen-Bridge, a professor at the National University of Singapore, surveys training in narrative skills and legal ethics in several common law systems of legal education. The author suggests ways in which programs of legal education can better prepare students for the difficult choices and ethical restraints involved in the creation and use of narrative.

## **General Articles & Practice Notes**

Ryan Malphurs, who recently received his Ph.D. in Communication from Texas A & M University and works as a litigation consultant, examines judicial behavior in oral arguments before the U.S. Supreme Court from a communication perspective in *Making Sense of “Bong Hits 4 Jesus”: A Study of Rhetorical Discursive Bias in Morse v. Frederick*. The author presents his findings based on studying the rhetorical discursive inter-

action among the Justices in a specific case and then considers the scholarly and social repercussions.

Susan L. Turley, an attorney-advisor for the Air Force's Legal Information Services, suggests that interviewing to obtain facts—similar to the interviewing conducted by journalists—is a valuable and underused legal research tool. She discusses how and why interviews can be worthwhile in legal research and provides suggestions for effective interviewing in *"To See Between": Interviewing as a Legal Research Tool*.

Finally, in this issue's practice note, *Argument, Analogy, and Audience: Using Persuasive Comparisons While Avoiding Unintended Effects*, Bruce Ching offers examples of how drawing an analogy between a client's situation and a familiar story can be a particularly persuasive use of narrative.

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*A personal note—*

*The Fall 2010 issue of J. ALWD marks the beginning of the next phase of the Journal's development. With this issue, two of the Journal's founders will leave the positions they have held since 2002: I will step down as co-editor, and Michael Smith will leave the Editorial Board. Michael's vision and voice have shaped the Journal; he has been a true friend and colleague; he will be missed.*

*It has been my honor to work for the last eight years with a group of generous and talented individuals who have charted the Journal's course: Michael Smith, a founding member of the editorial board; Carol Parker, Terry Phelps, and Marilyn Walter, editorial board members since 2004; Melody Daily, a board member since 2006; Ian Gallacher, Ruth Anne Robbins, and Melissa Weresh, board members since 2008; and Tom Cobb, Sara Gordon, Jeff Jackson, Sue Painter-Thorne, who joined us as Assistant Editors and board members in 2009. I am very grateful to Ian, my co-editor in 2009 and 2010, for graciously taking on that position.*

*Finally, special thanks to Amy Sloan, for asking Michael and me to take on a short-term project back in 2002, and to Tom Berger for his patience and constancy.*

*Linda Berger*