ARTICLE

HENDIADYS IN THE LANGUAGE OF THE LAW

WHAT PART OF "AND" DON'T YOU UNDERSTAND?

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The rhetorical device hendiadys, first identified in the work of Virgil, is a type of conjoined phrase—that is, it joins two words by "and." But hendiadys differs from other conjoined phrases in that it expresses a single complex and sometimes unfathomable idea. The most frequently cited example is a line from Virgil's *Georgics* that translates literally as "we drink from gold and cups," and is most often rendered in English as "we drink from golden cups."[1] But scholars have long challenged this simplistic reading on the ground that it does not account for Virgil's decision to use two nouns in place of a noun and adjective: if he merely wanted to say "golden cups," he could have done so.[2] It is more likely, they argue, that the poet meant the reader to grasp at least two successive ideas (that the occasion required both "the appropriately sacred vessel and the appropriately rich material"), if not three ("each idea in turn and . . . their combination or fusion").[3] Indeed, "[t]he central word in hendiadys is usually *and*, a word we take as signaling a coordinate structure, a parallelism of thought and meaning . . . [b]ut in hendiadys . . . this normal expectation is not met or is even deliberately thwarted."[4] This is what distinguishes hendiadys from other types of conjoined phrases.

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1 George T. Wright, *Hendiadys and Hamlet,* 96 PMLA 168, 168 (1981).

2 *Id.*

3 *Id.*

4 *Id.* at 169.

Until recently, hendiadys has figured only rarely in the analysis of legal texts. The first extensive scholarly contribution, in 2016 by Professor Samuel L. Bray, argues that the constitutional phrases "cruel and unusual" and "necessary and proper" may be interpreted as hendiadys—"unusually cruel" and "properly necessary."[5] Whether you think these are reasonable readings or not, Bray's interpretation of these conjoined phrases as hendiadys shows that he misunderstands the term. First, as noted above, hendiadic phrases have multiple meanings. But by interpreting one adjective as an adverb modifying the other in these phrases, Bray attempts to fix their meaning rather than embracing the rich variety of meaning inherent in hendiadys. But second, and more importantly, he is *a priori* mistaken in his attempt to ground his interpretation in hendiadys: given its inherent indeterminacy, it simply has no place in the language of the law, whether as interpretive or persuasive strategy.[6] Quixotically or not, lawyers seek fixed meaning in words, because words are all the law has to shape reality.[7] But literature waves a pirate flag of defiance to a single, articulable meaning, and hendiadys is perhaps the ultimate challenge: it multiplies and problematizes meaning. In short, though thoughtful, Bray's article is the poster-child for inter-disciplinary misalliance. And finally, hard though it may be for legal scholars to concede, the solution to perplexing statutory or constitutional pairs may lie less in rarefied literary interpretation than in informed, ethical, and clear judicial construction.[8]

Section I of this article provides historical context for hendiadys. It looks at the use of hendiadys in literature, with emphasis on Shakespeare's *Hamlet* and the novels of William Faulkner, where the device effectively and often unsettlingly underscores themes of doubt, self-deception, multi-

5 Samuel L. Bray, "*Necessary and Proper" and "Cruel and Unusual": Hendiadys in the Constitution*, 102 Va. L. Rev. 687, 690–91 (2016).

6 Moreover, the use of hendiadys to interpret conjoined phrases in the law finds no support in the history of legal language. Cloistered in royal courts, law courts, and chambers, and derived from Latin, French and Old English, the language of the law developed at a remove from both ordinary and literary English. *See* Dale Barleben, *Legal Language, Early Modern English and their Relationship* (2003), http://homes.chass.utoronto.ca/~cpercy/courses/6362Barleben1.htm.

7 *See, e.g.*, Joshua A.T. Fairfield, *The Language-Game of Privacy*, 116 Mich L. Rev. 1167, 1169 (2018) (noting that "[l]aw is language and . . . like other languages . . . develops according to systems of negotiated meaning"); David Gray Carlson, *Dworkin in the Desert of the Real*, 60 U. Miami. L. Rev. 505, 529 (2006) (noting that "law is language, and therefore it follows that it is impossible to do jurisprudence without committing oneself to a position on the relation of signifier to signified").

8 Peter M. Tiersma explains that

> [I]nterpretation, when referring to ordinary language usage, refers primarily to a mental process that attempts to infer the communicative intentions of the speaker or writer. For any number of reasons, that process can go awry . . . [but] that is often empirically testable. . . . This type of ordinary language interpretation is also quite common in the legal sphere. . . . Yet there is also a form of legal interpretation that is quite distinct from ordinary language interpretation. This occurs when a legal actor—usually a court—declares that certain legal language will have a particular meaning. For purposes of clarity, I propose that we resuscitate the . . . obsolescent term statutory construction . . . .

Peter M. Tiersma, *The Ambiguity of Interpretation: Distinguishing Interpretation from Construction*, 73 Wash. U. L. Q. 1095, 1096–97 (1995) (emphasis omitted).

plicity, complexity, and ambiguity. This background section also discusses the history of conjoined phrases in legal language. Section II then looks at misguided attempts to use hendiadys to understand conjoined phrases in the law, where ambiguity is far from desirable. Finally, in Section III, we look briefly at two other literary devices: synecdoche and metaphor. Although they are not as intrinsically oppositional to settled meaning as hendiadys, if used carelessly, these figures of speech can confound meaning and mask conscious or unconscious biases that threaten reasoned analysis and equitable decisionmaking. We conclude that metaphor and synecdoche have a place in the lawyer's rhetorical toolbox when handled carefully—unlike hendiadys, which we believe has no proper place in the language and interpretation of the law.

I. Background

A. Hendiadys in Literature

The very ambiguity and indeterminacy that is a trademark of hendiadys and that would make it sit uncomfortably in legal texts or, for that matter, in instructional materials on assembling an IKEA couch, is what makes it appropriate in some literary works. William Empson, the poet and critic, explains that ambiguity "is not satisfying in itself, . . . it must in each case arise from, and be justified by, the peculiar requirement of the situation. On the other hand, it is a thing which the more interesting and valuable situations are more likely to justify."[9]

In literature, hendiadys is one stylistic means of conveying problematic situations and questions.[10] It does this by defying expectation, refusing to conjoin obvious pairs and instead making perplexing connections. "The syntax of hendiadys is simply coordination but surely the power of the figure comes from the potential conflict . . . between the coordinate syntax and a semantic disjunction."[11] Hendiadys "has a syntactical complexity that seems fathomable only by an intuitional understanding of the way words interweave their meaning rather than by pains-

9 William Empson, Seven Types of Ambiguity 235 (1966).

10 Of course, structure, characters, and imagery also support these themes. In *Hamlet*, a revenge tragedy with multiple subplots, Laertes and Fortinbras serve as revenge heroes in antithesis to Hamlet. Rosencrantz and Guildenstern, onetime friends of Hamlet whose parasitic dependence upon the king renders them spies and stooges, and Reynald, an acquaintance of Laertes turned informant of Polonius, upend notions of trust and friendship. The dumb-show mimics the play-within-the-play, which is in turn a menacing double of *Hamlet*. Images are full of oxymorons and paradoxes: "mirth in funeral, and with dirge in marriage." Roles and relationships become murky once Hamlet's uncle and mother marry and become "uncle father and aunt mother." The images, structure, role reversals, and doubling produce "a sort of pathological intensification." *See* Frank Kermode, Shakespeare's Language 102 (1st ed. 2000).

11 Ellen Spolsky, *The Limits of Literal Meaning*, 19 New Literary History 419, 426 (1988).

taking lexical analysis":[12] not "bows and arrows of outrageous fortune" (components of one weapon) nor "bows and slings" (two instruments for launching missiles) or "stones and arrows" (two types of missiles), but *slings and arrows* (mixed categories).[13] Subversion of the normal coupling forces the reader to conjure successively the stone hurled by slings, the arrow sent flying by the bow, and the wounds delivered by each.[14]

Because hendiadys requires a seeming mismatch, most literary scholars would exclude from this literary device everyday expressions with clear and settled meanings like "nice and hot"; phrasal collocations or tautologies like "lord and master" or "high and mighty," in which two words are used simply for emphasis and elevation, and expressions using related terms, like "pen and ink" or "wind and rain."[15] For conjoined terms to be hendiadys, the element of the unexpected must be present, even when it deviates from its most common appearance in noun and noun or adjective and adjective form.[16]

Literary scholar Duncan Chesney opines that hendiadys's unexpected, elevated, and unsettling style is most suited to tragedy, and as "tragedy is only possible at certain historical moments of collision and radical social change,"[17] it emerges mostly during transitional eras. This may be why hendiadys is used some sixty-six times in *Hamlet,* underscoring "the play's themes of anxiety, bafflement, disjunction, and the falsity of appearance."[18]

Hamlet is the product of a transitional era. In the move from the medieval to renaissance ages, Shakespeare uses hendiadys to dramatize the sensibility that divides Hamlet from the heroes of traditional revenge tragedies. Hamlet says that when Fortinbras marches off to battle Poland *for a fantasy and trick of fame*, twenty thousand men "go to their graves like beds."[19] The hendiadys suggests that men are duped into sophomoric,

12 Wright, *supra* note 1, at 172.

13 Note that hendiadic expressions quoted in this section appear in italics.

14 *Cf.* Wright, *supra* note 1, at 182 (discussing this hendiadys).

15 *See id.* at 174. Most scholars would also exclude zeugma, which unlike hendiadys is comic and witty. Zeugma is "a kind of ellipsis in which one word, usually a verb, governs several congruent words or clauses" usually in curious yokings. *See* Duncan M. Chesney, *Shakespeare, Faulkner, and the Expression of the Tragic,* Coll. Literature, Summer 2009, at 156 n.4. Examples are Thomas Macaulay's "The Russian grandees came to Elizabeth's court dropping pearls and vermin," *see* Gertrude Block, *Language Tips*, N.Y. St. B.J., Jan. 2014, at 60, and Pope's "When husbands, or when lapdogs breathe their last," *see* Wright, *supra* note 1, at 170. These phrases have a syntactically parallel structure but seemingly disparate ideas. *Id.*

16 Some literary scholars would restrict hendiadys to its purest and most common form of noun pairs, though Wright identifies twelve forms of hendiadys, including noun and adjective-noun ("that *capability and godlike* reason"); adjective, adjective and adjective ("*wanton, wild, and usual* slips"); verb and verb ("that *live and feed* upon your majesty"). *See* Wright, *supra* note 1, at 185–88.

17 Chesney, *supra* note 15, at 144.

18 *See* Wright, *supra* note 1, at 169, 178.

19 William Shakespeare, The Tragedy of Hamlet Prince of Denmark act 4, sc. 4, ll. 63–65 (Barbara S. Mowat & Paul Werstine eds., 2012).

grandiose dreams of fame and personal advancement that turn out to be both deceptive and destructive. Although Shakespeare's early revenge tragedies took no notice of the morality of endless cycles of revenge, by the time *Hamlet* was written they are put to question.

The disturbing dichotomy between appearance and reality is also apparent in Hamlet's first encounter with the ghost of his father. There he questions,

> [W]hy the sepulcher
> Wherein we saw thee quietly interred
> Hath oped his *ponderous and marbled jaws*
> To cast thee up again.[20]

Although "*ponderous and marbled* jaws" can be translated as meaning "heavy stone doors," it also suggests that the mystery behind these doors' re-opening requires pondering, determining, whether the spewed forth apparition is holy or unholy.[21] Moreover, because the doors are likened to jaws there seems to be a biblical analogy with Jonah and the whale. Thus, hendiadys captures a complex of meanings in a single figure of speech.

The post-Reconstruction South of William Faulkner was also a historical moment of "collision and radical social change," and he used hendiadys to get at the heart of "a new South faced with the implications of its awful 'inheritance.'"[22] In *Absalom, Absalom,* Chesney explains, the language is convoluted.

> The truth of the South is foul and dire, and neither the successive narrators nor the reading audience (then or now) can readily accept it straight on. It is a truth, like all tragic truths, that can only be articulated indirectly, anamorphically, in words that undermine or disavow themselves even as they multiply and abound.[23]

For Faulkner's tale of oppression, exploitation, fratricide, incest, and miscegenation, themes similar to those in *Othello* and *Hamlet*, hendiadys seems appropriate. Faulkner clearly thought so when he borrowed the hendiadic title *The Sound and the Fury* from *Macbeth*—a mad cacophony of furious noise and roaring anger. They also appear frequently in *Absalom, Absalom*: "*fatal and languorous* atmosphere"; "*dismal and*

20 *Id.* at act 1, sc. 4, ll. 53–56 (emphasis added).

21 "Be thou a spirit of health or a goblin damned, Bring with thee airs from heaven or blasts from hell." *Id.* at act 1, sc. 4, ll. 44–46.

22 Chesney, *supra* note 15, at 144, 153.

23 *Id.* at 154.

incorruptible fidelity"; "motionless in *the attitude and action* of running"; "the *stern and meager* subscription list of the county newspaper's poems" that are issued "out of some *bitter and implacable* reserve of undefeat."[24]

If hendiadys in literature speaks to cultural transitions that cause uncertainty, conjoined phrases in the law have a very different history and impact on law. Whereas hendiadys in literature meaningfully nuances and complicates human experience, hendiadys in statutory interpretation threatens the consistency of meaning and application.

B. Conjoined Phrases in the Law

Cloistered in royal courts, law courts, and chambers, and derived from Latin, French, and Old English, the language of the law developed at a remove from both ordinary and literary English.[25] Among other distinctive features, it was characterized by conjoined phrases, also known as binomial expressions. These expressions are among the most defining and durable features of our legal language, as prevalent in early Anglo-Saxon legal documents as in contemporary form-book wills and contracts.[26] Indeed, it appears that conjoined phrases are five times more common in legal English than in ordinary or literary English.[27] Rightly or wrongly, they are perhaps the most derided aspect of legal language, eliciting jeers of "legalese!" and accusations of self-serving, obscurantist verbosity. While surely no profession or professional is without fault, other more substantive and consequential reasons also underlie law's "and" obsession.

Some conjoined phrases join two terms that were once, but are no longer, distinct from each other, like "last will and testament." Some phrases are obviously intended to convey solemnity, like the requirement that a witness in medieval England swear that "I with my eyes saw and with my ears heard," rather than merely swearing to tell the truth.[28] And

24 *Id.* at 145. This last example may mean the newspaper published odes that are read by a meager few but written and published in bitter defiance of their interest and debatable worth. *Id.*

25 Dale Barleben explains that

> modern English legal vocabulary finds its roots about the time of the Norman Conquest. Old English, Latin, and French were progenitors for legal [early modern English], as borrowings from these latter two languages helped shape the later lexicon. Old English words retained were less precise, yet were already ingrained in "boilerplate" legal language that relied on these phrases for their consistency. Latin and French, in contrast, were used more to indicate precise meanings for evolving concepts of law that needed articulation, yet also led to the impenetrability commonly associated with such language. Both Latin and French also held prestige value in their usage, which underscored the closed nature of legal language and its belonging to a self-regulating society.

Barleben, *supra* note 6. Indeed, French was the language of the law as late as the 17th century. Peter M. Tiersma, Legal Language 35 (2000).

26 Tiersma, *supra* note 25, at 15.

27 Marita Gustafsson, *The Syntactic Features of Binomial Expressions in Legal English*, 4 Text 123, 125, 132 (1984).

28 Tiersma, *supra* note 25, at 15.

some are intended to block every possible end-run by a wily opponent or ill-intentioned citizen.[29]

However, many, perhaps even the majority, of binomial expressions join two synonyms or near-synonyms for the purpose of clarity. One scholar notes the historical background as follows:

> [A] characteristic related to [legal] vocabulary . . . [by the 1590s] was the production of binomials; that is, new terminology commonly formed by combining a native term, or an integrated loan word, and its foreign (near-) synonym . . . . Terms like "bargain and sale" or "breaking and entering" are such examples, combining a French term and a term from Old English, to enumerate the specifics of a legal concept. Similar such binomials in the literary register were often also common, but functioned for completely different reasons, including, for example, the production of paradox.[30]

Such expressions also serve a related rhetorical purpose, the creation of emphasis, as in tautologies like "cease and desist"; sometimes these phrases are alliterative, like "aid and abet." As wordy and expendable as these expressions seem today, they are rooted in the drafters' attempts to make words *do something*: give the law effect in the world by inducing compliance. These locutions are not so much declarative as directive.[31] Put another way, "Cease and desist" means not just "Stop it" but "Stop it! This means you!"

Sometimes, as with "will and testament" or "cease and desist," it is obvious into which category a conjoined phrase best fits, and its interpretation is straightforward. Sometimes, however, it is far from clear how the two elements relate to each other, as for instance in uneasy drafting compromises or when the two terms in an emphatic tautology are not quite synonymous. And other pairs, though joined by "and," are syntactically ambiguous and can be read as disjunctive or conjunctive (or even both) in meaning.[32] Adding to the confusion is the interaction between

29 *Id.*

30 Barleben, *supra* note 6 (citing Terttu Nevalainen, *Early Modern English Lexis and Semantics, in* The Cambridge History of the English Language Vol. III 332–458 (Roger Lass ed., 1999)).

31 *See, e.g.,* Elizabeth Fajans & Mary R. Falk, *Linguistics and the Composition of Legal Documents: Border Crossings*, 22 Leg. Stud. Forum 735–36 (1998).

32 *See, e.g.,* Ira P. Robbins, *"And/Or" and the Proper Use of Legal Language,* 77 Md. L. Rev. 311, 317–18 ("The word 'and' can create misunderstanding when nouns connected by it are 'acting, or are being acted on, individually or collectively.' Using 'and' to connect the *subjects* of a sentence can create ambiguity in whether the subjects act individually or collectively, such as 'A and B must call C.' Must A and B complete this call while using the same phone, or can they call separately? Similar problems arise when the *objects* of a sentence are connected by 'and,' such as 'C must call A and B.' Here, the reader is left uncertain whether C is required to call A and B together or individually. Moreover, using multiple adjectives joined by 'and' to describe a plural noun can create confusion over whether both adjectives modify the noun collectively or individually. For

traditional conjoined phrases and the traditional rule of construction holding that every word should be given effect.[33]

Yet for all the need for an interpretive touchstone, it seems unlikely that calling a problematic conjoined phrase in the law hendiadys is helpful, for two reasons. First, hendiadys is an obscure literary figure. As detailed above, it was used extensively, intentionally, and to brilliant and disturbing effect by Shakespeare. Although hendiadys has not entirely disappeared,[34] later occurrences are rare and seemingly confined to literature, and it is unlikely that a conjoined phrase in the law derives from such a recondite rhetorical figure.

Second, by its nature, hendiadys escapes fixed meaning; it is not simply ambiguous or vague, but rather, simply (and almost certainly intentionally) indeterminate, immune to "painstaking lexical analysis."[35] Lawyers seek settled or at least reliable meaning,[36] however quixotic the attempt, while a writer who uses hendiadys rejects a fixed single meaning. At a minimum, it would seem that the use of hendiadys in statute, judicial opinion, or contract would be extremely unwise. Whether and with what frequency and effect it has been used in the law is a question that has only recently become a subject of debate among legal scholars.

II. Hendiadys in the Law

Although several attempts precede it,[37] and a number have followed it, the most extensive use of hendiadys to interpret legal language is

instance, the phrase 'Emily must call young and healthy residents' leaves the reader wondering whether, to receive a phone call from Emily, these residents must be both young and healthy or if they require only one of the listed characteristics. These are only a few examples where, in the right context, 'and' can confuse the reader of a contract, statute, or other document.") (quoting Kenneth A. Adams & Alan S. Kaye, *Revisiting the Ambiguity of "And" and "Or" in Legal Drafting,* 80 St. John's L. Rev. 1167, 1172 (2006)).

33 Tiersma, *supra* note 25, at 64.

34 Wright, *supra* note 1, at 171–72. Wright mentions its occasional use in Milton, in Poe's *The Fall of the House of Usher* ("*ponderous and ebony* jaws" echoes *Hamlet*), in Hawthorne's *Scarlet Letter* (the *gnawing and poisonous* tooth of bodily pain), and in Dylan Thomas's *A Refusal to Mourn the Death, by Fire, of a Child in London* (I shall not "mourn / *the majesty and burning* of the child's death").

35 *Id.* at 172.

36 The search may be for different kinds of meaning—"literal or semantic meaning, . . . contextual meaning as framed by the shared presuppositions of speakers and listeners, . . . real conceptual meaning, . . . intended meaning, . . . reasonable meaning, or . . . previously interpreted meaning"—but the search is inevitable. Richard H. Fallon Jr., *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. Chi. L. Rev. 1235, 1239 (2015).

37 *See, e.g.,* Jeffrey J. Grieve, Note, *When Words Fail: How Idaho's Constitution Stymies Education Spending and What Can Be Done About It,* 50 Idaho L. Rev. 99, 129–30 (2014) (criticizing the hendiadys-like interpretation by state courts of the phrase "thorough and efficient system of . . . schools" to "roughly express[] the concept of a minimally sufficient level of educational resources"). This merging of "efficient" into "thorough" "makes it difficult to isolate the effect of an efficiency requirement" and suggests that hendiadic interpretation can deprive terms of meaning even while it purportedly elucidates. *See* Bennett v. N.Y.C. Dep't of Corr., 705 F. Supp. 979, 986 (S.D.N.Y. 1989) (employing hendiadys as an interpretive strategy in adjudicating a Title VII hostile environment sexual harassment claim and noting that "defendants would read the phrase

"Necessary and Proper" and "Cruel and Unusual": Hendiadys in the Constitution,[38] by Professor Samuel L. Bray. Analyzing those adjectival phrases in a search for original meaning, Bray concludes, first, that "cruel and unusual" may be "persuasively" read to mean "unusually cruel,"[39] arguing that

> this phrase can easily be read as a hendiadys in which the second term in effect modifies the first: "cruel and unusual" would mean "unusually cruel." When this reading is combined with the work of Professor John Stinneford, which shows that "unusual" was used at the Founding as a term of art for "contrary to long usage," it suggests that the Clause prohibits punishments that are innovatively cruel. In other words, the Clause is not a prohibition on punishments that merely happen to be both cruel and innovative. It is a prohibition on punishments that are innovative *in their cruelty*.[40]

Second, Bray concludes that "necessary and proper" may be read hendiacally to mean "'properly necessary,' something like 'appropriately necessary.'"[41]

> "[N]ecessary and proper". . . affirms that Congress has incidental powers to carry into execution the other powers granted by the U.S. Constitution. "Necessary" means the connection between the enumerated end and the incidental power must be close, while "proper" reaffirms that connection and clarifies that "necessary" is not to be taken in its strictest sense.[42]

In this article we try our best not to fall into the bottomless debate about the original meaning of the constitutional language in issue or what,

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'alter . . . conditions of employment, and create an abusive working environment,' to describe two elements: (1) altered conditions of employment, and (2) abusive working environment"). The court goes on to conclude that

> [i]n view of the Supreme Court's apparent endorsement . . . of the proposition that "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult," and its discussion of hostile environment generally, I read the quoted phrase from *Vinson*—"alter . . . conditions of employment, and create an abusive working environment"—as a single element, stated in what is referred to in rhetoric as a hendiadys, the expression of a single idea using two phrases connected by "and." Thus, in order to satisfy this requirement of *Vinson,* Bennett need show only that the discriminatory hostility was sufficiently pervasive to change the work atmosphere, rather than being merely episodic, and thereby to change also a condition of employment.

The court in *Bennett* appears unaware of the problematic aspect of hendiadys, unaware that if the requirement is truly hendiadic, it might mean one thing or another. Or another. Or another. Or all at once.

38 Bray, *supra* note 5, at 687.

39 *Id.* at 688.

40 *Id.*at 690 (quoting John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation,* 102 Nw. U. L. Rev. 1739, 1745 (2008)).

41 Bray, *supra* note 5, at 691.

42 *Id.* at 694.

if any, weight is appropriately assigned to that meaning.[43] (That, of course, is easier said than done.) Our point is that however thoughtful, scholarly, and nuanced Bray's article, it is ultimately a misguided attempt to conjoin legal language with a literary figure.

First, it is far from certain that "cruel and unusual" and "necessary and proper" are hendiadys at all. Certainly nothing in Bray's research suggests that the drafters, cultivated and sophisticated men though they were, intended to employ an obscure and confounding literary figure. It is more likely that these two phrases are examples of the emphatic tautology, that age-old, if problematic and much maligned characteristic of the language of the law.[44] At the time of the drafting of the Eighth Amendment, "cruel and unusual" could more easily be intended and understood as a tautology or near tautology than as an arcane literary figure. In his article *The Original Meaning of "Cruel,"* Professor John Stinneford notes that "unusual" punishments—those not sanctioned by long usage—were by definition considered cruel in the founding era. Logically then, it is possible to argue that "unusual" adds nothing but emphasis to "cruel."[45] Similarly, it is possible that "proper" adds nothing of substance to "necessary and proper."[46] Indeed, one writer notes, "[i]t is very likely that Chief Justice Marshall viewed necessary and proper as a pleonasm with the second adjective proper importing no additional, legally significant, or justiciable meaning."[47] Bray cites authority for this proposition, but dismisses it as "giving up too quickly."[48] Sometimes, though, as Occam's Law holds, the obvious solution should not be discarded too quickly.

Further, it is possible that the real interpretive difficulty of "cruel and unusual" and "necessary and proper" is that of syntactic ambiguity: the pairs are not merely conjoined, but rather, they are also disjunctive—punishments that are cruel and punishments that are unusual are both forbidden.[49] In other words, punishments that are cruel or unusual are

43 The debate is summarized by Bray, most particularly with respect to textual analysis. *Id.* at 706–12, 720–32.

44 Bray is not unaware of the more straightforward possibilities that the two phrases he analyzes are tautologies or disjunctive. Indeed, on these points, he cites the authorities cited *infra* at notes 46, 47, 49, and 50.

45 John F. Stinneford, *The Original Meaning of "Cruel,"* 105 Geo. L.J. 441, 489 (2017); *see* John D. Bessler, Cruel & Unusual: The American Death Penalty and the Founders' Eighth Amendment 180–81 (2012) (suggesting that "cruel and unusual" might be a tautology).

46 *See* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine,* 69 U. Chi. L. Rev. 1721, 1728 (2002).

47 H. Jefferson Powell, *The Regrettable Clause:* United States v. Comstock *and the Powers of Congress*, 48 San Diego L. Rev. 713, 724 n.42 (2011); *see also* John Mikhail, *The Necessary and Proper Clauses*, 102 Geo. L.J. 1045, 1121 (2014) ("'[N]ecessary and proper' appears to have functioned more like boiler-plate language at the founding, signaling little more than an informal and flexible standard for exercising appropriate discretion in various contexts.").

48 Bray, *supra* note 5, at 725.

49 William Michael Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning and the Case of Amar's Bill of Rights*, 106 Mich. L. Rev. 487, 499 (2007).

forbidden. Similarly, Congress may be authorized to make both those laws that are necessary and those that are proper.[50]

Of course, hypothesizing that "cruel and unusual" and "necessary and proper" are emphatic tautological or semi-tautological figures characteristic of the law or that "and" may have been intended to mean "or" does not tell us how they should be construed by courts and applied to individual cases, but it clears the air a bit.

Further, and perhaps more importantly, even if they are not tautologous or disjunctive, the two phrases in question do not seem to qualify as hendiadys. Although literary scholars do not agree upon the composition of hendiadys,[51] most examples of hendiadys, from Vergil on, are noun pairs and seventy-eight percent of 313 hendiadic pairs identified in Shakespeare's plays are nouns.[52] Here, the two phrases in question are adjectival. While this surely does not rule out hendiadys, it makes it less likely. More importantly, "cruel and unusual" and "necessary and proper" lack the elements of surprise and mystery that characterize hendiadys. It is the nature of hendiadys to produce a double-take, to strike the reader as "disturbing" and "an anomaly."[53] Although "cruel and unusual" may strike a twenty-first century reader as an odd pairing, as noted above, it was seemingly usual in the eighteenth century.[54]

However, even assuming that the two phrases are hendiadic, Bray fails to heed his own warning about the problematic nature of hendiadys. He notes that "there is no one thing that hendiadys 'means.' To recognize that a pair of words with a conjunction is a single complex expression does not establish how the components interact. The uses and possible meanings of hendiadys are multiple, overlapping, and not sharply defined."[55] Ending his discussion of "necessary and proper," he writes, "Now one could go further, and draw on other shades of meaning for 'proper.' Within a hendiadys, this kind of multiplicity of meaning is familiar."[56] Yet he continues, "*[b]ut it is a constitution we are interpreting, not a sonnet.*"[57] As if to say, because the law requires something like fixed meaning, a literary figure that defies unambiguous meaning may be conscripted in the interpretive wars.

50 *See* Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause,* 55 Case W. Res. L. Rev. 243, 265–67 (2004).

51 Bray, *supra* note 5, at 695.

52 Wright, *supra* note 1, at 174.

53 *Id.* at 170.

54 *See* Bray, *supra* note 5, at 690.

55 *Id.* at 703.

56 *Id.* at 750.

57 *Id.* (emphasis added). The reference is presumably to Justice Marshall's admonition, "We must never forget that it is a constitution we are expounding." McCulloch v. Maryland, 17 U.S. 316, 407 (1819).

In the case of hendiadys, that conscript can turn out to be a double agent. Critiquing Bray's reading of "cruel and unusual" as "innovatively cruel," Stinneford accepts arguendo Bray's characterization of the Eighth Amendment language as hendiadys but counters that

> [t]his argument is incorrect to the extent it posits that the word "cruel" is morally and constitutionally neutral and that the Eighth Amendment permits cruel punishments so long as they are not innovative. *In fact, the words "cruel" and "unusual" modify each other.* [T]he word "cruel" describes the moral category of forbidden punishments, and the word "unusual" provides the concrete reference point for determining whether a punishment falls into that category.[58]

In short, a hendiadic phrase will not sit still.[59]

Since Bray's article, hendiadys has been used to interpret other conjoined pairs in the law: notably, "armed and dangerous" within the meaning of *Terry v. Ohio,*[60] and "advice and consent" in the Constitution.[61] These phrases seem no more convincingly or necessarily hendiadic than those in Bray's article.

Bray's approach to conjoined phrases has been used in a prosecutor's appellate brief to counter a defendant's argument that in the phrase "armed and dangerous," which is at the heart of *Terry v. Ohio,*[62] each word must be treated as a unique and distinctive ingredient of the reasonable suspicion needed to justify a stop and frisk.

Citing Bray's article and quoting from it at length, the prosecutor writes,

> The phrase "armed and dangerous" is a hendiadys. . . . [T]he two terms can modify each other in . . . [a]n asymmetrical fashion. . . . "Armed"

58 Stinneford, *supra* note 45, at 468 n.167 (emphasis added).

59 In her article *Before Interpretation,* Professor Anya Bernstein similarly takes issue with Bray's conclusions:

> [H]endiadys is one version of a consolidating reading, as opposed to an additive one that is 'read like a telegram—a word said, then "Stop," then another word, then another "Stop."' Bray argued for approaching two focal phrases in a consolidating, or hendiadic, way, as a matter of original understanding. Bray may be right about the original understanding of these two phrases. But I believe that both hendiadic figures and other phrases susceptible to idiomatic reading are often characterized by a fundamental indeterminacy; often, there will be no clearly correct or incorrect, option. Rather, judges exercise judgment—often unacknowledged—to make such decisions.

84 U. Chi. L. Rev. 567, 585 (2017) (quoting Bray, *supra* note 5, at 763); *see also* André LeDuc, *Making the Premises About Constitutional Meaning Express: The New Originalism and Its Critics*, 31 BYU J. Pub. L. 111, 112, 169–70 (2016) (criticizing Bray's analysis from an anti-originalist/textualist perspective as "another Ptolemaic epicycle in the debate" over constitutional meaning).

60 Terry v. Ohio, 392 U.S. 1, 28 (1968).

61 Josh Blackman, *Scotus After Scalia,* 11 N.Y.U. J. L. & Liberty 48, 133–35 (2017).

62 *Terry*, 392 U.S. at 28.

> is a complete and total modifier of "dangerous." It is not enough that a person be "dangerous" to permit a Terry patdown or search, because the whole point of Terry is to permit searches for weapons. But conversely, "dangerous" is not a complete and total modifier of "armed." As seen below in the cases, with some types of weapons, particularly firearms, being "armed" is, if not exactly tantamount, very close to being tantamount to being "dangerous." The terms differ in other ways—whether one is "armed" is a straight question of fact (you either have a gun on you or you do not); whether a person is "dangerous" is a predictive evaluation. And dangerousness, unlike being armed, is not a singular quality but rather is a function of two things—the amount of harm that the person can be expected to cause with their weapon, and the likelihood that the person will use the weapon.[63]

What is most notable about this thoughtful close reading by the prosecutor is that it is totally beside the point: the Supreme Court has made clear in language quoted immediately below in the prosecutor's own brief, that an officer's reasonable suspicion that a person is armed is *ipso facto* reasonable suspicion that the person is dangerous.

> In *Pennsylvania v. Mimms,* Philadelphia police officers pulled a vehicle over . . . and asked the driver to step out of the car. . . . When he did so, they noticed a large bulge under his jacket and, suspecting it was a gun, frisked him, resulting in discovery of a loaded revolver on his person . . . . The Court concluded that "there is little question the officer was justified. The bulge in the jacket permitted the officer to conclude that Mimms was armed *and thus* posed a serious and present danger to the safety of the officer." [64]

The brief writer thus seems to have given in to the temptation to use hendiadys to give his argument literary and intellectual heft—even though the Supreme Court's own language makes clear that "dangerous" serves purely as emphasis.

Hendiadys has also been recruited to interpret the Senate's "advice" and "consent" role in presidential appointments to the Supreme Court. Foreseeing epic battles over such appointments, one writer proposes a solution: "[T]he text of the Constitution provides a way to deescalate this tension: 'advice' comes before 'consent.'"[65]

63 Brief of Appellee at *10–12, Cardenas v. State of Alaska, No. A-12470, 2017 WL 6942570 (Alaska Ct. App. Sept. 11, 2017).

64 *Id.* (citing Pennsylvania v. Mimms, 434 U.S. 106, 107, 110–11 (1977)) (emphasis added).

65 Blackman, *supra* note 61, at 133.

> *Marbury v. Madison* [teaches that] . . . the Constitution prescribes a three-step appointment process. First, "the President . . . shall nominate" a person to fill an office. Second, through "the Advice and Consent of the Senate," the person "shall [be] appoint[ed]." Third, after the final act by the President—In *Marbury*, it was the President's signature on the commission, *not* the delivery—the appointment is confirmed to the position. This framework follows from the sequencing of Article II, Section II, but reads a critical word out of the Constitution: "advice." This process focuses exclusively on when the President "shall nominate" and when the Senate gives its "consent." But when does the Senate offer its "advice" to the President? If "advice" is merely another word for the Senate voting on the nominee, then it is but a "mere surplusage," is redundant for "consent," and adds nothing to the Constitution. A more thorough construction of "advice *and* consent" must take account of both provisions.
>
> As Samuel L. Bray explains in another thought-provoking piece, our Constitution is filled with a "largely forgotten figure of speech" known as a "hendiadys, in which two terms separated by a conjunction work together as a single complex expression." . . . Bray's thoughtful and unusual (hendiadys intended)[66] article does not address the "Advice and Consent" clause, but his framework offers some insights into how the phrase should be understood. Rather than two abstract concepts, the word "consent" should be understood to modify the word "advice." That is, the Senate is not being asked to offer its advice in vacuum, but in the context of exercising its power to consent to a nominee. The word "advice" has independent meaning—it is not enough to merely vote "yea" or "nay" on a nominee. The President will always make the ultimate decision of whom to select, but the Senate does have *some* role on advising him before the nomination is made, for once the nomination is made, the Senate's role is reduced to consent: "yea" or "nay."[67]

The author does not make a convincing case for hendiadys. First, "advice" and "consent" are related terms—there is nothing surprising or unusual about their pairing. Moreover, as worthy as is the aim of de-escalating the conflict over Supreme Court appointments, it is impossible to see how "consent" can be imagined to modify "advice" or how, if the conjoined phrase is indeed hendiadys, "advice" can have "independent meaning."

66 Although the compliment is apt, "thoughtful and unusual" is not hendiadys.

67 Blackman, *supra* note 61, at 133–35 (quoting Marbury v. Madison, 5 U.S. 137 (1803) and Bray, *supra* note 5).

Finally, hendiadys is too easily domesticated, confused with the emphatic tautology, as in this excerpt from an article on rhetoric directed to practitioners.

> *Hendiadys* . . . uses two nouns separated by a conjunction, instead of a noun and its qualifier, to express a single idea, . . . [e.g.,] the term "arbitrary and capricious," is one standard, not two; yet that standard almost always is expressed with these two terms. This device was a favorite of legal writers during the development of the civil law,[68] and our legal language carries on that heritage perhaps too readily. In any event, a hendiadys can be useful when one word does not adequately express a complex notion. For example, it might be argued that the term "arbitrary and capricious," while establishing a single standard, highlights aspects of the conduct under consideration that each individual word might not express adequately.[69]

Surely, as close as synonyms get, "arbitrary" and "capricious" do no more than reinforce each other. Thus, this is emphasis, not hendiadys. The coupling merely accentuates the idea that the law requires decisions and rules based on reason.

III. Synecdoche and Metaphor: More Cautionary Tales

As Pollock and Maitland wrote many years ago, "language is no mere instrument which we can control at will; it controls us."[70] Literary figures and tropes[71] are shiny objects that judges and commentators on the law can't resist.[72] But some shiny objects have sharp, ragged edges. Hendiadys is one example. The tropes synecdoche and metaphor are others. Synecdoche is a figure of speech in which a part is named but the whole is understood (silver for money or bread for food). A metaphor is a comparison of two dissimilar things that nonetheless have something in common (he was a lion in battle). Both are unlike hendiadys in that they are not intrinsically counter to fixed meaning and predictability, but they too can be used inappropriately. Synecdoche fails when it is used to show

68 The author cites no authority for this assertion.

69 Craig D. Tindall, *Rhetorical Style*, 50 Fed. Law. 24, 27–28 (2003). After describing hendiadys as two nouns, the author uses pairs of adjectives as examples.

70 Frederick Pollock & Frederick William Maitland, The History of English Law 87 (2d ed. 1968).

71 Figures are characterized by their particular syntax, while tropes are characterized by "alteration of meaning . . . whether the alteration occurs in a single word, as often in metaphor, metonymy, synecdoche, and so on, or proceeds from a governing design, as in allegory or a sustained ironic structure." Although its distinctive syntax places hendiadys in the figure category, the semantic ambiguity that also characterizes it suggests that it has the force of a trope. Wright, *supra* note 1, at 184 n.15.

72 Guilty as charged.

off erudition at the expense of reason. Metaphor is a dishonest and obfuscating form of persuasion when there is no true correspondence between the things being compared or when the perceptions that flow from the comparison encourage bias and mask oppression.

A. Synecdoche

Although not as mysterious as hendiadys, synecdoche is not as simple as it is sometimes made to appear. Indeed, even the definition in a non-specialist dictionary is complex: "a figure of speech by which a part is put for the whole, . . . the whole for a part, . . . the species for the genus, . . . the genus for the species, . . . or the name of the material for the made thing."[73] The meaning is further complicated by synecdoche's unsettled relationship to metonymy, "a figure of speech consisting of the use of the name of one thing for that of another to which it is associated (such as "crown" in "lands belonging to the crown").[74]

> Synecdoche is closely related to metonymy (and is, by some, regarded as a kind of metonymy). What distinguishes synecdoche from metonymy is that the latter reduces the whole to the part whereas the former merely attributes to the whole a quality of the part. Hence, if we were to read the expression "He is all heart" as a metonym, it would produce the nonsense supposition that he is composed entirely of heart. Read as synecdoche, however, the expression means that all of him is to be understood in terms of certain qualities associated with "heart"—namely, goodness, compassion, and the like. The key distinguishing effect is that metonymy is reductionist (reducing a whole to one of its parts) while synecdoche is integrative (unifying the various parts into a whole by way of the quality of one of the parts).[75]

Synecdoche is sometimes used as a persuasive device in the law,[76] but our major concern here, as with hendiadys, is its use an interpretive strategy. Judges in particular seem attracted to synecdoche, often when "for example," or "as a general term" would be more appropriate and intelligible. Too often the term seems proffered as a display of erudition. One typical example follows:

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73 *Synecdoche*, Merriam-Webster's Dictionary (New ed. 2016).

74 *Metonymy*, Merriam-Webster's Dictionary (New ed. 2016).

75 Pierre Schlag, *Hiding the Ball,* 71 N.Y.U. L. Rev. 1681, 1708 (1996).

76 Laura E. Little, *Hiding with Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions,* 46 UCLA L. Rev. 75, 106–07 (1998) (quoting Cleavinger v. Saxner, 474 U.S. 193, 205 (1985)) ("An example of a live trope illustrating both metonymy and synecdoche appeared in a case concerning whether qualified immunity protects members of a prison discipline committee adjudicating inmate rule infractions: 'If qualified immunity is sufficient for the schoolroom, it should be more than sufficient for the jailhouse where the door is closed, not open, and where there is little, if any, protection by way of community observation.' The Court's reference to 'schoolroom' and 'jailhouse' at least minimizes the stakes in the decision and arguably even belittles the problem of abusive and unfair adjudication.").

> To say that [defendant corporation] Ocwen, plus its officers, executives, and employees, schemed with other corporations to defraud homeowners, without adding any detail about what particular Ocwen agents (or classes of agents) might have done, is just to repeat by synecdoche that Ocwen participated in the scheme.[77]

A more florid display of erudition is found in an opinion deciding a complex immigration issue.

> [T]he array of pertinent [reliance interests in the right to seek relief noted in] influential precedents are not exhaustive but merely illustration by synecdoche. Such listings simply describe several sufficient, as opposed to necessary, conditions for finding retroactivity.[78]

This opinion is an example of extreme, and perhaps unwise, literary ambition—in addition to the baffling reference to synecdoche, the court uses numerous obscure, mainly Latinate, terms, e.g., "fuliginous," "asseverate," "perscrutation," and "enceinture."[79]

To judge by this 2003 circuit court opinion, below, the Supreme Court's admonition concerning the use of synecdoche seems to have had little effect. The Court noted that

> [i]t is implausible that the mention of three discrete events along the road to deportation was a shorthand way of referring to all claims arising from deportation proceedings. Not because Congress is too unpoetic to use synecdoche, but because that literary device is incompatible with the need for precision in legislative drafting.[80]

Finally, in *A Matter of Interpretation: Federal Courts and the Law*,[81] Justice Scalia makes somewhat less than rigorous use of the term synecdoche. He notes cryptically that the terms "Press" and "Speech" in the First Amendment "stand as a *sort of* synecdoche" that covers handwritten letters.[82] Yet, as Andre LeDuc points out, Scalia never explains why "reading the term[s] like a synecdoche is consistent with the semantic claims of originalism—or why the reading treats the term[s] like a

77 Taylor v. Ocwen Loan Servicing, LLC, No. 416CV04167SLDJEH, 2017 WL 3443209, at *3 (C.D. Ill. Aug. 10, 2017).

78 Arevalo v. Ashcroft, 344 F.3d 1, 14 (1st Cir. 2003) (internal cites and punctuation omitted).

79 *Id*. at 11, 13, 14. In a further attempt to turn law into literature, the court notes, "It is trite, but true, that courts are bound to interpret statutes whenever possible in ways that avoid absurd results." *Id*. at 8. To call a legal rule "trite" would seem a meaningless assertion.

80 Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 482 (1999).

81 Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law (Amy Gutmann ed., 1997).

82 *Id*. at 38 (emphasis added).

synecdoche rather than as a synecdoche."[83] Surely, one might as usefully say that the terms apple and peach are "a sort of synecdoche" for pear.

In brief, although the trope is sometimes effectively used as persuasion or interpretation, the term synecdoche tends too often to be tossed in as proof of erudition.

B. Metaphor

The use of metaphor in the law has been studied extensively and intensively,[84] given that, consciously or unconsciously, lawyers and judges use metaphor not only to clarify, but also to manipulate emotions, to induce agreement, and even to alter doctrine.

> [M]etaphoric language can be useful for describing or expressing an abstract legal concept. In fact, it is the ability of metaphor . . . to put an abstraction into concrete terms . . . that has led to the prevalence of metaphor in doctrinal law. However, a metaphor cannot possibly capture the true meaning of, and all the dimensions and nuances implicated by, an abstract legal concept. Indeed, it is this allure of metaphor combined with its potential pitfalls that led renowned jurist Benjamin Cardozo to his famous criticism of metaphors in doctrinal law: "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." [85]

Our purpose here is not to add to this theoretical discussion, but merely to emphasize, by way of two recent examples, the irresistibility and danger of metaphor and the caution with which literary devices should be used. One example arose in *Janus v. American Federation of State, County, & Municipal Employees, Council 31,*[86] where the Supreme Court held that the First Amendment was violated by the requirement that nonmembers of a public-sector union pay what is generally called an "agency fee," *i.e.,* a percentage of the full union dues. Writing for the majority, Justice Alito noted,

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83 André LeDuc, *Making the Premises About Constitutional Meaning Express: The New Originalism and Its Critics,* 31 BYU J. Pub. L. 111, 232 (2016).

84 When Christopher Rideout quotes Robert Frost as saying"[A]ll thinking is metaphorical," citing *Education by Poetry*, in Collected Poems, Prose, and Plays 717 (Lib. of America 1995), he is referring to current theories holding "[m]etaphor, far from being a matter of language and style, is instead a matter of thought. . . . '[T]hey are general mappings across cultural domains.'" J. Christopher Rideout, *Penumbral Thinking Revisited: Metaphor in Legal Argumentation*, 7 J. ALWD 155, 164–65 (2010) (quoting George Lakoff, *The Contemporary Theory of Metaphor*, *in* Metaphor and Thought 202–03 (Andrew Ortony ed., 2d ed. 1993)).

85 Michael R. Smith, *Levels of Metaphor in Persuasive Legal Writing*, 58 Mercer L. Rev. 919, 923 (2007).

86 Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018).

> Respondents . . . contend[ ] that agency fees are needed to prevent nonmembers from enjoying the benefits of union representation without shouldering the costs. . . . Petitioner strenuously objects to this free-rider label. He argues that he is not a free rider on a bus headed for a destination that he wishes to reach but is more like a person *shanghaied* for an unwanted voyage.[87]

To "shanghai" means "to put aboard a ship by force, often with the help of liquor or a drug."[88] The Chinese city's name became attached to the process in the 1800s, seemingly because ships unwillingly manned by the kidnapped sailors were often bound for the East; the abductors themselves were not Asian.[89] The term came to be a metaphor for coerced participation. It would seem to be a dead or "sleeping"[90] metaphor—an Internet search for the term indicated many writers are unaware of the literal meaning and wondering whether accusation of shanghaiing is a racist slur.[91]

In the quoted passage, Justice Alito attributes the "shanghaied" metaphor to the petitioner, but, curiously, provides no citation. Moreover, a word-search in Westlaw for the verb "shanghai" and its derivative forms in the petitioner's filings was unsuccessful. Even assuming that the petitioner did use this term in a pleading or oral argument, however, Justice Alito chose to adopt it. Now, we do not mean to suggest that Justice Alito intended to make his point more persuasively by appealing to anti-Asian sentiments. Nor do we think that Justice Alito meant to compare the respondent public-sector union to allegedly exploitive Chinese interests. But such is the power of metaphor, that his use of the term may well have that effect; as Steven Winters warns "what is at issue is not the truth or falsity of a metaphor but the perceptions and inferences that follow from it and the actions that are sanctioned by it."[92] And in an era characterized by rough and often abusive public discourse, many would deem metaphors like "shanghaied" especially inappropriate.

87 *Id.* at 2466 (emphasis added).

88 *Shanghai*, Merriam-Webster's Dictionary (New ed. 2016).

89 One might nonetheless wonder why the term referred to the destination and not the process or perpetrators, and why, if indeed, it did not speak to anti-Asian bias, the term has long survived the procedure.

90 "[M]etaphoricity is gradable and . . . even the most seemingly dead metaphors can be awakened through the unexpected uses of individual speakers." Stephen Hequembourg, *Literally: How to Speak Like an Absolute Knave*, 133 PMLA 56, 57 (2018) (discussing theories of Cornelia Muller, Metaphors Dead and Alive, Sleeping and Waking: A Dynamic View (2008)).

91 *See, e.g.,* IGN, *Is saying "I was shanghaied" racially insensitive?*, Boards, http:// www.ign.com.boards/boards/threads/is-saying-i-was-shanghaied-racially-insensitive.250600553/ (last visited July 9, 2020).

92 Steven L. Winter, *Death Is the Mother of Metaphor,* 105 Harv. L. Rev. 745, 759 (1992) (reviewing Thomas C. Grey, The Wallace Stevens Case: Law and the Practice of Poetry (1991)) (citing George Lakoff & Mark Johnson, Metaphors We Live By 158 (1980)).

The "shanghaied" metaphor may well enhance the persuasiveness of Justice Alito's opinion through the "perceptions and inferences that follow from it," thus denigrating the municipal union and its cause. But worse still is a metaphor that also effectuates doctrinal change because, whether deliberately or unconsciously, it "does not accurately and effectively capture the . . . concept at issue."[93] This is what happened with the "muddy waters" metaphor that altered the application of a Texas statute[94] that was intended to allow easier access to post-conviction DNA testing. In a thoughtful and well-researched article, Professors Carrie Sperling and Kimberly Holst argue that the courts' use of the muddy waters metaphor "demonstrates the power of a metaphor to attach meaning to a legal standard and alter the application of that standard in a way that is counter to legislative intent."[95] Indeed, they hypothesize "that the implicit power of the metaphor plays an even greater impact on how judges make decisions than previously recognized."[96]

The Texas post-conviction DNA statute allowed testing when "there was 'a reasonable probability that . . . [a convicted person] would not have been prosecuted or convicted if DNA testing had provided exculpatory results.'"[97] But in the first case decided under the statute,[98] the Texas Court of Criminal Appeals construed the statute to require that the DNA tests would prove innocence, saying that otherwise, the test would simply "muddy the waters."[99] This metaphor was then used to deny relief in many cases requesting access to DNA testing. Even after "the legislature explicitly amended the statute to correct for [the] misapplied burden[,] [t]he metaphor would not release its grip . . . ,"[100] and Texas courts adhered to the muddy waters standard. Given the persistence of the metaphor, it is not farfetched to wonder whether the hue of the muddy waters was related to the skin-tone of the majority of petitioners.

The authors postulate that the muddy waters metaphor connotes "dirt and dirty metaphors connote guilt,"[101] thus manipulating the emotions of decisionmakers. But we wonder whether this is merely a case of a "metaphor gone wrong"; it may instead be an instance of "judges gone

93 Smith, *supra* note 85, at 923.

94 Tex. Code Crim. Proc. Ann. art 64.03 (West Supp. 2016).

95 Carrie Sperling & Kimberly Holst, *Do Muddy Waters Shift Burdens?*, 76 Md. L. Rev. 629, 642 (2017).

96 *Id.*

97 *Id.* at 644 (quoting H. Research Org., S.B. 3 Bill Analysis, H.Res. 77, Reg. Sess. 2–3 (Tex. 2001)).

98 Kutzner v. State, 75 S.W.3d 427 (Tex. Crim. App. 2002).

99 *Id.* at 439.

100 Sperling & Holst, *supra* note 95, at 654.

101 *Id.* at 657.

bad," judges who deliberately use a metaphor with little correspondence to the plain language of the statute and legislative intent in order to mask biases. As Steven Winters warns, "It is this pragmatic attention to the relations created by our metaphors, and not some mysterious faculty like 'judgment,' that allows us to avoid the use of metaphor to mask oppression."[102]

> Whether in law, poetry, or anywhere else, the expression of a metaphor must be done appropriately. The appropriate expression does not mean merely following stylistic rules, but rather expressing the metaphor in a way that conveys its correspondences, or mappings, coherently. If metaphors, conceptually, are constrained by their own systematicity, then the expression of those metaphors must in turn reveal, not muddle, that systematicity.[103]

A court masked biases, possibly racist biases, with an inappropriate metaphor upon which other judges of the same persuasion then seized. The muddy waters cases are, therefore, a cautionary tale showing that metaphors may not only manipulate emotion, but may also conceal improper motives and further wrongful agendas.

IV. Conclusion

This article started as one inquiry and ended as the beginning of another. It began a few years ago when we had a chance encounter with hendiadys, in a book by Shakespeare scholar James Shapiro,[104] in which the author briefly discussed the use of the figure in *Hamlet* and cited the leading authority, George Wright's 1981 article *Hendiadys and Hamlet*.[105] Given that we both have backgrounds in literary studies, we read Wright with interest and admiration. We were intrigued by hendiadys and wondered about its use (or absence) in legal texts. Was it used? If so, where, and how? Was there scholarly comment on its use? How should one track this elusive figure?[106] Since literary figures and tropes reveal themselves to the reader only through close reading of individual texts or when they are called by their name, we chose the latter route, though much research remains to be done on, for example, the many other

102 Winter, *supra* note 92, at 759.

103 Rideout, *supra* note 84, at 190.

104 James Shapiro, A Year in the Life of William Shakespeare: 1599 (2005).

105 Wright, *supra* note 1.

106 We quickly ruled out searching for "and" in online databases.

binomial expressions in the Constitution and whether they are or are not hendiadic.[107]

Beginning our research, we found sparse mention of hendiadys—until Professor Bray's article was published, eliciting considerable comment and other explorations of hendiadys in law. We soon became convinced that not only was it unlikely that many, if any, binomial expressions in the law are hendiadys, but even if some are, that its use as an interpretive strategy is inappropriate. Hendiadys can only serve legal interpretation by betraying its own essence, which is multiplicity and complexity.

Other tropes and figures like synecdoche and metaphor create similar interpretive conundrums, even though these figures are not intrinsically antithetical to clear expression or understanding of the law. Their misuse, however, benefits neither law nor literature. Our takeaway is therefore simple: some literary devices, like hendiadys, have no proper place in the language of the law or in its interpretation, and others should be used judiciously.

107 We suspect that, like "cruel and unusual" and "necessary and proper," none of the others are hendiadys. *See* Tiersma, supra note 25, at 46 ("[T]he Framers of the Constitution seem to have agreed that it should be in the 'plain common language of mankind' . . . .") (citing Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution 344–45 (1996)).