

HEINONLINE

Citation:

Sarah Higinbotham, Bloodletting and Beasts: Metaphors of Legal Violence, 49 Wake Forest L. Rev. 727 (2014)

Provided by:

Provided by Hugh F. MacMillan Law Library

Content downloaded/printed from [HeinOnline](#)

Tue Nov 6 09:48:18 2018

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <https://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[Copyright Information](#)



Use QR Code reader to send PDF to your smartphone or tablet device

BLOODLETTING AND BEASTS: METAPHORS OF LEGAL VIOLENCE

*Sarah Higinbotham**

Research has shown that metaphors are how we make sense of the world. They influence how we think, what we buy, and even how we vote.¹ In order to understand the role that metaphors play in people's reasoning about crime, psychology professors Lera Boroditsky and Paul Thibodeau gave a fictional newspaper account to hundreds of readers, reporting that the city of "Addison" faced a dramatic surge in crime in 2004, with a 19% increase in reported crimes and a 52% increase in the murder rate.² The statistics, phrasing, and content of each story were identical, with a single word exception—the metaphor:

Crime is a {beast/virus} ravaging the city of Addison. Five years ago Addison was in good shape, with no obvious vulnerabilities. Unfortunately, in the past five years the city's defense systems have weakened, and the city has succumbed to crime. Today, there are more than 55,000 criminal incidents a year—up by more than 10,000 per year. There is a worry that if the city does not regain its strength soon, even more serious problems may start to develop.³

Half of the participants read that "[c]rime is a [*beast*] ravaging the city of Addison" and half read that "[c]rime is a [*virus*] ravaging

* Marion L. Brittain Postdoctoral Fellow, Georgia Institute of Technology, PhD, Georgia State University. I would like to thank Jonathan Cardi and the participants of the *Wake Forest Law Review's* Spring 2014 Colloquium, "Law as Violence: An Interdisciplinary Conversation." Thanks also to Jonathan Simon for his compelling work on *Brown v. Plata* and to Seth Hagen, Joe Kelly, and Bill Taft for their helpful comments.

1. See generally GEORGE LAKOFF & MARK JOHNSON, *PHILOSOPHY IN THE FLESH: THE EMBODIED MIND AND ITS CHALLENGE TO WESTERN THOUGHT* (1999); *THE POWER OF METAPHOR: EXAMINING ITS INFLUENCE ON SOCIAL LIFE* (Mark J. Landau et al. eds., 2014); Swee Hoon Ang & Alison Ai Ching Lim, *The Influence of Metaphors and Product Type on Brand Personality Perceptions and Attitudes*, 35 J. ADVERTISING 39 (2006); Mark J. Landau et al., *A Metaphor-Enriched Social Cognition*, 136 PSYCHOL. BULL. 1045 (2010).

2. Paul H. Thibodeau & Lera Boroditsky, *Metaphors We Think with: The Role of Metaphor in Reasoning*, 6 PLOS ONE 1, 3 (2011).

3. *Id.* at 3.

the city of Addison.”⁴ Regardless of their political party, 71% of those who read that “crime is a beast” opted for enforcement strategies to address crime.⁵ That number dropped to 54% when crime was metaphorically framed as a “virus.”⁶ When people were primed to think of offenders as “beasts,” they were far more likely to opt for longer prison sentences and more police force.⁷ But when primed with “virus,” they chose treatment, antidotes, and social reform.⁸ Significantly, when asked to report on what influenced their reasoning, 93% claimed the crime statistics alone led to their decision.⁹ “People like to think they’re objective and making decisions based on numbers,” Professor Boroditsky observed, “[b]ut they’re really being swayed by metaphors.”¹⁰ Throughout Thibodeau and Boroditsky’s five related experiments in 2011 and subsequent experiments in 2013, findings were consistent.¹¹ Metaphors exert a powerful but covert influence on people’s real-world policy decisions about legal violence.¹²

We have long understood that metaphor is more than a rhetorical device for poets and playwrights.¹³ Metaphors pervade the way we think about morally complex ideas like war, time, economy, love, illness, drugs, gender, and race.¹⁴ When we structure one thing in terms of another—thinking of crime as a “beast” ravaging the city—the metaphor becomes the very *conception* of the thing itself. New meaning, not just new expression, emerges. As a way of thinking about how metaphors shape cultural attitudes toward the law’s violence, I turn to Renaissance England, the

4. *Id.* (emphasis added).

5. *Id.* at 6.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. Adam Gorlick, *Is Crime a Virus or a Beast? When Describing Crime, Stanford Study Shows the Word You Pick Can Frame the Debate on How to Fight It*, STANFORD REP. (Feb. 23, 2011), <http://news.stanford.edu/news/2011/february/metaphors-crime-study-022311.html>.

11. See Thibodeau & Boroditsky, *supra* note 2, at 10; Paul H. Thibodeau & Lera Boroditsky, *Natural Language Metaphors Covertly Influence Reasoning*, 8 PLOS ONE 6–7 (2013) [hereinafter Thibodeau & Boroditsky, *Natural Language Metaphors*].

12. THE POWER OF METAPHOR, *supra* note 1, at 3–11; see also Thibodeau & Boroditsky, *Natural Language Metaphors*, *supra* note 11, at 2 (reporting that Democrats and Independents are more likely to be swayed by metaphors than Republicans).

13. See, e.g., GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* (1980); STEVEN PINKER, *THE STUFF OF THOUGHT: LANGUAGE AS A WINDOW INTO HUMAN NATURE* (2007); STEVEN L. WINTER, *A CLEARING IN THE FOREST: LAW, LIFE, AND MIND* (2001).

14. See Raymond W. Gibbs, Jr., *Conceptual Metaphor in Thought and Social Action*, in THE POWER OF METAPHOR: EXAMINING ITS INFLUENCE ON SOCIAL LIFE, *supra* note 1, at 17.

“bloodiest period in the history of the English criminal law,” as a case study in metaphors and meaning making.¹⁵ It was a time in which it might have been difficult to consider “law” as distinct from the violence it purportedly countered: hanging, burning, whipping, racking, dismembering, scourging, decapitating, and drawing and quartering were ubiquitous in early modern towns and cities. A woman my age, living in Shakespeare’s London, might have seen six hundred hangings if she faithfully attended the Gallows Days.¹⁶ “In the days when torture was a normal weapon in the arsenal of the state,” legal scholar Desmond Manderson writes, “[torture] was accomplished publicly. The mutilated bodies of traitors were displayed as if they were statues or icons on which state power had been etched. Their wounds were symbols for which their bodies had become a canvas for dissemination.”¹⁷ Amid the flourishing of early modern art, literature, print, and science, Elizabethans also confronted canvases of legal violence. Not only did citizens regularly see torture and execution in the town squares, they had only to cross to the Northern Gate of the London Bridge to see impaled heads and quartered bodies preserved in tar as reminders that Justice carries a sword.¹⁸

And yet, despite the frequency with which sixteenth- and seventeenth-century citizens gazed on the blood and bodies of their peers, the Elizabethans and Stuarts were not as inured to legal violence as we might assume. Instead, a wide continuum of perspectives existed on how violent the law needed to be in order to control violence, circulating not only vertically from Parliament, Star Chamber, Lord Chancellor’s chambers, and the Queen’s Bench, but also horizontally in plays, poetry, engravings, sermons, pamphlets, and woodcuts of the time.¹⁹ As today, a conversation existed that ranged from those who called for the law to be even more violent to those who advocated for what we now call

15. IAN W. ARCHER, *THE PURSUIT OF STABILITY: SOCIAL RELATIONS IN ELIZABETHAN LONDON* 237 (1991).

16. See STEVE HINDLE, *THE STATE AND SOCIAL CHANGE IN EARLY MODERN ENGLAND, c. 1550–1640* 119 (2000) (estimating that “some 75,000 felons went to the gallows in the century before 1630”).

17. DESMOND MANDERSON, *SONGS WITHOUT MUSIC: AESTHETIC DIMENSIONS OF LAW AND JUSTICE* 114 (2000).

18. See NIGEL CAWTHORNE, *PUBLIC EXECUTIONS: FROM ANCIENT ROME TO THE PRESENT DAY* 100 (2006); Brian Cookson, *The Story of Old London Bridge*, *LONDON HISTORIANS* 1 (Oct. 8, 2010), www.londonhistorians.org/?s=articles (link to PDF file).

19. Many of the texts and illustrations that I traced were in pamphlet form, a new genre in the early modern period that Michael Galchinsky notes is “[oriented] towards the present,” part of the “dynamic, interactive public sphere of its day,” an immediate response to public policy that can “enable it to take the political temperature of the moment.” Michael Galchinsky, *Political Pamphlet*, in *THE ENCYCLOPEDIA OF ROMANTIC LITERATURE* 1032 (Frederick Burwick et al. eds., 2012).

“restorative justice,” community-based dispute resolution that does not rely on violence.²⁰ And also, as today, early modern apologists for legal violence turned to metaphor to make legal violence seem natural and palatable.²¹

The early modern state repeatedly employed the medical metaphor of bloodletting, or “phlebotomy,” as a conceptual framework for defending torture and execution as essential to its state health.²² The metaphor worked as efficient cognitive packaging because the conventional attributes of bloodletting—draining blood from the body in order to heal it—parallel the conventional attributes of torture exacted against those who “infect” the body politic. Central to the meaning of both bloodletting and legal violence is that they both seem to be *harming* the body when in fact they are *healing* it. As we now recognize bloodletting as a failed medical policy based on a fundamental physiological misunderstanding (a practice that likely killed as many as it healed),²³ looking at legal violence through such a clearly defunct metaphor can illuminate the rhetorical and cultural strategies on which it relies. After I briefly trace the metaphor as it was used in three examples, a seventeenth-century pamphlet, court opinion, and sermon, I will turn to contemporary metaphors that endorse current practices of legal violence—metaphors that likewise enable the agent of punishment to seem different than the object.

THE PHYSIC OF THE GOVERNMENT TO LET OUT CORRUPT BLOOD

“There is scarce a Disease in which bleeding is not allowed,” wrote Cornelius Celsus, a prominent contributor to medicine during the Roman Empire whose theories on bloodletting were still read, followed, translated, and reprinted nearly 1500 years later by early

20. See generally Daniel W. Van Ness & Pat Nolan, *Legislating for Restorative Justice*, 10 REGENT U. L. REV. 53, 53 (1998) (describing restorative justice as “different from conventional justice processes in that it views crime primarily as injury (rather than primarily as lawbreaking), and the purpose of justice as healing (rather than as punishment alone)”).

21. See *infra* notes 39–48 and accompanying text; see also Elise J. Percy et al., “Sticky Metaphors” and the Persistence of the Traditional Voluntary Manslaughter Doctrine, 44 U. MICH. J.L. REFORM 383, 384 (2011) (“Law is ‘a profession of words.’ Lawyers use language to define, to explain, to bind and limit, to justify, and—perhaps most centrally—to persuade. . . . The potential influence of language on the development of the law makes it a powerful force that can be marshaled to serve the law’s normative ends.”).

22. See *infra* notes 49–51 and accompanying text; see also Gerry Greenstone, *The History of Bloodletting*, 52 BC MED. J. 12, 14 (2010).

23. *Bloodletting is Back! Here’s Everything You Need to Know About This Ancient Practice*, MEDTECH, <http://www.medtech.edu/blog/the-history-progression-and-modern-stance-on-bloodletting> (last visited July 9, 2014); see also Greenstone, *supra* note 22, at 14.

modern doctors.²⁴ Nicholas Culpeper, M. Ruland, and Abdiah Cole, authors of thirty-seven medical texts in the second half of the seventeenth century (including a six-volume comprehensive medical treatise), prescribe “an universal evacuation of fulness of humors or Plethory,” and by “universal” they recommend bloodletting as the comprehensive treatment for almost every conceivable disease: fever, arthritis, ulcers, kidney stones, asthma, tumors, skin disease, jaundice, memory loss, moles, cataracts, stuttering, “scabby” eyebrows, “trembling of heart,” insomnia, bad breath, sciatica, testicular pain, difficulty urinating, and “all . . . distempers of the Stomach.”²⁵ In much the same way that early modern legal sentences chronicle specific parts of the body on which to enact torture corresponding to the area of the body that offended the crown, early modern physicians targeted veins corresponding to the malady: veins in the arms, the temple, between the eyebrows, the ankle, behind the ears, veins under the tongue and between the thumb and forefinger, at the tip of the nose and the ankle, and in the penis and vagina.²⁶ Typically the surgeon bled until the patient lost consciousness.²⁷ They used a razor, lancet, scalpel, or, famously, particularly in France, leeches; in 1833 alone, over forty-one million leeches were imported into France for the purpose of bloodletting.²⁸ Bloodletting was routinely practiced in the fifteenth and twenty-sixth week of pregnancies in order to prevent abortion and prescribed for every psychological issue from delirium to depression.²⁹ Significantly for its correspondence to torture and execution, the physicians argue that neglecting to let blood for minor illnesses will lead to the onset of far more fatal diseases: “small Pox,” “Meazles,” “Leprosie,” and even the Plague.³⁰

Justice Edward Coke, when sentencing the Gunpowder Conspirators, developed a rhetorical paradigm of bloodletting and legal violence that framed betrayal to the state as an organic pathology, a product of “foul humors” that must be drained from the

24. NICHOLAS CULPEPER ET AL., *TWO TREATISES: THE FIRST OF BLOODLETTING, AND THE DISEASES TO BE CURED THEREBY, THE SECOND OF CUPPING AND SCARIFYING, AND THE DISEASES TO BE CURED THEREBY* 83 (3d ed. 1672); *see also* C.J. SPRENGELL, *THE APHORISMS OF HIPPOCRATES, AND THE SENTENCES OF CELSUS* 298 (London 1708) (“Bleeding ought to be the first Remedy in all acute Diseases.”); Greenstone, *supra* note 22, at 12.

25. CULPEPER ET AL., *supra* note 24, at 1, 17, 19–20, 25–73.

26. *Id.* at 25–73 (“[D]iseases” are listed in alphabetical order with specific directives of which vein to open; for example, “in diseases of the Jaws, first open the humerary veins, then under the Lip and the veins of the Palate”); *see also* JOHN S. HALLER, JR., *AMERICAN MEDICINE IN TRANSITION, 1840–1910* 42–43 (1981).

27. CULPEPER ET AL., *supra* note 24, at 79 (“It is a good Remedy in continual Feavers to let blood till they faint . . .”).

28. HALLER, *supra* note 26, at 44.

29. CULPEPER ET AL., *supra* note 24, at 25, 35, 60, 69.

30. *Id.* at 93–94.

body in order to heal it.³¹ As with medical bloodletting, the health of the body politic could be restored by aggressive purging of the blood. The failed Gunpowder Plot, in which Catholic recusants attempted to assassinate King James by blowing up the House of Lords on the opening day of the 1605 parliamentary session, prompted a national propaganda campaign against Catholics and other traitors in the aftermath of the plot's discovery: songs, broadsides, sermons, pamphlets, plays, woodcuts, and engravings ensured that people remembered the fifth of November.³² But ten weeks later, on the 30th and 31st of January, the conspirators' execution days were also immortalized in seventeenth-century art, sermons, historical pamphlets, poetry, and, of course, yearly bonfires.³³ In a famous sermon on the fifth of November, 1606, one year after the failed plot, the famous Anglican Bishop Lancelot Andrewes framed the traitors' execution day as "our Passe-over," "our Purim":

God himselfe taught us this way. In remembrance of the great *Deliverie* from the *destroying Angell*, He himselfe ordained the day of the *Passe-over* yearly to be kept. . . . The *Destroyer* passed over our dwellings, this day: It is our *Passe-over*. *Haman*, and his Fellowes had set the *dice* on us, and we by this time had beene all in pieces: it is our *Purim* day.³⁴

Andrewes was participating in the crusade that reiterated not only anti-Catholic sentiment but also the sanctified obligation of the law to punish through violence, to offer closure, and to provide resolution to terrifying extralegal violence.³⁵ The convicted traitors' quartered bodies were displayed for months, and, illustrating the efficacy of the metaphor, one pamphlet author approvingly noted that "[t]he standing quarters in England show God's blessing upon that nation, who dothe reveal them, and the justice of the country that doth punish them."³⁶

Andrewes's religious metaphors of Passover and Purim evoke sacred and mythically vast displays of publicly expressed

31. WILLIAM COBBETT & DAVID JARDINE, 2 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE PRESENT TIME 184 (London 1809).

32. See Guy Fawkes, BBCHISTORY, http://195.188.87.10/history/people/guy_fawkes (last visited July 9, 2014) (explaining that the Gunpowder Plot "was a propaganda coup for the Protestant English and served as a pretext for further repression of Catholics that would not be completely lifted for another 200 years"). See generally HUGH ROSS WILLIAMSON, THE GUNPOWDER PLOT (1952).

33. See, e.g., LANCELOT ANDREWES: SELECTED SERMONS AND LECTURES 146–50 (Peter McCullough ed., 2005).

34. *Id.* at 147.

35. *Id.* at 390–91.

36. ALAN HAYNES, THE GUNPOWDER PLOT: FAITH IN REBELLION 96 (1994).

retribution. "God himselfe taught us this way," Andrewes pointedly says, in order to make sacred a jurisprudence of violence.³⁷ John Donne, perhaps the other most famous preacher of the seventeenth century, likewise celebrates the "Deliverance from the Powder Treason" as an act of sacred obligation.³⁸ Their sermons reiterate the same points: the plot against the king is a plot against God, God delivers the righteous, and God expects earthly justice to be enacted in the form of executions, just as he will enact spiritual justice. God himself both modeled and commanded celebration of larger-than-life acts of retribution.

Justice Edward Coke acted on behalf of that sacred authority when he sentenced the convicted Gunpowder traitors under the *Crimen Majestatis* statute that mandated an escalating sequence of public torture:

[The traitor] shall have his judgment to be drawn to the place of execution from his prison as being not worthy any more to tread upon the face of the earth whereof he was made: also for that he hath been retrograde to nature, therefore is he drawn backward at a horse-tail. And whereas God hath made the head of man the highest and most supreme part, as being his chief grace and ornament, . . . he must be drawn with his head declining downward, and lying so near the ground as may be, being thought unfit to take benefit of the common air. For which cause also he shall be strangled, being hanged up by the neck between heaven and earth, as deemed unworthy of both, or either; as likewise, that the eyes of men may behold, and their hearts contemn him. Then is he to be cut down alive, and to have his privy parts cut off and burnt before his face as being unworthily begotten, and unfit to leave any generation after him. His bowels and inlay'd parts taken out and burnt, who inwardly had conceived and harboured in his heart such horrible treason. After, to have his head cut off, which had imagined the mischief. And lastly his body to be quartered, and the quarters set up in some high and eminent place, to the view and detestation of men, and to become a prey for the fowls of the air.³⁹

In his published opinion on the case, Coke frames these acts not only as sacred acts of retribution but also as a kind of merciful bloodletting to heal the communal body of people: "[the] physic of state and government, to let out corrupt blood . . ." ⁴⁰ The law seeks

37. LANCELOT ANDREWES: SELECTED SERMONS AND LECTURES, *supra* note 33, at 147.

38. John Donne, *A Sermon upon the 5th of November, 1622, Being the Anniversary Celebration of Our Deliverance from the Powder Treason*, in 5 THE WORKS OF JOHN DONNE 202, 229 (London, John W. Parker, West Strand 1839).

39. COBBETT & JARDINE, *supra* note 31, at 184.

40. *Id.*

to order and protect society, and it does so most effectively through violence. Each step of the sentence, from the drawing of the prisoners' bodies through the street head downward, to the witnessing of their own castration, is carefully explained as successive steps toward healing that body. In fact, Coke's sentence reads remarkably like Culpeper, Ruland, and Cole's early modern treatise on bloodletting, which, like the treason sentence, prescribes specific violence to corresponding "corrupt" areas of the body.⁴¹ Justice Coke's metaphor caught on.

The anonymous author of *Hanging, Not Punishment Enough for Murderers, High-way Men, and House-Breakers*, published at a printing house on Warwick Lane in London after the publication of Coke's sentence, likewise evokes a bloodletting metaphor when arguing that "the oftener [Justice] draws her sword, [she] is the more formidable."⁴² The law must be violent in order to counter the "Lamentable Increase of High-Way-Men, and House-breakers," the "Vermin" that infest early modern England.⁴³ Clearly a layperson, the author wishes that "Gentleman of the Long Robe" would address the "defect in our Laws."⁴⁴ He offers a solution: tighten the lax early modern penal code and get tough on crime. First, make the prisons, which he calls "Sanctuaries," more gruesome; second, repeal the "English Clemency and Mildness" of commuting sentences and offering benefit of clergy; and most importantly, make the thief who steals more than five shillings "*feel himself die*."⁴⁵ The gallows are "an easie Death."⁴⁶ But "Hanging them in Chains," "Starving them," "breaking them on the Wheel," "Whipping them to Death," or torture "yet unknown, be tryed" would better constitute the state response that will heal the body politic.⁴⁷

"Let it not be called Cruelty," the Hanging pamphleteer directs.⁴⁸ Rather, the law's violence should be understood as a form of communal bloodletting, a medical treatment that will heal the social pathology of crime: "As there is a Resemblance between the Natural and Politick Body, it may be well if our Legislators would proceed in the same manner that the Physicians do, who remove some particular Distempers by rectifying the whole Mass of Blood."⁴⁹

41. See *supra* notes 25–26, 39 and accompanying text.

42. HANGING NOT PUNISHMENT ENOUGH FOR MURDERERS, HIGH-WAY MEN, AND HOUSE-BREAKERS: OFFERED TO THE CONSIDERATION OF THE TWO HOUSES OF PARLIAMENT 23 (reprinted from an earlier lost edition, 1812) (1701).

43. *Id.* at 3, 24.

44. *Id.* at 3–4.

45. *Id.* at 5, 7–10.

46. *Id.* at 9.

47. *Id.* at 9, 17–18.

48. *Id.* at 14.

49. *Id.* at 25. See generally ARNOLD D. HARVEY, BODY POLITIC: POLITICAL METAPHOR AND POLITICAL VIOLENCE (2007), for a comprehensive study of the

Legal violence as sacred deliverance, legal violence as a bloodletting of the collective body politic—these are metaphorical framing mechanisms used to make a case for sustaining and intensifying the brute force of the late Elizabethan and early Stuart law. Under these metaphors lie two assumptions about the operation of the public sphere, assumptions that we no longer share: first, that individuals living together in a state constitute a single body, and second, that unified body of citizens is subsumed in a sacred and sovereign power so absolute that, according to Hobbes, “*Non est potestas Super Terram quae Comparetur ei*” (there is no power on earth to be compared to him).⁵⁰ Hobbes’ iconic frontispiece, a sovereign king figure literally composed of innumerable individuals, illustrates that “[a] Multitude of men, are made *One* person, when they are by one man, or one Person, Represented.”⁵¹



By permission of the British Library, shelfmark: 522.k.6.
© The British Library Board.

political metaphor of the body, and George Lakoff, *Metaphor and War: The Metaphor System Used to Justify War in the Gulf*, in *ENGULFED IN WAR: JUST WAR AND THE PERSIAN GULF* 95 (Brien Hallett ed., 1991), for Lakoff’s exploration of the state-as-person metaphor.

50. THOMAS HOBBS, *LEVIATHAN, OR THE MATTER, FORME, & POWER OF A COMMON-WEALTH ECCLESIASTICALL AND CIVILL*, at lxxiv (Richard Tuck ed., 1991) (1651).

51. *Id.* at lxxiv, 114.

It is such a conception of the state as “one body” that makes the bloodletting metaphor intuitive.⁵² Thus, Justice Coke’s bloodletting metaphor seems to have rooted deeply in the early modern cognitive structures, emerging in protean forms. Even in a pamphlet with a promising legal ethos such as *A Grave Advise, for the Supressing of Seminary Priests, Jesuits, and Other Popish Instruments, Without Effusion of Bloud, or Infliction of Capitall Punishment (Presented to His Majesty by Many Persons of Quality)*, the anonymous person of quality frames the threat to the community in terms of a single body with “bad blood,” “the veynes of a Common-wealth with intermixture of Blood, good and bad,” and still conceives of how to separate the good blood from the bad:

[H]owsoever it is in the power of Justice to suppress the person of a man . . . is not subject to the edge of any sword, how sharpe or keene soever: I confesse that the Teeth are soone blunted, that byte only out of the malice of a singular faction: But where poyson is diffused through the veynes of a Common-wealth with intermixture of Blood, good and bad, separation is to be made rather by vacuation, then by present incision.⁵³

Thus, when the body politic’s blood is intermixed with “bad” blood, the Sword of Justice is best used as a valve, shunting the poisonous Catholic blood to a sequestered area, but not draining it out, because (as the author continues) “[t]he greatest byter of a State is *Envie* joyned with thirst of *Revenge*”; that is, if the priests’ blood is actually shed, it may incite the remaining Catholics to rise up against the State.⁵⁴ The author extends bloodletting into a wider conceit about early modern medicine and healing, just as Culpeper et alia. warn that “neglecting” to let blood leads to worse disease;⁵⁵ if the “Sword of Justice is remisse in cutting off hainous offenders” then “the misled *Papall* multitude in the interim, may enter into a jealous suspence, whether that forbearance proceed from the feare of

52. The “sacred” nature of state rule inhered in Hobbes, Coke, Andrewes, and Donne does not seem to extend to Democratic America, although Sarah Palin’s recent NRA speech declared that if she were setting policy, “they would know that waterboarding is how we baptize terrorists.” David Sherfinski, *Sarah Palin: “Waterboarding is How We’d Baptize Terrorists” in Her Administration*, WASH. TIMES (Apr. 26, 2014), <http://www.washingtontimes.com/news/2014/apr/26/palin-waterboarding-how-wed-baptize-terrorists-her/#ixzz30Sa0eAth>. Palin’s metaphoric invocation of legal violence as forced baptism reveals a lingering sacred obligation to enact legal violence.

53. *A GRAVE ADVISE FOR THE SUPPRESSING OF SEMINARY PRIESTS, JESUITS, AND OTHER POPISH INSTRUMENTS, WITHOUT EFFUSION OF BLOUD, OR INFLECTION OF CAPITALL PUNISHMENT* 9 (London 1644) [hereinafter *A GRAVE ADVISE*].

54. *Id.* at 9–10.

55. CULPEPPER ET AL., *supra* note 24, at 93–94.

exasperating their desperate humors.”⁵⁶ These “desperate humors” signify that Catholics—framed as pathogens in the body politic—require invasive intervention if the state is to be in good health. It is the same metaphor yet with a different prescription for dealing with the disease: solitary confinement (and more specifically, life without parole) rather than execution.

One final example from many that grew out of Coke’s initial bloodletting metaphor is that of Dr. William Laud. The Star Chamber tried Dr. Laud, Archbishop of Canterbury, for high treason in 1640; in one of the “divers remarkable Speeches . . . made against [Laud]” recorded in the 310 pages of the court report, key witness Serjeant Wilde concludes that the bishop, like the Biblical Naaman, would transmit a disease if not “cured” by the Sword of Justice: “To conclude, Naaman was a great man; but he was a leper. [Laud’s] leprosy hath so infected all, as there remains no other cure but the sword of justice; which we doubt not but your Lordship will so apply, that the Commonwealth shall yet live again and flourish.”⁵⁷

Laud was duly executed, and it is reported that “[he laid] his head upon the block,” and the executioner “very dexterously did his office, and took it off at a blow” before a large gathering, a “spectacle.”⁵⁸ The paradigm of disease and the paradigm of justice share a common rationale in bloodletting—that a body’s pain is cured, paradoxically, by invasive and painful countermeasures. The point of similarity between the metaphor’s vehicle (bloodletting) and its tenor (legal violence) is that what *appears* as violence enacted on a human body is in fact a way of *healing* it. This legally violent healing is enacted not with lancet or leech but with the Sword of Justice.

But the image of Justice holding a sword was not limited to the late Elizabethans and early Stuarts; it is still in use today in courtrooms and as state symbols, prompting Judith Resnik and Dennis Curtis to point out that

56. A GRAVE ADVISE, *supra* note 53, at 3.

57. WILLIAM COBBETT & DAVID JARDINE, 4 COBBETT’S COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE PRESENT TIME 317, 356 (London 1809).

58. *Id.* at 624.

[w]hat the Renaissance images teach is that adjudication's purposes and norms have long transcended geography and political jurisdictional authority. Yet the visual traditions of Justice have their political roots in governments that were hierarchical, non-democratic, and tolerant of profound inequalities. It is therefore not surprising that the icons of Justice that have come down to us signal little about access to justice or about rights-seeking.⁵⁹

For Resnik and Curtis, the transcultural and transhistorical dominance of Justice's symbolism indicates a problem: "The precepts of good democratic governance encoded and iterated in the symbolism of Justice are far too narrow," they write.⁶⁰ Justice's sword, specifically, encoded with the law's right to enact violence against the violent, limits the cultural imagination of law's more constructive purposes. And metaphorically charged language to frame legal violence continues to the present day, as well.

One specific metaphorical invocation for contemporary legal violence can be found in Justice Scalia's and Justice Alito's dissents in the Eighth Amendment Supreme Court decision *Brown v. Plata*.⁶¹ The Court held that California's prison system violated the Eighth Amendment, in part because of extreme overcrowding: California's prison capacity almost doubled the number of prisoners that the system was designed to hold.⁶² The Court upheld a decision to reduce California's prison population to 137.5% of design capacity within two years, and specifically found that "[t]he medical and mental health care provided by California's prisons falls below the standard of decency that inheres in the Eighth Amendment. This extensive and ongoing constitutional violation requires a remedy, and a remedy will not be achieved without a reduction in overcrowding."⁶³

The Court's opinion was based on expert testimony about California's deplorable prison conditions, including testimony from a correctional officer that, "in one prison, up to 50 sick inmates may be held together in a 12- by 20-foot cage for up to five hours awaiting treatment."⁶⁴ The opinion references appended photographs of "telephone-booth sized cages without toilets" in which a psychiatric expert reported seeing an inmate held "nearly 24 hours, standing in a pool of his own urine, unresponsive and nearly catatonic. Prison officials explained they had 'no place to put him.'"⁶⁵

59. JUDITH RESNIK & DENNIS E. CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS 17 (2011).

60. *Id.*

61. 131 S. Ct. 1910 (2011).

62. *Id.* at 1923.

63. *Id.* at 1947.

64. *Id.* at 1925.

65. *Id.* at 1924.

Both Justice Scalia and Justice Alito dissented, calling the ruling “radical”; in fact, Scalia wrote that it was “perhaps the most radical injunction issued by a court in our Nation’s history.”⁶⁶ Both dissenting Justices wrote that reducing California’s overcrowded prisons in order to remedy the Eighth Amendment violations is “outrageous,” a “judicial travesty,” “extreme,” “dangerous,” and “drastic.”⁶⁷ But the Justices’ most powerful tools in contradicting the opinion seem to be rhetorical, not critical. In particular, their metaphors point toward the larger metaphoric conceit of prisoners not as “bad blood” within a single, unified human body but rather as “specimens,” as distinctly nonindividualized and nonhuman beings.⁶⁸

When referring to prisoners who will be released early under the *Brown v. Plata* “most generously rewarded” opinion, Justice Scalia notes that “many will undoubtedly be fine physical specimens who have developed intimidating muscles pumping iron in the prison gym.”⁶⁹ But Justice Kennedy had already noted that “[p]risoners are crammed into spaces neither designed nor intended to house inmates. As many as 200 prisoners may live in a gymnasium, monitored by as few as two or three correctional officers.”⁷⁰ The prison gyms were, in fact, part of the testimony given to the Court by a medical expert, who described the converted gymnasiums as so overcrowded that when a prisoner was assaulted, “prison staff did not even learn of the injury until the prisoner had been dead for several hours.”⁷¹ In an opinion article following the *Brown v. Plata* decision, Stephen Yair Liebb and Hector Oropeza (who have spent a combined fifty years in California State Prisons) note that “Justice Scalia ignores the reality that gyms have been used to house prisoners for many years, which is part of the problem brought on by overcrowding” and that “[w]eights have not been available in California prisons for more than a decade.”⁷² But even more telling is Justice Scalia’s use of “specimen,” a distinctly nonhuman idiom meaning “[something used] as an example of

66. *Id.* at 1950.

67. *Id.* at 1950–51, 1964.

68. Joshua Page has traced the form and content of the public discourse on retracting Pell Grant eligibility for Prisoners in *Eliminating the Enemy: The Import of Denying Prisoners Access to Higher Education in Clinton’s America*, 6 PUNISHMENT & SOC’Y 357 (2004), illustrating the way that the rhetorical “us/them” dichotomy played out in 1994 legislation that denied Pell Grants to prisoners, effectively ending college-in-prison degree programs for decades.

69. *Plata*, 131 S. Ct. at 1953.

70. *Id.* at 1924.

71. *Id.* at 1933–34.

72. Stephen Yair Liebb & Hector Oropeza, *The Supreme Court Got It Right on Prison Overcrowding in California*, FOX NEWS LATINO (June 10, 2011), <http://latino.foxnews.com/latino/politics/2011/06/10/opinion-us-supreme-court-decision-on-prison-overcrowding-in-california-is/>.

its . . . species” and “typical of the group or class to which it belongs.”⁷³ By framing the prisoners as “intimidating specimens,” Scalia triggers the same sort of cognitive priming structure that led participants in Boroditsky and Thibodeau’s metaphor study to opt for legal violence over social reform; “specimen,” like “beast,” frames offenders as other than human. Scalia’s platform is based not on the rationality of law but on an emotionally laden metaphor.

Likewise, Justice Alito dissents not only with the opinion but also seems to ignore the blatant human rights violations outlined in the opinion, euphemizing the conditions as merely “undesirable.” “Undesirable prison conditions that do not violate the Constitution are beyond the federal courts’ reach.”⁷⁴ As such, Alito argues that *Brown v. Plata* violates common sense, and he predicts (despite evidence presented to the contrary) that the early releases will have a “major and deleterious effect on public safety.”⁷⁵ But again, as with Scalia, Alito pins the crux of his dissent on a metaphor. In an italicized, single-sentence paragraph, Alito conceptualizes the released prisoners not as individuals but as enemy troops: “The three-judge court ordered the premature release of approximately 46,000 criminals—the equivalent of three Army divisions.”⁷⁶

The inmates will not, in fact, be released en masse, let alone as a deployed military operation, and they will all be prisoners for whom release was imminent even without the court’s injunction. But the metaphor powerfully invokes the mental imagery of an army waging war on the peaceful citizens of California. When conflated, Scalia’s and Alito’s metaphors evoke mental imagery of troops of Robocops emerging from Pelican Bay and assaulting the surrounding peaceful cities. Both dissenting Justices activate a cultural narrative that imagines a powerful us/them dialectic, much the same that Richard Delgado notes is prevalent in race metaphors.⁷⁷ And they both cite fictional outcomes as evidence for their dissents: apocalyptic scenarios embellished with metaphor. Aristotle teaches us that we pity the downfall of a person like ourselves; Justices Scalia and Alito use metaphor to keep the

73. *Specimen Definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/specimen> (last visited July 10, 2014).

74. *Plata*, 131 S. Ct. at 1959.

75. *Id.*

76. *Id.*

77. Richard Delgado, *Mindset and Metaphor*, 103 HARV. L. REV. 1872, 1874–75 (1990). See also JONATHAN SIMON, MASS INCARCERATION ON TRIAL 36 (2014), in which Simon describes how prisoners are systematically constructed as “an image of the monster, a creature of unrelenting, unmotivated predatory violence.”

incarcerated from being perceived as like us, an essential step in the dehumanizing process.⁷⁸

Jonathan Simon has pointed out that the last forty years of mass incarceration and the warehouse prison have been largely ignored by the humanities.⁷⁹ This could be, Simon suggests, because Foucault's dominant theory of the disciplinary prison, at its basic level, does not cohere with the warehouse model of incarceration:

It may also be that the very nature of mass imprisonment, with its reduction of the subject to a thin risk calculus, annihilates the self that remains the primary interest of the humanities. But if so, this crisis of the self facing millions of our citizens, especially the poor, minorities, and the young (whereas Foucault had noted that disciplinary practices actually invested those at the bottom of power hierarchies with individuality, history, a deep interior truth), one that calls out for response by the humanities and cultural studies.⁸⁰

The humanities share civic and ethical obligations with the law and have a position to play on the penal field. Here, I have suggested that one contribution can be to point out the ways that the semantics of legal violence, both historically and currently, shape the public discourse. Thibodeau and Boroditsky demonstrate that exposure to even one metaphor can have a profound effect on people's policy decisions, in particular, their opinions on how violent the law needs to be. Other studies have illustrated that higher neural activity occurs when our brains encounter metaphors rather than purely referential speech.⁸¹ Our brains are literally more stimulated by figurative than literal language. In the seventeenth century and in the twenty-first, metaphors attempt to reconcile the destructive qualities of law with the health of the state. We can challenge the normative power of such metaphors that attempt to conceptualize criminals as subhuman or even superhuman "specimens" by pointing out that these images are a construction of language and not a natural, fixed concept of those who break the law.

Ironically, one of history's most famous bloodlettings is that of Charles II. After being restored to the throne after his father's regicide and ruling England for twenty-five years, Charles suffered

78. ARISTOTLE, *POETICS* 24 (S. H. Butcher trans., 2006) ("[P]ity is aroused by unmerited misfortune, fear by the misfortune of a man like ourselves."). Thanks to Bill Taft for this point.

79. Jonathan Simon, *Beyond the Panopticon: Mass Imprisonment and the Humanities*, 6 *L. CULTURE & HUMAN.* 327, 327–28 (2010).

80. *Id.* at 339 (footnotes omitted).

81. Joël Pynte et al., *The Time-Course of Metaphor Comprehension: An Event-Related Potential Study*, 55 *BRAIN & LANGUAGE* 293, 312 (1996).

a seizure.⁸² Doctors drained twenty-four ounces of blood from his left arm and jugular veins, but when that procedure did not improve his speech, they administered emetics, enemas, and other purgatives until he died.⁸³ Charles II was most likely killed by the cure. Now “bloodletting” is used colloquially to represent *deliberate* killing or reducing employees from a company, and so we turn to other cognitive structures in order to create and constrain the meaning of morally complex ideas like mass incarceration. Some might look to the 700% increase in prison rates since the 1970s as a form of contemporary bloodletting,⁸⁴ a practice based on a dangerous and discredited theory of social policy.

82. Greenstone, *supra* note 22, at 13; *see also* Nicole Greenspan, *Charles II, Exile, and the Problem of Allegiance*, 54 HIST. J. 73, 73 (2011); *Charles II (1630-1685)*, BBC, http://www.bbc.co.uk/history/historic_figures/charles_ii_king.shtml (last visited July 10, 2014).

83. Greenstone, *supra* note 22, at 13.

84. *See The Prison Crisis*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/safe-communities-fair-sentences/prison-crisis> (last visited June 20, 2014).