**Metaphor and Moral Plausibility in Legal Judgment: Constructing Culpability on Fragile Foundations?**

**Abstract**

The struggle for justice is commonly articulated in literature and drama through metaphors of physical encumbrance (cramped, constraining conditions, being entangled and mired) and escape (e.g. to open landscapes and a view of the horizon and sky). What is less well known or observed is that a comparable metaphorical opposition of encumbrance/escape plays an important role in legal language too. This article traces the appearance of this metaphor across some key moments in English criminal law in which *in*justice is conceptualised metaphorically in terms of being held up, kept down or back, impeded, constrained or contained, and that achieving a just outcome necessitates shaking off the encumbrance and getting free. The article argues that analysis of this metaphor establishes an important intersection between literature and law. Following a discussion of the relevant general themes, the article offers a close reading of a number of appellate judgments on a range of criminal legal issues. Some of these judgments are very well known and concern questions such as how courts should set standards of culpability (e.g. on dishonesty and recklessness) and assess a defendant’s responsibility (e.g. the availability of ‘excusatory’ defences to murder). We seek to throw light on the way that the metaphors of encumbrance and escape work (or in some cases fail to work) in legal language, and thereby to advance understanding of the moral intelligibility, persuasiveness and longer-term prospects of judicial rulings as authorities.

**1. Introduction**

Metaphors play an important role in conceptualising and developing ideas, adopting positions and convincing others of our arguments. It is furthermore a matter of broad agreement that this holds true also for legal language.[[1]](#footnote-1) Law is, after all, replete with abstract principles and mechanisms, the meaning and application of which would remain mysterious and opaque but for the possibility of their being conceptualised in terms that are more concrete and familiar. Like other abstract notions, our comprehension of law and its concepts is shaped by metaphorical language that draws on matters of common experience – e.g. of our own bodies and our environment[[2]](#footnote-2) – as well as ingrained cultural norms that combine to ‘structure how we perceive, how we think, and what we do’.[[3]](#footnote-3)

Metaphors can be used strategically to achieve particular ends, but more importantly they also insinuate themselves in language independently of the conscious intentions of particular speakers or writers, and become embedded there by long usage. The consequence of this is that metaphors also naturalise and disguise the deeper roots of legal terms and their meanings, and the process by which we observe law (to borrow an expression) ‘wording the world’.[[4]](#footnote-4) For this reason, careful examination of the metaphors by which legal principles are conceptualised has an important place in the study of what makes some judgments apparently more persuasive, more (for want of a better expression) morally plausible, and potentially also more enduring as legal authorities than others. This article suggests that law and legal judgments may be understood in terms of a metaphorical opposition of encumbrance and escape – terms that have always been a familiar and readily observed aspect of literary, but hitherto not so much legal, language. In making this argument, we focus on the conceptualisation in legal language of ideas that have been key to the development of the criminal law: culpability standards (e.g. regarding dishonesty, recklessness) and assessments of a defendant’s responsibility (e.g. excusatory defences). In numerous works of literature, the relevant metaphorical opposition helps to frame notions of justice and morality: the experience of being cramped, mired, entangled, impeded, constrained and contained by being held back or down, perhaps by being stuck inside, behind or under something, with movement and/or vision blocked, obscured or otherwise restricted being associated with injustice. Conversely the depiction of escape from gloomy, confining and constraining conditions – to (say) a clear view of open skies and expansive, uninterrupted horizons – often conveys the possibility of and hope for justice.

We should be clear at this point that our concern here is *not* with the justifiability or otherwise of imprisonment (which, as the chief means by which criminal justice is meted out, is of course a *literal* interpretation of our theme),[[5]](#footnote-5) but rather with the way that our metaphor affords meaning and plausibility to attempts to articulate the demands of justice more generally.[[6]](#footnote-6) Making its appearance in ways that are typically more oblique than in literary texts, we will observe that it often takes the form of warnings about the delivery of justice becoming metaphorically bogged down, entangled, held up and mired in matters that may be peripheral to that noble end (such as technicalities, terms of art or unsound policies) or even downright dangerous (the moral compromises and failings of particular defendantsto which a court might extend undue and unwise sympathy). An already familiar example is the fluvial metaphor of ‘attrition’, used particularly frequently to refer to the phenomenon of rape trials which, like stones that for a time are carried in a river but finally lose momentum and get stuck on the bed, are held up and finally stopped by the multiple difficulties encountered along its journey between complainant and conviction.[[7]](#footnote-7) We argue that to focus attention on these sorts of instances of metaphor establishes an important intersection between literature and law that is key to advancing our broader understanding of legal rhetoric and judgments.

Before we begin properly, we must pause briefly to acknowledge that this approach to bringing metaphorical meanings and their effects to light is not free of contestation, risk and limitation. In the first place, the analysis of law by way of drawing out comparisons with works of literature inevitably invites objections, since there are important differences between law and literature that have always bedevilled ‘law and literature’ scholarship.[[8]](#footnote-8) There is no need to rehearse here the various challenges that such differences pose, since these have been debated in detail by others and elsewhere.[[9]](#footnote-9) It is sensible however at least to acknowledge that there are indeed differences to take into account in terms of professional conventions, author intention and reader expectation. Hence writers and readers of literary fiction can usually be more readily assumed than writers and readers of legal judgments to be alert to the significance of possible figurative meanings, while writers and readers of an legal judgments will typically expect to place greater weight on direct, explicit and literal meaning in the articulation of key points.[[10]](#footnote-10) Insofar as these differences relate to author intention though, they are in any case not of crucial importance here. This is because our analysis of legal texts is concerned only with metaphors which, being embedded in language, cannot necessarily be attributed to the conscious decision of the instant language-user. Our analysis focuses on the persuasive- and plausibility affording *effects* of metaphor in language rather than the intentionsthe judge.

Second, accepting that law and literature scholarship can produce important intellectual advances and that metaphors in legal judgments may be analysed independently of judges’ intentions, it must also be acknowledged that it is not possible entirely to eliminate doubt or disagreement as to precisely what metaphor (or what combination of metaphors) is primarily at work in any given legal utterance.[[11]](#footnote-11) Although we make the case below that analysis of law alongside literature often suggests a pivotal role for the metaphor of encumbrance/escape, we do not attempt to claim that this has *universal* or uncontested application. At the end of the third section below, we suggest that instances of legal language *failing* convincingly to achieve moral intelligibility and plausibility may be symptomatic of the encumbrance/escape metaphor working *against* the impression that the Court is attempting to convey. In addition to this, we must also acknowledge that owing to the inherent fluidity and uncertainty regarding the underlying conceptual foundations of judicial opinions, as well as the necessarily restricted range of disciplines and actual examples discussed here, there are likely numerous instances in which some metaphor other than encumbrance/escape may well be at work either in addition or instead. In both such instances, it may be that our metaphor may nonetheless have a role to play in considering the success or failure of the arguments made, and we use sources relating to the partial defence of loss of control in murder cases (and the issue of parliament’s exclusion of ‘sexual infidelity’ as a qualifying trigger for that defence) to illustrate this.

These issues do not, we think, pose major difficulties, and are raised here rather as a preliminary acknowledgement of inevitable objections to and limitations of our approach. This article, and law and humanities scholarship more broadly, proceeds on the basis that advancing an argument does not require us to foreclose all possibility for contestation and re-reading, which to the contrary are all part of on-going efforts imaginatively to sophisticate our understanding of law and legal language. With this ethos in mind, the article presents its main thesis below, beginning with a review of the encumbrance/escape metaphor in literature, culture and legal discourse generally (section 2), and then followed by a close examination of some key moments in the recent history of criminal law, identifying particular judgments in which we find evidence of the metaphor at work (section 3).

**2. Encumbrance/escape as a living metaphor in law and literature**

Lakoff and Johnson observe that the metaphors ‘we live by’ (i.e. those that shape our conceptual world) are those that are grounded in collective experience and culture.[[12]](#footnote-12) Thus the language available to us for dealing in evaluative and normative judgements commonly draws on facts such as that human beings are creatures who tend to (for example) stand upright, live in built structures that are independent of (but attached to) the natural environment and who experience the world (including our own bodies) as entities bounded by/contained within borders or surfaces.[[13]](#footnote-13) These experiences and cultural conditions allow us to make sense therefore of evaluative metaphors that relate respectively to *orientation* (a speech might be described as ‘uplifting’ or ‘aspirational’ or criticised for resorting to ‘underhanded’ tactics), to *buildings* (and we have already noted that a legal judgment’s ‘foundations’ may be described as ‘solid’ or ‘shaky’), to *containers* (an argument might be ‘impregnable’, or be full or devoid of ‘substance’), *movement/journeys* (a reform agenda might be ‘making progress’, ‘getting stuck’, going down the ‘wrong track’, etc.) and doubtless numerous others besides.[[14]](#footnote-14) Our suggestion is that in literature and law, the opposition of encumbrance/escape typically combines some or all of these as its component elements, but that it is also a ‘living’ metaphor in its own right. We argue that notions of justice and injustice are accordingly conveyed in terms of the possibility of (and obstacles to) movement and of a setting apart from impediment.

Let us therefore consider some ways in which encumbrance/escape combines orientation, container and buildings metaphors. Although we observe that ‘up’ and ‘out’ will often align positively with *escape* (and hence with justice) and ‘down’ and ‘in’ more negatively with encumbrance (and hence with injustice), the opposite can sometimes also be true and the text in question not necessarily any less intelligible for that. So for instance, metaphors for ‘down’ will very often signify pejoratively in terms of being trapped, covered or obscured, but in other contexts may connote the opposite (say, in circumstances where modesty is called for); the possibility of *building up* signals ambition, aspiration and an heroic rebellion against gravity, although again a focus *down* on what *underlies* a building can also signify positively in terms of connectedness, sensitivity to context and a sense of realism; container metaphors signify in terms of the desirability of *getting out of* a constraining situation but once more being ‘outside’ may alternatively signify negatively in terms of being excluded or marginalised. Therefore, the particular way around we find these metaphorical oppositions depends largely on the particular sort of experience they draw on in any given instance. In any case, they all implicitly prioritise the possibility of movement as the actor desires, and in opposition to forced inertia and forces that in some sense constrain, weigh, oppress or drag.

*2.1. Encumbrance/escape as a living literary and cultural metaphor*

Understanding metaphors of justice in literature and culture requires us in the first place to observe how broader evaluative and moral notions of freedom, hope and possibility are conceptualised. These concepts have traditionally been associated with natural phenomena such as the sky (in the possibility of movement through three dimensions) and the horizon as the visual limit of the experienced world and, in the east, the location of the rising sun. This particular marriage of the abstract and the physical is traceable in western culture at least as far as the sky-god of the Palaeolithic age[[15]](#footnote-15); it dominated medieval thought, as mapped out in the vertical structure of earth and Heaven depicted in Dante’s *The Divine Comedy*[[16]](#footnote-16)and is reflected also in gothic ecclesiastical architecture with spires soaring precipitously skyward and grand east windows.[[17]](#footnote-17) Modern idioms in which we speak of ‘new horizons’, a ‘new dawn’, ‘brilliant’ ideas and ‘blue-sky’ thinking derive intelligibility from comparable associations.

The same symbolic repertoire relating to the sky and to light has found its way also into *legal* architecture, and is reflected in the various epochs of that ‘staging’ of legal hearings, trials and judgments.[[18]](#footnote-18) For example, communities of ancient Britain seem to have interpreted the importance of light an openness literally, with courts believed to have been conducted outside, sometimes on a hill or near a tall tree – ‘in the sight of God. … literally as well as metaphorically “open”...’.[[19]](#footnote-19) Traditional ‘Greek revival’ law buildings of the newly independent United States were in their turn designed to reflect the ‘openness and lightness’ of the foundational values of democracy and republicanism.[[20]](#footnote-20) More recently, the simultaneously literal and symbolic *transparency* of the spectacular glass-walled modern palaces of justice in Europe and Asia goes some way to recreating the impact and ambition of the high gothic era cathedral architects in their expression of the desire to signify beyond earthly constraints and compromises to higher ideals.[[21]](#footnote-21) Inside courtrooms today, we may typically find a separation between its highest official and others: the judge’s bench occupying an elevated position,[[22]](#footnote-22) contrasting with the lowly, subterranean location of the defendant in the cells below the court, and who must ascend a staircase to enter the dock.[[23]](#footnote-23) The relative positions of the judge and the accused – high versus low as well as free versus constrained and light versus dark – reflect orientation and container metaphors, but most importantly signify an opposition between freedom from and encumbrance by corrupting and compromising influences. Even although he may eventually be acquitted, the prisoner is for the duration of the trial encumbered by the suspicion of having acted *under* the sway of and *in* thrall to such factors, while the judge speaks with the authority of the law because she at all times remains free of and above them.[[24]](#footnote-24)

Turning now to literature, the first thing to emphasise is that there are *innumerable* instances of the metaphor of encumbrance/escape that emerge from prior associations of the sky with notions of freedom, hope and possibility. We cannot possibly hope to do justice to the subject, either in terms of the range of examples or the detail in which we can discuss them in the limited space allowed here. Let us nonetheless provide at least a taste, which will in any case help us advance to the analysis of legal language in the next section. In William Golding’s twentieth century novel *The Spire*, a Dean desires to have constructed atop his cathedral a magnificent spire, despite widespread anxieties about the stability of that building’s foundations.[[25]](#footnote-25) Dean Jocelyn envies and identifies with the birds flying about the highest reaches of the structure, ‘free in a world of branches and the liberty of wings’, and laments that down below, people are by contrast ‘so shackled, crawling over the earth’.[[26]](#footnote-26) In the nineteenth century, Dickens used such an approach on a number of occasions to convey a sense of freedom, possibility and hope. David Copperfield’s happy recollections of the simple and wholesome Peggotty family are indistinguishable from his impressions of the open landscape of the Suffolk coast on which they live, and to which he recalls briefly escaping from the prison-like existence at home with his tyrannically ‘firm’ stepfather Mr Murdstone: ‘I have never seen such sunlight as on those bright April afternoons… I have never beheld such sky, such water, such glorified ships sailing away into golden air’.[[27]](#footnote-27) In *Jude the Obscure*, Hardy’s depiction of the youthful Jude climbing onto a barn roof to view the faraway spires of Christminster visible in the setting sun (‘points of light like the topaz’ gleamed’), is similarly powerfully symbolic of his hopes of intellectual, moral and spiritual freedom.[[28]](#footnote-28)

Conversely, literature affords numerous examples of moral and spiritual failure and the frustration of hopes conceived in terms of a failure to avoid or escape from a physical encumbrance that holds one back or down. Beginning once more with Golding’s *The Spire*, Dean Jocelyn’s determinedly ‘upward’ ambition for his building project must contend the ominously contrasting signs. His master builder urges his employer to join him in ‘looking down’ at the ground[[29]](#footnote-29) where instead of the firm foundations that ought to be there, we find the earth disturbingly ‘moving like porridge coming to the boil in a pot […] turning, seething’ with instability, like ‘the roof of hell’.[[30]](#footnote-30) Jocelyn later experiences a premonitory dream in which, like his ill-fated spire-building project, he imagines himself lying on his back and sinking down into and being swallowed up by the treacherously boggy ground on which his cathedral is built.[[31]](#footnote-31) The overarching theme of the story then nicely combines the threats of earthward collapse (buildings and orientation), failure to progress (movement) and being swallowed (containers), which all lend dramatic and moral intelligibility to Jocelyn himself eventually being compromised by moral entanglement and personal breakdown.

Other twentieth century novels provide similar illustrations of the point. George Batailles’ grimly erotic novella *Story of the Eye* imagines the hopelessly degrading fate of a particularly unfortunate prostitute who is locked inside a ‘cramped, windowless pig-sty’ for a man’s sadistic sexual enjoyment, and to collapse ‘under the bellies of the grunting swine’.[[32]](#footnote-32) Being shut up and held down in darkness from which there can be no hope of escape appropriately stages her abuse and mistreatment. Likewise J. G. Ballard’s novel *Concrete Island* depicts a man who, after losing control of his car that skids down an embankment, finds himself permanently trapped on a traffic island: an area of grass entirely closed off from the world by three intersecting motorways which obscure the horizon in all directions, which thereafter constitutes his entire world and future.[[33]](#footnote-33)

Elsewhere we find the same sense of encumbrance conveyed in terms of the dangers of becoming attached to a corrupting or diverting entity that one is unable to get free of. In *David Copperfield*, Uriah Heep is the the creepy and wan young clerk who uses his cynical persona as ‘the umblest person going’[[34]](#footnote-34) to attach himself to others in order to exploit and potentially ruin them. Under his influence, the initially eminent and upstanding lawyer Mr Whickfield becomes increasingly crumpled and defeated, and becomes implicated in Heep’s fraudulent practices. Elsewhere, we find the danger of being so diverted from the ‘right path’ by a corrupting attachment expressed in the thoughts of Alexei Alexandrovich Karenin – the high-ranking public official and cuckold of Tolstoy’s *Anna Karenina* – who determines that in order ‘to continue on his path of active, honest and useful life’ he must find ‘the best, most decent … most *just* way [to] shake off … the *mud* she [his wife Anna, by her illicit love affair] had spattered on him in her fall.’[[35]](#footnote-35) It is in essence the same order of metaphor that Dante puts to use in the opening of his ‘Inferno’, in which his narrator describes his moral decline in terms of having wandered off from the path and into ‘a dark wood’[[36]](#footnote-36) and requiring the assistance of the spirit of Virgil to steer him from that unpromising start on his redemptive journey.[[37]](#footnote-37)

Moving from these general observations of ideas about hope, possibility and morality to ones more specifically relating to justice, we find that literature affords plenty of examples of the absence of justice as a grip or a trap, and a holding back or holding down. Shakespeare draws on this metaphor in *Hamlet* in the self-analysis of the murderer Claudius, who admits that he can never be truly forgiven for his foul deed because he is unable to free himself of the fruits won by his crime:

But, O, what form of prayer  
Can serve my turn? 'Forgive me my foul murder'?  
That cannot be; since I am still possessed  
Of those effects for which I did the murder—  
My crown, mine own ambition and my queen. …

O wretched state! O bosom black as death!  
O limed soul that, struggling to be free,  
Art more engaged! …[[38]](#footnote-38)

The imagery of a soul in lime and ‘struggling to be free’ vividly illustrates the conceptual metaphor of a barrier to justice that we find in encumbrance. Claudius still possesses ‘those effects’, but at the same time they crucially still possess *him* since giving them up (and thereby rendering his ‘foul murder’ materially fruitless) is impossible for him.

Where we perceive vindictiveness or revenge dressed up as justice (and thus as an instance of *in*justice) we also find the appearance of the encumbrance metaphor. To satisfy his jealousy (but at the same time also to uphold moral and religious norms), Alexei Alexandrovich Karenin decides that ‘justice’ following his wife’s ‘crime’ in *Anna Karenina* requires that she should suffer, and that this should mean not divorcing her but compelling her to stay tethered to him in loveless marriage.[[39]](#footnote-39) A more extreme example is *Oliver Twist*, in which Dickens conveys a sense of injustice as a blocking or restraining of one who desires to be free by the death of the young prostitute Nancy*.* In a line that might equally have been spoken by Anna Karenina upon receiving her husband’s demand to continue to observe outward decorum, Nancy despairs that she is ‘chained to my old life. I loathe and hate it now, but I cannot leave it. I must have gone too far to turn back’.[[40]](#footnote-40) In the terrible scene that follows, in which Sikes beats Nancy to death for her indiscretion, the murderer shuts out the dawn, symbolically extending the night and thus shutting Nancy off from hope of a just outcome: ‘Seeing the faint light of early day without, the girl rose to undraw the curtain. “Let it be,” said Sikes, thrusting his hand before her. “There's enough light for wot I've got to do.”’[[41]](#footnote-41) In this way, the sense of injustice encoded in Nancy’s death scene is heightened in Sikes’s closing it off from the coming day. Only after the murder is done does the sun’s equalising light – and with it the possibility of retribution – find a way back in, and too late for Nancy, the scene can finally escape that unnaturally long night:

The sun—the bright sun, that brings back, not light alone, but new life, and hope, and freshness to man—burst upon the crowded city in clear and radiant glory. Through costly-coloured glass and paper-mended window, through cathedral dome and rotten crevice, it shed its equal ray. It lighted up the room where the murdered woman lay. It did. He tried to shut it out, but it would stream in. If the sight had been a ghastly one in the dull morning, what was it, now, in all that brilliant light![[42]](#footnote-42)

As depictions of moral failure and barriers to justice then, each of these scenes find their conceptual intelligibility and plausibility in terms of the unifying metaphor of impediment, grip, movement arrested by being variously held back or down, shut away, locked up, entangled and mired. It is fairly clear therefore that encumbrance/escape is indeed a ‘living’ metaphor in literature, and provides a wealth of associations with notions of justice.

*2.2. Encumbrance/escape as a living metaphor in legal language*

Having outlined the encumbrance/escape as a living metaphor for a range of evaluative ideas that include morality and justice in literature and culture, the task now is to consider its role in legallanguage. Scholarship that has addressed metaphors underpinning legal concepts seems generally to have focused on those metaphors that we have identified here as its component elements, but without hitherto relating this explicitly to encumbrance/escape. For example, Philipopoulous-Mihalopoulous describes familiar *orientation* metaphors such as legal ‘standing’, which by evoking and with implicit approval for (as he has put it) ‘an erect … posture … before the court, despite the fact that one might be burdened by the carrying of a right or an obligation’[[43]](#footnote-43) associates the gaining of law’s attention with orienting oneself vertically and as such against the physical downward constraint of gravity. Secondly, Nicola Lacey proposes ‘proportionality’ as a metaphor underpinning law’s claim to legitimacy across range of criminal, civil, constitutional and commercial issues, in terms of measuring the ‘right amount’ on a figurative scale.[[44]](#footnote-44) In one sense this is a metaphor of orientation and movement (i.e. how far along a horizontal scale should we push a particular marker to achieve the right balance); it is also one of containers (the question of determining an ‘amount’ of a relevant abstract legal concept to be weighed against another).

‘Container’ metaphors are identifiable in legal discourse too, in which legal concepts and ideas are conceptualised in terms of bounded space. Our own body being a container in this sense (as an example of an entity enclosed and separated from the world by the surface of the skin),[[45]](#footnote-45) we might think of metaphors such as the ‘body of law’ or the ‘limbs’ of a legal test as container metaphors. Consider also socio-legal and criminological research that seeks to understand how fear of crime differs across different urban environments. Researchers have observed that anxieties about urban areas such as bridges, underpasses, parks and parking lots are associated with the tendency of those ‘liminal’ spaces to render the boundary around each particular neighbourhood indistinct. Our experience of boundaries that are *in*distinct can be unsettling precisely because we are used to thinking of security in terms of bounded spaces, and the rupture of boundaries by extension with the rupture of our own skin. To encounter a rupture in an important boundary, particularly if this results in the creation of an area that is closed off from general observation causes a two-fold jarring with the underling container metaphor, since we simultaneously experience both the rupturing of the container in which we want to think of ourselves as secure and implicitly associate with our own skin (i.e. our neighbourhood) and also the feeling of being trapped in another (e.g. the stretch of bridge, subway, park, etc.) that is effectively cut-off from the world and thus potentially dangerous.[[46]](#footnote-46)

‘Building’ metaphors are also a familiar aspect of legal language, and legal sources commonly draw on aspects of the built environment in order to conceptualise ideas such as law’s ‘boundaries’, its ‘foundations’ and the ‘premises’ and ‘constructions’ of its arguments).[[47]](#footnote-47) Buildings metaphors, and especially metaphors of building *up*, convey a sense of incremental movement away from the constraints, limitations, and fetters of the earth and its gravitational pull.[[48]](#footnote-48) It is often possible to detect this is in textbooks on law that (consciously or unconsciously) invoke building metaphors for their explanatory framework. For example, Michael Zander in his introductory textbook describes the *ratio decidendi* of a case as its ‘central core of meaning’, as distinct from *obiter dicta* which is ‘more peripheral’.[[49]](#footnote-49) This metaphorical scheme of a core and its periphery is an apt way in which to conceive how only a particular part of a case serves as precedent for future cases, calling to mind, as it does, a plot of land designated for urban development, at the centre of which is first erected a column of concrete and steel suitable for supporting the stacked floors that will perform the defiance of gravity, and around which there is a garden area in which one must remain tethered to the earth.

If legal precedent is indeed a high-rise building, supported by its ‘central core’ of *ratio* and surrounded by its low-lying periphery of *dicta*, then it is only to be expected that its critics (who want to call into question such authority-transmitting mechanisms) should seek to undermine its figurative foundations and weaken the load-bearing capacity of that core. Marco Wan objects to the idea of *ratio* as a case’s ‘central core’ on the basis that this denigrates other potentially interesting aspects of a case.[[50]](#footnote-50) In this way, law and humanities scholarship first draws attention to legal metaphors, and then offers reasons why other (potentially entirely different) metaphors might be more appropriate or preferable. Sticking with the example of the legal case, critical analysis that identifies instances in which *ratio* fails to earn its special distinction may therefore articulate an explanatory framework that jettisons notions of secure foundations supporting a stable and steadily growing structure with those of ‘slippage’ and ‘subsistence’.[[51]](#footnote-51) As any common lawyer will acknowledge, *ratio* and *obiter* are not always obviously distinct, and for at least two reasons. First, and particularly in the older (i.e. House of Lords) appeals in which reasons given by different judges for agreeing with the majority opinion might vary considerably, difficulties can arise in discerning precisely which parts of the judgment is binding and which is not. There is the further problem that *obiter dicta* can sometimes be treated *as if* it were authoritative (as in the first case we analyse below). Both of these problems effectively create the potential for uncertain components in the structure making up the relevant ‘line’ of authority. The logical conclusion of critical commentary that seeks in this way to undermine legal certainties by way of the building metaphor is that those apparent certainties are in danger of ‘collapse’, and that people who come into contact with law may (like the unfortunate Richard Carstone of *Bleak House*, whose doomed and increasingly desperate hope for a favourable outcome to *Jarndyce v Jarndyce* sees him to an early grave) be in danger of being *buried*.[[52]](#footnote-52) We would see Mulcahy’s criticisms of courtroom architecture as enfolding the legal process *inside* walls, *under* roofs and *behind* barriers as drawing on this same metaphor of *burial* by the law.

At one level then, all of these strands are suggestive of a multiplicity of different metaphors, which in combination provide various means by which law’s values can be conceptualised and evaluated meaningfully. Without denying that multiplicity however, we want to suggest here that we gain further insight on the role of metaphor in legal language by identifying what it is that underlies them. We have so far identified metaphors relating to orientation, containers and buildings. Our suggestion is that underlying these particular metaphors, and what allows them to do their important work in affording moral intelligibility and plausibility is a broader metaphorical opposition of encumbrance/escape. For example, when Zander refers to *ratio* as a ‘central core of meaning’, he immediately follows this up (and in the same sentence) with an alternative metaphor – ‘its sharpest cutting edge’.[[53]](#footnote-53) It is clear from this that the quality of *ratio* that Zander is trying to emphasise its capacity to effect *movement* and a *transport* of legal authority through time, a purpose for which the building metaphor doesn’t quite cut it. We observe similarly that the distinguishing feature of *Jarndyce v Jarndyce* is that it effectively *goes nowhere* and (leaving aside a livelihood for vampiric lawyers like Mr Vholes) creates no new possibilities, but only frustration, exhaustion and defeated hopes – all outcomes associated with the failure of justice in the terms of encumbrance. Mulcahy’s critical account of legal spaces being gradually walled in and roofed over is likewise strongly suggestive of the inhibition and the stifling of growth and movement, undermining law’s symbolic aspiration towards light and openness.[[54]](#footnote-54)

**3. The encumbrance/escape metaphor in the language of criminal legal judgments**

Let us now turn finally to some specific criminal legal developments, and consider what the conceptualisation of the relevant principles in legal language owes to notions of encumbrance/escape. The discussion below focuses on how the appearance of this metaphor affects the persuasiveness and moral intelligibility of legal language, considering judgments on how culpability standards should be set (primarily dishonesty and recklessness) and how a defendant’s responsibility should be assessed. The aim here is to demonstrate that the significance of the metaphor as a basis for conceptualising normative ideas goes well beyond a literary or dramatic device, penetrating deeply into legal language too.

*3.1. Assessing culpability objectively: shaking off the mud of her fall*

In a ranging, ambitious speech that strayed some way beyond the particular civil law question at hand (whether or not a casino gambler was entitled to his winnings in light of his alleged cheating), the Supreme Court in *Ivey*[[55]](#footnote-55) announced that the established two-part test for dishonesty laid down in *Ghosh*[[56]](#footnote-56) was unduly complicated, wrong in principle and should no longer be used. In *Ghosh* the Court of Appealhad decided that a finding of dishonesty for the purposes of the Theft Act 1968 required the defendant to be proved to have *known* that his actions were dishonest by the standards of reasonable and honest people; Lord Hughes in the Supreme Court in *Ivey* ruled that such knowledge is unnecessary.[[57]](#footnote-57) Others have observed that the issue this raises is primarily one about process, that is to say: whether lower criminal courts will actually follow *Ivey* notwithstanding its remarks about *Ghosh* are strictly *obiter*.[[58]](#footnote-58) But we can also understand this in the metaphorical terms discussed above: can Lord Hughes hope for his judgment to ‘stand’, given that his judgment exhorts the lower courts to build up a new legal structure based not on the solid *central core* of the judgment (i.e. *ratio*) but on ground that is *more peripheral* and not designed to bear such weight?

In giving reasons for insisting on the change to the test for dishonesty he favours, Lord Hughes directly addresses the normative question of whose standards the law represents, and whose it does not:

The law does not, in principle, excuse those whose standards are criminal by the benchmarks set by society, nor ought it to do so. On the contrary, it is an important, even crucial, function of the criminal law to determine what is criminal and what is not; its purpose is to set the standards of behaviour which are acceptable.[[59]](#footnote-59)

At one level this is simply to state what should in any case be obvious: nobody would expect law to tolerate behaviour *merely* on the ground that the actor lives by different (and lower) moral standards than ‘reasonable and honest people’. The necessity for Lord Hughes’ statement of the apparently obvious becomes clearer when he addresses what he regards as the central weakness of the then established *Ghosh* test of dishonesty. For the Court of Appeal in *Ghosh*, even if the defendant’s personal opinion might be at odds with those ordinary standards (be they ‘Robin Hood’ or an ‘ardent anti-vivisectionist’ removing animals from cages), a jury should have no problem convicting, ‘because they [i.e. D] know that ordinary people would consider these actions to be dishonest.’[[60]](#footnote-60) Whether this is true or not in any given case is a matter of fact for the jury; provided the jury do make that finding, and furthermore agree that the behaviour at issue offends the general and ordinary societal standards that they collectively represent, there ought indeed be no issue about those standards being undermined by the defendant’s deviation from them. But Lord Hughes construes this as one not about facts but logical necessity, and as something that goes beyond the jury’s remit. ‘Even if this were correct’, worries his Lordship (referring to the assurances given by Lord Lane CJ in *Ghosh*):

…it would still mean that the defendant who thinks that stealing from a bookmaker is not dishonest (as in *R v Gilks* [1972] 1 WLR 1341 - see para 73 below) is entitled to be acquitted. It is no answer to say that he will be convicted if he realised that ordinary honest people would think that stealing from a bookmaker is dishonest, *for by definition he does not realise this*.[[61]](#footnote-61)

There are at least two ways in which we might construe this passage, both of which invoke the encumbrance/escape metaphor. In the first place, it is an example of the very familiar judicial appeal to the value of simplicity, and of not burdening juries with technical legal artifice that can impede justice by placing a barrier between them and their reaching a (guilty) verdict.[[62]](#footnote-62) But elsewhere, Lord Hughes seems to suggest that the problem of *Ghosh* may be much more serious than that, and that the inclusion of a subjective aspect in the *Ghosh* test may be allowing law’s special role as the setter of culpability standards to be compromised. In the earlier case of *Gilks* that Lord Hughes refers to, Mr Gilks’ defence had been that it was not dishonest for him to withhold £100 mistakenly given to him by a bookmaker, because ‘bookmakers were fair game’.[[63]](#footnote-63) Although Gilks’s appeal was rejected, the Court of Appeal nonetheless approved the trial judge’s direction that the jury should ‘put itself in his shoes and ask itself whether he had thought he was acting honestly or dishonestly’. For Lord Hughes, this makes *Gilks* a ‘powerful demonstration’ of the ‘perils’ of construing dishonesty subjectively,[[64]](#footnote-64) and hence of the second limb of the *Ghosh* test: ‘that the less the defendant’s standards conform to what society in general expects, the less likely he is to be held criminally responsible for his behaviour’.[[65]](#footnote-65) The implications of what Lord Hughes is saying here are quite dramatic, since he appears to envision a situation in which grubby moral relativists like Gilks are permitted to invade and usurp law’s special position as setter of culpability standards, dragging the latter down to the lowest common denominator.

The encumbrance/escape metaphor makes its appearance in the *Ivey* judgment therefore, not only in the very direct form of practically simplifying legal principles in order to remove obstructions and impediments to conviction, but also in the more oblique and deeper sense of law asserting and insisting on its ability to set normative standards on culpability and to be uncoupled from elements that would exert moral drag or constraint. Reinforcing this picture of encumbrance/escape as the relevant organising metaphor is the observation that, of all the cases that his Lordship could have cited to exemplify the preferred approach to instructing juries on the meaning of dishonesty, he chose *Rostron.*[[66]](#footnote-66) *Rostron*, as Lord Hughes takes the trouble to explain, is the case involving ‘the removal of golf balls at night from the bottom of a lake on a private golf course’[[67]](#footnote-67) and so constitutes an image that stands as an apt metaphor for the normative risk (as Lord Hughes saw it) represented by *Gilks*[[68]](#footnote-68): that of being in the decidedly undignified position of being mired, swamped and submerged. It may not have been Lord Hughes’s intention to convey as much by his choice of words or legal authority, but it is undoubtedly the *effect* of these choices. The latter is the most important consideration for us, since it is this that ensures that *Ivey* achieves moral intelligibility and plausibility. We might speculate further that this quality may also turn out to be an important aspect of its longevity as an authority, although it is beyond the scope of this article to establish as much.

From this point, we move on to show how the appearance of encumbrance/escape as an organising metaphor in appellate rulings has a broader application, although this is in no way to suggest it as anything like a *general* rule, since our aim here is not so ambitious*.* What can be demonstrated here is that the plausibility afforded to legal language by this metaphor is certainly not confined to a single case, and that for a start, other judgments favouring ‘objective’ assessments of culpability provide further examples. In *B*[[69]](#footnote-69) (concerning the rape of a woman by her male partner) the then Lord Justice Hughes held that when assessing the reasonableness of the defendant’s erroneous belief in the victim’s consent for the purposes of s.1(2) of the Sexual Offences Act 2003, juries are not permitted to take his mental illness (schizophrenia in this case) into account. Enlisting support for this view, Hughes LJ makes a thematic sideways step, observing that in ‘the slightly different context of provocation’[[70]](#footnote-70) the ‘concept’ of ‘a reasonable glue sniffer’ (referred to in *Morhall*[[71]](#footnote-71)) ‘undoubtedly proved unworkable, as well as wrong in principle’.[[72]](#footnote-72) The unworkability of this ‘concept’, claims Hughes LJ, is underlined by Parliament’s decision to exclude all characteristics‘which bear on [the defendant’s] capacity for tolerance and self-restraint’ when in 2009 they came to abolish the defence of provocation and replace it with the statutory defence of ‘loss of control’.[[73]](#footnote-73)

These comments by Hughes LJ are in one sense very mysterious, since they mischaracterise both the House of Lords’ ruling in *Morhall* and also the loss of control defence to murder. In the case of *Morhall*, the House of Lords never actually proposed the ‘reasonable glue-sniffer’ as a ‘*concept*’ in the systematic way that Hughes LJ seems to imply. Rather, that earlier court referred to such a person because the defendant Morhall happened to be a glue-sniffer, the relevant point of law (which also continues to apply under the new loss of control defence) being that the jury should take into account all characteristics of the defendant that were relevant to the gravity of provocation aimed at him. This makes sense since taunts about having a glue-sniffing habit are indeed more likely to be perceived as acutely grave and provocative by a person who has such a habit than one who does not! Furthermore, and again contrary to Hughes LJ’s assessment, the statute creating the new partial defence of loss of control (that replaced provocation after 2009) does *not* require juries to exclude from consideration *all* characteristics bearing on the defendant’s own capacity for tolerance and self-restraint. Rather, and to the contrary, it requires them to *include* all of the defendant’s circumstances with the exception of those characteristics of the defendant that bear *only* on this capacity).[[74]](#footnote-74)

In other words therefore, Hughes LJ’s comments on provocation and loss of control mischaracterise the law and are thus explicable *only* in terms of the broader principle apparently at stake, namely that where the criminal law has set a particular normative standard of culpability, this standard cannot be allowed to be undermined by a person’s own personal failure to avoid falling foul of it, be it because of their addiction to substances (as in *Morhall*), mental illness (*B*) or personal attitudes (*Ivey*). What Hughes LJ (and, later, Lord Hughes) is articulating then is the danger that law may be prevented from achieving justice if courts fail to ensure that it can remains free from the sorts of moral and intellectual constraints that encumber defendants.

Going further back in criminal legal history, Lord Hailsham’s judgment in *Howe*[[75]](#footnote-75)provides more information about the significance of the encumbrance/escape metaphor. Lord Hailsham’s speech in that case is well known for its unyielding, uncompromising hardness on the question of the availability of duress as a defence to murder. The argument against Lord Hailsham’s position is that denying the defence to a defendant who was genuinely and reasonably compelled by threats of death or serious violence would be to require him ‘to comply with a higher standard than that demanded of the average person’.[[76]](#footnote-76) Lord Hailsham dispatched this argument by insisting that, to the contrary, ‘acts of heroism [may indeed be expected from] ordinary human beings of no more than ordinary fortitude’, and that he himself has known ‘too many’ examples.[[77]](#footnote-77) This image of self-sacrifice, conspicuously at odds with the usually more realistic expectations placed on the ‘reasonable person’ of law, echoes instead the Homeric ideal of an almost divine equanimity in the face of pain, humiliation and death. This is a projection that flies so free of ‘ordinary’ standards as to risk losing contact with earth altogether. The parallel might be drawn closer still. Readers who are familiar with Homeric epics will recall that when Hector, champion of Troy and ‘tamer of horses’, faces up finally and (for him) fatally to the god-like Achilles, he refers to himself not only as sacrificing his life for his city, but also (crucially) as *transcending* the confines of a biographical or local story, which of course he does thanks to Homer’s *Illiad*:

All comfortless he stands: then, with a sigh,

‘Tis so—heaven wills it, and my hour is nigh! […]

Yet in a mighty deed I shall expire,

Let future ages hear it, and admire!’[[78]](#footnote-78)

Notwithstanding obvious differences, *Howe* bears comparison with *Ivey* and with *B* because the overriding concern of Lord Hailsham’s speech is that law must be free from the fetters of ordinary moral limitations and compromises, and must be allowed to fulfil its special role as *setter* of the normative standard to be enforced. In maintaining this position, law cannot afford be seen to identify with one so morally compromised that they would (in this example) decide to violate the sanctity of human life. The crucial matter is not whether it is *realistic* to expect a person to uphold that standard in the relevant circumstances, but rather that law’s status is not subject to the same compromises that entangle such a person. We saw above how the legal problem of testing for dishonesty may be seen as being conceptualised by way of the metaphor of escaping from an encumbrance (the latter we furthermore imagined as submersion in a dark pond, following the train of Lord Hughes’s reference to *Rostron*). We may observe, similarly, that Lord Hailsham’s disapproving reference in *Howe* to law casting ‘the cloak of its protection upon the coward and the paltroon’[[79]](#footnote-79) invokes comparable imagery for cautionary purposes, since here too we are invited to agree with his lordship that what is beneath that cloak is also *beneath law’s rightful attention*, implying that to confer such protection law would in a sense be going in the wrong direction: stooping unduly low when it ought instead be striving to a higher normative level. As such *Howe* shares this quality with the other judgments considered so far in terms of how it achieves its persuasive effect.

*3.2. Retreating from the objective but not from the encumbrance/escape metaphor*

Encumbrance/escape as the organising metaphor is not limited to judgments favouring objective tests of culpability; to the contrary it observably serves both objective and subjective approaches. Consider the two turning points so familiar to generations of students of English law and its history: the principle laid down in *Caldwell*[[80]](#footnote-80)that ‘recklessness’ for the purposes of criminal damage may mean objectively reckless *in*advertence as well as advertent risk-taking, and the rejection of that principle in favour of the narrower ‘subjective’ formulation some years later in *G and another.*[[81]](#footnote-81) In the earlier case, Lord Diplock expressed his strong objection to the idea of juries having to take into account the inner thoughts of a person who at the relevant time was gripped by ‘rage or excitement [or] under the influence of drink’.[[82]](#footnote-82) The grip of those forces strongly evokes the conditions reserved for the Wrathful in Dante’s Purgatory, who are continually overwhelmed at the foot of that mountain by ‘harsh and stinging… smoke … and totally obscured by dark, dense clouds.’[[83]](#footnote-83) Like the Pilgrim narrator of *The Divine Comedy*, Lord Diplock’s words invoke this sense of the malefactor being held down in the grip of blinding forces in order to emphasise the necessity for rising up and out of them, as the Pilgrim duly does.

A generation after *Caldwell*, as is well-known, objective recklessness had somewhat fallen out of favour and so in *R v G and another* the House of Lords confirmed that in order to find that a defendant was reckless, it would be necessary that it be proved that he *ad*vertently ran an unjustifiable risk. In this case there is some room for contestation as regards whether the governing metaphor is encumbrance/escape or something else, but that contestation ultimately resolves in favour of encumbrance/escape. Lord Steyn makes the observation that the *Caldwell* structure had, all along, been built on ‘fragile foundations’,[[84]](#footnote-84) thus engaging the ‘building’ metaphor. The speech generally regarded as the more authoritative in *G and another* however is Lord Bingham’s, who stated that treating as culpable recklessness any inadvertence to an ‘obvious risk’ was itself an ‘obvious unfairness’.[[85]](#footnote-85) Lord Bingham’s use of the word ‘obvious’ (which itself mirrors Lord Diplock’s earlier use), is telling for our investigation. The word means ‘clear path’ or ‘clear view of the way’, and this reaffirms the appropriateness of conceiving law (and the right formulation of a particular legal principle) in terms of a place from which such a view is possible. Following the logic of such a metaphor inevitably leads us to think of what is necessary to attain that view, and hence (again) to notions of freeing oneself from confines and obstacles that might otherwise surround us, perhaps by ascending to higher ground. This does not contradict the metaphor of a building (which may be the means by which that higher ground is reached), but emphasis on achieving a clear line of sight confirms that it is this sense of an escape from obstructions and obscurations that is key to the success of the judgment as a piece of moral rhetoric.

*3.3. Problem cases? Limitations and absences of the encumbrance/escape metaphor*

We have so far discussed examples of key appeal judgments to show that the encumbrance/escape metaphor has an important role to play in judicial rhetoric. However, we acknowledged from the outset that there are cases in which, at least as a descriptive tool, our metaphor fails to work for us. In this final subsection, we use the statutory partial defence of ‘loss of control’ to murder as an example of an area of criminal law in which the predominance of encumbrance/escape is either contested (the parliamentary debates), or else shows itself only negatively – i.e. by working against the impression being attempted (the leading appeal case). We reflect on this this briefly here before closing.

In the parliamentary debates on the proposed exclusion of ‘sexual infidelity’ as a qualifying trigger for the partial defence in murder trials,[[86]](#footnote-86) some of the metaphors that we identified component elements of the encumbrance/escape metaphor can be observed to perform the necessary meaning-giving function independently. Answering questions from opposition MPs on how and why a jury should separate sexual infidelity from the various other factors that might have led to the defendant losing self-control, the government minister[[87]](#footnote-87) gave replies couched in terms heavily morally loaded:

Dominic Grieve MP [for the Opposition]: ‘How is the jury going to be invited to *disentangle* the elements that went into causing that act?’

Claire Ward [for the government]: ‘I am really quite surprised that the hon. and learned Gentleman thinks that it is acceptable, *in this day and age,* for someone to use the partial defence that sexual infidelity is an acceptable reason for killing.’ [my emphasis][[88]](#footnote-88)

Despite the minister’s answer being technically incoherent (inasmuch as it translates an issue about trial procedure into one about the questioner’s own moral integrity), it nonetheless has the shape and feel of moral plausibility. We might on the one hand claim that the minister achieves this plausibility in a way comparable to the appeal to encumbrance/escape we observed in *Ivey*, *B* and *Howe* in terms of disconnecting the relevant legal test from outmoded beliefs and thereby removing barriers to justice for victims*.* In this sense it is clear that what is at stake from the government’s perspective is law’s status as setter of culpability standards, and the impediment to realising this status represented by views that are morally *stuck* and stubbornly clinging to vestiges of male privilege.[[89]](#footnote-89) On the other hand however, the italicized phrases suggest that, despite Dominic Grieve MP setting up his question in terms of encumbrance (or at least ‘entanglement’) and an implication that escape from that encumbrance would be practically impossible, the minister’s reply is made out by way of other metaphors. And although not necessarily in conflict with encumbrance/escape, these are nonetheless plausibility-affording metaphors in their own right. We observe therefore that in this instance, metaphors pertaining to movement and journeys (notions of making progress, of leaving one place and arriving at another) and to historical time and containers (*in* and *out* of one age or another) may be doing more work than encumbrance/escape in carrying the argument.

Then in the leading appeal case in which the Court of Appeal were tasked with interpreting the sexual infidelity clause in the statute, we find an instance of a judgment that entirely *fails* to use the encumbrance/escape metaphor effectively in securing moral plausibility. In *Clinton*[[90]](#footnote-90), Lord Judge CJ held that evidence of a homicide victim’s sexual infidelity *cannot* be excluded from the jury’s consideration for the purposes of s.54(3) of the Coroners and Justice Act 2009 if that evidence provides useful contextual information about the circumstances in which the killing took place. At a crucial point in the judgment, Lord Judge CJ describes the experience of loss of control as if from Clinton’s own perspective in terms of falling, crushing and drowning, and of inertia:

[T]he walls and the ceiling just seemed to close in. She [Mrs Clinton, the victim] was talking but he [Mr Clinton, the defendant] could not hear what she was saying. He could see her mouth opening and closing. He could hear a noise, like the distant sea. He wanted everything to stop. He wanted everything to slow down.[[91]](#footnote-91)

What are we supposed to make of such a passage? In strictly literal terms, it is simply a description of facts. But if we allow ourselves to consider what that particular factual account contributes to the broader persuasive appeal of the decision, another layer of meaning presents itself. A paragraph and a half later, his Lordship concluded that since the victim’s sexual infidelity was not the *sole* trigger for the defendant’s violence, but rather constituted important context for assessing the gravity of the taunts made to him,[[92]](#footnote-92) the jury ought not have been directed to disregard it.[[93]](#footnote-93)

Critical commentary of this ruling has tended to agree that, since sexual infidelity will rarely be the *sole* and *only* reason for a defendant’s loss of control isolated from anything else, *Clinton* effectively means that trial judges are more likely than not to allow it to be included, an outcome that surely runs counter to the ‘bar-raising’ normative purpose of the sexual infidelity *exclusion* in s.55(6)(c) of the legislation. The consequence of this is that the issue of how to interpret the legislative provisions remains to be settled decisively. Unlike Lord Bingham’s decisive ‘way-clearing’ rhetoric in *G and another* therefore, Lord Judge CJ’s ruling leaves us with a sense of moral insecurity and uncertainty.[[94]](#footnote-94) This criticism provides a key to understanding the *metaphorical* significance of Lord Judge CJ’s imagery of collapsing ceilings and engulfing seas and Clinton’s desire for ‘everything to stop’, since these phrases invoke a sense of drowning, suffocating and inertia. The encumbrance/escape metaphor here is certainly having an effect, but unfortunately for Lord Judge CJ it is working *against* the moral plausibility of the judgment.

**4. Conclusions**

We acknowledged at the start of this article that caution must be observed in carrying out and engaging with the sort of analysis offered here, chiefly for three reasons. First, the approach adopted here requires us to identify metaphors in legal language that are ‘unmarked’ in the sense of lacking any explicit sign that the relevant judicial utterances are intended to carry a meaning other than the literal. We have not sought, in other words, to argue that the persuasive effect of the metaphor can typically be accounted for by any deliberate or strategic ‘deployment’ of metaphor. Second, we have acknowledged also that there are clear differences between legal and literary texts as regards the shared expectations of authors and readers and relevant professional conventions. Third, we have acknowledged and noted immediately above that, although we would expect that the encumbrance/escape has an application that is more general than the particular individual cases discussed, we do not set out to claim that it represents a universal basis for legal rhetoric.

Notwithstanding all of that however, we have sought to identify a common rhetorical wellspring that significantly structures how norms are thought and articulated across disciplinary boundaries. If encumbrance/escape is (as Lacey puts it in a different context) a ‘legitimating image’[[95]](#footnote-95) then this is so because it is a ‘living’ metaphor that is deeply ingrained in our existing conceptual frameworks for notions of morality, normativity and so forth. We have suggested that a figurative notion of ‘escape’ from encumbrance is identifiable in relevant sources of both law and literature. The metaphor makes its appearance in various ways, and most often by invoking other metaphors that are its component elements: orientation (say, making an ‘ascent’), containers (being held inside something else) or movement (freedom and constraint) but in any case implicating a desire to be free of weighty shackles, constraints, fetters, obscuring layers, and so forth. We have identified examples of how success at so freeing oneself may be associated with the possibility of justice (and in our instant case, the possibility of satisfactory tests for culpability). We have also identified examples of the reverse experience, of a failure so to free oneself from that which exerts a drag (down, back, inside and under) being paired conversely with justice confounded or obstructed, and arguably personified in the ‘antagonists’ of legal cases, which in our case included, for example, Gilks, Ivey, Rostron, B, Morhall, Clinton, Howe and Caldwell. Although this cast list is drawn from particular topics within English criminal law, we would suggest that further analysis is likely to confirm that the conceptual metaphor at work has a much broader reach than this. By leading the discussion of a range of case law drawn from twentieth and twenty-first century criminal legal history with the recent Supreme Court ruling on dishonesty, we hope to have shown furthermore that the observations made here are no mere matters of coincidence, or niche or historical interest, but an important part of understanding legal language.

1. For discussion of metaphor and its role in law, see Gary Watt, *Equity Stirring* (Hart, 2007); David Gurnham, *Law’s Metaphors: interrogating languages of law, justice, and legitimacy* (Wiley-Blackwell, 2016); Michael Hanne and Robert Weisberg, *Narrative and Metaphor in the Law* (Cambridge University Press); M. Johnson, ‘Mind, Metaphor, Law’ (2007) 58 *Mercer Law Rev.* 845; L. Morra, ‘New Models for Language Understanding and the Cognitive Approach to Legal Metaphor’ (2010) 23 *International J. of Semiotics of Law* 387. [↑](#footnote-ref-1)
2. We will examine a number of these, but for now, an example of ‘body’ and ‘environment’ metaphors respectively might be the legal *hearing* and law’s *sources*. See further, Paul Raffield, ‘Bodies of Law: the divine architect, common law and the ancient constitution’ (2000) *International Journal for the Semiotics of Law*, 13: 333-356. [↑](#footnote-ref-2)
3. G. Lakoff and M. Johnson, *Metaphors We Live By* (University of Chicago Press, 2003). [↑](#footnote-ref-3)
4. See E. Mertz, R. Burns, M. Anderson, et. al., ‘Forty-five years of law and literature: reflections on James Boyd White’s The Legal Imagination and its impact on law and humanities scholarship’ (2019) *Law and Humanities*, Online First: <https://doi.org/10.1080/17521483.2019.1607026>: ‘Humans grapple with reality and with existence by wording the world in which they find themselves. … [F]requently, even obsessively, we find ourselves categorizing it, organizing it into words. Some subset of these words is used within legal texts or forms.’ (Thomas D. Eisele) [↑](#footnote-ref-4)
5. For a law and literature perspective on whole life imprisonment, see David Gurnham, ‘The moral narrative of criminal responsibility and the principled justification of tariffs for murder: Myra Hindley and Thompson and Venables’ (2003) 23(4) *Legal Studies* 605-623. [↑](#footnote-ref-5)
6. This is not to say that the metaphor is not also frequently applied to criminal justice and penal servitude. A memorable example from literature is Oscar Wilde’s autobiographical *Ballad of Reading Gaol \**, which juxtaposes its generally hard and claustrophobic tone (‘All that we know who lie in gaol/ Is that the wall is strong…’) with its hopeful refrain that varies slightly each time it is repeated:

   ‘I never saw a man who looked

   With such a wistful eye,

   Upon that little tent of blue

   We prisoners called the sky,

   And at every happy cloud that passed

   In such strange freedom by.’ [↑](#footnote-ref-6)
7. See Jennifer Temkin and Barbara Krahé, *Sexual Assault and the Justice Gap: a question of attitude* (Portland and Oxford: Hart Publishing, 2008) [↑](#footnote-ref-7)
8. On the differences between literature and law that pose challenges for ‘law and literature’ scholarship, see Simon Stern, ‘Narrative and the Legal Text: judicial opinions and their narratives’, in Michael Hanne and Robert Weisberg, *Narrative and Metaphor in the Law* (CUP, 2018) 121-139; also Gerald Wetlaufer, ‘Rhetoric and Its Denial in Legal Discourse’ (1990) *Virginia Law Review*, 76(8), 1545 - 1597, at 1587. [↑](#footnote-ref-8)
9. In early debates on ‘Law and Literature’, and more recent debates too, proponents argued that students of legal practice would benefit (and become better lawyers) by attending to the ethos, principles and techniques to be found in literary writing and criticism, and furthermore that legal texts could be read *as* literary texts. See James Boyd White, *The Legal Imagination: 45th Anniversary Edition* (Wolters Kluwer, 2018); K. Dolin, *A Critical Introduction to Law and Literature* (Cambridge University Press, 2007); Ian Ward, *Law and Literature: Possibilities and Perspectives* (Cambridge University Press, 1995)*.* [↑](#footnote-ref-9)
10. Few readers of *Bleak House*, for example, surely fail to discern in Dickens’s opening description of ‘fog everywhere’ a metaphor of some kind, even absent the references to the Court of Chancery and the Lord Chancellor himself being “at the very heart of the fog” that makes it explicit. Charles Dickens, *Bleak House* (London: Penguin Classics, 1985) 49-50. For a discussion of the metaphors used in *Bleak House*, see Watt (n 1). See further below for discussion on determining what and where the ‘key points’ of a judgment actually are. [↑](#footnote-ref-10)
11. In her own reflections on the ‘proportionality’ metaphor, Nicola Lacey refers to the necessary role for a degree of ‘speculation’ in such work, see Nicola Lacey, ‘The metaphor of proportionality’ (2016) *Journal of Law and Society*, 43(1): 27-44, 43-4 at 44. See also N. Lacey and H. Pickard, ‘The Chimera of Proportionality: Institutionalising Limits on Punishment in Contemporary Social and Political Systems’, (2015) 78(2) *Modern Law Rev.* 216. [↑](#footnote-ref-11)
12. Lakoff and Johnson (n 3) 18. We acknowledge that the concepts of ‘experience and culture’ are not straightforward or self-evident and that they engage further complex ideas pertaining to phenomenology (i.e. the subject’s immediate and unanalysed experience of the world) and semiotics. However, in the interests of making progress in the instant essay, we park these considerations and take at face value Lakoff and Johnson’s reference to metaphors being embedded in ‘experience and culture’ as a useful short-hand. [↑](#footnote-ref-12)
13. Ibid, especially chapters 4 (orientation), 6 (containers) and 11 (buildings). [↑](#footnote-ref-13)
14. Ibid, see especially chapter 16 (on journey metaphors). [↑](#footnote-ref-14)
15. Karen Armstrong, *A Short History of Myth* (London, Canongate, 2005). [↑](#footnote-ref-15)
16. Dante Alighieri, *The Divine Comedy Volume III: Paradise*, trans. and notes by Mark Musa (London: Penguin Classics, 1986). Dante’s Pilgrim narrator first finds that the unfortunate occupants of Hell (who, of course, will never again see the sky) are advised to ‘abandon all hope’. Having escaped from hell and ascended the mountain of purgatory, Dante’s narrator then experiences Heaven as an escape from the shackles and darkness below, where ‘it was as if one day shone on the next – as if [God] had decked the heavens with a second sun.’ (Canto I, at 63). [↑](#footnote-ref-16)
17. On gothic ecclesiastical architecture and its symbolism of light, see Otto von Simpson, *The Gothic cathedral: origins of Gothic architecture and the medieval concept of order* (Harper and Row, 1964). [↑](#footnote-ref-17)
18. Linda Mulcahy, *Legal Architecture: justice, due process and the place of law* (Abingdon: Routledge 2011). See also Raffield (n 2). [↑](#footnote-ref-18)
19. Mulcahy, Ibid, at 7. [↑](#footnote-ref-19)
20. Johnathan D. Rosenbloom, ‘Social Ideology as seen through courtroom and courthouse architecture’ (1998) *Columbia-VLA Journal of Law & the Arts*, 22:4, at 516. [↑](#footnote-ref-20)
21. Arnaud Lucien, ‘Staging and the Imaginary Institution of the Judge’ (2010) *International Journal of the Semiotics of Law* 23: 185-206; Lorin Geitner, ‘Social Architecture and the Law: Law, Through the Lens of Religion’ (May 10, 2013) online: SSRN: https://ssrn.com/abstract=2265600; Mulcahy 2011 (n 19) at 19, 49-50; Shailesh Kumar, ‘Interpreting the *Scales of Justice*: architecture, symbolism and the semiotics of the Supreme Court of India’ (2017) *International Journal of the Semiotics of Law*, 30:638-9, 652-6. For criticism of modern court architecture, see Judith Resnik, Dennis Curtis and Allison Tait, ‘Constructing Courts: architecture, the ideology of judging, and the public sphere’, chapter 23, 515 – 545 at 532, 5; Johnny Rodger and Peter Robson, *Spaces of Justice: The Architecture of the Scottish Court* (Farleigh Dickinson University Press, 2018) at 88. [↑](#footnote-ref-21)
22. A. Levine, ‘Staging the Imaginary Institution of the Judge’ (2010) *Int J Sem L* 23 185-206; Rosenbloom (n 21); Lucien, ibid; Geitner (n 22). [↑](#footnote-ref-22)
23. Mulcahy (n 18) at 49; Rodger and Robson (n 21) at 81. [↑](#footnote-ref-23)
24. On the use of legal architecture to evoke a sense of authority, see Renske Vos, ‘A walk along the Rue de la Loi: EU facades as front- and backstage of transnational legal practice in L. Boer and S. Stolk, *Illuminating the Backstage of Transnational Legal Practice* (Routledge 2019), who finds ‘authority … made tangible [by] all this raw concrete force’ (at 9). [↑](#footnote-ref-24)
25. William Golding, *The Spire* (London: Faber and Faber, 1965). [↑](#footnote-ref-25)
26. Ibid, 102. [↑](#footnote-ref-26)
27. Charles Dickens, *David Copperfield* (Heron Centennial Edition, 1967) p.172. [↑](#footnote-ref-27)
28. Thomas Hardy, *Jude The Obscure* (London: Penguin Popular Classics) 19. [↑](#footnote-ref-28)
29. Golding, above (n 25) at 36. [↑](#footnote-ref-29)
30. Ibid, 79-80. [↑](#footnote-ref-30)
31. Id, 64. [↑](#footnote-ref-31)
32. Georges Batailles, *Story of the Eye* (Penguin, 1979) at 46. [↑](#footnote-ref-32)
33. J. G. Ballard, *Concrete Island* (Harper Perennial, 2008) [↑](#footnote-ref-33)
34. Dickens (n 27) at 280. [↑](#footnote-ref-34)
35. Leo Tolstoy, *Anna Karenina*, trans. Richard Pevear and Larissa Volokhonsky (London: Penguin Classics, 2006) at 279, emphasis added. [↑](#footnote-ref-35)
36. Dante Alighieri, *The Divine Comedy Volume I: Inferno*, trans. and notes by Mark Musa (London: Penguin Classics, 2003), Canto I, at 67. [↑](#footnote-ref-36)
37. Ibid. [↑](#footnote-ref-37)
38. Shakespeare, *Hamlet* Act III, scene 3: 51-5; 67-9 [Folio, 1623] (Stanley Wells and Gary Taylor, *The Oxford Shakespeare: The Complete Works* (Oxford: Clarendon: Oxford University Press, 1998). [↑](#footnote-ref-38)
39. Tolstoy, (n 35) at 282. [↑](#footnote-ref-39)
40. Charles Dickens, *Oliver Twist* (Heron Centennial Edition: 1967) 435. [↑](#footnote-ref-40)
41. Ibid, 443. [↑](#footnote-ref-41)
42. Ibid, 445. [↑](#footnote-ref-42)
43. Philipopoulous-Mihalopoulous, ‘Flesh of the Law: Material Legal Metaphors’ (2016) *Journal of Law and Society*, 43(1): 45-65 at 49. [↑](#footnote-ref-43)
44. See N. Lacey and H. Pickard, above (n 11); also Lacey, above (n 11) at 43-4. [↑](#footnote-ref-44)
45. Lakoff and Johnson, above (n 3) at 29. [↑](#footnote-ref-45)
46. See, for example, Moore, S. E. J. and Breeze, S. ‘Spaces of male fear: the sexual politics of being watched’ (2012) 52, *Brit. J. Criminol*. 1172-91. [↑](#footnote-ref-46)
47. See further Philippopoulos-Mihalopoulos, above (n 43). [↑](#footnote-ref-47)
48. Lakoff and Johnson, above (n 3), at 46-53. [↑](#footnote-ref-48)
49. Michael Zander, *The Law Making Process* (Hart (Bloomsbury) 2015), at 254. [↑](#footnote-ref-49)
50. Marco Wan, *Reading the Legal Case: Cross-currents between law and the humanities* (Abingdon: Routledge, 2012) at 2. [↑](#footnote-ref-50)
51. See further R. Rorty, *Contingency, Irony, And Solidarity* (1989); see also Peter Goodrich, ‘The New Casuistry’ *Critical Inquiry* 33, no. 4 (Summer 2007): 673-709. [↑](#footnote-ref-51)
52. For commentary see Watt (n 1) 56-7. [↑](#footnote-ref-52)
53. Zander, above (n 49). [↑](#footnote-ref-53)
54. Mulcahy, above (n 18) at 39-41. See also Barb Toews, ‘ “It’s a dead place”: a qualitative exploration of violence survivors’ perceptions of justice architecture’ (2018). [↑](#footnote-ref-54)
55. *Ivey v Genting Casinos (UK) Ltd t/a Crockford* [2017] SC 67 [↑](#footnote-ref-55)
56. [1982] QB 1053. [↑](#footnote-ref-56)
57. *Ivey*, above (n 55) per Lord Hughes at para [74]: ‘…the second leg of the test propounded in *Ghosh* does not correctly represent the law and that directions based upon it ought no longer to be given.’ [↑](#footnote-ref-57)
58. See Karl Laird, ‘Case Comment: Dishonesty: *Ivey v Genting Casinos UK Ltd (t/a Crockfords Club)*’ (2018) *Crim LR* 395. [↑](#footnote-ref-58)
59. *Ivey*, above (n 55) para. [59]. [↑](#footnote-ref-59)
60. Per Lord Lane CJ at 1064. [↑](#footnote-ref-60)
61. *Ivey* above (n 55) para [59]. [↑](#footnote-ref-61)
62. Lord Hughes reminds us that dishonesty is ‘a simple … English word’ [63]: hence the ‘significant refinement’ [54] introduced in *Ghosh* was ‘not necessary’[57]. [↑](#footnote-ref-62)
63. Ibid, para [73]. [↑](#footnote-ref-63)
64. Ibid. [↑](#footnote-ref-64)
65. Ibid, para [58]. [↑](#footnote-ref-65)
66. [2003] EWCA Crim 2206. [↑](#footnote-ref-66)
67. *Ivey*, para [53]. [↑](#footnote-ref-67)
68. [1972] 1 WLR 1341. [↑](#footnote-ref-68)
69. *R v B* [2013] EWCA Crim 3. [↑](#footnote-ref-69)
70. Ibid, para [29]. [↑](#footnote-ref-70)
71. [1996] AC 90. [↑](#footnote-ref-71)
72. *B*,above (n 69), para [29]. [↑](#footnote-ref-72)
73. Ibid, para [38]. [↑](#footnote-ref-73)
74. See the Coroners and Justice Act 2009, in which s.54(1)(c) requires juries to compare the defendant’s conduct with ‘a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D’, and then in s.54(3) clarifies that ‘the reference to “the circumstances of D” is a reference to all of D's circumstances other than those whose *only* relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint.’ [my emphasis]. [↑](#footnote-ref-74)
75. *R v Howe* [1987] AC 417. [↑](#footnote-ref-75)
76. *Abbot v The Queen* [1977] AC 755, dissent at 771. See Law Commission, ‘Murder, manslaughter and infanticide’, LawComm 304 (2006) at 121-2, who concluded that there is a ‘moral basis’ for allowing duress to be a full defence to murder, namely: ‘If a reasonable person might have acted as D did, then the argument for withholding a complete defence is undermined.’ (para 6.43, at 121). [↑](#footnote-ref-76)
77. Above (n 75) at 432. [↑](#footnote-ref-77)
78. Homer, *The Iliad of Homer*, trans. Alexander Pope (London: Cassel, 1909) Book XXII, at 397. It is tempting to suppose that Lord Hailsham – who took a double First at Oxford in *Literae Humaniores* (essentially Classics) and was injured in the Second World War – may have had such a scene of epic sacrifice in mind, but we should recall that the argument being advanced here does not depend on *conscious* invocations of metaphor. [↑](#footnote-ref-78)
79. Above (n 75) at 432. [↑](#footnote-ref-79)
80. *R v Caldwell* [1981] 1 All ER 961. [↑](#footnote-ref-80)
81. *R v G and another* [2003] UKHL 50. [↑](#footnote-ref-81)
82. *Caldwell*, above (n 80) at 965. [↑](#footnote-ref-82)
83. Dante, *The Divine Comedy, Vol II: Purgatory*, trans. Mark Musa (London: Penguin Classics, 1985) Canto XVI, 1-6. [↑](#footnote-ref-83)
84. *G*, above (n 81), per Lord Steyn, para [49]. ‘Objective’ recklessness does however live on in cases where the defendant’s failure to appreciate an obvious risk was due to his intoxication (*DPP v Majewski* [1977] AC 443) or a deliberate ‘closing of his mind’ due to rage or excitement (*R v Parker* [1977] 1 WLR 600). [↑](#footnote-ref-84)
85. Ibid, per Lord Bingham, at para [33], referring to the reservations expressed at trial by the judge as well as by the jurors themselves. [↑](#footnote-ref-85)
86. The clause that finally became s.55(6)(c) in the Coroners and Justice Act 2009. [↑](#footnote-ref-86)
87. Claire Ward, Parliamentary Under Secretary of State for Justice. [↑](#footnote-ref-87)
88. Commons Hansard, Nov 9, 2009, Col. 80. [↑](#footnote-ref-88)
89. See C.A. Forell, ‘Gener equality, social values and provocation law in the United States, Canada and Australia’, *Journal of Gender, Social Policy and the Law* (2006) 14:1, 27-69 at 32; Women’s Aid, ‘Murder law proposal’s criticized’, 2008; see more generally David Gurnham, *Memory, Imagination, Justice* (Ashgate 2009) at 63ff. [↑](#footnote-ref-89)
90. *R v Clinton* [2012] EWCA Crim 2; [2013] Q.B. 1. [↑](#footnote-ref-90)
91. Ibid, at para. [75]. [↑](#footnote-ref-91)
92. Ibid, para. [75-6], in which she (Mrs Clinton) had told the defendant (her husband) that he hadn’t the ‘fucking bollocks’ to kill himself, that she had had intercourse with five different men and that she would leave him and the children. [↑](#footnote-ref-92)
93. Ibid, para [77]. [↑](#footnote-ref-93)
94. See Simon Parsons. ‘The loss of control defence - fit for purpose?’ (2015) *Journal of Criminal Law* 79(2) 94-101; L.H. Leigh, ‘Loss of control: the significance of sexual infidelity and other matters’ (2012) *Archbold Review* 2, 4-6; Findlay Stark, ‘Case Comment: Killing the unfaithful’ (2012) *Cam LJ* 71(2), 260-3; Amanda Clough, Sexual infidelity: the exclusion that never was? (2012) *Journal of Criminal Law* 76(5), 382-8. [↑](#footnote-ref-94)
95. Lacey, above (n 11) at 44. [↑](#footnote-ref-95)