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DO MUDDY WATERS SHIFT BURDENS?

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Muddy the waters: to make a situation more confused and less easy to understand or deal with.[1]

INTRODUCTION

Metaphor has long been touted as a powerful tool of persuasion. Ancients said it. Social scientists have tested it. Legal scholars have hypothesized that a metaphorical framework shapes the way we understand and apply the law. However, we hypothesize that metaphor may be even more powerful than legal scholars have believed—that it can actually supplant the intended operation of the law, thwart legislative intent, yet remain hidden from critique. In this Essay, we support our hypothesis by following the use of a particular metaphor from its first reference in a judicial opinion through its eventual incorporation into doctrine despite subsequent legislative changes to the law. We demonstrate that the use of the metaphor has almost certainly acted as a stealth legal test, in direct opposition to the test the legislature originally constructed and later amended. By tracing the metaphor through its journey in the Texas courts, we aim not only to illustrate the power of metaphor, but to alert practitioners and scholars to the dangers of metaphor in the legal context.

One of the strongest forces behind effective metaphor is its unconscious influence. By exposing a problematic metaphor and its effects on Texas law, we hope to convince lawyers that competent advocacy requires becoming aware of the metaphors at play in any given legal test or standard. Once

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1. CAMBRIDGE IDIOMS DICTIONARY (2d ed. 2006), http://idioms.thefreedictionary.com/muddy+the+waters.

aware, advocates can challenge metaphors that influence judicial decisions and adversely affect their clients.

We chose the muddy waters metaphor because of its use by the Texas courts in reaction to the implementation of a new, and potentially powerful, criminal justice reform. As we entered the new millennium, our understanding about the accuracy of the criminal justice system faced a dramatic shift. In the late 1980s, DNA became a powerful new tool that began to change the way serious crimes were investigated and prosecuted by law enforcement.[2] DNA testing could, with an extremely high degree of accuracy, identify individuals by looking at unique parts of their genetic code.[3] Prosecutors began using DNA testing to link bodily fluids found at the scene of a crime to a particular person.[4] In some cases, DNA testing gave prosecutors reliable scientific evidence that could identify a perpetrator with near certainty.[5]

DNA's potential to accurately identify and convict perpetrators of crime came with a flip side: it could also expose cases in which the wrong person was convicted. The very same evidence used to convict a defendant—for example, blood left at the scene—could now be subjected to DNA testing to accurately determine whose blood was left behind. DNA testing could, thus, exclude the person convicted of the crime and implicate an alternative suspect.[6] With this new post-conviction avenue to check the accuracy of some convictions, criminal defense lawyers began requesting DNA tests on behalf of inmates who claimed they were innocent of their crimes. For example, in 1989, Gary Dotson, who was serving a minimum twenty-five-year sentence for sexual assault and kidnapping, became the first person exonerated using

2. Lisa Calandro et al., *Evolution of DNA Evidence for Crime Solving—A Judicial and Legislative History*, FORENSIC MAG. (Jan. 6, 2005, 3:00 AM), http://www.forensicmag.com /article/2005/01/evolution-dna-evidence-crime-solving-judicial-and-legislative-history.

3. *See Advancing Justice Through DNA Technology: Using DNA to Solve Crimes*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/ag/advancing-justice-through-dna-technology-using-dna-solve-crimes (last updated Mar. 7, 2017) ("DNA can be used to identify criminals with incredible accuracy when biological evidence exists.").

4. *See* Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1656 (2008) ("Law enforcement has strong incentives to conduct DNA testing before trial to prove guilt. Courts have held that uncorroborated inculpating DNA tests, standing alone, suffice to prove guilt.").

5. *See id.* at 1647–48. For examples, see *Advancing Justice through DNA Technology*, *supra* note 3.

6. *See Advancing Justice Through DNA Technology*, *supra* note 3.

DNA.[7] By the end of 2000, DNA evidence had exonerated seventy-five people wrongly convicted of serious crimes, including crimes that carried the death penalty.[8]

Texas, the state with the highest number of executions in the country,[9] took notice. After a few high-profile death row exonerations,[10] the governor and the legislature agreed to reform the state's criminal procedure code to give convicted persons a reliable avenue to conduct DNA testing where the evidence could reasonably demonstrate that the person had been wrongly convicted.[11] In 2001, the Texas Legislature enacted Article 64.03 of the Criminal Code to make it easier for convicted persons to obtain post-conviction DNA testing.[12] But experts have been frustrated, claiming that the statute has not lived up to its promise.[13]

Lawyers and scholars have posited theories about why the statute fell short of its intended goal. Some say it puts too much discretion in the hands of judges, many of whom would like to maintain the status quo.[14] Others say that prosecutors in Texas have aggressively fought DNA testing motions, fearing that too many exonerations would undermine confidence in the system and lead jurors to become more demanding in their need for proof beyond a reasonable doubt.[15] No one, yet, has posited a theory based on rhetoric

7. Garrett, *supra* note 4, at 1648; *see also* Dolores Kennedy, *Gary Dotson: Other No Crime Exonerations Involving DNA*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3186 (last visited Apr. 2, 2017).

8. SAMUEL R. GROSS & MICHAEL SHAFFER, NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN THE U.S, 1989–2012, at 18–20, 21 n.35 (2012) https://www.law.umich.edu /special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf.

9. *Number of Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976 (last visited Apr. 2, 2017).

10. *See Innocence: List of Those Freed from Death Row*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row (last visited Apr. 2, 2017).

11. *See infra* Section II.A.

12. TEX. CODE CRIM. PROC. ANN. art 64.03 (West Supp. 2016).

13. Michael Hall, *Why Can't Steven Phillips Get a DNA Test?*, TEX. MONTHLY (Jan. 2006), http://www.texasmonthly.com/articles/why-cant-steven-phillips-get-a-dna-test/ ("The statute promises a lot but delivers little. Unfortunately, it places so much authority in the trial judge." (quoting David Dow & the Texas Innocence Network)).

14. *See* Daryl E. Harris, Comment, *By Any Means Necessary: Evaluating the Effectiveness of Texas' DNA Testing Law in the Adjudication of Free-Standing Claims of Actual Innocence*, 6 SCHOLAR 121, 149 (2003) ("Although the decisions clearly lie within the discretion of the Texas Court of Criminal Appeals, they present a picture of a court that is oblivious to the public's concern over false convictions, as well as the legislature's desire to lower the required threshold and increase access to post-conviction testing."); Garrett, *supra* note 4, at 1651 ("Courts struggle with claims of new evidence of innocence, particularly those that depend on less reliable forms of evidence.").

15. *See* Mike Ware, *Dallas County Conviction Integrity Unit and the Importance of Getting It Right the First Time*, 56 N.Y.L. SCH. L. REV. 1033, 1037 (2012) ("Even now, more than twenty years after the first DNA exoneration, prosecutors often wage prolonged legal battles over whether

and persuasion. However, after evaluating the alternative arguments to explain why the Texas DNA statute failed to deliver on its promise, the effect of the muddy waters metaphor stands out as alarmingly persuasive.

We followed the muddy waters metaphor after the Texas Court of Criminal Appeals used it to describe the burden on applicants seeking DNA testing—that potentially favorable results from the DNA testing must do more than "merely muddy the waters."[16] We collected all the opinions in which the metaphor was used by the Texas courts when interpreting the DNA testing statute. We analyzed those opinions, looking at the outcome in each case, the way the metaphor had been used, and how frequently it was used. We continued to track the metaphor even after the Texas legislature provided a new test by amending the statute. Texas's implementation of its DNA testing statute tells a powerful story of how metaphors unconsciously drive decisions in often unintended directions and how firmly they stick, persisting in their course even when they are unwanted.

I. METAPHORS AT FIRST BLUSH

> *[M]etaphor does not merely thrust latent connotations into the foreground of meaning, but brings into play some properties that were not previously meant by it.*[17]

Metaphor begins as a literary device that appears harmless—a tool to color and liven literature. Closer study demonstrates that a metaphor's power is much greater than entertainment. Metaphors play on our understanding of concepts and cause us to react on an implicit level. While metaphors can be used to help us understand abstract or complex concepts, they can also be used to manipulate our reaction to words and concepts. This has a profound impact in the context of legal analysis. When metaphors are used to portray legal concepts, we may be causing words to take on secondary—and possibly unintended—meanings. This Part explores metaphors first by examining them as literary devices that evoke emotion; second by examining the science behind metaphors and how they impact the processing of information and emotion; and finally, by highlighting the use of metaphors in judicial decisions and how their use in that context may impact how judges make decisions because metaphors operate on an implicit level—thwarting efforts to regulate emotion or bias by judges.

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a requesting defendant is entitled (statutorily, constitutionally, or otherwise) to DNA test available evidence at all.").

16. Kutzner v. State, 75 S.W.3d 427, 439 (Tex. Crim. App. 2002).

17. PAUL RICOEUR, THE RULE OF METAPHOR: MULTI-DISCIPLINARY STUDIES OF THE CREATION OF MEANING IN LANGUAGE 97–98 (Robert Czerny et al. trans., Univ. of Toronto 1977) (quoting Monroe C. Beardsley, *The Metaphorical Twist*, 22 PHIL. & PHENOMENOLOGICAL. RES. 293, 303 (1962)).

A. The Words Paint a Picture

Art washes away from the soul the dust of everyday life.[18]

The first place we encounter metaphor is in the realm of literature. Metaphor is commonly thought of as a literary device that creates a similarity between two unlike objects. Metaphor is a helpful literary tool because it quickly provides the reader with context for understanding the text, scene, character, or situation. Aristotle defined metaphor "as a linguistic device comparing dissimilar things," and Nietzsche argued that metaphor was a tool for understanding truth, which could "never be apprehended directly and is understood indirectly in terms of more concrete experiences."[19]

In studying metaphor as a literary device, we find that it is defined in terms of movement. It transposes ideas by taking an ordinary word and displacing its meaning with a secondary meaning.[20] In this way, we force certain words to take on secondary meanings (for example, light for spiritual clarity, dirtiness for inappropriate or bad behaviors, or warmth for love). This secondary meaning allows a single idea to appear "naked and undisguised" despite its underlying meaning.[21] As a result, metaphor acts as a change of meaning—by using words with secondary meanings, those words act as carriers of meaning.[22]

This secondary meaning can be seen in numerous literary examples. Recall Lady Macbeth vigorously scrubbing at an imaginary spot of blood on her hands as if removing that imagined spot would cleanse her of the guilt she harbored for murdering the King.[23] Words indicating dirtiness and cleanliness stand in for concepts relating to guilt and innocence. Some of the most common metaphors are those found in the Bible. Throughout the Bible, Jesus is referred to as the light[24] and God as a rock,[25] symbolizing the salvation and

18. The quote is commonly attributed to Picasso, but likely originates from German author Berthold Auerbach. *See Music Washes Away from the Soul the Dust & Everyday Life*, QUOTE INVESTIGATOR (Feb. 17, 2016), http://quoteinvestigator.com/2016/02/17/soul/.

19. Mark J. Landau et al., *A Metaphor-Enriched Social Cognition*, 136 PSYCHOL. BULL. 1045, 1046 (2010).

20. RICOEUR, *supra* note 17, at 17–19; *see also* Jeanne L. Schroeder & David Gray Carlson, *The Appearance of Right and the Essence of Wrong: Metaphor and Metonymy in Law*, 24 CARDOZO L. REV. 2481, 2514–15 (2003) (asserting that metaphor seeks to turn signification into meaning, by acting as a substitution).

21. RICOEUR, *supra* note 17, at 62 (quoting PIERRE FONTAINIER, LES FIGURES DU DISCOURS 219 (1968)).

22. *Id.* at 110–11.

23. WILLIAM SHAKESPEARE, MACBETH act 5, sc. 1.

24. *See, e.g.*, *John* 1:5; *John* 8:12; *Psalm* 27:1; *Ephesians* 5:14.

25. *See, e.g.*, *Deuteronomy* 32:4; *Psalm* 18:12; 2 *Samuel* 22:32.

protection offered by faith in each. On the other hand, Satan is referred to as darkness, signifying wrong and evil.[26]

While metaphor has played a significant role in literature, our understanding of metaphor has expanded beyond its use as a literary device. Social and cognitive science research has revealed the profound impact of metaphor on our emotions and how we process information.

B. Social and Cognitive Science Illustrate the Way Metaphor Works in Our Minds

Social and cognitive scientists have studied metaphors and found that they have an impact on how we process information. At times, we may be aware of the impact, but often, the impact happens on an unconscious level. As we access our mental framework for understanding and processing information, metaphors help us select an existing framework with which to process the information or help us create new frameworks for the information. In addition, metaphors play on our emotions and lead to the attachment of implicit or even unconscious meaning to statements or concepts linked to the metaphor.

1. Metaphors Attach to the Framework of Our Understanding

[A]ll thinking . . . is metaphorical . . . .[27]

One of the ways in which metaphors stealthily work their way into our understanding of concepts and legal analysis is through our schema. Schema theory states that our understanding of new concepts is based on a framework of schemata that we develop over time through experience.[28] Each of our previous experiences creates a new layer of schemata that work together to create a framework for how we understand things. There are various ways in which schema can be organized. They may be based on categories, relationships, or serial episodes; the type of organization impacts the way in which we retrieve information and place the new information within that schema.[29]

For example, we have many schemata for understanding "dog." First, we may think of a dog in terms of a living being—it has a system of organs,

26. *See, e.g.*, *Colossians* 1:13; *Acts* 26:18.

27. ROBERT FROST, *Education by Poetry*, *in* COLLECTED POEMS, PROSE, & PLAYS 717, 720 (Lib. of America 1995).

28. JEAN MATTER MANDLER, STORIES, SCRIPTS, AND SCENES: ASPECTS OF SCHEMA THEORY 2–3 (1984).

29. *See id.* at 6–7; Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1384 (1988) (discussing schema as "preconceptual experiences" that act as "organizing principles for the construction of conceptual models").

it needs to be fed and watered, and it breathes. We may also think of a dog as a general category for many specific breeds of a particular animal—Cocker Spaniels, Labradors, Chihuahuas. Conversely, we may think of a dog as a specific category within the larger category of animals or mammals. Finally, we may think of "dog" in terms of secondary meanings—to dog someone, to be a dog, dog as man's best friend. Depending on the context of how "dog" is used, we will retrieve the appropriate schema to understand the meaning of the information being presented by the word "dog." Our retrieval of meaning may not be perfect; as a result, our schema continues to develop and assigns or modifies meaning related to new information.[30]

Because metaphor operates on our ability to identify an ordinary word (source), and transfer meaning via other words (target), metaphors activate schematic frameworks within our minds and impact our understanding of a new concept.[31] As a result, metaphors can be used to consciously create new relationships between concepts and, at the same time, they may also unconsciously affect our understanding of them.[32] This is particularly true where metaphor has attributed a secondary meaning to the source word.[33]

2. Metaphors Fly Under the Radar

Because metaphors operate in both conscious and unconscious planes of information processing, cognitive scientists have tried to uncover the ways metaphors impact our ability to understand the concepts they represent. The traditional cognitive model suggests that we first try to understand a concept

30. Linda L. Berger, *Metaphor and Analogy: The Sun and Moon of Legal Persuasion*, 22 J.L. & POL'Y 147, 156–57 (2013).

31. *Id.* at 172–73 (comparing the work of cognitive scientists George Lakoff and Mark Johnson with that of Dedre Gentner and co-authors; both groups find that metaphor builds meaning by using the source-target theory, but they diverge on how those meanings develop with regard to traditional and novel metaphors). For additional cognitive theory on metaphor see, for example, GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY (1980); GEORGE LAKOFF & MARK JOHNSON, PHILOSOPHY IN THE FLESH: THE EMBODIED MIND AND ITS CHALLENGE TO WESTERN THOUGHT (1999); Dedre Gentner et al., *Metaphor Is Like Analogy*, *in* THE ANALOGICAL MIND: PERSPECTIVES FROM COGNITIVE SCIENCE 199 (Dedre Gentner et al. eds., 2001); George Lakoff, *The Contemporary Theory of Metaphor*, *in* METAPHOR AND THOUGHT 202 (Andrew Ortony ed., 2d ed. 1993); Landau et al., *supra* note 19, at 1046.

32. Linda L. Berger, *The Lady, or the Tiger? A Field Guide to Metaphor and Narrative*, 50 WASHBURN L.J. 275, 279 (2011).

33. *See* RICOEUR, *supra* note 17, at 62, 110–11; Linda L. Berger, *Of Metaphor, Metonymy, and Corporate Money: Rhetorical Choices in Supreme Court Decisions on Campaign Finance Regulations*, 58 MERCER L. REV. 949, 954–55 (2007) [hereinafter Berger, *Of Metaphor*]; Linda L. Berger, *What is the Sound of a Corporation Speaking? How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law*, 2 LEGAL COMM. & RHETORIC 169, 174 (2004); Mark L. Johnson, *Mind, Metaphor, Law*, 58 MERCER L. REV. 845, 848–49 (2007); Steven L. Winter, *Death Is the Mother of Metaphor*, 105 HARV. L. REV. 745, 753–54, 757–59 (1992) (reviewing THOMAS C. GREY, THE WALLACE STEVENS CASE: LAW AND THE PRACTICE OF POETRY (1991)).

via the literal meaning of the phrase presented to us.[34] Next, we test that meaning in the context in which it was presented.[35] Finally, if that literal interpretation fails to make sense, we search for a non-literal, alternative meaning.[36] Additionally, social and cognitive scientists have found that subjects spend more time determining whether a statement is literally false when metaphoric interpretations are presented.[37] People generally process nonliteral meaning at the same time and in the same way as literal meaning.[38] As a result, metaphor is processed first by inference and then by context.

Cognitive psychologists have also found that metaphor causes a feeling to stay with us even when it is not expressly stated.[39] This metaphoric transfer strategy suggests that by manipulating psychological states related to one concept, the metaphor will impact how the person processes information on a dissimilar concept—in a manner that is consistent with their metaphoric relationship.[40] For example, generous and caring people are frequently described as warm while unfriendly and unkind people are described as cold. This metaphoric characterization was exemplified in a study that found subjects feel emotionally closer to friends and family when subjects were holding a warm beverage and that subjects felt socially excluded when they perceived the room temperature to be colder.[41]

Another study examined the link between morality and physical cleanliness. The study found that exposure to immoral or unethical behavior—whether the immoral behavior was that of the subject's or another—triggered a desire for physical cleansing.[42] Further, when subjects engaged in the act of physical cleansing, it seemed to assuage their moral discomfort and reduced subjects' need for compensatory behaviors.[43] Using cleanliness and morality in metaphor is common—a dirty mind, a soiled reputation, washing one's hands of something, or cleansing one's soul. This link to cleanliness was further evidenced in studies where subjects who were exposed to a dirty work area made harsher moral judgments, but when subjects washed their

34. *See* Sam Glucksberg et al., *On Understanding Nonliteral Speech: Can People Ignore Metaphors?*, 21 J. VERBAL LEARNING & VERBAL BEHAV. 85, 85 (1982).

35. *Id.*

36. *Id.*

37. *Id*. at 94.

38. *Id*. at 85, 97.

39. *See* Landau et al., *supra* note 19, at 1047 (summarizing a series of studies on the impact of various metaphorical stimuli on the ways in which people processed information).

40. *Id*.

41. *Id.* at 1049–50.

42. Cheng Bo Zhon & Katie Liljenquist, *Washing Away Your Sins: Threatened Morality and Physical Cleansing*, 313 SCIENCE 1451, 1452 (2006).

43. *Id.*

hands, they made less harsh moral judgments.[44] The link between cleanliness and morality is deeply ingrained in our social psyche.

Metaphorical characterization of a problem can impact the way we think about solving the problem. One study examined how people used metaphor to process complex information and solve social problems.[45] In that study, a crime was characterized as a "beast" in one test group and as a "virus" in the other test group. The group given the beastly characterization selected enforcement-oriented measures for addressing the crime. The virus test group favored more community-minded measures for addressing the crime. The scientists found that subtle metaphor—even just one word—could impact the way the subjects solved a problem. Furthermore, when the metaphor was removed from the description of the problem and instead suggested in a response or a list of responses, subjects exposed to the beast metaphor were still more likely to select enforcement-oriented measures than those subjects exposed to the virus metaphor.[46] Interestingly, the scientists found that the subjects rarely identified the metaphor as a factor in reaching a decision; instead subjects pointed to other information, such as statistical data, as influencing factors.[47]

Science demonstrates that metaphor shapes the way people think about and understand concepts. Metaphor requires more than a simple analysis of comparing two unlike things and finding similarity[48]; it requires an implicit understanding of moral and cultural context. Metaphors shape how people conceptualize and process information.[49] Moreover, they impact our understanding on an implicit physical and emotional level. Social scientists hypothesize that metaphor use increases as the level of conceptual abstraction increases—resulting in heavier reliance on metaphor to make sense of abstract concepts.[50] Law is complex and often abstract. As a result, it is not surprising that metaphor has found a home in analysis of the law and in legal decision-making.

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44. *See* Landau et al., *supra* note 19, at 1051 ("[T]he simple act of washing one's hands led participants to judge a moral dilemma as less severe.").

45. Paul H. Thibodeau & Lera Boroditsky, *Metaphors We Think With: The Role of Metaphor in Reasoning*, PLOS ONE (Feb. 23, 2011), http://journals.plos.org/plosone/article?id=10.1371/ journal.pone.0016782.

46. *Id.*

47. *Id.* at 3.

48. *See* Andrew Ortony, *Beyond Literal Similarity*, 86 PSYCHOL. REV. 161, 179 (1979) (noting that even an early study of metaphors found that encountering metaphors requires a more complex use of reasoning than simple comparison and similarity).

49. Landau et al., *supra* note 19, at 1052.

50. *Id.* at 1059.

C. Metaphors Abound in the Law

> *Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.*[51]

A quick scan of U.S. case law quickly reveals an abundance of metaphors. They are in our judicial opinions and briefs presented to the court. While metaphors in the law have been studied, the chief criticism is that the metaphor has been misinterpreted or has failed to bring clarity to a legal concept.[52] Metaphors have also been championed as tools for effective advocacy in the law.[53] We believe that the study of metaphor in the law must go a step further. It is important to understand how metaphors have the potential to create bias and unwittingly trigger emotion in the analysis and understanding of law. In this way, metaphor has the power to thwart attempts to regulate emotion in judicial decision-making and undermine the intended application of the law.

1. Metaphors Sprout Abundantly in the Law

The use of metaphors is readily apparent in U.S. case law. Metaphors are embedded in a range of legal concepts, ranging from the Wall of Separation,[54] the Color-blind Constitution,[55] and the marketplace of ideas[56] to the corporation as a person.[57] Judicial decisions are sprinkled with the use of metaphor. Some are colorful descriptions, such as "throwing away your umbrella in a rainstorm,"[58] while others are used to communicate abstract legal principles—the "penumbra" of rights.[59]

Just as there are countless metaphors to be found in the law, there is no shortage of scholarly discussion of metaphors and their place within the law.[60] Some scholars criticize the use of metaphor in law because metaphor

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51. This quote comes from an opinion drafted by Judge Benjamin Cardozo. Berkey v. Third Ave. R. Co., 155 N.E. 58, 61 (N.Y. 1926).

52. *See infra* notes 60–61 and accompanying text.

53. *See infra* note 66 and accompanying text.

54. Reynolds v. United States, 98 U.S. 145, 164 (1878).

55. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting); *see also* Regents of Univ. of Cal. V. Bakke, 438 U.S. 265, 327 (1978) (Brennan, J., concurring in part and dissenting in part).

56. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (discussing the phrase in terms of "free trade in ideas").

57. Citizens United v. FEC, 558 U.S. 310, 343 (2010).

58. Shelby Cty. V. Holder, 133 S. Ct. 2612, 2650 (2013) (Ginsburg, J., dissenting).

59. Griswold v. Connecticut, 381 U.S. 479, 483–84 (1965).

60. *See* Michael R. Smith, *Levels of Metaphor in Persuasive Legal Writing*, 58 MERCER L. REV. 919, 919–20 (2007). Smith suggests that so many articles about metaphor and law exist that they talk over each other—from different perspectives including linguistics, philosophy, rhetoric, cognitive psychology, and literary theory. *Id.*

often fails to reflect the accurate application of the law.[61] One of the key criticisms of metaphor is that it functions to boil down complex and abstract legal ideas into a simple turn of phrase.[62] Others are concerned with where metaphorical meaning comes from,[63] the potential for prejudice or disenfranchisement by the use of certain metaphors,[64] and the use of metaphors to mislead.[65] Conversely, many scholars have encouraged the study of metaphor and argued that we should embrace the power of metaphor as a tool for more effective advocacy.[66]

Academics have long discussed the power of metaphor in advocacy and its tie to rhetoric.[67] A large body of scholarship has focused on identifying metaphor and the ways it is used in legal narrative. A great deal of the scholarship focuses on how readers process metaphors used in judicial decisions. The body of scholarship is well developed with regard to the cognitive pro-

61. *See* Louis J. Sirico, Jr., *Failed Constitutional Metaphors: The Wall of Separation and the Penumbra*, 45 U. RICH. L. REV. 459, 461–63 (2011) (arguing that metaphors have limitations in legal analysis because they are imprecise and demonstrating that some metaphors persist despite their failings); *see also* Jonathan H. Blavin & I. Glenn Cohen, *Gore, Gibson, and Goldsmith: The Evolution of Internet Metaphors in Law and Commentary*, 16 HARV. J.L. & TECH. 265, 267–68 (2002) (discussing the application of out-of-date metaphors to new technology and how that leads to the creation of bad law); Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 748 n.26 (1993) (highlighting the potential for finding different meanings when an abstract statement could be construed as a metaphor or an analogy).

62. *See, e.g.*, Julie A. Oseid, *The Power of Metaphor: Thomas Jefferson's "Wall of Separation Between Church & State"*, 7 LEGAL COMM. & RHETORIC 123, 123 (2010); J. Christopher Rideout, *Penumbral Thinking Revisited: Metaphor in Legal Argumentation*, 7 LEGAL COMM. & RHETORIC 155, 157–58 (2010).

63. *See* Thomas Ross, *Metaphor and Paradox*, 23 GA. L. REV. 1053, 1054 (1989); *see also*, Stephanie A. Gore, *"A Rose by Any Other Name": Judicial Use of Metaphors for New Technologies*, 2003 U. ILL. J.L. TECH. & POL'Y 403, 405–06.

64. *Compare* Chad M. Oldfather, *The Hidden Ball: A Substantive Critique of Baseball Metaphors in Judicial Opinions*, 27 CONN. L. REV. 17, 36 (1994) (critiquing the use of baseball metaphors by judges), *with* Michael J. Yelnosky, *If You Write It, (S)he Will Come: Judicial Opinions, Metaphors, Baseball, and "The Sex Stuff"*, 28 CONN. L. REV. 813, 817 (1996) (replying that baseball is a valid source for judicial metaphors).

65. *See* Keith Cunningham-Parmeter, *Alien Language: Immigration Metaphors and the Jurisprudence of Otherness*, 79 FORDHAM L. REV. 1545, 1555 (2011); Winter, *supra* note 33, at 751 (citing Margaret Jane Radin, *"After the Final No, There Comes a Yes": A Law Teacher's Report*, 2 YALE J.L. & HUMAN. 253, 262 (1990)).

66. *See* Gerald Lebovits, *Not Mere Rhetoric: Metaphors and Similes*, 74 N.Y. ST. B. ASS'N J., June 2002, at 64; Gerald Lebovits, *Not Mere Rhetoric: Metaphors and Similes—Part II*, 64 N.Y. ST. B. ASS'N J., July–August 2002, at 74; *see also* Michael Frost, *Greco-Roman Analysis of Metaphoric Reasoning*, 2 J. LEGAL WRITING 113 (1996); Michael Goldberg, *Against Acting "Humanely"*, 58 MERCER L. REV. 899, 918 (2007); Smith, *supra* note 60; Robert L. Tsai, *Fire, Metaphor, and Constitutional Myth-Making*, 93 GEO. L.J. 181 (2004).

67. *See* Berger, *supra* note 32, at 303; Linda H. Edwards, *Once Upon a Time in Law: Myth, Metaphor, and Authority*, 77 TENN. L. REV. 883, 885 (2010); *see also* Frost, *supra* note 66, at 141; Goldberg, *supra* note 66, at 915.

cess—how the concepts of transfer and schema theory are at play when metaphors are introduced in the law.[68] Metaphor has even been referred to as the "lens through which we view a legal issue and the context with which we imagine it operating."[69]

However, less attention has been paid to how metaphors impact the way that judges make decisions.[70] In order to understand the seismic impact that metaphor has in the context of judicial decisions, it is important to understand the culture of how cases are decided in the United States. Great value is placed on the ability to regulate emotion in judicial decisions in order to achieve unbiased decisions based in law and analytical reason. However, metaphors have the ability to operate on an implicit plane, opening the door for emotion to bias judicial decision-making.

2. Metaphors Thwart Emotion Regulation by Judges in the Process of Making Decisions

Law is reason free from passion.[71]

A long-held value is that judges should operate in the absence of emotion. Judges act in many ways, but those ways are based in logic, pragmatism, or the rule of law.[72] In fact, when President Barack Obama suggested that he would nominate a Supreme Court Justice with empathy, there was a public outcry.[73] While judges have often been treated as emotionless beings, it has been recognized that this is not true. In fact, some argue that emotion

68. *See* Berger, *supra* note 32, at 278–79 (explaining how metaphors are used to manage abstract concepts); *see also* Berger, *Of Metaphor*, *supra* note 33, at 958–59 (explaining metaphor as a cognitive process); Berger, *supra* note 30, at 164–65 (theorizing that processing novel metaphors results in more reflective processes for making decisions); Edwards, *supra* note 67 (discussing how stories and metaphors create a structure for how readers understand the law); Johnson, *supra* note 33, at 857–67 (explaining how metaphors create meaning via established schematic structures); David T. Ritchie, *The Centrality of Metaphor in Legal Analysis and Communication: An Introduction*, 58 MERCER L. REV. 839 (2007) (explaining the cognitive theory of metaphor); Schroeder & Carlson, *supra* note 20, at 2514–15 (asserting that metaphor seeks to turn signification into meaning by acting as a substitution); Winter, *supra* note 33; Winter, *supra* note 29, at 1383–84 (discussing the transfer theory of metaphor); Steven L. Winter, *Transcendental Nonsense: Metaphor, Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1107–14, 1162–71 (1989).

69. Edwards, *supra* note 67, at 911.

70. *But see* Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. CAL. INTERDISC. L.J. 259, 259 (2009).

71. ARISTOTLE, POLITICS, BOOK III (C. 384 B.C.E.), *reprinted in* THE BASIC WORKS OF ARISTOTLE, 1113, 1202 (Richard McKeon ed., Benjamin Jowett trans., Modern Library ed. 2001).

72. RICHARD A. POSNER, HOW JUDGES THINK 19 (2008). Posner suggests nine theories for judicial behavior. *Id*.

73. Terry A. Maroney & James J. Gross, *The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective*, 6 EMOTION REV. 142, 142 (Apr. 2014) (citing John Hasnas, *The 'Unseen' Deserve Empathy, Too*, WALL ST. J., May 29, 2009, at A15).

is valuable in judging.[74] Emotion can "support[] moral reasoning," help "motivat[e] appropriate and timely responses to transgressions," and help to connect with "human interests" within the case.[75] Furthermore, we recognize that the humanity offered by a judge is more valuable than the unwavering consistency offered by a computer algorithm or a system of mandatory sentencing.[76]

In light of this recognition, the trend has been toward a strategy of emotion regulation. In her senate confirmation hearing, Justice Sonia Sotomayor stated, "[w]e're not robots [who] listen to evidence and don't have feelings. We have to recognize those feelings and put them aside."[77] This statement describes the strategy of emotion regulation. It recognizes that a "good judge" will identify emotions and employ strategies to manage those emotions.[78] The reality of emotion regulation in judges is more complex than that.

When a judge (or any person) is presented with information, his or her brain goes through a series of steps to process the information. This includes making links to relevant factual knowledge and to physiological states, such as emotional responses.[79] In essence, the newly acquired information activates feelings based on previously stored information in the brain, and the brain judges this new information via the previously stored information. This can happen on a conscious or unconscious level.[80] The dual process theory of cognition states that human judgment operates on two cognitive systems working at the same time. The first is an intuitive system, which includes emotions, and the second is a reflective system that is considered to be more rational.[81] As a result, emotion can impact judgment in a variety of ways,

74. *Id.* at 143 ("[J]udges sometimes assert that emotions play an important role in their work . . . ." (citing Posner, *supra* note 72).

75. *Id.* (citations omitted) (first citing Dacher Keltner et al., *Emotions as Moral Intuitions*, *in* AFFECT IN SOCIAL THINKING AND BEHAVIOR 161 (Joseph P. Forgas ed., 2006); Liane Young, *Damage to Ventromedial Prefrontal Cortex Impairs Judgment of Harmful Intent*, 65 NEURON 845 (2010); then citing Terry A. Maroney, *Angry Judges*, 65 VAND. L. REV. 1207 (2012); and then citing William J. Brennan, Jr., *Reason, Passion, and "The Progress of the Law"*, 10 CARDOZO L. REV. 3 (1988)); *see also* Rebecca K. Lee, *Judging Judges: Empathy as the Litmus Test for Impartiality*, 82 U. CIN. L. REV. 145, 147–48 (2014).

76. Hayley Bennett & GA (Tony) Broe, *Judicial Neurobiology, Markarian Synthesis and Emotion: How Can the Human Brain Make Sentencing Decisions*, 31 CRIM. L.J. 75, 87 (2007).

77. *On the Nomination of Hon. Sonia Sotomayor to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 71 (2009) (statement of The Honorable Sonia Sotomayor, Circuit Judge).

78. Terry A. Maroney, *Emotional Regulation and Judicial Behavior*, 99 CAL. L. REV. 1485, 1489–90 (2011)

79. Bennett & Broe, *supra* note 76, at 85.

80. *Id.*

81. Neal Feigenson, *Emotional Influences on Judgments of Legal Blame: How They Happen, Whether They Should, and What to Do About It*, *in* EMOTION AND THE LAW: PSYCHOLOGICAL PERSPECTIVES 45, 46–47 (Brian H. Bornstein & Richard L. Wiener eds., 2010).

including information processing—or via the schema used to process the information.[82]

In order to regulate emotion and control for bias, judges must be aware that the emotion exists—or that it is likely to exist. Judges may regulate emotion by attempting to separate the emotion they feel from their response to the issue.[83] Or, judges can attempt to change the way they assess the stimulus of the emotional response.[84] In any case, judges are only able to manage known emotional responses.[85] Even when judges attempt to manage emotions that they are aware of, science suggests that judges are unable to effectively regulate these emotions or control for emotional bias.[86] Furthermore, even when judges are successful at managing those emotions, that effort hinders their ability to engage in the process of making a decision by using up cognitive resources.[87] What happens then, when the emotional response is triggered on an implicit level—such as the case with metaphors?

As cognitive scientists have demonstrated in numerous studies, metaphors create implicit reactions that are deeply ingrained in our cultural psyches.[88] This ability of metaphors to manipulate understanding on an unconscious level is what leads us to the muddy waters of our hypothesis. The use of the muddy waters metaphor by courts demonstrates the power of a metaphor to attach meaning to a legal standard and alter the application of that standard in a way that is counter to legislative intent. When the metaphor is used, the court is persuaded to deny DNA testing—even after the legislature amends the statute to make it clear that the statute's design is to allow for greater access to DNA testing. We hypothesize that the implicit power of the metaphor plays an even greater impact in how judges make decisions than previously recognized. It not only shapes our understanding of the law, but it can change the application of the law—it shifts burdens.

II. A METAPHOR TAKES ROOT AND BLOSSOMS

As with any body of water, we can trace this metaphor back to its source. The unstoppable flow of this metaphor begins with a statute. Recognizing a potential problem with wrongful convictions, the Texas legislature enacted a

82. *Id.*

83. Maroney & Gross, *supra* note 73, at 144–45.

84. *Id.* at 146.

85. *See* Maroney, *supra* note 78, at 1490–91, 1555.

86. Jeremy A. Blumenthal, *A Moody View of the Law: Looking Back and Looking Ahead at Law and the Emotions*, *in* EMOTION AND THE LAW: PSYCHOLOGICAL PERSPECTIVES 185, 185–86 (Brian H. Bornstein & Richard L. Wiener eds., 2010). Even aware and motivated judges tend to overcorrect for bias. *Id.*

87. *Id.*

88. *See supra* Part I.B.

law to give convicted persons better access to post-conviction DNA testing.[89] From there, the metaphor's story flows to a courtroom, where a Texas court sought to apply the language of the statute and invoked the metaphor. Once invoked, the metaphor spilled over; in case after case, it thwarted convicted persons from getting access to DNA testing. Despite a legislative attempt to stem the tide, the metaphor caused the application of the standard to meander back to its muddy waters, which resulted in a burden that does not match the statutory language or its legislative intent.

A. The Texas Legislature Plants a Seed

By 2001, post-conviction DNA testing had exonerated ninety wrongly convicted men.[90] Forty-eight of them had been facing death sentences.[91] Amid growing concerns about wrongful convictions, six states and the District of Columbia enacted statutes giving inmates a right to post-conviction DNA testing.[92] Although Texas had not yet seen a flood of DNA exonerations, like many other states, Texas became aware that it had, in fact, imprisoned innocent people.[93]

The notion that innocent people might be serving long prison sentences, or might even be under a sentence of death, compelled lawmakers to address inmates' lack of access to DNA testing. And, when the Texas legislature opened its regular session in January 2001, Senator Robert Duncan, a Republican from Lubbock, introduced Senate Bill 3, commonly known as SB 3.[94] The bill would allow access to and testing of DNA evidence that reasonably

89. S. 3, 77th Leg., Reg. Sess. (Tex. 2001) (enacted).

90. GROSS & SHAFFER, *supra* note 8, at 21 n.35.

91. *Exoneration Detail List*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View={faf6eddb-5a68-4f8f-8a52-2c61f5bf9ea7}&SortField=Exonerated&SortDir=Asc&FilterField1=Sentence&FilterValue1=Death (last visited Apr. 2, 2017).

92. Garrett, *supra* note 4, at 1679–80.

93. *See, e.g.*, *Gilbert Alejandro*, INNOCENCE PROJECT, http://www.innocenceproject.org/cases/gilbert-alejandro/ (last visited Apr. 2, 2017) (noting that Alejandro's 1990 conviction for aggravated sexual assault was overturned after DNA evidence was retested and proved his innocence); *Kevin Byrd*, INNOCENCE PROJECT, http://www.innocenceproject.org/cases/552/ (last visited Apr. 2, 2017) (explaining how Byrd's 1985 conviction for rape was overturned in 1997 after DNA testing was permitted in courts and proved his innocence); *Roy Criner*, INNOCENCE PROJECT, http://www.innocenceproject.org/cases/roy-criner/ (last visited Apr. 2, 2017) (describing that Criner's 1990 conviction for aggravated sexual assault and murder was overturned in 2000 after DNA testing excluded Criner as a possible suspect).

94. S. 3, 77th Leg. Reg. Sess. (Tex. 2001) (enacted); *see also Senate Votes to Approve DNA Testing Bill*, TEX. SENATE NEWS (Feb. 19, 2001), http://www.senate.state.tx.us/75r/Senate/Archives/Arch01/p021901a.htm.

could support a convicted person's claim of innocence.[95] Shortly after pardoning a man who served a fifteen-year prison sentence before DNA exonerated him,[96] the newly appointed governor, Rick Perry, declared SB 3's passage an emergency and fast-tracked the bill.[97]

At the time, Texas did not provide specific and effective procedures for testing DNA in a way that ensured justice.[98] Therefore, supporters of SB 3 argued that a post-conviction DNA testing statute was necessary "to establish a uniform, fair process for inmates to request . . . testing so that [the parties] know how to proceed if they want to have a test conducted."[99]

Ultimately, SB 3's language reflected legislative intent to give more inmates access to post-conviction DNA testing. However, it placed a legal burden on the convicted person to show more than a *desire* to conduct DNA testing on evidence from their cases.[100] The burden addressed prosecutors' concerns that setting the threshold for testing too low would open the floodgates to frivolous claims.[101] Therefore, SB 3 allowed applicants access to test biological evidence only when there was "a reasonable probability that he or she would not have been prosecuted or convicted if DNA testing had provided exculpatory results."[102]

Senate Bill 3 quickly gained momentum. After Governor Rick Perry fast-tracked the bill, the Senate waived the typical requirement that a bill be

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95. HOUSE RESEARCH ORG., SB 3 BILL ANALYSIS, H.R. 77, Reg. Sess. 1–2 (Tex. 2001) [hereinafter SB 3 BILL ANALYSIS]. The report stated a purpose of Senate Bill 3 was to:

> authorize a convicted person to ask a court for a DNA test; require the court to order a test if certain conditions were met; require courts to appoint and compensate attorneys for indigent defendants who want to pursue DNA testing; allow appeals of court decisions relating to DNA tests; establish rules for preserving biological evidence; and require the Texas Department of Criminal Justice (TDCJ) to notify people in its custody of the new testing provisions.

Id.

96. *Freed in Dallas*, INNOCENCE PROJECT (May 27, 2009), http://www.innocenceproject.org/freed-in-dallas/.

97. *Perry Declares DNA Bill on Capitol Fast Track*, CHRON (Feb. 9, 2001, 6:30 AM), http://www.chron.com/news/houston-texas/article/State-briefs-2002676.php.

98. SB 3 BILL ANALYSIS, *supra* note 95, at 5 ("The avenues available under current law—*habeas corpus* petitions, requests for new trials, and the clemency process—are inadequate because they do not provide a specific procedure that is impartial and that ensures justice in cases in which DNA evidence could exonerate people convicted of crimes.")

99. *Id.* at 5.

100. *Id.* at 9.

101. John Council, *Convicts and the Code: Genetics Meets Criminal Law in Confounding New DNA Statute*, LAW.COM (Nov. 13, 2001), http://www.truthinjustice.org/texas-dna.htm.

102. SB 3 BILL ANALYSIS, *supra* note 95, at 2–3; S. 3, 77th Leg., Reg. Sess. (Tex. 2001). The person seeking the test must show (1) that the convict's identity was an issue; (2) that the DNA evidence remains preserved in testable condition; (3) the request for testing was not simply to delay the execution of sentence; and (4) a reasonable probability the inmate "would not have been" convicted if the DNA test "provided exculpatory results." *Id.*

read in three consecutive sessions[103] and passed SB 3 unanimously.[104] In the House, the Criminal Jurisprudence Committee scheduled the bill for hearing. Seven witnesses, including two prosecutors, spoke in favor of the bill.[105] None spoke against it.[106] In its report on the committee hearing, the House Research Organization ("HRO") summed up the testimony, articulating the reason for the new law and its relatively applicant-friendly burden for testing.[107] The HRO's report assured House members that "[w]rongfully convicted defendants would have no problem meeting this standard."[108] The House passed the bill, the Governor immediately signed it into law,[109] and SB 3 was codified as Article 64 of the Texas Code of Criminal Procedure.[110]

B. The Statutory Language: A Familiar Friend

Like other states' DNA testing statutes, SB 3 placed the burden on the applicant to demonstrate that the DNA evidence to be tested was material to the conviction.[111] To meet this burden, the convicted person must show by a preponderance of the evidence that a "reasonable probability exists that the person would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing."[112]

The Texas legislature chose familiar language to articulate the applicant's burden. The language tracks the burden placed on convicted persons to demonstrate materiality in other post-conviction contexts.[113] For example, when a defendant raises a constitutional claim because the government failed

103. *See How a Bill Becomes a Law*, TEX. HOUSE OF REPRESENTATIVES, http://www.house.state.tx.us/about-us/bill/ (last visited Apr. 2, 2016) (stating that "the Texas Constitution requires a bill to be read on three separate days in each house before it can have the force of law").

104. *SB 3 History*, TEX. LEGISLATURE, http://www.legis.state.tx.us/billlookup/History.aspx?LegSess=77R&Bill=SB%203 (last visited Apr. 2, 2017).

105. SB 3 BILL ANALYSIS, *supra* note 95, at 1.

106. *Id.*

107. *See id*. at 5–8.

108. *Id.* at 6.

109. *SB 3 History*, *supra* note 104.

110. TEX. CODE CRIM. PROC. ANN. art. 64 (West Supp. 2016).

111. Garrett, *supra* note 4, at 1676.

112. S. 3 at 4, 77th Leg., R.S. (Tex. 2001).

113. *See* Kathy Swedlow, *Don't Believe Everything You Read: A Review of Modern "Post-Conviction" DNA Testing Statutes*, 38 CAL. W. L. REV. 355, 369–70 (2002). Professor Swedlow noted:

> Regardless of which materiality standard is used, it is notable that many of these statutes describe the materiality showing in terms of a 'reasonable probability.' This is identical to the prejudice standard set forth in *Strickland v. Washington*: a reasonable probability that confidence in the outcome of the trial has been undermined.

Id. (footnotes omitted) (citing Strickland v. Washington, 466 U.S. 668, 691–92 (1984)).

to disclose exculpatory evidence prior to trial, the defendant must demonstrate "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[114] Likewise, when defendants claim that trial counsel was ineffective, they must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[115]

The reasonable probability standard has a well-established meaning, honed through years of litigation. A "reasonable probability," according to the United States Supreme Court, "is a probability sufficient to undermine confidence in the outcome."[116] The question, as articulated in *Kyles v. Whitley*,[117] is not whether the defendant would more likely than not have been acquitted; the question is whether, without the exculpatory evidence, the defendant received a fair trial—one resulting in a verdict worthy of confidence.[118] As *Kyles v. Whitley* made clear, a *reasonable* probability of a different result is not the same as the probability of a different result.[119] The adjective matters.[120] According to the Supreme Court, the burden of demonstrating materiality does not require the defendant to show that, more likely than not, he would not have been convicted.[121] The burden is to show a *reasonable* likelihood, which amounts to something less than a preponderance.[122]

DNA evidence, like exculpatory *Brady* evidence, rarely clarifies evidence presented at trial.[123] New exculpatory evidence, even strong exculpatory evidence, may not prove innocence and, therefore, may not definitively

114. United States v. Bagley, 473 U.S. 667, 682 (1985).

115. *Strickland*, 466 U.S. at 694; *see also* 113, *supra* note 114, at 369–70 ("Regardless of which materiality standard is used, it is notable that many of these statutes describe the materiality showing in terms of a 'reasonable probability.' This is identical to the prejudice standard set forth in *Strickland v. Washington*: a reasonable probability that confidence in the outcome of the trial has been undermined.").

116. *Bagley*, 473 U.S. at 682. Texas later adopted the standard in *Ex parte* Reed, 271 S.W.3d 698, 727 (Tex. Crim. App. 2008).

117. 514 U.S. 419 (1995).

118. *Id.* at 434.

119. *Id.*

120. *Id.*; *see also* Strickler v. Greene, 527 U.S. 263, 298 (1999) (Souter, J., concurring in part and dissenting in part) ("Despite our repeated explanation of the shorthand formulation ['reasonable probability'], the continued use of the term 'probability' raises an unjustifiable risk of misleading courts into treating it as akin to the more demanding standard, 'more likely than not.'").

121. *Kyles*, 514 U.S. at 434.

122. *Id.*

123. One commentator squarely places the role of DNA evidence in the full context of a trial:

> DNA alone does not prove guilt or innocence, as DNA is only one piece of the evidence used in a criminal trial against the defendant. DNA evidence alone tells us nothing without a backdrop of specific factual circumstances in an individual case. Obviously one's own DNA that comes from one's own clothing or bed sheets would not be determinative of establishing guilt without more facts. However, identifying one's DNA in an orifice

predict an acquittal. Instead, new exculpatory evidence must be considered alongside the evidence that was presented at trial, evidence that was strong enough to convince a jury, beyond a reasonable doubt, that the defendant was guilty.[124] Often, new exculpatory evidence only adds more doubt, for instance, by merely impeaching the credibility of a state's witness.[125] Therefore, if a defendant's post-conviction evidence sufficiently muddies the waters of the state's case, it may arguably create a reasonable probability of a different result because it undermines confidence in the outcome. Therefore, in many cases, DNA evidence that sufficiently muddies the waters of the State's case would also meet SB 3's reasonable probability of a different outcome burden.

The reasonable probability language the Texas legislature chose to use in the new DNA-testing statute came with an established history, meaning, and corresponding body of doctrine that courts have relied on for decades in criminal post-conviction litigation.[126] However, inexplicably, Texas courts opted for a different standard and a metaphor ill-suited to carry out the legislature's intent.

C. The Court of Criminal Appeals Reaches for a Metaphor

Armed with a new tool to challenge his conviction and death sentence, Richard William Kutzner moved for post-conviction DNA testing under Article 64.03 of the Texas Code of Criminal Procedure.[127] He filed his motion for testing just a few months after the new law took effect, only nine days before his scheduled execution.[128]

A jury had convicted Kutzner of capital murder in 1997.[129] The prosecution presented strong circumstantial evidence tying Kutzner to the crime.

> of a neighbor's child would be determinative of establishing guilt. Judges must determine what the relevance of the DNA test is, as weighed against the other evidence in the case. The standard used in evaluating the results makes the circumstances surrounding the case critical.

Anna Franceschelli, *Motions for Postconviction DNA Testing: Determining the Standard of Proof Necessary in Granting Requests*, 31 CAP. U. L. REV. 243, 245 (2003).

124. *See, e.g.*, Bowen v. Maynard, 799 F.2d 593, 613 (10th Cir. 1986) (finding exculpatory evidence withheld by the prosecution undermined confidence in the outcome because the "withheld evidence raised serious questions about the manner, quality, and thoroughness of the investigation").

125. *See* United States v. Bagley, 473 U.S. 667, 676 (1985) (reiterating that no difference exists between impeachment evidence and exculpatory evidence).

126. *See* TEX. CODE CRIM. PROC. ANN. art. 64.03 (West Supp. 2016); *see also* Swedlow, *supra* note 114, at 369–70.

127. Kutzner v. State, 75 S.W.3d 427, 429 (Tex. Crim. App. 2002).

128. *Id.*

129. *Id.* at 435–36.

Jurors heard that the victim had been murdered at her real estate office.[130] Her killer had used unique red electrical wire and zip ties to bind her neck and ankles.[131] Police believed the killer also removed a video recorder and computer keyboard from her office.[132] Police found a note handwritten by the victim in which she mentioned Kutzner, his wife, his phone number and a reference to two big dogs (and Kutzner had two big dogs).[133] The state's investigators found the same type of wire and zip ties used to bind the victim at Kutzner's home and in his truck.[134] A tool mark expert testified that the tie wraps were snipped with a tool found in Kutzner's truck.[135] Jurors also heard that investigators found the video recorder and the keyboard in the possession of people who claimed to have received them from Kutzner.[136] Finally, at the punishment phase, jurors learned that Kutzner committed a strikingly similar murder just a few weeks prior.[137]

Kutzner had exhausted all of his state and federal post-conviction remedies by the time the DNA testing statute went into effect.[138] Without any further court intervention, the state would execute Kutzner on July 25, 2001.[139] Kutzner filed a motion in the trial court on July 16, 2001.[140] He sought DNA testing on three items: scrapings from underneath the victim's fingernails, a hair found on the tie wrap on the victim's neck, and a hair found on a piece of cellophane on the victim's body.[141]

The trial court denied his request, and Kutzner appealed to the Texas Court of Criminal Appeals.[142] Kutzner's case became the first under the new DNA testing statute to reach that court. After agreeing that Kutzner met the jurisdictional requirements of the statute, the court turned its attention to the reasonable probability standard set forth in Article 64.03.[143] First, the court disagreed over whether the legislature's language—"a reasonable probability exists that the person would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing"—was ambiguous.[144] A five-member majority found the that the language was ambiguous, noting:

130. *Id.* at 436.
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.* at 429.
139. *Id.*
140. *Id.*
141. *Id.* at 436.
142. *Id.* at 429.
143. *Id.* at 432.
144. *Id.* at 437 (quoting TEX. CODE CRIM. PROC. ANN. art. 64.03(a)(2)(A) (West Supp. 2016)).

> [The law] could be interpreted to require a convicted person to show a reasonable probability exists that favorable DNA results would prove his innocence. It could also be interpreted to require a convicted person only to show a reasonable probability exists that favorable DNA results would result in a different outcome unrelated to the convicted person's guilt/innocence.[145]

The majority relied on statements such as one from SB 3's sponsor, Senator Duncan, who explained that the statute was "meant to exonerate people of crimes that DNA testing 'conclusively' establishes they did not commit."[146] Based on the legislative history that tied the statute to the concern that innocent people may have been wrongly convicted, the court chose to interpret the standard to require "a reasonable probability exists that exculpatory DNA tests will prove a convicted person's innocence."[147] The court went further in explaining the standard, adding that Kutzner had not met his burden under the statute because, "[a]t most, exculpatory DNA test on this evidence would 'merely muddy the waters.'"[148] The Court grabbed the muddy waters metaphor, not from anything said by the bill's sponsor or advocates. Nor did it find the metaphor in the actual legislative history. Instead, the metaphor came from a summary written by the House Research Organization, an independent department of the House of Representatives.[149] The report's metaphorical description of the statutory burden became more powerful than any of the explicit statements of legislative intent found in the legislative history.

Three members of the court disagreed with the majority, finding no ambiguity in the reasonable probability standard. Judge Keasler wrote, "[t]hat phrase, to me, unambiguously requires the convicted person to show that he would not have been prosecuted or convicted. Nothing in the plain language of the statute refers to actual innocence."[150] Judge Keasler saw the majority's reach into the legislative history as inappropriate because, from his perspective, the appellate court's role is to apply the plain language of the statute where the language is clear.[151]

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145. *Id.* (footnotes omitted) (first citing *Ex parte* Elizondo, 947 S.W.2d 202, 207 (Tex. Cr. App. 1996); and then citing Williams v. Taylor, 529 U.S. 362 (2000) (O'Connor, J., concurring in part and in the judgment); Lockhart v. Fretwell, 506 U.S. 364 (1993) (O'Connor, J., concurring)).

146. *Id.* at 438 n.23 (citing S. Deb. on S. 3, 77th Leg., Reg. Sess. at 0:19:00 Tex. Senate Video & Audio Archives Feb. 19, 2001 (statement of Sen. Duncan)).

147. *Id.* at 439.

148. *Id.* (quoting SB 3 BILL ANALYSIS, *supra* note 95, at 6).

149. *About the HRO*, HOUSE RESEARCH ORG., http://www.hro.house.state.tx.us/About.aspx#about (last visited Apr. 2, 2017).

150. *Kutzner*, 75 S.W.3d at 443 (Keasler, J., concurring).

151. *Id.*

The concurrence did not challenge the majority's use of the muddy waters metaphor as inappropriate. In fact, it did not even mention the metaphor. The three members of the court certainly could have argued that the metaphor was inapplicable and misleading because, as the standard has been understood in other post-conviction contexts, favorable DNA results that would sufficiently muddy the waters of the state's case would also undermine confidence in the outcome, which arguably warrants an order granting the DNA testing.

Without any argument regarding the appropriateness of the metaphor, the Court of Criminal Appeals latched onto the "muddy waters" language to articulate a test that proved nearly impossible for a convicted person to meet. This metaphor would blossom and grow as other inmates' requests for DNA testing reached the courts.[152]

Even with strong disagreement about the appropriate burden, all members of the Court agreed with the result—that Kutzner's appeal should be denied.[153] Even under a *Brady* standard, Kutzner could not have demonstrated a reasonable probability of a different result because favorable DNA would do very little to shift the way the jury would have seen the prosecution's case. In fact, it would have done very little to muddy the waters of the prosecution's case against him.

D. Subsequent Courts Grab the Metaphor and Run with It

We started with a hypothesis that metaphors have a powerful and stealth effect on the application of legal standards. We were, therefore, curious about how this metaphor—so closely tied to a legal burden—was used after its inception. Certainly, subsequent courts' use of the metaphor should provide evidence of the metaphor's effects. Therefore, we collected the cases that used the muddy waters metaphor after the statute was enacted.[154] We focused first on the forty-six cases in which courts used the muddy waters metaphor when applying the initial version of Article 64.03 enacted in 2001. What we found was surprising. In all forty-six cases, courts denied inmates' motions for access to DNA testing. In other words, no court found that the DNA evidence would do more than muddy the waters.

152. *See infra* Parts II.D–F.

153. *Kutzner*, 75 S.W.3d at 443.

154. We gathered the data by using Westlaw to search all cases from April 5, 2001, to February 11, 2017, that used the terms "64.03 & DNA & testing & muddy & waters." We culled the list to only the cases in which the court applied the 2001 version of Article 64.03. We found forty-six cases that met our inclusion criteria. Of the forty-six cases in which courts used the muddy waters metaphor when interpreting Article 64.03, all forty-six resulted in denial of the inmates' motions. In other words, no court found that the DNA evidence would do more than "muddy the waters." *See* App'x.

Next, we looked at the way the courts used the metaphor when denying inmates' requests. We found that when using the metaphor, many courts gave it heightened significance by repeating it. In fact, the muddy waters metaphor appeared eighty-two times in those forty-six cases.[155] Most often, courts used the metaphor like a one-two punch, mentioning the metaphor as part of the legal burden and later applying the metaphor in denying relief. For example, in *Pendergrass v. State*,[156] the Court of Appeals laid out the statutory burden:

> Chapter 64 "does not . . . require convicted persons to prove their innocence before a convicting court may order DNA testing under Article 64.03. It merely requires convicted persons to show a reasonable probability exists that exculpatory DNA tests would prove their innocence." A movant does not satisfy this requirement however if exculpatory test results "would merely muddy the waters."[157]

Then, applying the burden to the facts in *Pendergrass*, the court of appeals concluded, "In view of the evidence tending to establish Pendergrass's guilt, no 'reasonable probability exists that exculpatory DNA tests would prove [his] innocence.' Rather, exculpatory results 'would merely muddy the waters.' Accordingly, we conclude that Pendergrass's sole issue is without merit."[158] The court's interpretation of the statutory burden and the metaphor worked hand-in-hand to deny relief.

Likewise, other courts used the muddy waters metaphor in their conclusions, applying the metaphor to the facts to deny relief in twenty-one of the forty-six cases.[159] For example, in *Carrillo v. State*,[160] the court concluded that "[a]n exculpatory DNA test could, at most, show that the spermatozoa on the sock and blanket recovered from appellant's residence contained DNA from someone other than appellant. Such a result would not exonerate appellant, but at most would only 'muddy the waters.'"[161] Like in *Pendergrass* and *Carrillo*, the metaphor became the simplest way to apply the burden to the facts presented, and the ease with which the metaphor could be used to dispense with the inmate's request became evident in the cases that used the metaphor.

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155. App'x at Case Nos. 1–44, 46–47.

156. No. 10-02-041-CR, 2003 WL 22359222 (Tex. App. Oct. 15, 2003); *see also* App'x at Case No. 16.

157. *Id.* at *1 (omission in original) (citation omitted) (quoting *Kutzne*r, 75 S.W.3d at 438–39).

158. *Id*. at *2 (alteration in original) (citation omitted) (quoting *Kutzne*r, 75 S.W.3d at 439).

159. *See* App'x at Case Nos. 1–44, 46–47.

160. Carrillo v. State, No. 05-02-01612-CR, 2003 WL 22928895, at *1 (Tex. App. Dec. 12, 2003); *see also* App'x at Case No. 18.

161. *Id*. at *1.

However, the most telling evidence that the metaphor has supplanted the legal burden articulated in *Kutzner*, is the fact that courts began to express the metaphor as if it was the actual legal test. In fact, the courts' articulation of the metaphor as the test was so clear in some cases that West editors began expressing the muddy waters metaphor *as* the legal test in the headnotes of those cases.[162] The muddy waters metaphor had become, in essence, the burden Texas inmates must satisfy to test DNA evidence from their cases, and that burden seems completely at odds with the reasonable probability standard and the legislature's intent.

E. The Legislature Wrestles with the Courts

The Texas DNA-testing statute was hailed as a legislative fix to a serious criminal justice problem by creating "minimal" criteria "so as not to bar inmates unfairly from receiving tests."[163] In practice, however, the statute fell short of the legislative goals. As requests for DNA testing made their way through the appellate courts in Texas, it became clear that the DNA testing statute was not working as envisioned. As *Prison Legal News* reported, "In 2001, the Texas Legislature passed one of the most progressive DNA testing laws in the country. The courts eviscerated it."[164]

The Texas legislature meets only once every two years, and the next legislative session was scheduled to start in January 2003. By that time, the Texas Court of Criminal Appeals had applied the 2001 statute in just three cases, denying relief each time.[165] Not satisfied with the Court of Criminal Appeals' application of the statute, lawmakers acted quickly to correct the Court's misinterpretation of the legislative intent.[166] This time, Representatives Hochberg and Pena introduced the legislative changes to the DNA-testing statute in the House of Representatives in a bill known as HB 1011.[167]

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162. *See* App'x at Case Nos. 3, 9, 13, 18, 26, 29, 31, 36; *see, e.g.*, Watkins v. State, 155 S.W.3d 631, 632 (Tex. App. 2005) (stating in headnote two that "[t]he statutory requirement that DNA testing results be exculpatory is not met, in order to be entitled to post-conviction DNA testing, if the DNA evidence would merely muddy the waters").

163. SB 3 BILL ANALYSIS, *supra* note 95, at 6.

164. Matthew T. Clarke, *Texas Court of Criminal Appeals Reinvigorates DNA Testing Law*, PRISON LEGAL NEWS (Aug. 15, 2006), https://www.prisonlegalnews.org/news/2006/aug/15/texas-court-of-criminal-appeals-reinvigorates-dna-testing-law/; *see also* Matthew D. Sharp, *The Need for an Innocence Network in Texas*, 7 SCHOLAR 257, 269 (2005) ("Despite its seemingly broad application, the Texas Court of Criminal Appeals has, on several occasions, interpreted it rather narrowly.").

165. *See* App'x at Case Nos. 1–3.

166. HOUSE RESEARCH ORG., H.R. 1011 BILL ANALYSIS, H.R. 78, REG. SESS. 2 (2003) [hereinafter HB 1011 BILL ANALYSIS], http://www.hro.house.state.tx.us/pdf/ba78R/HB1011.pdf .

167. *Id.*

As the House Research Organization's legislative history report shows, supporters of HB 1011 believed that the legislature, displeased with the *Kutzner* decision, targeted the burden inmates must show to receive testing[168]:

> HB 1011 would clarify the Legislature's intent with regard to the convicted person's burden of proof and would undo the Court of Criminal Appeals' imposition of a higher burden in the *Kutzner* case. The Legislature did not intend to require the convicted person to prove actual innocence, a principle under habeas corpus law, to meet the burden to have a DNA test done. HB 1011 would reinforce the intent of the 77th Legislature by specifying that the convicted person only need prove by a preponderance of the evidence that the person would not have been convicted if exculpatory results had been obtained. Furthermore, the bill would articulate the standard in a simpler, more concise manner than current law.[169]

The legislative fix was simple and clear. The bill dispensed with the reasonable probability language. Instead, it required a convicted person to establish by a preponderance of the evidence that "the person would not have been convicted if exculpatory results had been obtained through DNA testing."[170] Although the new burden articulated in the statute is a seemingly higher burden than SB 3 originally provided, the legislature was clear—the Court of Criminal Appeals had erected too high a standard for Texas inmates seeking access to DNA testing, and the amendments to the statute were intended to rectify that. The amendments to Article 64.03 sailed through the legislature. In the House, seven people spoke in favor and none spoke against.[171] The amendments eventually landed on the Governor's desk, and without a single vote in opposition, Governor Perry signed the bill. It took effect in September 2003.[172] Not surprisingly, the muddy waters metaphor was not mentioned in legislative history. The muddy waters metaphor and the possibility that courts would continue to invoke it when applying the amended statute were arguably invisible.

F. A Metaphor Stubbornly Resists

After the Texas Legislature amended Article 64.03, creating a more favorable burden for those seeking DNA testing, Darlie Lynn Routier's case made its way to the Court of Criminal Appeals.[173] A Texas jury convicted

168. *Id.* at 3.

169. *Id.*

170. H.R. 1011, 78th Leg., Reg. Sess. (Tex. 2003).

171. HB 1011 BILL ANALYSIS, *supra* note 166, at 1.

172. *History, H.B. 1011*, TEX. LEGISLATURE, http://www.legis.state.tx.us/BillLookup/history.aspx?LegSess=78R&Bill=SB1101 (last visited Apr. 2, 2017).

173. Routier v. State, 273 S.W.3d 241, 244–45, 257 (Tex. Crim. App. 2008).

Routier and sentenced her to death for the murder of her two young sons.[174] The boys had been stabbed to death.[175] Routier claimed an unknown intruder attacked her sons and then attacked her, and she had sustained serious knife wounds.[176] However, the State claimed that she killed her sons and staged an intrusion.[177] Her motive, the State argued, was to collect insurance money.[178] After her conviction became final, Routier sought DNA testing under Article 64.03.[179]

In analyzing Routier's claim, the Texas Court of Criminal Appeals heeded the legislature's message and used the legislature's more lenient burden under the new statutory scheme. The court found that DNA evidence left on items at the scene by an intruder unknown to Routier would "more likely than not have caused the jury to harbor a reasonable doubt as to the [her] guilt and decline to convict her."[180] By unhitching the muddy waters metaphor, Routier won the ability to test the DNA from the crime scene before her execution.[181]

With a new pronouncement from the Court of Criminal Appeals, Texas seemed perfectly positioned to open the floodgates to post-conviction DNA testing. Surprisingly, though, courts continued to deny DNA testing at about the same rate as they had before the legislative fix to Article 64.03.[182]

Because the muddy waters metaphor had become the rule of thumb for DNA-testing cases—the way of expressing and applying the previous legal standard—courts should have cast off the muddy waters metaphor along with the troublesome language of the original *Kutzner* opinion. The muddy waters metaphor, after all, went hand-in-hand with the old, court-created burden requiring an inmate to show that "exculpatory DNA would prove [his] innocence."[183] Instead, the muddy waters metaphor stubbornly persisted, finding its way into forty-five decisions applying the statute even after the 2003 legislative fix.[184]

This use of metaphor to express a legal burden and its subsequent use in analysis of the legal burden is not surprising. As discussed, using metaphor in this fashion is nothing new in legal analysis. Furthermore, the use of the metaphor resulting in an improper—or at least unintended—burden is also

174. *Id.* at 244–45.
175. *Id.* at 244.
176. *Id.* at 244–45.
177. *Id.*
178. *Id.* at 258.
179. *Id.* at 246.
180. *Id.* at 259.
181. *Id.*
182. *See* App'x at Case Nos. 45, 48–91.
183. Kutzner v. State, 75 S.W.3d 427, 439 (Tex. Crim. App. 2002).
184. *See* App'x at Case Nos. 45, 48–91.

not surprising. Again, we have discussed this as a criticism of metaphor in legal analysis. The surprise was that the power of the metaphor continued to persist even though the legislature explicitly amended the statute to correct for this misapplied burden. The metaphor would not release its grip on the application of this burden.

The muddy waters metaphor made appearances in forty-six cases applying the amended version of Article 64.03.[185] Some courts simply ignored the legislature's amendments, incorrectly citing the statutory burden as first interpreted in *Kutzner* and using the muddy waters metaphor.[186] Other courts, however, recognized the new statutory language, but retained the muddy waters metaphor when applying the new statute to the facts of the case.[187] The metaphor was often used, as it had been in the past, as the legal standard. For example, the court in *Lawrence v. State*[188] simply concluded that the inmate could not test the DNA evidence because "DNA evidence that would merely 'muddy the waters' is not required to be tested by Chapter 64."[189] Likewise, the court wrote in *Qadir v. State*[190]: "It is not sufficient for a movant under chapter 64 to establish that a new DNA test result would merely 'muddy the waters' on the validity of a conviction."[191] In addition, courts continued to use the metaphor as a powerful closing. For example, the court in *Bridges v. State*[192] ended its opinion with: "In summary, this is a situation in which granting DNA testing would, at most, 'muddy the waters.' That is insufficient to mandate testing."[193]

Perhaps some courts of appeals used the metaphor at the State's urging. The State continued to equate the muddy waters metaphor to the legal test even after the statutory changes took effect.[194] Some courts of appeals ex-

185. *See* App'x at Case Nos. 45, 48–92. Only one court granted testing. *See* App'x at Case No. 81.

186. *See* App'x at Case Nos. 45, 48, 62, 65, 72–73.

187. *See, e.g.*, Fontenot v. State, No. 14-09-00014-CR, 2010 WL 1704744, at *3 (Tex. App. Apr. 29, 2010) (noting the appropriate statutory burden but then stating that the "standard is not met where exculpatory results would 'merely muddy the waters'" (citing Rivera v. State, 89 S.W.3d 55, 59 (Tex. Crim. App. 2002)); *see also* App'x at Case Nos. 49–61, 63–64, 66–71, 74–75, 77–91.

188. No. 06-13-00144-CR, 2013 WL 5948112 (Tex. App. Nov. 5, 2013).

189. *Id.* at *6 (quoting *Ex Parte* Gutierrez, 337 S.W.3d 883, 901–02 (Tex. Ct. Crim. App. 2011)).

190. No. 02-13-00308-CR, 2014 WL 3377794 (Tex. App. Apr. 10, 2014).

191. *Id.* at *9–10 (citing Hill v. State, No. 02-11-00398-CR, 2012 WL 4010460, at *12 (Tex. App. Sept. 13, 2012)).

192. No. 06-12-00109-CR, 2014 WL 1410323 (Tex. App. Apr. 11, 2014).

193. *Id.* at *4 (citing *Ex Parte* Gutierrez, 337 S.W.3d at 901).

194. *See, e.g.*, Sims v. State, No. 03-14-00201-CR, 2014 WL 7475235, at *4 (Tex. App. Dec. 17, 2014); Baylor v. State, No. 02-10-00561-CR, 2011 WL 4008026, at *2 (Tex. App. Sept. 8, 2011).

plicitly recognized the change in the statute and the legal burden, but continued to use the old metaphor, as if it had no connection to the interpretation of the statute that the legislature explicitly acted to correct.[195]

Most notably, in 2011, eight years after the legislature amended Article 64.03, the Court of Criminal Appeals reached again for the muddy waters metaphor. In a capital case, *Ex parte Gutierrez*,[196] the court denied DNA testing to a defendant convicted as a party to a crime.[197] The court carefully noted that "the task of fashioning rules to 'harness DNA's power to prove innocence without unnecessarily overthrowing the established system of criminal justice' belongs 'primarily to the legislature.'"[198] Nevertheless, the court breathed new life into the old muddy waters metaphor it had first used in the *Kutzner* decision. First, in upholding the trial court's ruling that denied counsel for Gutierrez to pursue his DNA motion, the court said that Gutierrez did not demonstrate "reasonable grounds" for his DNA-testing request[199] because "DNA testing would simply 'muddy the waters.'"[200] The court then analyzed Gutierrez's request for testing and found that none of the requested testing would establish, by a preponderance of the evidence, that he would not have been convicted if the test results provided exculpatory evidence.[201] The court ended its opinion by stating, "In sum, granting DNA testing in this case would 'merely muddy the waters.'"[202] The new legislative fix failed. The Court of Criminal Appeals had implicitly supplanted the intended burden with the old metaphor.

Lower courts had already shown their fondness for the metaphor, but *Gutierrez* gave it new life and authority. After *Gutierrez*, twenty appellate courts cited the case and also used the metaphor.[203] With only one exception, those courts used the metaphor in denying relief under Article 64.03.[204] The

195. *See, e.g.*, *Ex parte* Gutierrez, 337 S.W.3d at 889, 892; Estrada v. State, No. 12-13-00283-CR, 2015 WL 1869574, *2 n.5, 3 (Tex. App. May 27, 2015), *petition for discretionary review refused* Nov. 4, 2015; Fain v. State, No. 02-13-00366-CR, 2014 WL 6840282, at *16 (Tex. App. Dec. 4, 2014), *reh'g denied* Apr. 15, 2015.

196. 337 S.W.3d 883 (Tex. Ct. Crim. App. 2011).

197. *Id.* at 889, 901, 902.

198. *Id.* at 889 (quoting District Attorney's Office v. Osborne, 557 U.S. 52, 61 (2009)).

199. *Id.* at 889, 892.

200. *Id.* at 892 (citing Rivera v. State, 89 S.W.3d 55 (Tex. Crim. App. 2002)).

201. *Id.* at 899–901.

202. *Id.* at 901.

203. *See* App'x at Case Nos. 70–77, 79–83, 85–90, 92.

204. Only one court used the metaphor but also granted the inmate's DNA-testing motion. In that case, the court found the potential for exculpatory DNA compelling, stating, "[e]vidence that exculpates the innocent and ties the guilty to [the victim] at the time of her death cannot be held to merely 'muddy the waters.'" Fain v. State, No. 02-13-00366-CR, 2014 WL 6840282, at *16 (Tex. App. Dec. 4, 2014), *perm. app. denied* Apr. 15, 2015.

metaphor had seeped back into the courts' legal test, even returning to West headnotes as an expression of the legal test for applying Article 64.03.[205]

III. MEASURING THE METAPHOR'S IMPACT

Texas's history with wrongful convictions has taken confusing and seemingly contradictory turns. The State's reputation for being tough on crime is well established. Texas executes more of its inmates than any other state.[206] Prosecutors have fought highly publicized attempts to overturn wrongful convictions, with one prosecutor even facing criminal punishment for his role in hiding evidence from the defense that could have freed a death row inmate.[207] At the same time, the legislature and the Governor have implemented progressive measures meant to address wrongful convictions. In addition to the DNA-testing statute, Texas was the first to compensate the wrongly convicted.[208] Texas also created a forensic science commission to investigate and rectify convictions that were based on faulty science.[209] The Dallas County District Attorney's Office is the best example of Texas's conflicted approach to wrongful convictions. Once the bastion of hard-nosed prosecutions based on questionable practices, the District Attorney's Office became the leader in investigating and undoing wrongful convictions when it created one of the country's first conviction integrity units.[210]

However, in the end, the courts are the final arbiters, and it may be that they are simply biased against testing. Even when given a new standard and a new metaphor, the pull of the muddy waters language is too strong to resist. The metaphor is well-liked by the courts and prosecutors. It is easy to use. It creates strong visual imagery and helps attach meaning to the abstract statutory language.

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205. *See* Larson v. State, 488 S.W.3d 413 (Tex. App. 2016), *reh'g overruled* Apr. 26, 2016, *perm. app. denied* Oct. 5, 2016. A West headnote to *Larson* reads: "A favorable DNA test result, as a factor in favor of granting a postconviction motion for DNA testing, must be the sort of evidence that would affirmatively cast doubt upon the validity of the inmate's conviction; otherwise, DNA testing would simply muddy the waters. Tex. Crim. Proc. Code Ann. art. 64.03(a)." *Id.* at 414.

206. *Number of Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976 (updated Feb. 1, 2017).

207. Lise Olsen, *Prosecutors Accused of Hiding Evidence, Inventing Testimony in Death Penalty Case*, HOUS. CHRON. (July 4, 2016, 11:53 PM), http://www.houstonchronicle.com/news/houston-texas/houston/article/Prosecutors-accused-of-hiding-evidence-inventing-8340431.php.

208. *Executive Summary: "Making up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation"*, INNOCENCE PROJECT (Dec. 2, 2009), http://www.innocenceproject.org/executive-summary-making-up-for-lost-time-what-the-wrongfully-convicted-endure-and-how-to-provide-fair-compensation/.

209. *Frequently Asked Questions*, TEX. FORENSIC SCI. COMM'N, http://www.fsc.texas.gov/faq (last visited Apr. 2, 2017).

210. *Conviction Integrity Unit*, DALLAS CTY. DISTRICT ATT'Y, https://www.dallascounty.org/department/da/conviction_integrity.php (last visited Apr. 2, 2017).

The metaphor creates a nearly insurmountable hurdle for inmates. The metaphor is dirty, and dirty metaphors connote guilt. They evoke harsher judgments. The metaphor may be evidence of some other bias (whether known or implicit) that judges have against defendants in these types of cases. After all, these defendants have been found guilty of their alleged crimes—they are sullied, and the muddy waters metaphor reinforces this view of convicted persons. Furthermore, the metaphor presents an impossible standard. Where enough doubt added to the overall trial evidence should warrant a new trial, muddy waters just get muddier. There is no metaphorical way to actually cleanse the water. Mud is mud. However, because the secondary meaning is layered within the metaphor, it hides from challenge and stubbornly resists removal. Furthermore, even if one were to confront the metaphor, on what basis would it be challenged? Any hidden bias or secondary meaning is, by definition, hidden and not explicitly stated in any decision.

This metaphor also presents an opportunity to question the motivation behind the courts' decisions. Maybe the courts chose to ignore the will of the legislature—at least once, if not twice. If so, they did so with little commentary or outrage from those who advocated for legislative change and from those actually seeking testing. The muddy waters metaphor has never been challenged as inappropriate.

By following the cases that use the metaphor, we have shown how metaphor can overtake the actual legal standard, making it impervious to legislative change and even court-created changes. The metaphor persists because it is easy. It is used as the legal standard, but seen as completely disconnected from the standard; and as a result, it continues to impact application of the law without challenge.

The Texas DNA-testing story seems inexplicable until one uncovers the metaphor's role in driving judicial decisions. The story is one that should alert attorneys, judges, and lawmakers to the implicit power of metaphors and their potential to influence the law. Unchallenged, metaphors may result in unintended application of the law and may even shift burdens. Attorneys representing clients in high stakes cases cannot afford to let problematic metaphors remain hidden.

APPENDIX

	CASE DETAILS				How was "Muddy Waters" Used?					
	Case Name	Reporter Citation	Court	Date	Version of Statute Applicable to the Case	Version the Court Actually Applied	Testing Granted?	# of times?	In closing?	In a Head note?
1	Kutzner v. State	75 S.W.3d 427	CCA	4/10/2002	2001	2001	No	3		
2	State v. Patrick	86 S.W.3d 592	CCA	9/11/2002	2001	2001	No	2		
3	Rivera v. State	89 S.W.3d 55	CCA	11/6/2002	2001	2001	No	2		Yes
4	Thompson v. State	95 S.W.3d 469	Houston	11/21/2002	2001	2001	No	1	Yes	
5	Jackson v. State	2003 WL 115460	Dallas	1/14/2003	2001	2001	No	3	Yes	
6	Torres v. State	104 S.W.3d 638	Houston	3/13/2003	2001	2001	No	1		
7	Wilson v. State	2003 WL 1821465	CCA	3/26/2003	2001	2001	No	2		
8	Wall v. State	2003 WL 4904037	Fort Worth	4/17/2003	2001	2001	No	1		
9	Jacobs v. State	115 S.W.3d 108	Texarkana	7/8/2003	2001	2001	No	3	Yes	Yes
10	Baggett v. State	110 S.W.3d 704	Houston	7/10/2003	2001	2001	No	4	Yes	
11	Breeden v. State	2003 WL 21543761	Fort Worth	7/10/2003	2001	2001	No	1		
12	Garrett v. State	2003 WL 21757335	Dallas	7/31/2003	2001	2001	No	2	Yes	
13	Eubanks v. State	113 S.W.3d 562	Dallas	8/1/2003	2001	2001	No	3		Yes
14	Smith v. State	2003 WL 22303995	CCA	10/8/2003	2001	2001	No	1	Yes	
15	Davenport v. State	2003 WL 22330325	Houston	10/14/2003	2001	2001	No	1	Yes	
16	Pendergrass v. State	2003 WL 22359222	Waco	10/15/2003	2001	2001	No	2	Yes	
17	Waller v. State	2003 WL 22456324	Dallas	10/31/2003	2001	2001	No	1		
18	Carrillo v. State	2003 WL 22928895	Dallas	12/12/2003	2001	2001	No	3	Yes	Yes
19	Harper v. State	2003 WL 22977077	Texarkana	12/19/2003	2001	2001	No	2	Yes	
20	Day v. State	2004 WL 205729	Dallas	2/4/2004	2001	2001	No	1		

21	Jones v. State	2004 WL 440430	Houston	3/11/2004	2001	2001	No	2	Yes	
22	Ware v. State	2004 WL 440425	Houston	3/11/2004	2001	2001	No	2	Yes	
23	Ireland v. State	2004 WL 503225	Houston	3/16/2004	2001	2001	No	3	Yes	
24	Lopez v. State	2004 WL 503323	Houston	3/16/2004	2001	2001	No	2	Yes	
25	Walker v. State	2004 WL 503331	Houston	3/16/2004	2001	2001	No	2	Yes	
26	Carter v. State	134 S.W.3d 484	Waco	3/17/2004	2001	2001	No	2		Yes
27	Bingley v. State	2004 WL 744486	Houston	4/8/2004	2001	2001	No	2	Yes	
28	Darnell v. State	2004 WL 1088755	Fort Worth	5/16/2004	2001	2001	No	1		
29	Lang v. State	2004 WL 1858347	El Paso	8/19/2004	2001	2001	No	4	Yes	Yes
30	Bigham v. State	2004 WL 1903401	El Paso	8/26/2004	2001	2001	No	1		
31	Flores v. State	150 S.W.3d 750	San Antonio	9/22/2004	2001	2001	No	2		Yes
32	Larson v. State	2004 WL 2708039	Texarkana	11/30/2004	2001	2001	No	2	Yes	
33	Leone v. State	2004 WL 2903471	Houston	12/16/2004	2001	2001	No	3		
34	Travis v. State	2004 WL 307275	Dallas	12/16/2004	2001	2001	No	1		
35	Wright v. State	2004 WL 3017273	Dallas	12/16/2004	2001	2001	No	1		
36	Watkins v. State	155 S.W.3d 631	Texarkana	1/1/2005	2001	2001	No	2		Yes
37	Treakle v. State	2005 WL 503651	Fort Worth	3/3/2005	2001	2001	No	1	Yes	
38	Bates v. State	177 S.W.3d 451	Houston	5/12/2005	2001	2001	No	1		
39	Skinner v. State	2005 WL 2270825	Dallas	5/27/2005	2001	2001	No	2	Yes	
40	Phillips v. State	2005 WL 1819598	Dallas	8/3/2005	2001	2001	No	1		
41	Smith v. State	2005 WL 2270825	Dallas	9/19/2005	2001	2001	No	2	Yes	
42	Kitt v. State	2005 WL 2385619	Houston	9/29/2005	2001	2001	No	1		
43	White v. State	2006 WL 59356	Fort Worth	1/12/2006	2001	2001	No	1		
44	Young v. State	2006 WL 1720086	Dallas	6/23/2006	2001	2001	No	1		
45	Dunham v. State	2006 WL 1727737	Dallas	6/26/2006	2003	2001	No	1		
46	Murphy v. State	2006 WL 2167215	Houston	8/1/2006	2001	2001	No	1		
47	Pitts v. State	2006 WL 2507307	Waco	8/30/2006	2001	2001	No	2		
48	Sandefer v. State	2007 WL 1747963	Dallas	6/19/2007	2003	2001	No	1	Yes	
49	Sanchez v. State	2007 WL 2446992	Houston	9/30/2007	2003	2003	No	1		
50	Johnson v. State	2007 WL 3317530	Dallas	11/9/2007	2003	2003	No	1		
51	Chavez v. State	2007 WL 4465539	Houston	12/20/2007	2003	2003	No	1		
52	Graves v. State	2008 WL 442592	Houston	2/19/2008	2003	2003	No	2	Yes	
53	Yarbrough v. State	258 S.W.3d 205	Waco	3/12/2008	2003	2003	No	4	Yes	

54	Orozco v. State	2008 WL 1704382	Dallas	4/14/2008	2003	2003	No	1	Yes		
55	Wicker v. State	2008 WL 2440270	Dallas	6/18/2008	2003	2003	No	2	Yes		
56	King v. State	2008 WL 4724435	Corpus Christi	7/29/2008	2003	2003	No	1			
57	Calton v. State	2009 WL 976004	Fort Worth	4/9/2009	2003	2003	No	2			
58	In re Gonzales	2009 WL 2195421	Austin	7/24/2009	2003	2003	No	1			
59	Jacobs v. State	294 S.W.3d 192	Texarkana	9/7/2009	2003	2003	No	1			
60	Elam v. State	2009 WL 3126413	Houston	9/29/2009	2003	2003	No	1			
61	Coronado v. State	2009 WL 3152118	Houston	10/1/2009	2003	2003	No	1			
62	Smith v. State	2009 WL 3371547	Tyler	10/21/2009	2003	2001	No	1			
63	Fontenot v. State	2010 WL 1704744	Houston	4/29/2010	2003	2003	No	3	Yes		
64	Huckaby v. State	2010 WL 2132806	Fort Worth	5/27/2010	2003	2003	No	1			
65	White v. State	2010 WL 2650588	Houston	7/1/2010	2003	2001	No	1			
66	Mejia v. State	2010 WL 2650021	Houston	7/6/2010	2003	2003	No	1			
67	Jones v. State	2011 WL 611833	Amarillo	2/22/2011	2003	2003	No	1	Yes		
68	Ex parte Gutierrez	337 S.W.3d 883	CCA	5/4/2011	2003	2003	No	3	Yes		
69	Gonzalez v. State	2011 WL 3672067	Fort Worth	8/18/2011	2003	2003	No	2	Yes		
70	Baylor v. State	2011 WL 4008026	Fort Worth	9/8/2011	2003	2001/2003	No	3			
71	Wynn v. State	2011 WL 5865710	Texarkana	11/23/2011	2003	2001/2003	No	1			
72	Strickland v. State	2012 WL 4503431	Fort Worth	10/2/2012	2003	2001	No	1			
73	Hill v. State	2012 WL 4010460	Fort Worth	9/13/2012	2003	2001	No	7	Yes		
74	Padilla v. State	2013 WL 3185896	Austin	6/20/13	2003	2003	No	1			
75	Lawrence v. State	2013 WL 5948112	Tyler	11/5/2013	2003	2003	No	1			
76	Chavero v. State	2014 WL 69954	Corpus Christi	1/9/2014	2003	version unclear	No	1			
77	Davis v. State	2014 WL 548695	Dallas	2/11/2014	2003	2003	No	1			
78	Qadir v. State	2014 WL 1389545	Fort Worth	4/10/2014	2003	2003	No	1			
79	Bridges v. State	2014 WL 1410323	Texarkana	4/11/2014	2003	2003	No	1	Yes		
80	Fain v. State	2014 WL 6840282	Fort Worth	12/4/2014	2003	2003	Yes	1			
81	Sims v. State	2014 WL 7475235	Austin	12/17/2014	2003	2003	No	1			
82	Campos v. State	2015 WL 7204966	Houston	4/22/2015	2003	2003	No	1			
83	Harriman v. State	2015 WL 2095698	Dallas	5/4/2015	2003	2003	No	2	Yes		
84	Larue v. State	2015 WL 6522816	Beaumont	10/28/015	2003	2003	No	1			

85	Estrada v. State	2015 WL 1869574	Corpus Christi	11/4/2015	2003	2003	No	2		
86	Ambriati v. State	2015 WL 6998616	Beaumont	11/12/2015	2003	2003	No	2	Yes	
87	Medford v. State	2016 WL 7008030	Fort Worth	2/4/2016	2003	2003	No	1	Yes	
88	Larson v. State	2016 WL 1268003	Texarkana	4/1/2016	2003	2003	No	3		Yes
89	Fothergrill v. State	2016 WL 1435658	Dallas	4/11/2016	2003	2003	No	1		
90	Reed v. State	2016 WL 3626329	CCA	6/29/2016	2003	2003	No	1		
91	Brooks v. State	2016 WL 5940843	Houston	10/13/2016	2003	2003	No	3		