"Penumbra": The Roots of a Legal Metaphor

By BURR HENLY*

Introduction

> "Metaphors in law are to be narrowly watched, for starting out as devices to liberate thought, they end often by enslaving it."[1]
>
> "Between truth and untruth there lies a penumbral zone which belongs to both; and I have often admired the adroitness with which Mr. Chamberlain sails within the 'half-shadow.' "[2]

Language in law is rife with metaphors. Judges and commentators have created a legal landscape inhabited with, among other things, slippery slopes,[3] bright and blurred lines,[4] constitutional foothills,[5] scales of justice,[6] level playing fields,[7] and a wall of separation between church and state.[8] Metaphors are not just illustrations offering graphic images or concrete versions of legal concepts. They are models—shorthand versions of reality that emphasize or exclude in order to make a point. Like many models, metaphors portray one part of experience by borrowing terms associated with another part. Thus, they require a jump from one category of experiences and related descriptive terms to another.

Metaphors that are overtly spatial involve the most obvious kind of

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1. Berkey v. Third Ave. Ry., 244 N.Y. 84, 94, 155 N.E. 58, 61 (1926) (Cardozo, J.).

2. Tyndall, Letter to the Editor, The Times (London), Nov. 26, 1884, at 6, col. 6.

3. *See, e.g.*, Commodity Futures Trading Comm'n v. Schor, 106 S. Ct. 3245, 3258 (1986).

4. *See, e.g.*, Young v. United States *ex rel.* Vuitton et Fils S.A., 107 S. Ct. 2124, 2140 n.23 (1987) ("bright-line"); Carey v. Westinghouse Elec. Corp., 375 U.S. 261, 268 (1964) ("blurred line").

5. *See, e.g.*, Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1, 131 (1961) (Warren, C.J., dissenting).

6. *See, e.g., In re* Murchison, 349 U.S. 133, 136 (1955).

7. *See, e.g.*, Southern Natural Gas Co. v. Federal Energy Regulatory Comm'n, 813 F.2d 1111, 1112 (11th Cir. 1987).

8. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 673 (1984).

category jump. With such spatial metaphors,[9] legal ideas are described and discussed as if they existed in two- or even three-dimensional form. For example, legal ideas often seem to have weight as well as volume, as when interests are "balanced."[10] Spatial metaphors make it possible to visualize change. Doctrines can be extended,[11] narrowed,[12] expanded,[13] and circumscribed.[14] Branches are separated[15] but not hermetically sealed off.[16] Legal rules develop frontiers,[17] cores,[18] and cutting edges.[19] Without splitting hairs,[20] fine lines get drawn.[21] Without using protractors, lawyers are able to define spheres of influence.

More fundamentally, the very act of judging requires category jumps—from fact to law, from passion to principle, from persons to rules. In this sense, all law is metaphoric. It speaks about (and decides) concrete disputes in abstract terms. Judges use metaphors in their opinions to ease this transition. Spatial metaphors, in particular, remain abstract yet are visual—and thus imaginable. By reifying rules, these metaphors convey a comforting sense that the law exists "out there" in the world of objects. It is as if reified rules somehow should be confined and controlled in a way that mere ideas cannot—as if laws fixed by spatial coordinates should be subject, not only to societal constraints, but to physical ones like entropy and inertia as well. Judges can even imagine setting a statute next to the Constitution to see how it measures up. In

9. By "spatial metaphors" I mean metaphors that explicitly call objects and geometric principles to mind.

Spatial metaphors are ubiquitous in law. Indeed they may be inherent in language. In language in general, abstract concepts are formed in spatial terms. They arise out of experiences in the world. *See* J. WHITE, THE LEGAL IMAGINATION 707 (1985). White observes that abstract terms in Romance languages are rooted in space. He notes the counterexample of "radio", which migrated from an abstract term in physics to identify a household appliance. Radio comes from the word "radius", however, so even it can be said to have originated in a spatial term.

10. *See, e.g.*, United States v. Salerno, 107 S. Ct. 2095, 2100 (1987).

11. *See, e.g.*, Zant v. Stephens, 462 U.S. 862, 897 (1983).

12. *See, e.g.*, Kossick v. United Fruit Co., 365 U.S. 731, 743 (1961).

13. *See, e.g.*, Anderson v. Creighton, 107 S. Ct. 3034, 3040 n.3 (1987).

14. *See, e.g.*, Associated Gen. Contractors v. California State Council, 459 U.S. 519, 532 (1983).

15. *See, e.g.*, Commodity Futures Trading Comm'n v. Schor, 106 S. Ct. 3245, 3262 (1986) (Brennan, J., dissenting).

16. *See, e.g.*, INS v. Chadha, 462 U.S. 919, 951 (1983).

17. *See, e.g.*, Illinois v. Gates, 462 U.S. 213, 264 (1983).

18. *See, e.g.*, Rakas v. Illinois, 439 U.S. 128, 145 (1978).

19. *See, e.g.*, Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 417 (1946).

20. *See, e.g.*, Riddle v. Secretary of Health & Human Servs., 817 F.2d 1238, 1249 (6th Cir. 1987).

21. *See, e.g.*, City of Houston v. Hill, 107 S. Ct. 2502, 2519 (1987).

this way, spatial metaphors allow the process and product of law-making to be more "objective."

Perhaps the most important and puzzling spatial metaphor in American constitutional law is Justice William O. Douglas' "penumbra" from *Griswold v. Connecticut*.[22] In striking down a Connecticut statute forbidding the use of contraceptives, Douglas stated for the Court that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[23]

This Article explores certain questions raised by the penumbra metaphor in the law. What was its origin? How does it operate within the *Griswold* opinion? What does it signify in spatial terms, that is, what does its model of the Bill of Rights look like? Finally, what does the penumbra metaphor reveal about the limits of legal geometry, of law in space?

I. Penumbra: A Pre-*Griswold* Scrapbook

Commentators sometimes discuss Douglas' *Griswold* penumbra as if the metaphor had never before appeared in American jurisprudence. The parties' briefs in *Griswold* did not suggest the penumbra metaphor, and Douglas has been treated as if he whipped it up out of thin air.[24] In fact, the penumbra metaphor had a long and distinguished history prior to *Griswold*, beginning with Justice Oliver Wendell Holmes.[25] The key pre-*Griswold* uses of "penumbra" are set forth below in chronological order grouped according to their author.

A. Justice Oliver Wendell Holmes

> The growth of law is very apt to take place this way: Two widely different cases suggest a general distinction, which is a clear one when stated broadly. But as new cases cluster around the opposite poles, and begin to approach each other, the distinction becomes more difficult to trace; the determinations are made one way or the other on a very slight preponderance of feeling, rather than articulate reason; and at last a mathematical line is arrived at by the contact of contrary decisions, which is so far arbitrary that it might equally well have been drawn a little further to the one side or the other. The distinction between the groups, however, is phil-

22. 381 U.S. 479, 484 (1965). *See infra* notes 78-105 and accompanying text.

23. 381 U.S. at 484.

24. *See, e.g.*, 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1377 (L. Levy, K. Karst & D. Mahoney eds. 1986) ("This 'penumbra' theory, which has no generative power of its own, is best understood as a last-ditch effort by Justice Douglas to avoid a confrontation with Justice Hugo L. Black over a doctrinal issue dear to Black's heart.").

25. *See infra* notes 26-44 and accompanying text.

> osophical, and it is better to have a line drawn somewhere in the penumbra between darkness and light, than to remain in uncertainty.[26]

Extensive research suggests that this 1873 statement by Holmes is the first time the penumbra metaphor appears in American jurisprudence.[27] Holmes seems to use the word penumbra in its primary meaning: "a space of partial illumination (as in an eclipse) between the perfect shadow on all sides and the full light."[28] The penumbra, he suggests, is a gray area where logic and principle falter. Holmes asserts, however, that lines should be drawn, even though they are to some degree "arbitrary" and "philosophical." Judges should press on in spite of reason's limits, or perhaps because of them. Flanked by polar principles, with cases clustering to one side or the other, Holmes' common-law judge draws a line through the area of partial illumination. For Holmes, this line-drawing may even *end* uncertainty and thereby banish the penumbra—at least until the common law again needs to "grow."[29]

> Perhaps the reasoning of the cases has not always been as sound as the instinct which directed the decisions. It may be that sometimes it would have been as well not to attempt to make out that the judgment of the court was consistent with constitutional rules, if such rules were to be taken to have the exactness of mathematics. It may be that it would have been better to say definitely that constitutional rules, like those of the common law, end in a penumbra where the legislature has a certain freedom in fixing the line, as has been recognized with regard to the police power.[30]

In this passage from *Danforth v. Groton Water Co.*,[31] Holmes clarifies his view that penumbral uncertainty is, in effect, a grant of freedom to the decision-maker. He describes "penumbra" as an area of imprecision lacking mathematical exactness. In the penumbra, we are unencumbered by logic and precedent. Indeed, instinct is central to the judge's or legislator's conclusion. Significantly, Holmes attributes this penumbra of uncertainty to constitutional provisions as well as to common law principles.

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26. Holmes, *The Theory of Torts*, 7 AM. L. REV. 652, 654 (1873), *reprinted in* 44 HARV. L. REV. 773, 775 (1931).

27. *See infra* note 47. A LEXIS search of United States Reports since 1790 reveals no other use of the penumbra metaphor prior to 1873. A search of certain law review articles and other materials likely to contain the metaphor also produced no evidence of earlier use.

28. WEBSTER'S NEW COLLEGIATE DICTIONARY 871 (9th ed. 1985).

29. In this first quote, Holmes is addressing the growth of the law. By definition, hard cases (penumbral cases) make new law.

30. Danforth v. Groton Water Co., 178 Mass. 472, 476-77, 59 N.E. 1033, 1034 (1901) (Holmes, C.J.).

31. *Id.*

> If this view be adopted we get rid of all questions of penumbra, of shadowy marches where it is difficult to decide whether the business extends to them. We have sharp lines drawn upon the fundamental consideration of the jurisdiction originating the right.[32]

Holmes' use of the penumbra metaphor in the passage above is doubly spatial. Here "sharp lines" based on the state boundaries of the empowering jurisdictions can cut through the areas of shadow in the law. The rule, suggests Holmes, will eventually become as clearly delineated as a map of the fifty United States.

> [W]hile I should not dream of asking where the line can be drawn, since the great body of the law consists in drawing such lines, yet when you realize that you are dealing with a matter of degree you must realize that reasonable men may differ widely as to the place where the line should fall. I think that our discussion should end if we admit, what I certainly believe, that reasonable men might regard six years as not too remote. Of course many gifts will be hit by the tax that were made with no contemplation of death. But the law allows a penumbra to be embraced that goes beyond the outline of its object in order that the object may be secured.[33]

Holmes' use of the penumbra metaphor in *Schlesinger v. Wisconsin* is again explicitly spatial. Statutes circumscribe an outline based on their object. Their reach, however, extends beyond this outline into the penumbra, so that "the object may be secured."[34] This view has been referred to as Holmes' "penumbra doctrine."[35] It suggests that all statutes are overly broad because a law's reach will necessarily exceed its aim. Unlike Holmes' common law and constitutional penumbras,[36] his statutory penumbra[37] is not just an area of uncertainty where logic and language falter. Holmes applies the penumbra metaphor as representing the outer bounds of authority emanating from a law. This statutory penumbra does not merely attract with the pull of analogy; it actually presses

32. Hanover Star Milling Co. v. Metcalf, 240 U.S. 403, 426 (1916) (Holmes, J., concurring) (first appearance of the penumbra metaphor in the United States Reports).

33. Schlesinger v. Wisconsin, 270 U.S. 230, 241 (1926) (Holmes, J., dissenting).

34. *Id.*

35. Black, *The "Penumbra Doctrine" in Prohibition Enforcement*, 27 ILL. L. REV. 511 (1933).

36. *See supra* notes 26-32 and accompanying text.

37. By using the phrase "statutory penumbra", I do not mean to suggest that the penumbra metaphor, when applied to statutes, always describes expansive power. Judges also picture penumbras of statutory provisions as amounting to gaps where intent is uncertain. *See infra* notes 57 & 68 and accompanying text.

outward.[38] Like all matters of degree, the precise line where the penumbral force ends cannot be determined rationally; it is ultimately based on the desire or instinct of the judge. Holmes suggests that, when the legislature has been reasonable (meaning not too irrational), further discussion by judges is unproductive.

> The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other. Property must not be taken without compensation, but with the help of a phrase, (the police power) some property may be taken or destroyed for public use without paying for it, if you do not take too much. When we come to the fundamental distinctions it is still more obvious that they must be received with a certain latitude or our government could not go on.[39]

In this quotation, Holmes forcefully reiterates his message in *Danforth v. Groton Water Co.*,[40] decided twenty-seven years earlier, that constitutional law cannot be expected to establish fixed lines. Constitutional provisions end in penumbras, which may or may not cover a case depending on any number of facts, policies, and phrases. For Holmes, the Framers did not definitively chart good and bad, permitted and prohibited, light and umbra. Instead, penumbras exist for which the Constitution is the source of legal authority, but the Constitution does not and cannot settle questions as to the proper exercise of that authority. And the more fundamental the constitutional question, Holmes suggests, the more important it is to acknowledge penumbral uncertainty.

> While I do not deny it, I am not prepared to say that the penumbra of the Fourth and Fifth Amendments covers the defendant, although I fully agree that Courts are apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them. But I think, as Mr. Justice Brandeis says, that apart from the Constitution the Government ought not to use evidence obtained and only obtainable by a criminal act. There is no body of precedents by which we are bound, and which confines us to logical deduction from established rules. Therefore we must consider the two objects of desire, both of which we cannot have, and make up our minds which to choose. . . . We have to choose, and for my part I think it a less evil that some criminals should

38. Compare Justice Holmes 1873 statement, *supra* text accompanying note 26 ("new cases clustering around the opposite poles"), with his later statement in *Schlesinger*, *supra* note 34 and accompanying text (statutory penumbra "hits" certain gifts to secure its "object"). The first penumbra operates by common law analogy; the second exerts statutory force.

39. Springer v. Government of the Phil. Islands, 277 U.S. 189, 209-10 (1928) (Holmes, J., dissenting).

40. 178 Mass. 472, 59 N.E. 1033 (1901). *See supra* text accompanying note 30.

escape than that the Government should play an ignoble part.[41]

In this excerpt from his well-known dissent in *Olmstead v. United States*,[42] Holmes creates a third application of the penumbra metaphor. The penumbra of the Fourth and Fifth Amendments can shield a criminal defendant, much like an umbrella. Holmes suggests here that, unlike the penumbra of uncertainty or the penumbra of statutory force, there is a protective penumbra created by certain provisions of the Bill of Rights.

Holmes is reluctant to extend this penumbral protection, although he implies that if the penumbra covered the defendant, that would decide the case. So, while the scope of the penumbra of the Fourth and Fifth Amendments is uncertain, the question for the court is not one of line-drawing within the area of partial illumination, but of determining whether the case is covered by the penumbra at all. Holmes sketches this as a problem of interpretation: "Courts are apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them."[43] Holmes avoids this problem by switching his focus from the penumbra of constitutional protection to the penumbra of common-law uncertainty.[44] He steers clear of the protective Bill of Rights penumbra, with its independent and binding force, preferring that of the judge-made common law. While admitting that the Constitution could cover the case, he simply decides it on other grounds.

B. Justice Benjamin H. Cardozo

In 1932, Benjamin H. Cardozo replaced Holmes on the Supreme Court. Holmes' influence on Cardozo is no secret; Cardozo openly described Holmes in the most reverential terms:

> [Y]et we have one judge even now who can vie with the best of his English brethren, past as well as present, in the art of packing within a sentence the phosphorescence of a page. If I begin to quote from the opinions of Mr. Justice Holmes, I hardly know where I shall end, yet fealty to a master makes me reluctant to hold back.[45]

41. Olmstead v. United States, 277 U.S. 438, 469-70 (1927) (Holmes, J., dissenting) (citation omitted).

42. *Id.*

43. *Id.* at 469 (citing Gooch v. Oregon Shortline R.R., 258 U.S. 22, 24 (1922) (Holmes, J.)). In *Gooch*, the Court narrowly construed a federal statute providing no less than 90 days for certain tort victims to provide notice of their injuries.

44. The words of a constitututional provision presumably are the core of Holmes' umbral protection, while the policy related to the constitutional text creates a penumbra of uncertain coverage.

45. B. CARDOZO, LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES 21 (1931).

Holmes' influence on Cardozo appears to include the use of the penumbra metaphor:

> There is in all such controversies a penumbra where rigid formulas must fail. No test more definite can then be found than the discretion of the court, "to be carefully and guardedly exercised" in furtherance of justice.[46]

This appears to be the first use of the penumbra metaphor by a judge other than Holmes.[47] Cardozo used the metaphor at least three more times after his elevation to the Supreme Court. Each time penumbra was used to express the same essential idea:

> Much that the framers of a schedule are at liberty to do, this court in the exercise of its supervisory jurisdiction may not require them to do. For the legislative process, at least equally with the judicial, there is an indeterminate penumbra within which choice is uncontrolled.[48]
>
> The law is not indifferent to considerations of degree. Activities local in their immediacy do not become interstate and national because of distant repercussions. What is near and what is distant may at times be uncertain. There is no penumbra of uncertainty obscuring judgment here.[49]
>
> The conception of the spending power advocated by Hamilton and strongly reinforced by Story has prevailed over that of Madison, which has not been lacking in adherents. Yet difficulties are left when the power is conceded. The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event. There is a middle ground or certainly a penumbra in which discretion is at large.[50]

Cardozo employs the penumbra metaphor in Holmes' initial sense—as an area of uncertainty.[51] For Cardozo, the penumbra metaphor describes an indeterminate zone, where judges have "discretion"[52] and

46. Norwegian Evangelical Free Church v. Milhauser, 252 N.Y. 186, 191, 169 N.E. 134, 135 (1929) (Cardozo, C.J.) (quoting Ferry v. Sampson, 112 N.Y. 415, 418, 20 N.E. 387, 389 (1889)).

47. This conclusion is based on a LEXIS search which included United States Reports since 1790 and New York cases since 1893. Federal District Court and Court of Appeals cases and the vast preponderance of state cases are not currently in the LEXIS system for years prior to 1930.

48. Dayton Power & Light Co. v. Public Utils. Comm'n, 292 U.S. 290, 309 (1934) (Cardozo, J.).

49. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring) (citations omitted).

50. Helvering v. Davis, 301 U.S. 619, 640 (1937).

51. *See supra* note 26 and accompanying text.

52. Helvering v. Davis, 301 U.S. at 640. *See supra* text accompanying note 50.

their "choice is uncontrolled."[53] Like Holmes, Cardozo contrasts line-drawing in the penumbra of uncertainty with the precision and rigidity of formulas.[54] Cardozo's penumbra starts where formulaic, settled law ends.

C. Justice Felix Frankfurter

> Can the Kansas Supreme Court transmute the general interest in these constitutional claims into the individualized legal interest indispensable here? No doubt the bounds of such legal interest have a penumbra which gives some freedom in judging fulfillment of our jurisdictional requirements. The doctrines affecting standing to sue in the federal courts will not be treated as mechanical yardsticks in assessing state court ascertainments of legal interest brought here for review.[55]

President Roosevelt appointed Felix Frankfurter to fill the vacancy in the Court caused by Cardozo's death in 1938. Frankfurter used the penumbra metaphor above in his very first term. In more than two decades on the Court, he never used it again. Frankfurter's use of the penumbra metaphor is familiar. Following Holmes and Cardozo, Frankfurter identifies penumbral uncertainty with judicial freedom and sets it in opposition to the rigidity of "mechanical yardsticks."[56]

D. Judge Learned Hand

> Compunctions about judicial legislation are right enough as long as we have any genuine doubt as to the breadth of the legislature's intent; and no doubt the most important single factor in ascertaining its intent is the words it employs. But the colloquial words of a statute have not the fixed and artificial content of scientific symbols; they have a penumbra, a dim fringe, a connotation, for they express an attitude of will, into which it is our duty to penetrate and which we must enforce ungrudgingly when we can ascertain it, regardless of imprecision in its expression.[57]

Here, Judge Learned Hand graphically employs Holmes' penumbra of statutory force.[58] Statutory language (like all language, one suspects)

53. Dayton Power & Light Co. v. Public Utils. Comm'n, 292 U.S. at 309. *See supra* text accompanying note 48.

54. *See supra* notes 26-32 and accompanying text.

55. Coleman v. Miller, 307 U.S. 433, 465 (1939) (Frankfurter, J., concurring). Of special interest is the fact that Douglas joined in this concurrence. Douglas went on to use the penumbra metaphor several more times prior to Griswold v. Connecticut, 381 U.S. 479 (1965). *See infra* notes 67-69 and accompanying text.

56. Coleman v. Miller, 307 U.S. at 465.

57. Commissioner v. Ickelheimer, 132 F.2d 660, 662 (2d Cir. 1943) (Hand, J., dissenting) (footnote omitted) (citing Johnson v. United States, 163 F. 30, 32 (1st Cir. 1908) (Holmes, J.)).

58. *See supra* notes 33-37 and accompanying text.

has "a dim fringe, a connotation."[59] But Hand states that the judge cannot treat this statutory uncertainty as a grant of unbridled discretion. In Hand's view, the penumbra of a statute must be seen as words radiating will which judges have a "duty" to "penetrate" and "enforce."[60]

> The phrase, "clear and present danger," has come to be used as a shorthand statement of those among such mixed or compound utterances which the [First] Amendment does not protect. Yet it is not a *vade mecum*; indeed, from its very words it could not be. It is a way to describe a penumbra of occasions, even the outskirts of which are indefinable, but within which, as is so often the case, the courts must find their way as they can.[61]

Hand's "penumbra of occasions"[62] is reminiscent of Holmes' cases clustering around principles.[63] But Hand takes penumbral uncertainty even further; "clear and present danger"[64] never amounted to a clear distinction. There is no light and dark divided by "a line drawn somewhere in the penumbra."[65] Here, all is penumbra, and judges must grope along "as they can."[66]

E. Justice William O. Douglas

> There is no square holding of the Louisiana courts on the point. The problem lies in the penumbra of Louisiana law, making all the more difficult a prediction as to what the Louisiana courts would hold.[67]
>
> The Labor Management Relation Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be resolved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy.[68]
>
> Here it is plain that the stockholder and those who manage the corporation are completely and irrevocably opposed on a matter of corporate practice and policy. A trial may demonstrate that the stockholder is wrong and the management right. It may show a dispute that lies in the penumbra of business judgment, unaf-

59. Commissioner v. Ickelheimer, 132 F.2d at 682. *See supra* text accompanying note 57.
60. *Ickelheimer*, 132 F.2d at 682.
61. United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950) (Hand, J.).
62. *Id.*
63. *See supra* note 26 and accompanying text.
64. United States v. Dennis, 183 F.2d at 212. *See supra* text accompanying note 61.
65. *See supra* note 26 and accompanying text.
66. United States v. Dennis, 183 F.2d at 212. *See supra* text accompanying note 61.
67. General Box Co. v. United States, 351 U.S. 159, 169 (1956) (Douglas, J., joined by Harlan, J., concurring).
68. Textile Workers v. Lincoln Mills, 353 U.S. 448, 457 (1957) (Douglas, J.).

fected by fraud.[69]

Like Frankfurter, Justice Douglas joined the Court in 1938. In each of these quotations, Douglas adopts the same syntax. A problem or dispute "lies in the penumbra." In the first two quotations, penumbra describes the area of doubt outside of the region governed by square holdings and express, substantive law. One cannot predict how these problems will turn out. The third quotation is different. Here, the penumbra is akin to Holmes' protective constitutional umbrella. If the dispute is within the "penumbra of business judgment" then management's decision apparently is insulated from judicial scrutiny. Thus, the judicial task in the third quotation is not one of line drawing in the penumbra of uncertainty, but of locating the case inside or outside the penumbra.

F. Professor H.L.A. Hart

After the three Douglas opinions, but prior to *Griswold v. Connecticut*,[70] Harvard law professor H.L.A. Hart published two works in which "penumbra" appeared prominently.

> A judge has to apply a rule to a concrete case—perhaps the rule that one may not take a stolen "vehicle" across state lines, and in this case an airplane has been taken. He either does not see or pretends not to see that the general terms of this rule are susceptible of different interpretations and that he has a choice left open uncontrolled by linguistic conventions. He ignores, or is blind to, the fact that he is in the area of the penumbra and is not dealing with a standard case.[71]
>
> All rules involve recognizing or classifying particular cases as instances of general terms, and in the case of everything which we are prepared to call a rule it is possible to distinguish clear central cases, where it certainly applies and others where there are reasons for both asserting and denying that it applies. Nothing can eliminate this duality of a core of certainty and a penumbra of doubt when we are engaged in bringing particular situations under general rules.[72]

Both statements illustrate just how accepted penumbra had become as a metaphor prior to *Griswold*. In flat academic prose, Hart sets forth a strikingly Holmesian analysis.[73] There are penumbras of uncertainty, but also core areas where the distinctions are clear. On the one hand,

69. Smith v. Sperling, 354 U.S. 91, 97 (1957) (Douglas, J.).

70. 381 U.S. 479 (1965).

71. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 610 (1958) (footnote omitted).

72. H. HART, THE CONCEPT OF LAW 119 (1961).

73. Indeed, the 1958 piece describes itself as a defense of Holmes. Hart, *supra* note 71, at 593.

there is law—a car is a vehicle—and on the other there are hard cases—an airplane may or may not be a vehicle.

Hart's analysis differs from Holmes' penumbra of uncertainty, however, in that Hart gives a stronger sense of being able to identify where certainty ends and uncertainty begins. For Holmes, cases cluster and shade gradually into the penumbra. Hart, on the other hand, seems profoundly confident that core, "central" cases[74] can be distinguished from penumbral ones. In Hart's view, a judge should be able to draw not just one line (dividing the penumbra), but two lines (dividing the penumbra, and distinguishing penumbra from core).[75]

II. The *Griswold* Penumbra

In *Poe v. Ullman*,[76] Douglas and Harlan agreed in separate dissents that Connecticut's law prohibiting the use of contraceptives by married couples violated the Fourteenth Amendment.[77] In his majority opinion in *Griswold*, written four years later, Douglas backed off from his fourteenth amendment position. He wrote that the Connecticut law violated the penumbral right of privacy, not the Due Process Clause of the Fourteenth Amendment.[78]

Justice Harlan concurred in the *Griswold* judgment, but adopted a different analysis. He described himself as unable to join the Court's opinion:

> [The] approach to this case [is] very much like that taken by my Brothers Black and Stewart in dissent, namely: the Due Process Clause of the Fourteenth Amendment does not touch this Connecticut statute unless the enactment is found to violate some right assured by the letter or penumbra of the Bill of Rights.[79]

To what extent is this statement by Harlan an accurate account of Black's position? Did Black accept the idea that the provisions of the Bill of Rights could have penumbras? In his dissent, Black observed, "I get nowhere in this case by talk about a constitutional 'right of privacy' as an emanation from one or more constitutional provisions."[80] However, he described his disagreement with the Court's opinion as a narrow

74. *Id.* at 615.

75. *Id.* at 606-15. *Compare* Holmes, *supra* note 26, at 654.

76. 367 U.S. 497 (1961) (Frankfurter, J.).

77. *Id.* at 515 (Douglas, J., dissenting); *id.* at 539 (Harlan, J., dissenting). In *Poe v. Ullman*, the majority rejected an attack on Connecticut's anti-contraception statute based on lack of standing due to desuetude in the law's enforcement. *See* Clark, *Constitutional Sources of the Penumbral Right of Privacy*, 19 VILL. L. REV. 833, 836 (1974) (comparing *Poe* with *Griswold*).

78. Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).

79. *Id.* at 499 (Harlan, J., concurring).

80. *Id.* at 509-10 (Black, J., dissenting).

one, resulting from his inability "to stretch the [First] Amendment so as to afford protection to the conduct of these defendants . . . ."[81]

Black's use of the verb "stretch" strongly suggests that he viewed the First Amendment in spatial terms and would have conceded that the Amendment protected an area encompassing a core of easy cases and a periphery of harder ones. But Black never used the word "penumbra" and gave no hint that he pictured the Bill of Rights in anything other than starkest black and white.[82]

Douglas' opinion, like Harlan's concurrence, also leaves several open issues. If Douglas was attempting to keep his dispute with Black narrow in *Griswold*, why did he use the penumbra image (and the model of the Bill of Rights it represents) so often and so prominently? If Douglas did not care about breaking with Black, why did he retreat from his due process approach in *Poe v. Ullman*?[83] Perhaps Douglas was thinking not so much of his relationship with Black but of his relationship with Holmes. In a sense, Douglas and Black were competing in *Griswold* for Holmes' vote and even for the right to bear Holmes' legacy.[84]

The *Griswold* opinion is a terse seven pages, very much in Holmesian style. In the first paragraph addressing the merits of the case, Douglas writes, "overtones of some arguments suggest that *Lochner v. New York* should be our guide. But we decline that invitation . . . ."[85] Thus, Douglas proclaims early that his opinion is in the tradition of Holmes' *Lochner* dissent.[86]

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81. *Id.* at 508 (Black, J., dissenting).

82. *See, e.g.*, Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 867 (1960) ("It is my belief that there *are* 'absolutes' in our Bill of Rights, and that they were put there on purpose by men who knew what their words meant, and meant their prohibitions to be 'absolutes.' " (emphasis in original)).

83. 367 U.S. 497, 515 (1961) (Douglas, J., dissenting).

84. Another motive, which ought not be dismissed, arises out of the well-known antipathy between Douglas and Frankfurter. *See, e.g.*, M. UROFSKY, THE DOUGLAS LETTERS: SELECTIONS FROM THE PRIVATE PAPERS OF JUSTICE WILLIAM O. DOUGLAS (1987). Douglas first embraced the penumbra metaphor by joining Frankfurter's concurring opinion in Coleman v. Miller, 307 U.S. 433, 460 (1939) (Frankfurter, J., concurring). *See supra* note 55 and accompanying text. Frankfurter never used penumbra in an opinion again. One can speculate, though, that Douglas' use of the term was intended to needle Frankfurter, as part of their feud. Frankfurter wrote the opinion in *Poe v. Ullman* but retired before *Griswold* was heard. "Getting" the *Griswold* opinion could easily have been seen by Douglas as his triumph over Frankfurter. Douglas may have emphasized the penumbra metaphor partly to "rub in" his victory.

85. *Griswold*, 381 U.S. at 481-82 (citation omitted).

86. Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (stating the classic attack on substantive due process). In his dissent in *Poe v. Ullman*, Douglas also expresses his agreement with Holmes:

> Mr. Justice Holmes, dissenting [in *Lochner*], rightly said that 'a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people

In several places in the opinion, Douglas embraces an approach very similar to Holmes' penumbra doctrine. He states that "[w]ithout those peripheral rights the specific rights [guaranteed under the Bill of Rights] would be less secure." Further, "while [the right] is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful."[87] And, finally "[t]he foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees *that help give them life and substance.*"[88] This analysis is purely Holmesian. Only Holmes advanced the position that "the law allows a penumbra to be embraced that goes beyond the outline of its object in order that the object may be secured."[89] Others described laws as having cores and penumbras,[90] but Holmes alone argued that the penumbra was sometimes necessary to protect the core.

Also, prior to *Griswold*, only Holmes explicitly treated the provisions of the Bill of Rights as having penumbras which protect conduct from government interference. In his dissent in *Olmstead v. United States*,[91] Holmes used the phrase "the penumbra of the Fourth and Fifth Amendments."[92] Douglas was unquestionably aware of Holmes' *Olmstead* dissent since in 1951 he quoted from it and termed it "powerful."[93] There is every reason to believe that Douglas, with nearly thirty years on the Court by the time of *Griswold*, was also familiar with Holmes' constitutional penumbra language from *Springer v. Government of the Philippine Islands*[94] and *Danforth v. Groton Water Co.*[95] In those opinions,

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of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.'

The error of the old Court, as I see it, was not in entertaining inquiries concerning the constitutionality of social legislation but in applying the standards that it did. Social legislation dealing with business and economic matters touches no particularized prohibition of the Constitution, unless it be the provision of the Fifth Amendment that private property should not be taken for public use without just compensation.

367 U.S. at 517-18 (Douglas, J., dissenting) (citations omitted).

87. *Griswold*, 381 U.S. at 479, 482, 484.

88. *Id.* at 484 (emphasis added).

89. Schlesinger v. Wisconsin, 270 U.S. 230, 241 (1926) (Holmes, J., dissenting). *See supra* text accompanying note 33.

90. *See supra* note 18 and accompanying text.

91. 277 U.S. 438 (1927). *See supra* text accompanying note 41.

92. 277 U.S. at 469 (Holmes, J., dissenting). *See supra* notes 41-43 and accompanying text.

93. On Lee v. United States, 343 U.S. 747, 762-65 (1951) (Douglas, J., dissenting).

94. 277 U.S. 189, 209 (1928) (Holmes, J., dissenting). *See supra* note 39 and accompanying text.

Holmes clearly provided a basis for the view that constitutional provisions do not terminate in fixed lines, but have penumbras, and that these penumbras can sometimes be protective.

So why did Douglas not cite Holmes in *Griswold*? It is always difficult to say why something did not happen but Douglas may not have cited Holmes' penumbra cases because, as applied to *Griswold*, they were simply not citable. *Olmstead* was a very backhanded nondenial by Holmes of the penumbral protection offered by the Fourth and Fifth Amendments. As such, it had no declaratory force. The *Springer* and *Danforth* quotations both grant substantial freedom to the legislature.[96] These precedents are not, therefore, great authority for invalidating the state law in *Griswold*. Holmes provided Douglas with the intellectual and linguistic underpinnings for the *Griswold* opinion, but not the support of law. Thus, Douglas could not persuasively use precedent from the penumbra tradition.

Justice Hugo Black, on the other hand, had plenty of ammunition from Holmes. He began by accusing Justices Byron White and Arthur Goldberg of relying, *sub silentio*, on *Lochner v. New York*,[97] a case Black termed "long discredited."[98] Like Douglas, Black sides with Holmes in *Lochner*. Black quotes extensively from Holmes in support of the view that the Due Process Clause of the Fourteenth Amendment should be narrowly construed.[99] In sum, Black devotes considerable effort to demonstrating that his dissent represents the Holmesian position.

This rivalry raises the issue of who would have garnered Holmes' vote in *Griswold*: Black or Douglas? Although such a discussion is necessarily speculative, it is hard to imagine Holmes joining either opinion.

Black wrote with Holmes' pith and authority, but was much more rigid and simplistic than Holmes in legal temperament. Holmes' straightforward, even obvious, statement that "[t]he great ordinances of the Constitution do not establish and divide fields of black and white"[100] was in basic conflict with Black's view of the Bill of Rights.[101] Although Holmes harbored deep reservations about an overly expansive reading of

95. 178 Mass. 472, 476, 59 N.E. 1033, 1034 (1901). *See supra* note 30 and accompanying text.

96. *See supra* notes 30 & 39 and accompanying text.

97. 198 U.S. 45 (1905).

98. *Griswold*, 381 U.S. at 514-15.

99. Three times Black quotes Holmes in his *Griswold* dissent. *Id.* at 518 n.11, 521 n.16, 523 n.19. He also cites Holmes' *Lochner* dissent. *Id.* at 523. Like Douglas, Black does not quote any of Holmes' penumbra language.

100. Springer v. Government of the Phil. Islands, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting). *See supra* text accompanying note 39.

101. *See supra* note 82.

due process under the Fourteenth Amendment, he tempered his opposition with pragmatic concern for dominant opinion, reasonableness, and tradition. For example, Holmes stated:

> I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe [upon] fundamental principles as they have been understood by the traditions of our people and our law.[102]

Holmes was, in many senses, a realist, while Black often thumped his Constitution with the fervor of a true believer.[103]

Douglas drew on Holmes' style and language; he even approached the law in Holmes' fashion—as one of many intellectual interests.[104] But though Douglas sometimes spoke with Holmes' words, he lacked Holmes' voice. In *Griswold*, Douglas pushed Holmes' penumbra metaphor much further than it could comfortably go. Douglas was not referring to penumbra to express the boundaries of law and language in any of Holmes' three senses.[105] Instead, he employed the metaphor as a way to link text to a new principle and right. This was not the familiar category jump from law to fact, but an attempt to add to our vision of the Bill of Rights. It seems doubtful that Holmes would have gone along.

III. Penumbra: A Sketchbook

Spatial metaphors in law invite their audience to picture a principle. We can see the tail wagging the dog or imagine that wall between church and state. But what does a penumbra look like? After *Griswold*, how are we to imagine the Bill of Rights?

Douglas gives us a number of hints as to his model of the Bill of Rights. He contrasts specific rights with peripheral rights.[106] According to Douglas, the First, Third, Fourth, and Fifth Amendments have penumbras that constitute "zones of privacy."[107] Relationships may lie "within the zone of privacy created by several fundamental constitutional guarantees."[108] Douglas seems to be suggesting a model like the

102. Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

103. *See, e.g.*, Black, *supra* note 82, at 879 ("For my own part, I believe that our Constitution, with its absolute guarantees of individual rights, is the best hope for the aspirations of freedom which men share everywhere.").

104. Domnarski, *Style and Justice Holmes*, 60 CONN. BAR J. 251 (1986).

105. *See supra* notes 87-88 and accompanying text.

106. Griswold v. Connecticut, 381 U.S. 479, 483 (1965).

107. *Id.* at 484.

108. *Id.* at 485.

following:

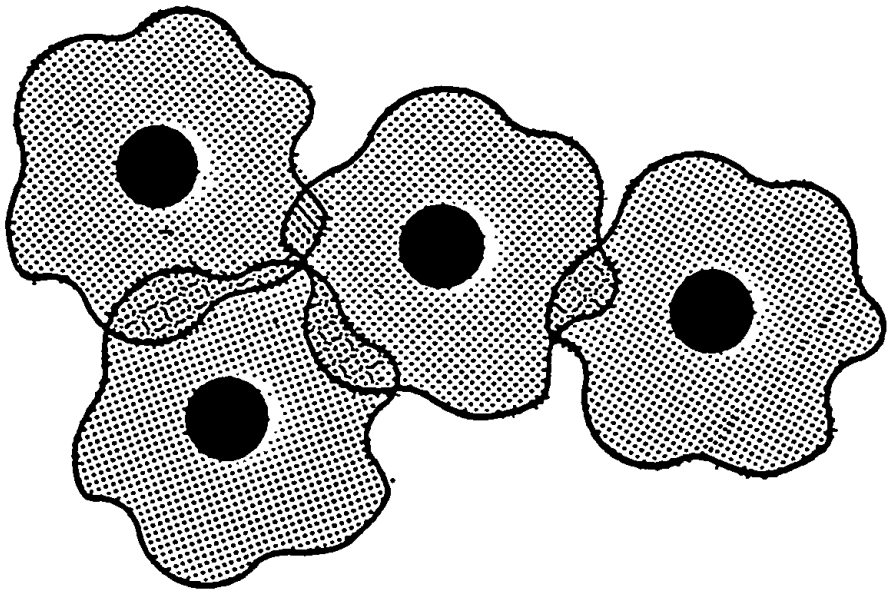

figure 1

This attempt to sketch Douglas' penumbras forces a great number of questions into view, including:

1. What *is* the penumbra? The vagueness inherent in language? Spirit? Will? Policy?

2. Do penumbras expand and shrink, as Holmes suggested, depending on interests involved? Are there core cases that are always protected? Are there cores at all?

3. If there are cores, do they correspond to the exact wording of an amendment? Compared to the core of an amendment, how big should the penumbra be?

4. Should the First Amendment be larger, reflecting a preferred status? Does it have a greater area of influence? A larger zone of privacy?

5. What about the Second Amendment? Does not the right to bear arms relate to the right to be left alone?

6. The Ninth Amendment is not described by Douglas as having a penumbra. Is the Ninth Amendment unimaginable?

7. Can we *place* cases on the model? Is it possible, in other words, to determine that a case belongs within a core, unprotected, or covered by one or more penumbras?

8. Do the specific cores of amendments actively emanate force? Do we have a living constitution in the sense that it has a life of its own? If so, why are the amendments described as surrounded by penumbras

and not coronas?[109]

9. Do "peripheral" rights, like the right of association,[110] have cores? How could they if they have no letter, no text? But don't they embrace easy and harder cases?

10. Do we have a picture, perhaps an unconscious one, of what a provision of the Bill of Rights "looks like?" Which of the following best approximates that picture?

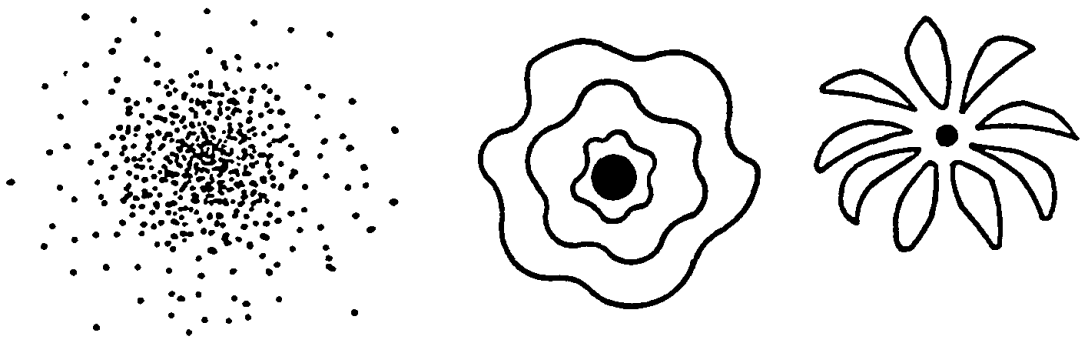

figure 2

11. Was Douglas mistaken in portraying the Bill of Rights as having individual penumbras? Should we view the Bill of Rights as one penumbra containing cores of text?

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109. In *Griswold*, Douglas described the penumbras as "formed by emanations" from certain provisions of the Bill of Rights. 381 U.S. 479, 484 (1965). *See supra* note 23 and accompanying text. This may amount to a mixed metaphor. Shadows are not emanated, and emanated light is a corona, not a penumbra.

110. The *Griswold* opinion states that "[i]n *NAACP v. Alabama*, 357 U.S. 449, 462 (1958), we protected the 'freedom to associate and privacy in one's associations,' noting that freedom of association was a peripheral First Amendment right." 381 U.S. at 483. In fact, Harlan's opinion for the court in *NAACP v. Alabama* did not use the term "peripheral", although it did note "the close nexus between the freedoms of speech and assembly." 357 U.S. at 460. In his *Griswold* dissent, Stewart termed the right of association a "true First Amendment" right. 381 U.S. at 530 n.7 (Stewart, J., dissenting). Presumably, for Stewart, peripheral rights are not true rights.

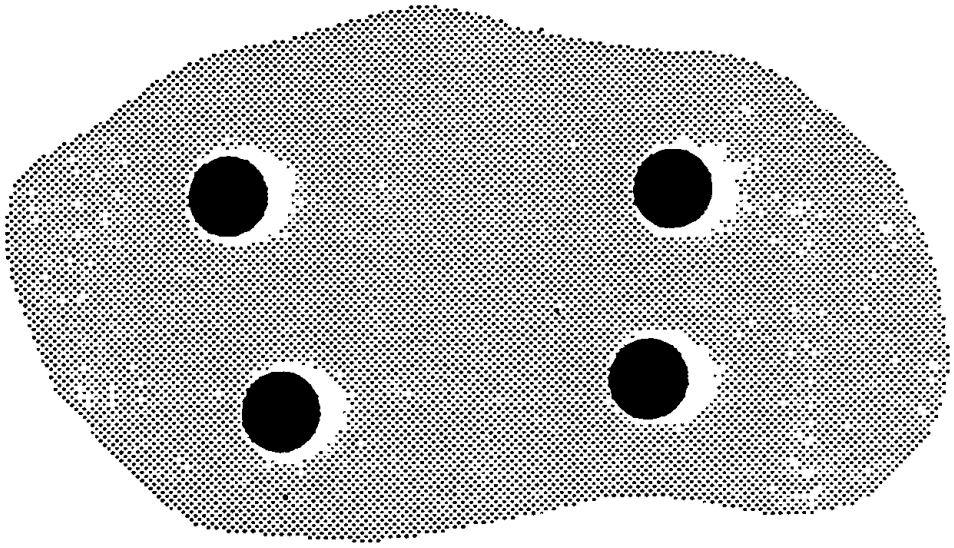

figure 3

12. If the Bill of Rights has shadows—both umbras and penumbras—what is the light source? The police power? The "natural outcome of dominant opinion," as in Holmes' phrase from *Lochner v. New York*?[111] Does not the penumbra model of the Bill of Rights have to be three dimensional and include the light source, something like the following?

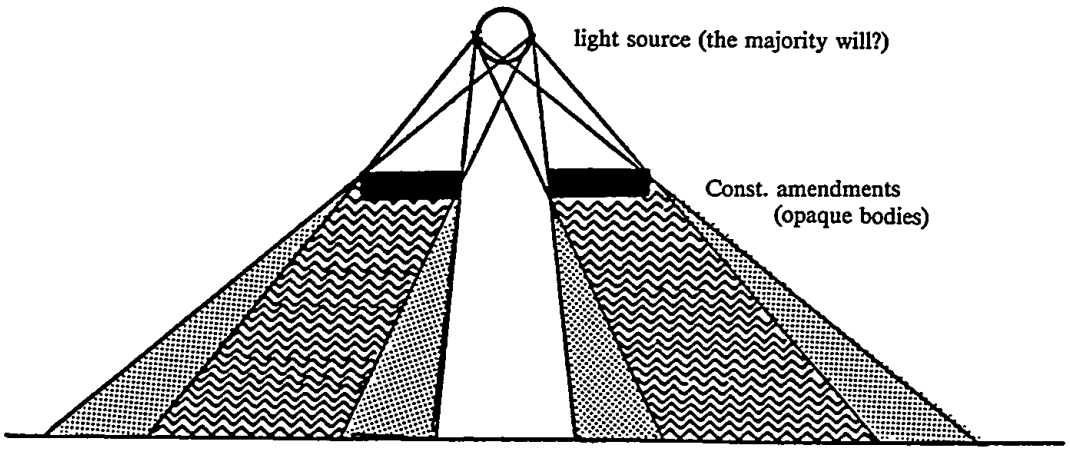

figure 4

Conclusion

It may be that no spatial metaphor can withstand this sort of scrutiny. Perhaps any metaphor taken literally will collapse.[112] One proba-

111. 198 U.S. 45, 76 (1905). *See supra* text accompanying note 102.
112. *See generally* C. TURBAYNE, THE MYTH OF METAPHOR (1962).

bly could not draw a satisfactory level playing field[113] or wall separating church and state.[114] But there is no need to try. Those metaphors bring concrete images to mind; one knows instantly what they mean.

Beginning with its use by Holmes, the penumbra metaphor has been fuzzy and ambiguous.[115] By its nature, it evokes no hard-edged sensation, no clear image. The penumbra metaphor illustrates instead the problem of law. It expresses, as much as anything, the distance judges have to travel between fact and law and how poorly equipped they are to bridge this gap.[116] For this reason, the penumbra metaphor has often been used as a shorthand for the limits of judicial reasoning. Just as often (and sometimes simultaneously) judges have used the penumbra metaphor to convey their discretion. In the penumbra, judges are, to some extent, free from text and precedent as well as reason. But they are never freed from responsibility, including the responsibility to try to penetrate what Cardozo called "the mists of metaphor."[117] Metaphors like "penumbra" are useful[118] and are even, at some level, inescapable. In the long run, though, they are not a substitute for theory.

113. *See supra* note 7 and accompanying text.

114. *See supra* note 8 and accompanying text.

115. Nevertheless, the penumbra metaphor may be more successful than Douglas' bald assertion in his *Poe v. Ullman* dissent that "the notion of privacy is not drawn from the blue." 367 U.S. 497, 521 (1961) (Douglas, J., dissenting).

116. In this sense penumbra can be referred to, playfully but not wholly in jest, as a meta-metaphor.

117. Berkey v. Third Ave. Ry., 244 N.Y. 84, 94, 155 N.E. 58, 61 (1926) (Cardozo, J.) ("The whole problem of the relation between parent and subsidiary corporations is still enveloped in the mists of metaphor.").

118. In order to illustrate the facts, to control them more effectively, to induce attitudes, or to inculcate ways of behavior, artists, philosophers, theologians, and scientists have used various devices. An extraordinarily successful one often used to illuminate areas that might otherwise have remained obscure is the model or metaphor.

C. TURBAYNE, *supra* note 112, at 3.