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"A Parade of Horribles"—Broccoli, Burial Markets, and Justice Scalia's Wife: The Role of Analogies in Human Decision-Making from Justices to Jurors

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Although Supreme Court advocates and trial attorneys argue before very different audiences, both Supreme Court justices and juries rely on analogies to make sense of ambiguous and complicated situations. For trial consultants, the use of analogies and their suggested integration into cases is not a new concept. In fact you would probably be hard pressed to find a trial consultant who would recommend avoiding the use of analogies at trial. Why do the majority of trial consultants suggest the adoption of analogies? Because an "analogy is a powerful cognitive mechanism that people use to make new inferences and learn abstractions,"[1] analogies assist in making a poorly understood situation more approachable. However, while trial consultants generally advocate the use of analogies, trial attorneys often fearfully shudder at the thought of using them.

Perhaps analogies and hypotheticals remind attorneys of their nightmares in law school—the grouchy curmudgeon professor posing a devastating analogy or the saccharine professor kindly asking a crushing hypothetical. All of us have similar night terrors related to the impossible challenge be it graduate school, law school, or grade school. But assuming most attorneys have shaken off the mental scars of law school, for trial attorneys, analogies often contain hidden weaknesses. When opposing counsel or adverse jurors identify an analogy's weakness, a seemingly solid case may suddenly disintegrate from its own flawed logic.

Without proper consideration and testing, adequate analogies may play into the hands of a skilled opposing counsel. After all, law schools do train burgeoning lawyers to think abstractly about

[1]Gentner, Dedre, and Arthur B. Markman. "Mapping in Analogy and Similarity." *American Psychologist 52*, no. 1 (1997): 32.

situations, turning seemingly stable arguments into tenuous and slippery scenarios. Thus, attorneys do have much to fear about poorly considered analogies—much is at stake. But, if reversed analogies have the ability to powerfully undermine a case, then successfully advanced analogies have the ability to control how justices and jurors understand a case. Whether an attorney offers his or her audience an analogy, this much is certain—justices or jurors will adopt their own analogy to deconstruct a case. Which analogy would you prefer: yours or theirs? All humans rely on analogies in their reasoning and decision-making; this paper reviews compelling research on the ubiquitous nature of analogies, distinguishes between intuitive and deliberative analogies occurring in the recent SCOTUS health care oral arguments, and makes suggestions for attorneys and trial consultants in the use of deliberative analogies at trial.

The Ubiquitous Analogy: Intuitive or Deliberative

"The ability to think analogically is central to human cognition"[2] and for good reason, because the versatile power of the analogy makes it "a tool for a wide range of purposes, including solving problems, constructing explanations, and building arguments."[3] The "mapping of relations" assists humans in understanding "two very disparate domains" by using our prior understandings of the world to make sense of new and novel situations.[4] Analogous reasoning "promotes comprehension and abstraction, "[5] making it "one of the most common forms of reasoning in law" as "legal inference is drawn from one case that has already been classified and is assessed to another case on the basis of similarity and dissimilarity."[6] Through analogical reasoning, known as hypotheticals in the legal community, legal scholars and practitioners attempt to anticipate the ramifications of various legal and policy decisions. Because the Supreme Court justices often face challenging policy decisions, they rely heavily on hypothetical analogies to achieve a clear understanding of the impact the Court's decision may have on its citizenry. Since humans adopt analogies to make sense of the ambiguity or uncertainty before them, evaluating, advancing, and controlling an analogy offers attorneys a powerful opportunity to influence how a judge or juror cognitively processes a case.

Jurors and justices often find themselves in a similar situation—"a deliberately adversarial problem area, in which there is no side with the right answer, but rather where everything is a matter of degree."[7] Separate from jurors, but similar in task, the justices have been presented with written briefs, lower court opinions, and various supplemental materials. Oral arguments present them with the opportunity to probe a case's "weakness, oversights, and implications….Hypotheticals/[Analogies] can

[2]Kurtz, Kenneth J, Chun-Hui Mao, and Dedre Gentner. "Learning by Analogical Bootstrapping." *Journal of the Learning Sciences 10,* no. 4 (2001): 417..

[3]Gentner, Dedre, and Keith J. Holyoak. "Reasoning and Learning by Analogy: Introduction." *American Psychologist 52,* no. 1 (1997): 32.

[4]Gick, Mary L., and Keith J. Holyoak. "Analogical Problem Solving." *Cognitive Psychology 12,* no. 3 (1980): 307.

[5]Kurtz, Kenneth J, Chun-Hui Mao, and Dedre Gentner. "Learning by Analogical Bootstrapping." Journal of the Learning Sciences 10, no. 4 (2001): 417

[6]Macagno, Fabrizio, and Douglas Walton. "Argument from Analogy in Law, the Classical Tradition, and Recent Theories." *Philosophy and Rhetoric 42,* no. 2 (2009): 154-155.

[7]Rissland, Edwina L. "Dimension-Based Analysis of Hypotheticals from Supreme Court Oral Argument," *Proceedings of the 2nd International Conference on AI and Law* Vancover, BC, 1989, p. 15.

be particularly potent in novel situations for which the body of relevant case law is sparse: they can provide gedanken [thought] experiments in which conditions can be tested in the way mathematicians test new conjectures."[8] Although the Supreme Court may have the advantage of education, experience, and background information, more information does not always mean superior decision-making. Much of the quality of an analogy or reasoning process depends upon whether a thinker intuitively or deliberatively approaches problem-solving.[9]

As humans we know that some analogies work better than others and that it may take careful consideration of characteristics to determine an analogy's suitability. We have all experienced this in trial strategies meetings: an attorney blurts out an analogy to describe a particular situation, and two minutes later a devastating flaw is found. Considering all facets of an analogy's utility forces humans into deliberative decision-making from what may have been an intuitive or impulsive analogy. Lately researchers have been focusing intensely on intuitive deliberative decision-making in public policy circles,[10] and scholars have adopted similar considerations in juror decision-making.[11] These scholars similarly describe two kinds of thinking: "Intuitive and automatic, and another that is reflective and rational—the Automatic/[Intuitive] system is rapid and is or feels instinctive….The Reflective/[rational] system is more deliberate and self-conscious,"[12] or "sometimes the term rational (or logical) is applied to decision-making that is consciously analytic, the term non-rational to decision-making that is intuitive and judgmental."[13]

As social science scholars have turned greater attention to the dual process of human decision-making, they note dangers and drawbacks associated with intuitive reasoning.[14] However, we would

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[8]Rissland, Edwina L. "Dimension-Based Analysis of Hypotheticals from Supreme Court Oral Argument," *Proceedings of the 2nd International Conference on AI and Law* Vancover, BC, 1989, p. 1.

[9]I believe it is useful to understand intuitive and deliberative thinking on a spectrum of idealization. On one end sits pure emotion and instinct, and on the other pure logic and analytic reasoning, neither contain the other, but the decision-making process contains a bit of each. We make our decisions using both emotion and logic, but the process by which we reach a decision can have varying levels of intuition and deliberation.

[10]See Brafman, Ori, and Rom Brafman. Sway: The Irresistible Pull of Irrational Behavior. New York: Random House, 2008.; Kahnneman, Daniel. *Thinking, Fast and Slow.* New York: Farrar, Straus, and Giroux, 2011.; Thaler, Richard H., and Cass R. Sunstein. *Nudge: Improving Decisions about Health, Wealth, and Happiness.* New York: Penguin Group, 2009.

[11]See De Vries, Marieke, Rob W. Holland, and Cilia L.M. Witteman. "Fitting Decisions: Mood and Intuitive Versus Deliberative Decision Strategies." *Cognition & Emotion 22,* no. 5 (2008): 931-43. ; Richetin, Juliette, Marco Perugini, Iqbal Adjali, and Robert Hurling. "The Moderator Role of Intuitive Versus Deliberative Decision Making for the Predictive Validity of Implicit and Explicit Measures." *European Journal of Personality 21,* no. 4 (2007): 529-46.; Simon, Herbert A. "Making Management Decisions: The Role of Intuition and Emotion." *The Academy of Management Executive 1,* no. 1 (1987): 57-64.; Sunwolf, and David Seibold. "Jurors' Intuitive Rules for Deliberation: A Structuational Approach to Communication Injury Decision Making." *Communication Monographs 65,* no. 4 (1998): 282-307.; Tormala, Zakary L., Joshua J. Clarkson, and Marlone D. Henderson. "Does Fast or Slow Evaluation Foster Greater Certainty?" *Personality and Social Psychology Bulletin 37,* no. 3 (2011): 422-34.

[12]Thaler, Richard H., and Cass R. Sunstein. *Nudge: Improving Decisions about Health, Wealth, and Happiness.* New York: Penguin Group, 2009. p.19-20.

[13]Simon, Herbert A. "Making Management Decisions: The Role of Intuition and Emotion." *The Academy of Management Executive 1,* no. 1 (1987): 57.

[14]These scholars often point out the dangers and drawbacks associated with intuitive reasoning, but neither reasoning process is superior in itself, but rather both ends of the spectrum offer benefits depending upon the situation. When decision-makers face situations and environments requiring quick decisions and actions, a deliberative process may be a poor approach. Similarly, when decision-makers face complex variables and an unclear path with much at stake, then an intuitive approach should probably be avoided.

all hope that in the courtroom both jurors and justices adopt a deliberative process "analyzing the pros and cons of different options before making a decision. Deliberative decision-making is cognition based, rule governed, analytical, precise and slow. Deliberating decision-makers take their time to thoroughly analyze the positive and negative aspects of different options."[15] While we hope for a deliberative process, we also know that humans prefer the comfort and east of intuitive reasoning. A skilled trial attorney will guide jurors toward a deliberative process by offering a deliberative analogy that quickly makes sense of the complex environment for jurors.

Supreme Analogies

Deliberative analogies occupy a liminal space between intuitive and deliberative decision-making. While analogies speak to prior personal experience and emotional familiarity, they also present a complex situation by making abstract concepts concrete. Intuitive analogies may fail to withstand legal scrutiny and questioning. At the Supreme Court, we would expect skillful implementation of deliberative analogies, but like jurors, even the justices occasionally lapse into intuitive analogies without any cognitive rigor.

In the Affordable Care Act cases, the justices were placed in the unenviable position of interpreting Congress' intention, limits to the Commerce Clause, the Anti-Injunction Act, and the expansion of Medicaid. The Affordable Care Act is 2,700 pages alone, and as Justice Scalia dryly noted "You really want us to go through these 2,700 pages?"[16] The media chastised Scalia for his comments, and to some degree rightly so, but his remark calls attention to the larger bulk of materials and arguments through which the justices must wade. In ordinary cases, justices have thousands of potential pages to examine; in the Affordable Care Act cases, the justices probably had well over 20,000 pages to review[17] and listened to 4 oral arguments comprising 6 hours. Much like jurors in complex cases, the justices also struggle to make sense of the information before them and reach an agreed upon decision.

The justices adopted a variety of analogies to test legal theories that advocates advanced, offering some humorous analogies at times. Justice Sotomayor inadvertently opened Pandora's box early in oral arguments when she asked "What is the parade of Horribles that you see occurring …. What kinds of cases do you imagine the courts will reach?"[18] Following Justice Sotomayor's statement, the justices poured forth their hypothetical analogies, some deliberative and insightful and some intuitive and distracting.

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[15]De Vries, Marieke, Rob W. Holland, and Cilia L.M. Witteman. "Fitting Decisions: Mood and Intuitive Versus Deliberative Decision Strategies." *Cognition & Emotion 22*, no. 5 (2008): 932.

[16]Ironically, even Justice Scalia, the standard bearer of textual scrutiny within historical context, notes the impossibility of scrutinizing the Healthcare Act's text.

[17]Some readers may dismiss the workload of the justices by indicating that a justice's clerks complete most of the work. While this is partially true, clerks typically identify and summarize the most relevant material for the justices' consideration, removing any redundant arguments. After the clerks have offered their suggested readings, then the justices will turn to the relevant material, often calling for further materials related to preceding cases noted throughout opposing briefs. Justices often joke that the first few years are spent just learning how to manage the sheer amount of paper presented to them.

[18]U.S. 11-398 Department of Health and Human Services et al. v. Florida et al. p.14 (3-26-2012).

Unfortunately, intuitive analogies tend to be hastily offered, contain fatal weaknesses, and may reflect a poor level of consideration. In the Affordable Care Act oral arguments, Justice Scalia advanced two poor analogies that he later quickly abandoned. The most active participant in oral arguments, Justice Scalia's weak analogies reflect his intuitive "off-the-cuff" style.

In this example, Justice Scalia presses Solicitor General Verrilli's definition of a "market" related to the distinct nature of the "health care market," and the need for an individual mandate as argued by the Solicitor General:

> *Justice Scalia: Could you define the market—everybody has to buy food sooner or later, so you define the market as food, therefore everybody is in the market; therefor you can make people buy broccoli."*
>
> *General Verrilli: No that's quite different. That's quite different. The food market, while it shares that trait that everybody's in it, it is not a market in which your participation is often unpredictable and often involuntary….*

Justice Scalia then attempts to shift the analogy to "blue eyes":

> *Justice Scalia: Is that a principled basis for distinguishing this from other situations? I mean you know, you can also say, well, the person subject to this has blue eyes. That would indeed distinguish it from other situations."*

It is not until Justice Ginsburg points out the obvious flaw that Justice Scalia relents:

> *Justice Ginsburg: Mr. Verrilli, I thought that your main point is that, unlike food or any other market, when you made the choice not to buy insurance, even though you have every intent in the world to self-insure, to save for it, when disaster strikes you may not have the money.*[19]

In the next example, Justice Scalia attempts to persuade Paul Clement, former Solicitor General for President George W. Bush, to adopt his understanding of "coercion." In this instance, Justice Scalia attempts to aid Mr. Clement, but Mr. Clement resists his characterization. Justice Scalia's impromptu analogy draws laughter and comments from other justices—both from his performance and lack of clarity—eventually abandoning his failing analogy:

> *Justice Scalia: ….I mean, I think you know the old Jack Benny thing, Your Money or Your Life, and you know he says 'I'm thinking, I'm thinking.' [laughter]*
>
> *It's funny because it's no choice. You know? Your life? Again it's just money. It's an easy choice….*
>
> *Now, whereas, if the choice were your life or your wife's, that's a lot harder. [laughter].... It's a tough choice…. Okay? You can't refuse your money or your life. But your life or your wife's, I could refuse that one. [laughter]*
>
> *[excerpted text……]*

[19]U.S. 11-398 Department of Health and Human Services et al. v. Florida et al. p.13-14 (3-27-2012).

Justice Sotomayor: Mr. Clement, he's not going home tonight. [laughter]

Justice Scalia: I'm talking about my life. I think – take mine, you know? [laughter]….I won't use that as an example. Forget about it.[20]

Justice Scalia's analogies neither appear well thought out nor do they present a situation that could lead to further insight. While the reference to Justice Scalia's wife provides a humorous moment its introduction serves as a distracting hindrance to Mr. Clement's case, forcing Chief Justice Roberts to restore order by declaring "That's enough frivolity for a while." Instead his analogies waste the advocate's precious time and detract from the argument. Although reasoning through intuitive analogies is common in human decision-making, one would hope a Supreme Court justice could offer a more rigorous analogy to test legal principles, particularly in such an important case.

In contrast to Justice Scalia's active questioning and impromptu intuitive analogies, Chief Justice Roberts and Justice Alito offer more thoughtful comparisons, striking at the heart of the individual mandate by comparing the unexpected need for health care to cell phones and the burdensome cost of health care to the burial market. Chief Justice Roberts advances a deliberative analogy when referring to people's inability to control when they enter the health care market:

General Verrilli: ….People cannot generally control when they enter that [healthcare] market or what they need when they enter that market.

Chief Justice Roberts: Well, the same, it seems to me, would be true for the market in emergency services: police, fire, ambulance, roadside assistance, whatever.

You don't know when you're going to need it; you're not sure that you will. But the same is true for health care. You don't know if you're going to need a heart transplant or if you ever will. So there's a market there. In some extent we all participate in it.

So can the government require you to buy a cell phone because that would facilitate responding when you need emergency services? You can just dial 911 no matter where you are?[21]

As General Verrilli attempts to explain the differences between health care and emergency services, Justice Alito offers burial services as an even closer analogy:

General Verrilli: ….This is an issue of market regulation and that's how Congress looked at this problem….

Justice Alito: Do you think there is a market for burial services?

General Verrilli: For burial services?....Yes I think there is.

Justice Alito: All right. Suppose that you and I walked around downtown Washington at lunch hour and we found a couple of healthy young people and we stopped them and we said: You know what you're doing? You are financing your burial services right now because eventually you're

[20]U.S. 11-400 Florida et al. v. Department of Health and Human Services, et al. p. 31-33 (3-28-2012).
[21]U.S. 11-398 Department of Health and Human Services et al. v. Florida et al. p. 5-6 (3-27-2012).

> *going to die, and somebody is going to have to pay for it, and if you don't have burial insurance and you haven't saved money for it, you're going to shift the cost to somebody else. Isn't that a very artificial way of talking about what somebody is doing?.....*
>
> *[excerpted text……]*
>
> *General Verrilli: ….[There's] a difference, and it's a significant difference. That in this situation one of the economic effects Congress is addressing is that the many billions of dollars of uncompensated costs are transferred directly to other market participants. It's transferred directly to other market participants because health care providers charge higher rates in order to cover the cost of uncompensated care, and insurance companies reflect those higher rates in higher premiums, which Congress found translates to a thousand dollars per family in additional health insurance costs.*[22]

Clearly Chief Justice Roberts' and Justice Alito's analogies tested case issues more thoroughly than Justice Scalia's broccoli or wife examples; however, one cannot tell whether the justices planned to pose these analogies or whether they materialized through discourse. But the justices' defenses and discussions of the analogies suggest a deeper consideration than impromptu or intuitive usage. Planned or unplanned, intuitive or deliberative, in either instance the larger issue for readers to recognize is that analogies have varying degrees of quality, and they play a fundamental role in human reasoning even at the highest level of decision-making. The advantage is awarded to the attorney who offers either juror or justice a deliberative analogy that makes the abstract concrete and withstands the battering of oppositional winds.

Principles for Analogies

1. Employ Deliberative Analogies

Test analogies before introducing them at trial. Each case is unique and the current political winds change so frequently it can be difficult to predict how analogies may be received. Analogies must resonate with the target audience in order to prove even moderately effective. References that emanate from outside the audience's breadth of knowledge or are culturally situated may prove confusing or simply be dismissed. But without testing analogies within the larger scope of a mock trial, attorneys may find their intuitive judgments lead them astray.

Recently, we conducted research in New York and some of the Gulf States. Attorneys in New York wanted to liken their opposition to the banking sector that caused, in part, the economic downturn. Similarly, attorneys in cases along the Gulf Coast wanted to liken their opposition to the oil industry. When testing these analogies during mock trials, we learned the proximity to these industries created a dependence which caused jurors to support their regional businesses. Family and friends were employed by the very industries the attorneys critiqued through their analogies. Conversely, New Yorkers viewed the oil industry in a more negative light than the banking sectors, and Gulf Coast

[22]U.S. 11-398 Department of Health and Human Services et al. v. Florida et al. p. 7-9 (3-27-2012).

jurors viewed Wall Street more negatively than the oil industry. Without previously testing jurors' reactions to these industries, we would not have expected to find these responses.

Testing analogies may also reveal analogies that jurors themselves may construct. We often find jurors creating their own analogies, which provide attorneys with a powerful weapon at trial. But without testing analogies, an attorney risks having his or her analogy replaced by another juror's, a risky and dangerous proposition. Vetting analogies prior to trial reduces the probability that they may be substituted with the imaginings of a juror.

The deliberative process of screening analogies during mock trials is crucial for success by scrutinizing hypotheticals in a controlled environment. Testing analogies at mock trials allows hidden weaknesses to be discovered by jurors or an "opposing counsel" without the damaging consequences at trial. And testing analogies also reveals their strengths, providing attorneys with a powerful framing device that may control jurors' perception of the case during deliberations. Of course it is not always feasible to test analogies through mock trials, but attorneys may still deliberate over analogies, considering strengths and weaknesses with team members. At the very least, deliberative analogies will more often prove effective than intuitive analogies by withstanding the opposition's scrutiny and may be adopted by jurors during deliberations.

2. Control Analogies

Trial attorneys must consider the timing of analogies. The earlier that attorneys use analogies in cases, the more vulnerable analogies become to the opposing counsel's criticisms. Thus, knowing when to advance the most important analogies is critical for attorneys and trial consultants to determine. Because analogies provide a potent frame through which jurors may understand and decide a case, the most effective analogies may often be used in closing argument. During closings, the opposition may have little time to counter or reverse an analogy for his or her own purposes. Smaller helpful analogies may be used throughout the case, but attorneys should time the most influential analogies for suitable contexts during court (witness testimony, closings, cross-examine, etc…).

Thematic resonance should also be considered and controlled by attorneys and trial consultants; analogies should not clash with case themes or social and political undercurrents. The prior example of banks and the oil industry involved attorneys that wanted to research breach of contract and product liability disputes. Thematically, using banks to frame a contract dispute or comparing the oil industry to the opposition in a product liability case meshes well with the case themes (i.e. banks ignored regulations and broke trust; oil industry's product hurt environment). If these analogies were offered to jurors on the West Coast or North-West, proximity would not have been an issue, and thematically the analogies would have resonated with larger case themes. Attorneys and consultants ought to consider the manner in which analogies align with larger case themes, because the analogies must intuitively make sense to the jurors. Any emotional reaction to the analogy or poor thematic alignment may cause jurors to reject the analogy and adopt their own.

Finally, turning or reversing an opposition's analogy can be devastating to the opposition's case. For jurors, exposing the weaknesses of the other side's analogy causes them to gravitate toward the most stable and secure analogy, which is, hopefully, yours. Trial consultants and attorneys should pay close attention to analogies used during pre-trial conferences and settlement discussions in antici-

pation of these analogies being brought out at trial. Turning these analogies and testing any reversed analogies may provide insight into the effectiveness of a failed analogy. The vast majority of attorneys neither test nor deliberate carefully over the analogies they incorporate in trial, many use them intuitively, leaving their case vulnerable should the analogy prove deficient. If a trial consultant or attorney can twist the opposition's analogy for his or her own purposes, then substantial influence may be gained during deliberations.

3. Avoiding Analogies

"That is not this case…." loathsome words to a Supreme Court Justice, but a wise approach depending upon the circumstances. Like Supreme Court advocates, trial attorneys and consultants may encounter situations where analogies should be avoided. Occasionally, analogies cannot sufficiently capture a case, or certain cases may prompt jurors to adopt adverse analogies. Without testing analogies in mock trials, it may be difficult for attorneys to know when analogies fail to encapsulate a situation and when cases prompt adverse analogies. In a recent breach of contract case with a complex interplay of variables and parties, we learned that adopting an analogy to contextualize the complex relationship actually prompted jurors to simplify the relationship through an analogy that cut against our client's interests. We knew opposing counsel would use a similar analogy and thus strategized to illustrate to jurors why the analogy fell short, or why "that is not this case." Sufficient research will assist attorneys and trial consultants in discerning when to advance an analogy and when to avoid one. It is not common that we recommend avoiding analogies, certainly humans may gravitate towards their own, but if an attorney can counter intuitive analogies then he or she may have broken down a troubling barrier that could cripple a case.

Conclusion

Perhaps the potent nature of an analogy results from its ability to lead a disparate group of people from confusion to clarity. Philosophers, anthropologists, linguistic scholars, and rhetoricians have all sought to explain the persuasive influence of analogies—there is an ineffable power to them. However, analogies are not a panacea for a troubled case. On their own, analogies will not persuade jurors of your client's case, but they will assist in framing jurors' understanding of complex issues, and they will be used in a jury's deliberations to make sense of the case.

Instead of cringing or running from analogies, we urge attorneys to consider adopting them in their cases. We know that analogies play a fundamental role in human decision-making from Supreme Court justices to ordinary jurors. Analogies assist justices and jurors in making sense of complex problems before them. Varying qualities of analogies exist based upon intuitive or deliberative reasoning, and even deliberative analogies may not hold up to mock trial testing. The question attorneys should ask, is not "should I use an analogy?," but rather "will jurors use my analogy, my opposition's, or their own?," because it is certain jurors will adopt an analogy. Which analogy jurors adopt depends upon deliberate consideration, but surely attorneys can offer better analogies than broccoli or Justice Scalia's wife.

