

Argument, Analogy, and Audience: Using Persuasive Comparisons While Avoiding Unintended Effects

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Like other rhetoricians, lawyers address their statements to particular audiences, and they shape their arguments in light of the characteristics of those audiences.¹ In addressing skeptical audiences, lawyers will find that narratives structured as stories tend to be more persuasive than more syllogistic forms of verbal reasoning.² In contrast to the straightforward lines of logical reasoning in syllogisms, narratives persuade by providing vicarious experiences for their audiences.³ For example, storytelling

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1 Legal writing textbooks acknowledge the importance of writing toward particular audiences. See e.g. Linda H. Edwards, *Legal Writing* (4th ed., Aspen Publishers 2006). In a chapter titled “The Office Memo and the Law-Trained Reader,” Edwards includes a subsection titled “Focus on the Reader.” *Id.* at 149. Similarly, in a chapter on writing persuasive briefs, Edwards titles a subsection, “Judges as Readers.” *Id.* at 241; see also Laurel Currie Oates & Anne Enquist, *The Legal Writing Handbook* (4th ed., Aspen Publishers 2006). Oates and Enquist title a chapter “The Objective Memorandum: Its Purpose, Audience, and Format.” *Id.* at 51. A subsection of a chapter on writing trial briefs is titled “Audience.” *Id.* at 379. And a section of a chapter on writing appellate briefs is titled “Understanding Your Audience, Your Purpose, and the Conventions.” *Id.* at 444.

The consequence of mismatching argument style to audience is described in Emily Couric’s book, *The Trial Lawyers: The Nation’s Top Litigators Tell How They Win* (St. Martin’s Press 1988). During the bench trial of a dentist who faced criminal charges of sexually molesting patients who were under anesthesia, defense counsel “argued the case in the grandiose manner that had brought him so much success before juries. He did not bother to modify his style to one more suitable for a judge. With great theatrics the defense attorney shouted at times, whispered at others, and occasionally pounded his fist on the defense table.” *Id.* at 53. But such theatrics in delivery style did not impress the judge during the bench trial. *Id.* At the conclusion of trial, the defendant was convicted of sexual abuse. *People v. Teicher*, 422 N.E. 2d 506, 507 (N.Y. 1981). (During the course of the trial, the prosecution used an analogy to link unfavorable emotional associations to the defendant, “compar[ing] the dentist’s behavior to a form of necrophilia—except here the bodies were warm.” Couric, *supra*, at 54.)

2 Syllogistic reasoning works deductively from propositions to arrive at a conclusion. A rhetoric textbook notes that “[p]robably the classic example” of a formal syllogism is the following:

Major Premise: All human beings are mortal.

Minor Premise: Socrates is a human being.

Conclusion: Socrates is mortal.

Sylvan Barnet & Hugo Bedau, *Current Issues and Enduring Questions* 23 (St. Martin’s Press 1987).

3 See Kerry Patterson et al., *Influencer: The Power to Change Anything* 50–51, 57, 72 (McGraw–Hill 2008). *Influencer* apparently refers to syllogistic reasoning as “verbal persuasion” and narratives as “stories.” But that terminology can be confusing because, of course, stories can be used in verbal persuasion.

proved to be more effective than more formal methods of persuasion in the context of promoting interest in adult literacy through a television soap opera in Mexico City after previous adult literacy campaigns did not have much effect.⁴ Storytelling was also more effective in convincing U.S. workers at a manufacturing company that they would need to increase worker productivity to be commercially competitive: the U.S. workers had been skeptical of a statistical summary, but then were convinced after some of their colleagues visited a Japanese company and talked about their conversion from skepticism to belief after observing the high efficiency of the Japanese workers.⁵

Drawing an analogy between the client's situation and a familiar story can be a particularly persuasive use of narrative.⁶ A well-chosen analogy accomplishes much of the work of persuasion for the advocate, because the analogy implicitly provides background information that the advocate does not have to spend time explaining.⁷ An effective analogy compares the current situation with another situation that is familiar,⁸ that has some emotional resonance,⁹ and that is free of unintended associations.¹⁰

An analogy fails when any of these three requirements is missing. For example, a rhetorician, Suzette Haden Elgin, gave an example of a bad analogy that had been recommended by an obstetrics professor who addressed "patients' reactions to the fees for delivering babies, and advised doctors to compare that cost to the cost of embalming the dead."¹¹ The first requirement—familiarity—is met because both parts of the comparison, birth and death, would be familiar to the pregnant women or new mothers to whom the doctors would be speaking. The second

4 *Id.* at 53–54.

5 *Id.* at 64–65.

6 Cass Sunstein has referred to "analogy, which engages narratives, which prominently affect emotions." See Cass Sunstein, *On Analogical Reasoning*, 106 Harv. L. Rev. 741, 771 n. 108 (1993).

7 See e.g. Noelle Nelson, *Winning!: Using Lawyers' Courtroom Techniques to Get Your Way in Everyday Situations* 274 (Prentice Hall 1997).

8 In warning against using unfamiliar comparisons, Nelson declares that "[i]f the person you want to convince is quite young, analogies from the Depression may have little impact; if a group you are addressing is primarily female, sports-oriented analogies may be worthless." *Id.* at 276.

9 See e.g. Michael R. Smith, *Levels of Metaphor in Persuasive Legal Writing*, 58 Mercer L. Rev. 919, 940 (2001) (noting, *inter alia*, that one rhetorical benefit of using metaphoric themes is the evocation of favorable emotions); Latour Lafferty, *Leadership in Trial Advocacy: Credibility is a Cornerstone of Effective Trial Advocacy*, 28 Am. J. Tr. Advoc. 517, 520 (2005) ("Charismatic leaders inspire 'extraordinary influence' over their followers through a persuasive communication style that articulates a highly emotional message using metaphors and analogies that appeal to the intellectual imagination and the audience's personal values.") (internal citations omitted).

10 See Suzette Haden Elgin, *BusinessSpeak: Using the Gentle Art of Verbal Persuasion to Get What You Want at Work* 164–65 (McGraw–Hill 1995).

11 *Id.*

requirement—emotional resonance—is also met because birth and death tend to provoke strong emotional reactions.¹² However, the analogy fails on the third requirement—freedom from unintended associations. Elgin observed several point-by-point correspondences between the experiences of birth and death, which would bring extremely unfavorable associations into the discussion of birthing a child: “the brain starts matching up the delivery table with the embalming table, the amniotic fluid with the embalming fluid, the delivery room with the morgue, the ambulance with the hearse, the doctor with the mortician.”¹³ Elgin summarized the impact by stating that “[t]his is a powerful metaphor, for sure, but its effects are disastrous!”¹⁴

On the other hand, after the death of the singer Elvis Presley, an effective analogy was used to defend his physician against criminal charges of overprescribing drugs to his patients. The defense compared the doctor to the biblical Good Samaritan, who altruistically treated a robbery victim’s wounds and provided for his subsequent lodging rather than leaving the victim along the roadway as previous passersby had done.¹⁵ Dr. George Nichopoulos testified that he prescribed drugs in hopes of becoming his patients’ only source, so that he could then start to wean them away from using such drugs.¹⁶ A commentator noted that Nichopoulos’s lawyer “argued in his closing statement that Dr. Nichopoulos was a ‘good [S]amaritan’ who treated drug-dependent patients whom no other doctor wanted to accept.”¹⁷ The jury acquitted Nichopoulos of all charges,¹⁸ finding that he had engaged in good-faith attempts at helping his patients.¹⁹

The commentators apparently missed an additional point that contributed to the familiarity and emotional resonance of Nichopoulos’s defense: the geographical location of the trial was probably important in

12 For example, Joyce Carol Oates incorporates analogies to birth and death to explain the “primitive” appeal that spectators find in prizefighting matches: “Of course [boxing] is primitive, too, as birth, death, and erotic love might be said to be primitive, and forces our reluctant acknowledgement that the most profound experiences of our lives are physical events—though we believe ourselves to be, and surely are, essentially spiritual beings.” Joyce Carol Oates, *On Boxing* 99 (expanded ed., Ecco Press 1994).

13 Elgin, *supra* n. 10, at 165.

14 *Id.*

15 For the biblical story of the Good Samaritan, see *Luke* 10:30–37.

16 *Presley’s Doctor Acquitted on All Prescription Charges*, N.Y. Times (Nov. 5, 1981) (available at <http://www.nytimes.com/1981/11/05/us/presley-s-doctor-acquitted-on-all-prescription-charges.html?sec=health>).

17 *Id.*

18 *Id.*

19 Philip M. Boffey, *A Question of Treatment*, N.Y. Times (Nov. 6, 1981) (available at <http://www.nytimes.com/1981/11/06/us/a-question-of-treatment-news-analysis.html>).

the success of the Good Samaritan analogy. The composition of a jury should “reflect a cross-section of the community, with the expectation that their view will reflect the beliefs, attitudes, and values of the community.”²⁰ The trial was held in Memphis, Tennessee,²¹ which is located within the “Bible Belt” of the southeastern United States.²² Thus, the selection of the jury from the population of that area made it especially likely that biblical parables—such as that of the Good Samaritan—would be familiar and emotionally resonant for the jury.

Because familiarity and emotional resonance are important features of effective analogies, the comparison to the Good Samaritan would not have been nearly as effective in a region with large numbers of non-Christian believers, just as an analogy to an incident from the life of the Buddha would not have worked well for Nichopoulos’s trial in Memphis. If people are not familiar with narratives from religions other than their own, an analogy to a story from a different religion would place greater demands on jurors’ attention—they would have to become acquainted with the new story at the same time as making the comparison to the defendant’s situation. Moreover, subjecting jurors to an unfamiliar religious narrative would tend to distance them from the defendant—rather than associating the defendant with a shared tradition that the jurors identify as their own. In addition, favorable emotional response to the unfamiliar story could be weaker than to a narrative that the jurors had repeatedly encountered since childhood.

In addition, casting Nichopoulos in the role of the Good Samaritan did not run the risk of invoking unintended associations for a general Christian audience, because no shortcomings appeared in the Samaritan’s actions or character. Thus, it provided a better analogy than some other biblical narratives, which could have unintended consequences when presented to an audience that was familiar with them. For example, defense counsel could have emphasized the difficulty of Nichopoulos’s choice by describing it as one in which the God-given wisdom of King Solomon would have been useful.²³ But jurors familiar with the biblical

²⁰ See e.g. Jeffrey D. Jackson, *The Selection of Judges in Kansas: A Comparison of Systems*, 69 J. Kan. B. Assn. 32 (Jan. 2000) (noting similarity between role of judge and role of jurors as community representatives).

²¹ Boffey, *supra* n. 19.

²² Regarding another case, *United States v. Thomas*, 74 F.3d 701, 705 (6th Cir. 1996), commentators have noted that Memphis’s location within the Bible Belt led federal prosecutors to choose it as the site to file obscenity charges—for which local community standards apply. In *Thomas*, a California-based company provided electronic pictures—apparently by telecommunications—which were subsequently downloaded in various locations including Memphis. See Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces*, 104 Yale L.J. 1639, 1652 (1995); Andrew Grosso, *The National Information Infrastructure*, 41 Fed. B. News. & J. 481 (1994).

²³ For an account of Solomon praying for wisdom and then using it, see e.g. 1 Kings 3:5–28.

story of Solomon might also remember how, in later life, he apparently lost his wisdom when he supported the worship of idols and thus earned the wrath of God;²⁴ therefore, the Solomon analogy would be riskier than the Good Samaritan analogy.

The successful use of the Good Samaritan theme in Dr. Nichopoulos's trial demonstrates that advocates should recognize the characteristics of their audience, including regional influences such as particular religious communities. This sort of discernment helps advocates select the kinds of analogies to familiar stories that will have emotional resonance for the audience, without invoking counterproductive comparisons.

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24 See e.g. 1 *Kings* 11:1–13.

