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Body

Perspective

'To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must, as one member of this court recently stated during oral argument, strike us as wrong with the force of a five-week-old, unrefrigerated dead fish.

Colorful rhetoric like this passage from a 1988 Seventh Circuit opinion provides a memorable reminder that the lawyer's principal working tool is the English language, in all its expressive glory.

One of the most powerful figures of speech available to judges and lawyers is the metaphor. Although metaphors are so ingrained in the law that we hardly notice them, the legal mind could hardly think without them. The law balances interests, weighs evidence, avoids slippery slopes and chilling effects, erects walls of separation and marks some of its boundaries with bright lines. The lawyer desperate for evidence embarks on a fishing expedition, and the desperate criminal tries in vain to flee the long arm of the law. The wheels of justice grind slowly, and occasionally justice miscarries. And your own client's case always cries out for justice.

Metaphors communicate quickly, and their message is simple: One thing is very like or equivalent to another. The well chosen metaphor is both readily understandable and perfectly attuned to the argument advanced. By way of illustration, consider the opinion of the U.S. Supreme Court in **Wooley v. Maynard**. George and Maxine Maynard, New Hampshire motorists, objected to the state's license plate motto, Live free or die. The Maynards sued the state to enjoin it from compelling them to carry this message on their car's license plate. Ruling in favor of the Maynards' First Amendment claim, Chief Justice Burger wrote: New Hampshire's statute in effect requires that appellees use their private property as a mobile billboard for the State's ideological message.

This metaphor nicely defines the essence of the state's action. The metaphor is rendered more effective and more persuasive by virtue of the negative associations we have with billboards. Advertising in general is an annoyance, and ugly billboards in particular often deface our public highways. In turning the plaintiff's private car into one of these noxious highway advertisements, the metaphor succinctly captures and highlights the State's offense. In fact, it subtly augments it. License plates, after all, are not as large and gaudy as real billboards, and State mottos are not as crassly commercial as billboard advertising.

Judge Jon O. Newman penned a memorable metaphor in a Fourth Amendment case, **Ayeni v. Mottola**. Secret Service agents obtained a warrant to search a residence based upon information concerning credit card fraud. The Service agents did not come alone, however, they brought along a crew from the CBS television newsmagazine Street Stories. The crew wanted to videotape a real government search, so the Service obligingly invited them to join the team of agents executing the search. As agents went through Mrs. Ayeni's house, she alleged that she tried to prevent the camera from filming herself and her son. The judge recounts what happened next, according to the complaint:

When Mrs. Ayeni attempted to shield her son's face with a magazine, [[agent] Mottola grabbed the magazine out of her hand, threw it on the floor, and told the plaintiffs to shut up. Mottola or one of the other agents directed the camera crew to videotape Mrs. Ayeni's face. Mrs. Ayeni was taped while an agent questioned her to learn where her husband was and how she had paid for several expensive watches that the agent found.

On a motion to dismiss the complaint, the court found the Ayenis had stated a clear violation of the Fourth Amendment. Agent Mottola, the judge wrote, exceeded well-established principles when he brought into the Ayeni home persons who were neither authorized by warrant to be there nor serving any legitimate law enforcement purpose by being there. A private home is not a soundstage for law enforcement theatricals.

What a winning metaphor! The analogy to theatricals highlights the agents' role in using the Ayeni home to put on a show. Unstated but implied in the metaphor is the frivolous nature of such entertainment, and the absurd tough guy role Agent Mottola in particular assumed. Mottola being no James Cagney, the show had to close. The metaphor neatly deflects any arguments that the filming might have a serious purpose, or that the public might well benefit from knowing how real-life searches are conducted.

Metaphors can be used by witnesses to describe things in vivid terms that a judge or jury will remember. James McElhaney once wrote about a witness who saw a man injured and gave this description: It looked like his arm had been caught in a giant egg beater. Long strips of flesh were ripped off his arm and were just hanging to it. The dramatic metaphor (actually a simile, since it is introduced by like or as) imprints an indelible image on the listener's mind, enabling any juror to visualize the injury suffered by the plaintiff.

Sometimes lawyers need to respond to metaphors, to strip them of their persuasive power. In oral argument before the U.S. Supreme Court in **Webster v. Reproductive Health Services**, former U.S. Solicitor General Charles Fried urged the Court to overrule **Roe v. Wade**. He attempted to minimize the impact this would have by saying **Roe** was just a single thread in privacy law that could be pulled out. Frank Susman, attorney for appellee Reproductive Health Services, adroitly responded to the metaphor by saying: It has always been my personal experience that when I pull a thread, my sleeve falls off. Newspapers around the country included this witty retort in their reports about the case.

Responding to a metaphor more often will require careful analysis. Consider Justice Byron White's statement in an early flag desecration case, **Smith v. Goguen**:

There would seem to be little question about the power of Congress to forbid the mutilation of the Lincoln Memorial or to prevent overlaying it with words or other objects. The flag is itself a monument, subject to similar protection.

This metaphor, equating the flag with a monument such as the Lincoln Memorial, might be challenged in different ways. The flag can be characterized as a mass produced object routinely available for purchase on the open market, unlike a national monument, which is public property, one of a kind, and irreplaceable. These differences arguably expose the metaphor as a false claim of identity between two very different things. Second, the metaphor can be corrected, to reveal why the original metaphor is inapt. For example, one might say that only certain special flags, like the one flown over Fort Sumter at the start of the Civil War, are truly equivalent to national monuments. Or the metaphor might be changed to draw a parallel between an individual flag, which replicates the symbol of the Nation, and a replica of the Lincoln Memorial, which its owner is free to deface, mutilate or burn.

Sometimes an entire case may turn on the validity of a metaphor. In **Commonwealth v. Gallagher**, the Pennsylvania Supreme Court reviewed the testimony of an expert witness, Dr. Ann Burgess, who coined the term rape trauma syndrome. Dr. Burgess testified at a rape trial in support of the prosecution. The victim was unable to identify her attacker soon after the crime, but did make a positive identification some years later, aided by flashbacks to the crime (the flashbacks were stimulated by events or persons in her life that sparked reminders of the attack). Dr. Burgess, describing the flashback phenomenon, testified that you [could] think of the mind like a computer button that, when pressed by something in the environment, brings back the image.

Of course, computer memory is not human memory, but merely a convenient (and simplistic) way for people to think about computers. By analogizing the human mind to a computer, the expert slighted the complex nature of human memory, and deflected attention from the many sources of human fallibility in remembering past events (e.g., confusion, suggestibility, diminishing recall over time, etc.). The court felt that the expert's mind/computer analogy constituted too strong an endorsement by the expert of the victim's ability to make the identification; the defendant's conviction was reversed. The lesson for lawyers? Beware of experts bearing metaphorical gifts.

Attorneys must take care in choosing their own metaphors as well. A tempting metaphor for the lawyer on trial is the jigsaw puzzle. Just put the pieces of evidence together, ladies and gentlemen of the jury, and they will yield the picture of guilt or liability that we have proved. The team prosecuting O.J. Simpson for murder used this metaphor, and even illustrated it with a giant video screen containing pieces that fit neatly together to form a picture of the alleged perpetrator, O.J. himself.

The problem with the jigsaw puzzle as a metaphor for the evidence in a case is that it is too demanding of perfection. The pieces of a puzzle fit together seamlessly. When the pieces are all in place, there is no ambiguity or doubt. The picture formed is complete, clear, and well-defined. Evidence in a litigated case, however, is rarely clear-cut. Conflicts among different witnesses' testimony, inconsistencies in a single witness's testimony, suspicions of bias, and questions about the reliability of witness perceptions and recollections make legal cases an exercise in probabilities, not certainties. The reconstruction of past events is never entirely free from doubt, and certainly never as perfect as the reconstruction of a puzzle from its constituent pieces. The jigsaw metaphor implicitly suggests a standard of proof that no case can meet. Jurors who absorb that message, perhaps unconsciously, may be more influenced by it than by lengthy judicial instructions about the meaning of proof by a preponderance of the evidence or proof beyond a reasonable doubt.

Metaphors in law can be vivid, memorable, and persuasive. But they can also be misleading, overpowering, and seductive. They highlight the way one thing resembles another, but mask the differences between them. They communicate swiftly, but discourage careful reflection. No wonder Judge Cardozo once wrote, Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.

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