

VERY LIKE A WHALE: ANALOGY AND THE LAW

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Hamlet: Do you see yonder cloud that's almost in shape of a camel?

Polonius: By the mass, and 'tis like a camel, indeed.

Hamlet: Methinks it is like a weasel.

Polonius: It is backed like a weasel.

Hamlet: Or like a whale?

Polonius: Very like a whale.

-- Hamlet, act 3, sc. 2

I. INTRODUCTION

A metaphor claims that one thing is actually another. “The past is another country,” L.P. Hartley wrote, “they do things differently there.”¹ Exercising more humility, a simile suggests that one thing is merely *like* another. Lord Byron famously described an Assyrian attack on biblical Jerusalem in a poem stuffed with simile. Its opening stanza paints a rich image:

The Assyrian came down like the wolf on the fold,
And his cohorts were gleaming in purple and gold;
And the sheen of their spears was like stars on the sea,
When the blue wave rolls nightly on deep Galilee.²

Like a wolf on the fold. Nice. You can just picture it, can't you?

Not everyone is enamored of these figures of speech. “One thing that literature would be greatly the better for,” Ogden Nash humorously rhymed, citing Byron's poem as evidence, “Would be a more restricted employment by the

authors of simile and metaphor.”³ Beautiful turns of phrase sometimes convey more than might be there, or disguise what is. Byron’s description neatly distributes guilt and innocence at the same time that it suggests a surprise attack (which, according to Byron’s source of inspiration, did not go so well for the Assyrians, and might not even have been that much of a surprise).⁴ Precision may be sacrificed to impose a normative point on ambiguous facts and unsuspecting audiences. Sometimes the past is *not* another country. Maybe the Assyrians weren’t so tough after all (or the rulers and inhabitants of Jerusalem so worthy of divine protection).⁵

Nash’s jeremiad against the poets wasn’t the first or the last of its kind. Raymond Chandler expanded the list of culprits beyond poets: “Goddamn silly simile. Writers. Everything has to be like something else.”⁶ Add lawyers and judges to that list. These writers, at least in common-law systems, are very fond of metaphor and simile, which goes by the professional name of analogical reasoning.

Generally speaking, when lawyers analogize they lack the ring of a Lord Byron. But one thing must *necessarily* be like enough to another for a common law system of precedent to function. Distinguishing cases, applying previous holdings to new facts, extrapolating from seemingly conflicting positions, all this requires a healthy power of comparison, and sometimes, imagination. It also requires self-reflection about the limits a judicial office imposes on that creativity. While a judge is expected to exercise judgment (the identical roots of these words say so), the task is constrained by factors the judge is not supposed to alter.

“Law” is the heading under which that constraint is known, but disagreement about what is included under it makes law an eternally contested concept. Metaphorically speaking, these analogical devices are all arrows in the legal writer’s quiver of arguments. The hope is that these arrows will pierce through doubts or confusion to persuade the reader that the writer’s legal point is correct. But this essay discusses a fear, not a hope, about analogical reasoning. Sometimes analogical reasoning portrays a subjective choice as an inevitable legal conclusion. Like the traveler in a forest who discovers tree after tree of perfect bull’s-eyes, this impression is misleading. When asked, the boy who shot the arrows explains his method: “first I shoot at a tree. Then I draw a target around the arrow.”⁷

Justice Cardozo warned that: “Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.”⁸ A cottage industry has emerged to study the phenomenon, picking out good from bad.⁹ Steven Winter, who relates the story of the boy painting targets around his arrows, rejects as mistaken the fear of subjectivity-run-amok that the story suggests. But even Winter acknowledges that this fear “seems yet more compelling when the narrator is a powerful official like a judge, backed by the might and authority of the state. If law is fused with narrative, then it seems to face precisely the problem of subjectivity that it strives so hard to avoid.”¹⁰

After all, when law and analogy mix, the concoction can be quite dangerous. Many legal systems have strictly forbidden its application in their criminal law, or guarded against it with rules of lenity and other restrictions on

statutory interpretation. Well known are the abuses of Soviet crime-by-analogy, a conversion technique adopted as socialist legal theorists and their more brutal revolutionary leaders sought to replace an imperial Russian law that obstinately refused to wither away (a neat Marxist metaphor). Thus, a criminal code enacted not long after the Bolshevik Revolution rejected the concept of *nulla poene sine lege*: “If any socially dangerous act has not been directly provided for by the present Code, the basis and extent of liability for it is determined by applying to it those articles of the code which deal with the offences most similar in nature.”¹¹

In a society purporting to be governed by law, few things could threaten the individual’s freedom more than a court’s power to determine that a crime had been committed not because the statute books defined one, but because the defendant’s act came close enough. Eventually, such analogical reasoning is no longer needed to disguise what is really going on. In due time, the Third Reich adopted this doctrine of analogy; the words of Nazi Minister of Justice Otto Thierack chill the blood: “Every judge is at liberty to call on me in case he thinks that a law compels him to render a judgment not compatible with real life. In such an emergency it will be my task to provide him with the law he needs.”¹²

The danger inherent in all of this comes down to lack of certainty. It is not possible to know with certainty which acts are permitted and which are forbidden when analogy can blur the division between them. It is unsurprising, then, that political crimes – treason and heresy being two good examples found in early English law -- tend to possess less certainty (in their elements, their definition, etc.) in history.¹³ Thus, Walter Walker, who “told his little child if he would be

quiet, he would make him heir of the crown,” was condemned to death for treason.¹⁴ The statute defined as treason “when a man doth compass or imagine the death of our Lord the King.”¹⁵ Though Hale called Walker’s fate a “very hard” judgment of treason, a legal mind could imagine that Walker had imagined the death of Edward IV.

The statute required the judge in Walker’s case to reason by analogy in order to convict him. Imagining the king’s death in an attempt to soothe a child was like enough to a plotter’s meeting to work political revolution. The problem, of course, is who’s to say? Today we find it easy to reject this analogy – the two are quite different. But why? Is it because Walker lacks the intent of a plotter? Lacks the means to realize his uttered thoughts? The motive? What is missing is not provided by the statute; it must be creatively supplied by the judge, whose “freedom from political pressure varies inversely, to some extent, with his freedom to create the rules which he will enforce.”¹⁶ That is why the definition of treason in Article III of the U.S. Constitution is perceived rightly to be an important liberty-protecting clause, for it specifies the crime in a way that makes reasoning by analogy difficult.

Fascists are easy fishing, as are Bolsheviks and British kings. Those born to freedom, Justice Brandeis asserted, “are naturally alert to repel invasion of their liberty by evil-minded rulers.”¹⁷ Analogical reasoning does not always come down like a wolf on the fold. In our twenty-first century, post-9/11 America, there are subtler opportunities for reasoning by analogy, although the pressure encouraging analogy remains essentially as it has been throughout history. It is

the desire for flexibility (itself a metaphoric description, for it conjures law as something rigid or bendable, and why should that be?). When the world seems to be fast changing, or the dangers new and especially frightening, or one's enemies encircling, the certainty of law seems less urgently desirable. This is a perennial and universal temptation, and therefore warrants our consideration:

The use of analogy in itself is not necessary to a tyrannical State, nor does its presence necessarily indicate the existence of such a State, but it does appear to be a symptom of that type of government which places the protection of the State from the risk of disorder above the protection of the individual from the risk of oppression.¹⁸

Or, as Justice Brandeis asserted: "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."¹⁹

In this essay, I examine three dangers present in the relationship that analogy maintains with law. The first two concern the risks inherent in (wittingly) comparing one technology to another and in comparing (often unwittingly) one era or social context to another. The third manifests when we fail to appreciate the unintended long-term consequences of analogies and metaphors in shaping thought and, therefore, society.

In an era of “rule-of-law reform,” when American lawyers and legal scholars seem eager to transplant the fruits of our legal system onto foreign soils (to borrow Alan Watson’s famous metaphor), it is worth noting some hazards lurking in our own tradition of analogical thinking. Perhaps we aren’t as equipped to engage in the rule-of-law export business as we tend to believe.²⁰ Relatedly, our experience climbing out of the “legal black hole” of Guantánamo Bay suggests not only problems of export, but the potential value of importing a bit more of what was once called “a decent respect to the opinions of mankind.”

II. First, A Caveat

A word of caution about this essay’s objective is warranted. There is no point to launching a facial attack on the use of analogy, and this essay should not be misinterpreted as such a blunt and blundering effort. The fact of the matter is that analogical reasoning is inescapable (in law as in life). In the words of Steven Winter, “human thought is irreducibly imaginative.”²¹ Winter’s rejection of the fear of analogical reasoning as subjectivity-run-amok has already been noted. He and others reject that fear as based on mistaken understandings of human cognition. As George Lakoff and Mark Johnson have written, metaphorical concepts “structure (at least in part) what we do and how we understand what we are doing.”²²

These scholars persuasively argue that this recursive feature means that it is empirically wrong to hold that “metaphor is only about the ways we *talk* and not about conceptualization and reasoning.”²³ For that reason and others steeped in cognitive theory, Winter rejects the anxiety that “metaphor is merely a matter

of expression – useful for rhetorical purposes, but perilous to reason.”²⁴ In fact, he argues, since our sense of rationality is related to our common, embodied experience of the world around us, the human tendency to categorize, analogize, or employ metaphors or other devices is not imaginative freedom unconstrained: it operates “in a regular, orderly, and systematic fashion.”²⁵

This essay does not seek to participate in the sophisticated scholarly debate about mind that Winter, Lakoff, Johnson and others have advanced. The philosophical, scientific, and legal circles in which these discussions have taken place are broad and deep, examining questions of the human condition and social structure that seem timeless. But they are not examined here. Nor do I seek to chronicle examples of the use of metaphor in legal writing.²⁶ My purpose is found in between these contributions. Even if human thought is more than analytic logic (which seems an easy concession to make, at least for someone not engaged in debates and experimentation about the nature of human thought), the use of metaphor can still present pitfalls, even if reasoning by analogy can be a “quite effective and efficient” mode of thought.²⁷

That is the substance of this essay. We may think in metaphoric ways, and conceptual metaphors may well “characterize patterns of semantic productivity and everyday reasoning.”²⁸ But not every use of metaphor may be conceptual, or based on embodied experience. Indeed, some may just be convenient, used to avoid articulating well-grounded reasons, or to persuade while remaining ambiguous about multiple possible reasons. This is an essay about those bad apples.

III. Dangers of Metaphor: Technology

Consider, first, the dangers of adopting a precedent from one side of a technological divide for use on the other. Just such a problem confronted the Supreme Court during its October 2013 term. The Court granted a petition for certiorari to decide the question whether the admission at trial of evidence obtained from a search of David Riley's cell phone following a traffic stop violated the Fourth Amendment. In an opinion handed down in the last days of the term, the Court held that a warrant was required to search for such digital information, even incident to an otherwise valid arrest (sometimes an exception to the warrant requirement).²⁹

The case boiled down to analogies and metaphors. Since the Court made clear (metaphorically) that "the ultimate touchstone of the Fourth Amendment is reasonableness," one might well ask how it could not.³⁰ To decipher what was reasonable, the Court wandered through its past decisions looking for analogous cases. Was a cell phone like a crumpled cigarette package, which if searched incident to arrest would reveal drugs hidden inside?³¹ Or was searching the cell phone more like opening a 200-pound, locked footlocker in the trunk of a car?³² Or more like an item within reaching distance of the arrested driver of a car, especially when it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle"?³³

What made the case cert-worthy was that cell phone technology, "nearly inconceivable just a few decades ago," had become "such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude

they were an important feature of human anatomy.”³⁴ Indeed, the analogy to “a container whose contents may be searched incident to an arrest” seemed “a bit strained as an initial matter” and “crumbles entirely” in the face of cloud computing (boy, what a metaphor there!).³⁵ The phone is more a device to display what is in distant clouds of data than a container holding data inside it. Weighed on metaphoric scales against two grounds for exceptions to the warrant requirement on one scale (protecting officer safety and preventing the destruction of evidence), the Court found the protection of privacy the greater good weighing down the other side of the scale. But why was this the right choice between individual privacy and “the promotion of legitimate governmental interests,” which the Court took as the appropriate metric?³⁶

The array of analogies didn’t answer this question; it just described ways of seeing the problem, rejecting each one. The Court, having rejected the container analogy, fought simile with simile: “The United States asserts that a search of all data stored on a cell phone is ‘materially indistinguishable’ from these sorts of physical items [*viz.* a billfold, address book, wallet, or purse]. That is like saying a ride on horseback is materially indistinguishable from a flight to the moon.”³⁷ So, the Court concluded, cell phones were different: “Prior to the digital age, people did not typically carry a cache of sensitive personal information with them as they went about their day. Now it is the person who is not carrying a cell phone, with all that it contains, who is the exception.”³⁸

It is unclear at best whether the opposing analogies in the Supreme Court’s opinion did any work reaching the Justices’ conclusion to treat cell phones

differently than physical containers. A cell phone is neither a container nor a window display nor anything other than a cell phone. But putting these images in the mind of the reader obscured the Court's ambiguity about what its holding was actually based upon. Was the empirical claim of ubiquity of cell phone possession and everyday use essential for the holding? Or was it the unique capacity of such small devices to hold such enormous volumes of information (or to provide access -- in the Court's evocative simile, like "a key in a suspect's pocket" -- to a larger trove located elsewhere)?³⁹ Was it the relative speed of a physical search (versus accessing and downloading digital information) that tipped the balance? How much weight to give the principle that privacy requires such protection even if evidence of a crime goes undetected, or officer safety is threatened as a result? Is it true that digital data never poses the risks that unknown physical objects might?

A good analogy might have persuasive impact on the reader, just as repeatedly contrasting a modern cell phone to a crumpled cigarette package emphasized the Court's rejection of the container analogy. But was the legal conclusion -- a warrantless search of a cell phone incident to arrest is unreasonable -- the cause or the effect of dismissing the container analogy? And if we cannot answer, what does one say to the court -- in our own country or another -- that finds a cell phone to be very like a container? Or an address book? Or like enough in some indeterminate number of points of comparison?

Rapid technological change need not always present a problem of ambiguous analogical reasoning. The Riley Court's approach was different than

the analogical reasoning Oliver Wendell Holmes famously employed when he interpreted the National Motor Vehicle Theft Act of 1919.⁴⁰ The issue was whether an airplane was a “vehicle” under the terms of the statute. Holmes handed down his three-paragraph opinion in 1931. He concluded that the statute’s prohibition of interstate transport of automobiles or “any other self-propelled vehicle not designed for running on rails” did not include self-propelled vehicles that flew through the air, even though airplanes were still quite new but also “well known in 1919.”⁴¹ This was for two reasons. First, “in everyday speech ‘vehicle’ calls up the picture of a thing moving on land.” Second, that was the best interpretation, he reasoned, because “[a]lthough it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.”⁴²

Holmes evaluated an analogical question – Are automobiles sufficiently like airplanes? – and provided precisely articulated reasons for answering “no”. He relied on common usage of a term in the statute and a principle about fairness in the criminal law. Whether he was right about either the empirical question or the value question is debatable. But it is clear what the reasons behind the analogical part of the decision are. *We know* why the analogy was rejected by Holmes.

But why did the Supreme Court pick and choose among the analogies it did in the cell phone case? The Government failed to convince the Riley Court

that searching wallets and address books was analogous to searching cell phones. The Court dismissed the analogy with one of its own: although a horse and a lunar lander are both “ways of getting from point A to point B, [] little else justifies lumping them together.”⁴³

But precisely why (in other words, which future social or technological changes to cell phones won’t matter) is unclear. The Court recognized this difficulty in rejecting a solution proposed by the Government: “Is an e-mail equivalent to a letter? Is a voicemail equivalent to a phone message slip? It is not clear how officers could make these kinds of decisions before conducting a search, or how courts would apply the proposed rule after the fact.”⁴⁴ The opinion thus held that the “search incident to arrest” exception to the warrant requirement did not apply to cell phones, but left open the possibility that another exception – for example, the “exigent circumstances” exception – might apply instead.⁴⁵ All well and good. But how did we get there and what role did (or will) all those analogies play?

IV. Dangers of Metaphor: Context

Liberty preserved by analogy risks destruction by analogy, too. The Government has had much more success glossing over the effects of such technological changes on our society in lawsuits about the right to travel. Digital terrorist watchlists (such as the No Fly List) have enabled a new power to take restrict freedom of movement. The state now monitors all commercial air travel and can deny access to any flight in U.S. airspace. Defending such programs, attorneys for the United States have relied on judicial precedents that consider air

travel just “one mode of transportation” interchangeable with others. Prohibiting air travel works no injury to any legally cognizable right, the argument goes, because other modes of transportation remain unrestricted.

These precedents, however, fall on the distant side of a technological divide, dating to an era when air travel was the rare and glamorous realm of the elite. That is a world that no longer exists (“the past is another country”).⁴⁶ Airplanes have become the greyhound buses of the twenty-first century, with more people boarding them each day than the entire population of the city of Philadelphia – in fact, nearly two hundred thousand people more.⁴⁷ Nevertheless, the Justice Department has routinely submitted affidavits from its paralegals noting the availability of ocean freighters in lieu of trans-Atlantic aircraft (although without mentioning the existence of a maritime watchlist, too) and finding ground transportation an equivalent substitute for aviation.⁴⁸ Is a car similar enough to a plane in the twenty-first century to accommodate such asserted equivalence? Regardless, is it the analogy that gets us to that conclusion, or the conclusion that makes the analogy resonate?

Ironically, while the Government has argued that air travel is analogous to other modes of transportation in order to defeat the argument that the No Fly List infringes any constitutional right to travel, Justice Department lawyers have been quite critical of analogies presented by plaintiffs arguing for more procedural rights to contest their inclusion on such lists. In the most hotly contested of the No Fly List cases, the Government argued as follows:

Primarily through analogies to cases in inapposite contexts, Plaintiffs demand a wide range of procedures and disclosures of information, none of which are called for by the requirements of due process in this setting, and all of which would significantly threaten the very national security interests the No Fly List is designed to protect. The kind of procedures Plaintiffs demand, including (among other things) adversarial hearings and access to witnesses and all information pertinent to a No Fly List determination (including classified national security and privileged law enforcement information), are not applicable to No Fly List determinations and, indeed, disregard well-founded protections for the kind of national security information needed maintain the No Fly List.⁴⁹

Why? What made the plaintiffs comparisons such “inapposite” analogies? The parties fought about such abstract issues as whether a deprivation of property was more severe than a deprivation of liberty. The Government claimed property losses were more serious, citing cases in which the State Department successfully defended the power to designate certain entities as terrorist organizations and the Department of the Treasury then froze their assets.⁵⁰ But this was only because the procedures accorded to those who fought such designations and asset freezes

were less onerous than those the plaintiffs sought in the ongoing No Fly List litigation and, in particular, did not require the Government to release of classified information.⁵¹

In a section of the Government's brief devoted to opposing the plaintiffs' analogies (indeed titled "Plaintiffs' Analogies To The Process Due In Plainly Distinct Settings Are Misplaced") rejected comparison between procedures in detention and criminal cases, deportation cases, and property disputes with procedures the plaintiffs desired to contest No Fly List designations. These contexts were "unrelated," the Government argued, criticizing the plaintiffs for failing to rely only on cases "arising in the national security context."⁵²

(Ironically, a few pages earlier, and without explanation, the Government invited the Court to "compare" the liberty interests in "avoiding the unwanted administration of antipsychotic drugs" and "not being confined unnecessarily" with "the ability to travel by airplane ... only a limited aspect of an individual's liberty interest in international travel," although neither case cited arose in a national security context, or even a context less than twenty-five years old.⁵³

Inapposite or helpful?) Opposition was on the grounds that the liberty deprivation involved in those cases was more severe and therefore the greater protections accorded to those injured were "not reasonably applicable" to the No Fly List context.⁵⁴

It is unsurprising that such arguments should be made in a memorandum of law supporting a motion (in this case, for summary judgment). What is surprising is the paucity of reasoned analysis. Instead, the assertion of "not

analogous” takes its place. But the whole point of the common law enterprise is to explain, reason, justify, and persuade readers of briefs and judicial opinions that one thing is sufficiently like, or unlike, another to warrant similar or different treatment. *Why* should the degree of injury or the nature of the context matter? That is the crucial point. But it is given short shrift, the lawyers merely noting the difference but not explaining its significance. Indeed, when the holding of a case involving cancellation of a USDA “grazing permit” suited the Government’s purpose, there was no apparent hesitation (or even embarrassment) in citing to this case involving a degree of injury outside of the context of national security that was simply not “analogous” to the issues before the court.⁵⁵

These No Fly List cases reveal a problem with analogical reasoning that manifests itself not in a gloss between different technologies but in ignoring essential contexts. As background, consider that the No Fly List is one of several terrorist watchlists, all drawn from a centralized terrorist screening database, created and administered by a post-9/11 organization housed in the FBI. The No Fly List is then sent to the Transportation Security Administration, which uses it to vet the travel of anyone who wishes to fly in U.S. airspace.

What should the standard of review be for adding a name to the terrorist screening database, or the more refined No Fly List? Set the standard too high and the watchlist may omit the names of people who would cause harm. Set it too low, and the false positives accumulate. The standard selected is called the “reasonable suspicion” test, which is met if “based on the totality of the circumstances, ... articulable intelligence or information ... taken together with

rational inferences from those facts, reasonably warrants a determination that” the criteria for placement on a watchlist such as the No Fly List has been met.⁵⁶

If this standard of review sounds familiar, that is because it is virtually identical to the reasonable suspicion standard created by the Supreme Court in Terry v. Ohio, a 1968 case with racial overtones about a policeman who wanted to stop people he thought might be casing a jewelry store.⁵⁷ That case upheld the power of police to briefly detain, question, and frisk an individual on grounds less than probable cause, which all agreed that the policeman lacked. All that was needed, the Court held, was a reasonable suspicion based on articulable facts found in the totality of the circumstances.

The multi-agency government working group that devised this standard was well aware that the Terry case involved law enforcement officials in a criminal investigative context. In fact, concern was expressed about applying the standard in the intelligence context. They avoided even using the case label.⁵⁸ But it was their only case, their only precedent cited for the standard they wished to adopt. The working group assured itself that Terry v. Ohio should only be the starting point of its thinking about the case.

This was magical thinking. Perhaps the working group did not want to say that watchlisting is analogous to a police stop, but that is what they did. The contexts must be “close enough” for the test to have legal legitimacy in its new use. The reasonable suspicion standard was devised for a particular context in which it, arguably, made some sense. The Court was concerned with officer safety – hence the limited frisk of a detainee for purposes of officer safety; and

concerned not to displace probable cause -- hence time limits placed on the stop itself. And there was always the reassuring thought that if the Terry stop developed into an arrest, there was a neutral magistrate on the other end to whom the facts of detention and arrest and charge would soon be brought for resolution.

None of that, of course, is part of the watchlist process, which the Government has sought to insulate from judicial review. Physical safety on its own does not justify such a low standard. There is no implicit time limit to watchlisting decisions. And until very recently no one had successfully accessed a neutral magistrate to evaluate the watchlisting decision in the first place, let alone routinized review procedures of the criminal justice system. And yet, the standard remains, protected by the sticky power of precedent stripped of context and adopted by implicit analogy.

V. The View from Guantánamo Bay

The first draft of this essay was completed while the author served as an observer at a military commission held at Guantánamo Bay, Cuba. In our day, this place has produced the worst metaphoric criticism of the United States's commitment to the rule of law: Guantánamo Bay was, and for some remains, a "legal black hole."⁵⁹ Its very selection as the place to interrogate and detain prisoners seized in what was then called the "war on terror" was intended to isolate it from U.S. law. A military order issued by President George W. Bush directed that military commissions be created to try certain non-U.S. citizens "with respect to whom I determine from time to time in writing" were members of al Qaida or committed, attempted to commit, or supported acts of terrorism or acts

that intend “injury to or adverse effects on the U.S., its citizens, national security, foreign policy, or economy.”⁶⁰

The Supreme Court thwarted that intention, extending access to judicial review of detention on the theory that non-U.S. citizens were eligible to petition for writs of habeas corpus because held under the “complete jurisdiction and control” of the United States.⁶¹ The Court also undid the system of military commissions established by Secretary of Defense Rumsfeld in response to President Bush’s military order.⁶² That original system was created *ad hoc* instead of adopting existing principles and rules of law that already operated either in the United States District Courts or in the courts-martial established by the Uniform Code of Military Justice. The Military Commissions Act of 2006 was similarly struck down by the Court as working an unconstitutional suspension of habeas corpus.⁶³ Only with the Military Commissions Act of 2009 could a new system begin to operate in earnest.

From a high of nearly 800 individuals detained at Guantánamo, 122 detainees remained there at the start of 2015.⁶⁴ However, this is due more to release for other reasons than the workings of any military commission. The military commission system has resulted in only three detainees either serving sentences or in the process of being sentenced; only seven more detainees are actively being prosecuted by military commission.⁶⁵ The guilty plea of one of the first detainees, Australian David Hicks (one of the petitioners in Rasul v. Bush), was recently set aside for the same reason that the guilty verdict of another tried by military commission (Ali al-Bahlul, for the offense of providing material

support to terrorism) was held to be unlawful and therefore vacated: “it was a plain ex post facto violation.”⁶⁶ Ongoing military commissions have proceeded at a snail’s pace because of the aggressive legal defense of appointed counsel. In the case that I observed, the docket extended (at that time) to 172 pages of pre-trial motions and arguments and rulings. Years and years must pass at this rate if the commission will ever reach the merits stage.⁶⁷ And then come the appeals.

Ironically, therefore, “legal black hole” may be the least accurate metaphor to describe the Guantánamo military commissions that presently operate. As the Principal Deputy Undersecretary of Defense for policy noted to the Senate Armed Services Committee in response to hostile questions: “Lawyers are litigating to death every new issue and these cases are dragging on for quite some time.”⁶⁸ By comparison, “in the civilian court system, because of the speedy trial and the efficiency of our courts, we are getting convictions and putting these people in prison fairly quickly.”⁶⁹

How odd it seems, and yet so very heartening, that a core principle of the rule of law – justice for all – seems to be at the source of these Supreme Court opinions and of the lawyers’ diligence in representing the accused. At the same time, how very bittersweet (if not simply bitter) the thought that the United States required more than a decade to re-accept this essential concept, and that the American public (as well as the officials and politicians who govern in their name) remain ambivalent at best, and more often at odds, about the continued utility of the Guantánamo system.

The effects on other countries of this malingering attitude of the United States are far-reaching and unpredictable. Upon hearing that an American court had thrown out the conviction of David Hicks, the “Australian Taliban” as a “plain ex post facto violation,” Australian Prime Minister Tony Abbott felt disinclined to see a vindication for the rule of law: “We did what was needed. Let’s not forget ... he was up to no good on his own admission.”⁷⁰ Contrast that dismissive attitude toward legal constraints with a comment that very same day by the Polish Foreign Minister, who was asked his reaction to a court order to pay more than a quarter of a million dollars in damages to Guantánamo Bay detainees tortured at a CIA black site in Poland. “We have to do it,” Grzegorz Schetyna said, “because we are a country that abides laws.”⁷¹ The legal black hole may be less than it was, but when will the effects of its gravity no longer be felt? And how striking to hear remarks so much more respectful of the power of law from an official from a newly emerged democratic country than from the leader of an “established” Western democracy.

On the same day that President Bush ordered the creation of these military commissions, he hosted Russian President Vladimir Putin at the White House. Their joint statement began by noting that “Our countries are embarked on a new relationship for the 21st century, founded on a commitment to the values of democracy, the free market, and the rule of law.”⁷² Given Mr. Putin’s subsequent track record, this statement proved as improvident as President Bush’s earlier reflections about the Russian president’s soul.⁷³ One wonders what influence the U.S. effort to find a place for prisoners untouched by law had on the Russian

leader's perceptions of the boundaries of permissible action in regard to his country's legal commitments to its citizens and in its efforts to fight its own wars. Russia's track record is one that treats law as an instrument of power. A Russian proverb speaks volumes about this life for much of the Russian experience: "The law is like the shaft of a wagon – it goes wherever you turn it."⁷⁴ As Stalin's Commissar of Justice, Nikolai Krylenko, put it, metaphorically:

The court is, and still remains, the only thing it can be by its nature as an organ of the government power – a weapon for the safeguarding of the interests of a given ruling class ... A club is a primitive weapon, a rifle is a more efficient one, the most efficient is the court ... For us there is no difference between a court of law and summary justice. ... The court is an organ of state administration and as such does not differ in its nature from any other organs of administration which are designed, as the court is, to carry out one and the same governmental policy ...⁷⁵

These metaphors matter, for they affect the way lawmakers, political leaders, bureaucrats, and private citizens think about legal problems. When law is a weapon or a tool, as it remains conceived in Russia today, it has only instrumental value, a means of empowerment of one group over others instead of a framework for institutions and processes of value to all.⁷⁶

The Russian liberal Alexander Herzen bemoaned his countrymen's willingness to violate the law, noting his government's equally dismissive attitude. "Complete inequality before the court nipped his respect for lawfulness in the bud. The Russian, whatever his social status, subverts or violates the law wherever he can do so without being punished, and the government acts in just the same way."⁷⁷ Which begets which? In creating a legal black hole at Guantánamo Bay, the United States experimented with a similar instrumentalist attitude toward law. One can only wonder if the abuses that occurred in such a place, lawless for only a relatively short time, were part of the effect or part of the cause of that instrumentalism.

By way of illustration, consider now the following rule -- Rule One for the Trial Judiciary -- and ask yourself whether it is a Russian or American rule. It has been slightly redacted to obscure the answer:

In the interests of justice, a ... Judge may modify or change any Rule of Court or any portion thereof, or determine a certain Rule of Court or any portion thereof is not applicable to a given trial When taking such action, a ... Judge will so advise counsel in the case, other interested parties, the Chief Trial Judge, and the trial judiciary staff.⁷⁸

Without context, it is hard to say. That context is supplied by the metaphors of law that legal culture, indeed the society's culture, supplies. In our culture of intense (and intense respect for) adversarial process, any attempt by a judge in

these proceedings to modify or change the rules of court would be subjected to intense scrutiny. This would come not only from the adversarial legal combatants themselves, but from observers from the bar, the news media, and many others. Indeed, my week spent observing the military commission proceedings in United States v. al-Nashiri focused on a motion to dismiss the charges because of unlawful influence over the commission proceedings by its convening authority and the Deputy Secretary of Defense, who sought to accelerate the proceedings by requiring the judge in the case to live at Guantánamo Bay, and accept no other judicial duties, until this particular commission had been brought to a conclusion.⁷⁹ The motion was vigorously argued and resulted in a detailed, carefully reasoned order from the military judge, who granted the motion in part, ordering the disqualification of five government officials (the Convening Authority and his staff of legal advisors) from any future action in the case.⁸⁰

But transplant the same rule from one system to another and its application “in the interests of justice” may vary dramatically. Part of the reason, as this essay argues, is the slippery nature of legal analogies. Their use may conflate different times or contexts, or reveal our weakness of will in the face of fear. But use them, it seems, we must. They are inescapable aspects of our legal imaginations that we are no more capable of isolating from law than our culture, society, and language.

The picture below, taken at Camp X-Ray by the author, shows the place where a now iconic image – of detainees squatting in orange jumpsuits, goggled and gagged to deprive them of their senses and their voice – is now rusting and

overgrown with weeds. The site has been preserved by court order, as potential evidence for lawsuits about torture.⁸¹ That torture occurred at Guantánamo Bay and elsewhere has now been confirmed.⁸² It was, after all, for al-Nashiri's torture that Poland now must pay compensation, even as he remains detained at Guantánamo Bay watching his military commission creep along. The United States has not yet been forced to pay compensation for torturing him, both in Poland and here.⁸³

A picture such as this seems the right way to end an essay on the theme "Critical Global Perspectives on the Rule of Law." At the same time, this decrepit image reveals the depths to which a country can plunge away from its rule-of-law principles and the great difficulties their restoration may later require. "The past is another country," but the United States today remains affected by a past in which "they do things differently." The lessons learned, if they are learned, provide a critical perspective of the first order: the rule of law is a fragile state of being that cannot be taken for granted. No state is immune from the temptation to depart from it.



Picture taken by the author, Feb. 26, 2015, Camp X-Ray, Guantanamo Bay, Cuba

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¹ L.P. HARTLEY, *THE GO-BETWEEN* 9 (1953).

² George Gordon (Lord) Byron, *The Destruction of Sennacherib* (1815).

³ Ogden Nash, *Very Like A Whale* (1935). The title of Nash's poem, comes from Hamlet's mocking exchange with Polonius that gives this essay its title.

⁴ 2 Kings 19:35 (NIV). Or, as Byron put it, "And the might of the Gentile, unsmeared by the sword, / Hath melted like snow in the glance of the Lord!"

⁵ At least according to the Bible, the Lord used an analogy to make clear His unhappiness with the wayward king and people of Judah not long after disposing of the Assyrians: "I will wipe out Jerusalem as one wipes a dish, wiping it and turning it upside down." 2 Kings 21: 13 (NIV).

⁶ Nick Laird, *Author, author: Like a prayer*, The Guardian, May 29, 2009 (quoting The Long Goodbye, Chapter 28).

⁷ STEVEN L. WINTER, *A CLEARING IN THE FOREST: LAW, LIFE, AND MIND* 104 (2001).

⁸ Berkey v Third Ave. Ry. Co., 244 N.Y. 84, 94 (1926) (Cardozo, J.).

⁹ An excellent summary of this literature, as well as a careful analysis of the life of one such legal metaphor, is found in Elizabeth G. Thornburg, *Just Say "No Fishing": The Lure of Metaphor*, 40 U. Mich. J. L. Reform 1, 2 n.5 (2006).

¹⁰ Winter, *supra* note 7, at 104-105. Put another way, the anxiety that Winter seeks to dispel is that comparison is always possible on any number of levels or features. Thus, the fear that "there is nothing to stop legal reasoning from degenerating into a too-easy game of ad hoc analogies and distinctions. ... If someone says law is like a solar system, how can you disprove it? Why isn't law like a pastry?" Id. at 227. Winter answers: "Everything may be like everything else in an infinite number of ways, but *analogy* consists in a mapping that characterizes a *conceptual relation* between domains initially understood as separate." Id., at 229 (emphasis in original). As I hope my examples in this essay demonstrate, I am not arguing against the use of any and all

analogy in law, but rather a use that obscures the thinking behind the analogy (or that should be behind it were the analogy removed).

¹¹ Article 16 of the RSFSR Criminal Code (1926), quoted in E.L. Johnson, An Introduction to the Soviet Legal System 39 (London: Methuen & Co., 1969); Harold J. Berman, Justice in the U.S.S.R.: An Interpretation of Soviet Law 35 (Harvard University Press, 1963).

¹² *Nazi Minister Promises to Make Laws to Order*, N.Y. Times, Aug. 30, 1942, p. 14. See also Berman, *supra* note 11, at 36.

¹³ *The Use of Analogy in Criminal Law*, 47 Col. L. Rev. 613, 622 n.81 (1947).

¹⁴ Id., at 622 n. 90 (citing 1 Hale, Pleas of the Crown 115).

¹⁵ Id.

¹⁶ Id. at 621 (footnote omitted).

¹⁷ Olmstead v. U.S., 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

¹⁸ *The Use of Analogy in Criminal Law*, 47 Col. L. Rev. 613, 628-629 (1947).

¹⁹ Olmstead v. U.S., 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

²⁰ Jeffrey Kahn, *The Nacirema Revisited*, 67 SMU L. Rev. 807-19 (2014).

²¹ Winter, *supra* note 7, at xi and 5.

²² GEORGE LAKOFF AND MARK JOHNSON, METAPHORS WE LIVE BY 5 (1980).

²³ Id., at 245.

²⁴ Winter, *supra* note 7, at 2.

²⁵ Id., at 69; see also id. at 117 (“embodied rationality frames and constrains, rather than determines, meaning.”).

²⁶ Megan E. Boyd, *Riding the Bench – A Look at Sports Metaphors in Judicial Opinions*, 5 HARV. J. SPORTS & ENT. L. 245 (2014).

²⁷ Winter, *supra* note 7, at 237.

²⁸ Winter, *supra* note 7, at 17. Winter describes two “pervasive conceptual metaphor[s]” in the notions that “more is up” (in the examples he gives, “her fame *skyrocketed*” or “productivity is way up”) and “less is down” (e.g. “my stocks *plummeted*” and “nationwide, crime is *down*”). Id.,

at 31. Reasoning creatures born without gravity like ours on earth might well have adopted different conceptual metaphors as they adapted to that lived experience.

²⁹ Riley v. California, 134 S.Ct. 2473, 2495 (2014).

³⁰ Id., at 2482 (quotation marks and citation omitted).

³¹ U.S. v. Robinson, 414 U.S. 218 (1973).

³² U.S. v. Chadwick, 433 U.S. 1 (1977).

³³ Arizona v. Gant, 556 U.S. 332, 343 (2009).

³⁴ Riley, 134 S.Ct. at 2484.

³⁵ Id. at 2491.

³⁶ Id. at 2484.

³⁷ Id. at 2488 (internal citations omitted).

³⁸ Id. at 2490.

³⁹ Riley, at 2491.

⁴⁰ McBoyle v. U.S., 283 U.S. 25 (1931).

⁴¹ Id. at 26.

⁴² Id. at 27.

⁴³ Riley, at 2488.

⁴⁴ Id., at 2493.

⁴⁵ Id., at 2494.

⁴⁶ Jeffrey Kahn, Mrs. Shipley's Ghost: The Right to Travel and Terrorist Watchlists 72 (University of Michigan Press, 2014).

⁴⁷ Id. at 57-58.

⁴⁸ Id. at 228.

⁴⁹ Docket Entry # 251, Defendants' Consolidated Memorandum in Support of Cross-Motion for Summary Judgment, Latif v. Holder, No. 3:10-cv-00750-BR (D. Ore., May 28, 2015), at 16.

⁵⁰ Id. at 20, n.8.

⁵¹ Id. at 20.

⁵² Id. at 31. This was an odd accusation given plaintiffs' citation to a case involving military detention at Guantánamo Bay and deportation cases related to terrorism.

⁵³ Id. at 23 and 24, n.13.

⁵⁴ Id., at 32.

⁵⁵ Id. at 39 (citing *Buckingham v. USDA*, 603 F.3d 1073, 1083 (9th Cir. 2010) with the parenthetical "(cancelled grazing permit)" to oppose a formal hearing in No Fly List challenges).

⁵⁶ March 2013 Watchlisting Guidance, § II.3.4., at 33.

⁵⁷ *Terry v. Ohio*, 392 U.S. 1 (1968).

⁵⁸ Kahn, *supra* note 46, at 228.

⁵⁹ The first appearance of this metaphor was in *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs*, EWCA (Civ.) 1598 (2002) at ¶¶ 22 & 64, 2003 U.K.H.R.R.76, 42 I.L.M. 358, 375 (2003). See also Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 *Int'l & Comp. L.Q.* 1, 1 (2004).

⁶⁰ Section 2(a), Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833, 57834 (Nov. 13, 2001).

⁶¹ *Rasul v. Bush*, 542 U.S. 466, 480 (2004).

⁶² *Hamdan v. U.S.*, 548 U.S. 557 (2006).

⁶³ *Boumediene v. Bush*, 553 U.S. 723 (2008).

⁶⁴ Statement of Honorable Brian P. McKeon, Principal Deputy Under Secretary of Defense for Policy, before the Senate Committee on Armed Services, 2 (Feb. 5, 2015).

⁶⁵ Id. at 11.

⁶⁶ *Hicks v. United States*, CMCR 13-004, U.S. Court of Military Commission Review, slip op. at 9 (Feb. 18, 2015) (quoting *Al Bahlul v. United States*, 767 F.3d 1, 29 (D.C. Cir. 2014)).

⁶⁷ See docket for *U.S. v. Abd al-Rahim Hussein Muhammed Abdu al-Nashiri*, available at www.mc.mil/CASES.aspx.

⁶⁸ Personal transcript of testimony by Honorable Brian P. McKeon, Principal Deputy Under Secretary of Defense for Policy, before the Senate Committee on Armed Services, Feb. 5, 2015

(transcribed from <http://www.armed-services.senate.gov/hearings/15-02-05-guantanamo-detention-facility-and-future-of-us-detention-policy>).

⁶⁹ *Id.* See also Carol Rosenberg, *Side Issues Slow Progress Toward 9/11 Trial at Guantanamo*, Miami Herald, Feb. 8, 2015.

⁷⁰ Jane Wardell and David Alexander, *Australian held at Guantanamo says he was tortured for five years*, Reuters, Feb. 18, 2015.

⁷¹ Alan Yuhas, *Poland agrees to pay reparations to Guantanamo detainees*, The Guardian, Feb. 18, 2015.

⁷² Joint Statement by President George W. Bush and President Vladimir V. Putin of Russia on a New Relationship Between the United States and Russia, 2 Pub. Papers 1399 (Nov. 13, 2001).

⁷³ Caroline Wyatt, *Bush and Putin: Best of Friends*, BBC News, June 16, 2001 (“I looked the man in the eye. ... I was able to get a sense of his soul. He's a man deeply committed to his country and the best interests of his country”).

⁷⁴ Vladimir Ivanovich Dal', Poslovitsy russkogo naroda 245 (1957).

⁷⁵ Vladimir Gsovski, I Soviet Civil Law 241 (1948). This is not to charge Russia with predisposition, merely to note the repeated problems of embedding the rule of law and dislodging the rule by law that is a hallmark of autocracy. Russia has produced many great jurists and honorable lawyers. But “careful research has not revealed a single significant work of Russian literature published prior to 1917 in which lawyers, judges, or the courts are portrayed in a positive light.” Michael Newcity, *Why is There no Russian Atticus Finch? Or Even a Russian Rumpole?* 12 Texas Wesleyan Law Review 271, 273 n.5 (2005).

⁷⁶ Jeffrey Kahn, *The Law is a Causeway: Metaphor & the Rule of Law in Russia*, in The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat) (IUS GENTIUM: COMPARATIVE PERSPECTIVES ON LAW & JUSTICE, VOL. 38) 229-250 (Silkenat, Hickey, & Barenboim, eds., Springer, 2014).

⁷⁷ Alexander Herzen, 7 Sobranie sochinenij 251 (1956) («Полное неравенство перед судом убило в нем в самом зародыше уважение к законности. Русский, к какому бы классу он ни

принадлежал, нарушает закон всюду, где он может сделать это безнаказанно; точно так же поступает правительство.»)

⁷⁸ Military Commissions Rules of Court, Rule 1.5 (May 5, 2014).

⁷⁹ See Appellate Exhibit 332 series, U.S. v. al-Nashiri, avail. at: <http://www.mc.mil/CASES.aspx>.

⁸⁰ AE 332U, Order, U.S. v. al-Nashiri, March 4, 2015.

⁸¹ Charlie Savage, *Camp X-Ray: A Ghost Prison*, N.Y. Times, Aug. 31, 2014.

⁸² Executive Summary, Senate Select Committee on Intelligence, Committee Study of the Central Intelligence Agency's Detention and Interrogation Program, 141, 160, 238, 440 (2014).

⁸³ Al-Nashiri v. Poland, App. No. 28761/11 (Eur. Ct. H.R. Feb. 16, 2015).