

If you say the word “analogy” to a lawyer, I would guess we all instantly think of case analogies—our minds, as we were trained, diving right back into the last trench from which we lobbed analogical grenades at some judge and her clerks. I suspect, however, that we might react differently to hearing the word “comparison.” This latter word invites something more personal and less clinical. Perhaps even something more withering or acidic. Comparison is this ugly thing I do when I envy a colleague’s publication list. When I feel like less of a neighborhood citizen because my neighbor’s lawn looks like a Pebble Beach fairway while mine looks like a roadside driving range. Or when I start to feel abused by my circumstances because I see, through the green, corroded eye of social media, that my friend is on vacation at the beach...again. But it’s not all bad in the land of comparison. It is only through the dual-lens of comparison that I see a refugee fleeing across the border of Poland and I gain some perspective over every other trivial matter I’ve brought into orbit around me. While analogies remain external to us, we almost always put the “i” in comparison. Unsurprisingly, our jurors apparently do this as well. In so doing, they go from applying law to fact, to applying fact to their most angelic selves and their most angelic neighbors; or perhaps just the neighbors with the best lawns.

It is this language of comparison that provides the insights to this month’s blog. A survey of jury decision-making research yields a raft of studies of mock jurors. Jules and I have written plenty in this space relying on mock-juror research. Though rare, courts in the long hallway of judicial time have occasionally opened the doors of their jury deliberation rooms for the scientific world to peek in. In this study, the authors reviewed the deliberations of two juries in the 1996 trial and retrial of the same criminal case.¹ The first jury deliberated for two days to an eventual impasse. The second jury came to a quick conviction on the same facts. The case involved a 26-year-old woman who was accused of drug trafficking after large amounts of drugs were found in her two suitcases upon her arrival at the Phoenix airport. She was traveling with a confederate and the two initially claimed they were flying to New Jersey, on one-way tickets, for a vacation in New York. Curiously, both were found to have traveled from Arizona to New York in the week prior to this arrest. Between the two of them and their four bags, they were hauling over 128 pounds of drugs. As most of the drugs were found in the defendant’s two bags, prosecutors flipped the confederate who agreed to testify against her. The defendant, however, claimed that she was unaware her bags were filled with drugs, telling police that the bags were simply given to her on the way to the airport by some unknown associate of her confederate. The confederate denied most of the involvement, claiming that the defendant was the actual leader of their failed enterprise. The jurors were given other inculcating evidence which included some incriminating jailhouse recordings.²

In applying the scientific practices of communications analysis to the two juries’ deliberations, the authors noted a curious rhetorical pattern recurring as the jurors dialogued. A juror who had the floor would glom onto a particular fact of the defendant’s behavior or testimony and formulate a targeted argument of guilt based on a comparison with the juror’s own

¹ David R. Gibson & Matthew P. Fox, *Facts into faults: The grammar of guilt in jury deliberations*, 23 DISCOURSE STUDIES, no. 4, 2021, at 474-496, <https://doi.org/10.1177/14614456211001605>

² See *Id.* at 479-80 for a more complete discussion of the case facts and arguments by counsel.

conduct or the generalized conduct of that juror's friends or neighbors. Seeing this rhetorical device recur, the authors called it a "Conditional-Contrastive Inculpation" or CCI. To put it as simply as I can in this small space, a CCI is an assertion or question in which the juror asserts their own innocent conduct (or the conduct of one's law-abiding friends, neighbors, or fellow jurors) as the gold standard against which the defendant's more suspect case facts or behaviors are compared.³ So, for instance, one juror opined "Even if I know someone for three months I'm at least gonna know where they live...what they do for a living."⁴ A CCI question looks something like this: "If you're unemployed are you gonna buy a one-way ticket back to New York [a week after you were just there]?"⁵ To be clear, most CCIs seem to be inculcating, but that was not always the case. In the first hung jury, the hold-out jurors also applied the device for the sake of arguing exculpation.⁶

Now for the fun parts. In the first trial deliberations, no CCIs were employed until one of the pro-acquittal jurors self-identified. Once the pro-acquittal minority self-identified, CCIs flowed out (overwhelmingly from the pro-prosecution majority) at an astounding rate—147 instances in about 390 minutes of deliberation!⁷ Remember, however, that this first jury failed to agree on a verdict and the case went to a second trial. The second trial resulted in a quick conviction in which all 8 jurors seemed to be of the same mind from the outset of the deliberations. That second jury deliberated for 41 minutes.⁸ With no holdout to persuade, they used only 9 CCIs.⁹ If you're curious, that's nearly half the average rate of CCIs per minute from the first trial to the retrial. In case you think just these two juries employed CCIs, the authors assure us that CCIs are present throughout other deliberations discussed in other studies of real juries.¹⁰

In a cursory review of some quotes online about comparison, I found this one from that old sage who is known by only one name: "Anonymous." Anonymous apparently once said, "Happiness is found when you stop comparing yourself to other people." It is sage advice. Perhaps it's also true that guilt is found when you *start* comparing yourself to defendants. If I were a juror, apparently I'd be in a world of deliberation trouble if the defendant were a prolific author with a nice lawn and a tan from his last vacation.

³ I am summarizing and condensing a good deal here due to the blog's limited space. CCIs can begin with an abstracted "you" or a "she" or a "they" or even a hypothetical "someone" who, in the offered comparison, behaves normally in comparison to the defendant. *See id.* at 483.

⁴ *Id.* at 483.

⁵ *Id.*

⁶ *Id.* at 482.

⁷ *Id.*

⁸ *Id.* at 481.

⁹ *Id.* at 482.

¹⁰ *Id.* at 491.