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# Analogical Reasoning

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## Chapter 6

# Analogical Reasoning

Your friend Bob sends out an invitation to a potluck feast. In her emailed RSVP, Sylvia writes, "So excited for this! I'll bring along a fruit dish for dessert."

She arrives with a tomato and goat cheese torte. Unhappiness ensues.

Bob is peeved because he believes Sylvia broke her promise to bring a fruit dish. He envisioned an apple pie or peaches with ice cream. Sylvia disagrees; she knows that tomatoes are agriculturally classified as fruits. Regardless, she thinks, Bob has no right to be upset because the dessert is delicious.

The friends turn to you at the end of the dinner party. Who is right? Is a tomato a fruit or a vegetable?

The process you used to reach an answer may have gone something like this: Well, a tomato has seeds like apples and peaches. Sylvia is right; it's technically a fruit.

Or like this: A tomato is usually served with a main course, like carrots or potatoes, not as a dessert. It has a savory taste, not a sweet one. Of course Bob should be mad; a tomato's a vegetable.[1]

If you followed either of these lines of thought, you reasoned by analogy. It is a form of reasoning that is commonplace; we use it every day to make decisions. And it is the aspect of legal reasoning that makes it a unique and distinctive form.

In this chapter, we break down why, exactly, this muddy and controversial form of reasoning has become such a bedrock of legal analysis and provide suggestions for how to construct effective analogies in your own legal writing.

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1. The Supreme Court answered this very question in the case of *Nix v. Hedden*, 149 U.S. 304 (1893). It decided that even though a tomato was a "fruit of a vine," it was more like a vegetable because it is usually served as part of an entrée, like carrots and potatoes, not as a dessert, like apples or blueberries. *Id.* at 307.

Treat like cases alike.[2] This command of the American legal system enables stability and allows easy cases to be disposed of quickly, often without resort to the adjudicative process. When the result in a present case is moored to the outcomes of past cases, the law remains more predictable, coherent, and, some would argue, fair.[3]

Analogical reasoning is the primary method by which practitioners tie present facts to legal precedent. This kind of formal reasoning is unique to the law—some have called it the hallmark of what makes legal reasoning distinct from other forms of reasoning[4]—but it is also characteristic of much of our informal thought processes. If I like the taste of a filet mignon, then I might safely assume that I will also like the taste of a New York strip. I conclude, based on the fact that both steaks come from the same animal, that they have a similar taste.

This kind of reasoning has a simple structure:

(1) A has characteristic Y;
(2) B has characteristic Y;
(3) A also has characteristic Z;
(4) Because both A and B have Y, B probably also shares characteristic Z.[5]

For our steak example, the analogy would be:

(1) Filet mignon comes from a cow;
(2) New York strip also comes from a cow;
(3) Filet mignon tastes good;
(4) Because both filet mignon and New York strip come from a cow, New York strip will also taste good.

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2. *See, e.g.*, H.L.A. Hart, The Concept Of Law 155 (1961).

3. Many theorists have questioned the fairness of this principle, arguing, among other things, that injustice perpetuates itself through the demand that like cases be treated alike. *Stare decisis* guarantees that an unjust result in one case will be replicated again and again. *See, e.g.*, Larry Alexander, *Bad Beginnings*, 145 U. Pa. L. Rev. 57, 80–86 (1996). While that is certainly a valid argument against the principle, cases are rarely completely "alike," and a thoughtful lawyer can avoid unjust results by arguing that the precedent case is distinguishable from the current case. This chapter gives guidance on how to craft those kinds of arguments.

4. *See, e.g.*, Lloyd L. Weinreb, Legal Reason: The Use Of Analogy In Legal Argument 4 (2d ed. 2016).

5. *See* Ruggero J. Aldisert, Logic For Lawyers: A Guide to Clear Legal Thinking 93–94 (3d ed. 1997).

It is easy to say how this logic leads to results that are consistent with precedent. It is also easy to see how quickly this form of reasoning can go awry. In our steak example, for instance, a faulty analogy could be:

(1) Filet mignon comes from a cow;
(2) New York strip comes from a cow;
(3) Filet mignon is pink on the inside when cooked;
(4) Because both filet mignon and New York strip come from a cow, New York strip will also be pink on the inside when cooked.

In fact, another circumstance altogether—your instruction to the chef to cook the filet mignon rare—accounts for its pink coloring. Because the analogy above tagged an irrelevant fact, the analogy does not accurately predict the result.

So too in legal analogies. As H.L.A. Hart said, "[U]ntil it is established what resemblances and differences are relevant, 'Treat like cases alike' must remain an empty form. To fill it, we must know when, for the purposes in hand, cases are to be regarded as alike and what differences are relevant."[6] Because of these weaknesses in the analogical form, because its predictive power is not as strong as deductive or even inductive reasoning, some scholars have questioned its value in legal reasoning, arguing that analogies are simply fig leaves for judges to import their policy preferences into the law.[7] While these objections certainly have merit, they do not change the reality on the ground: An effective lawyer must be able to dexterously deploy analogies to win cases.[8] This chapter helps you do just that.

## A. The Judgment of Importance

Let's return to the problem of Sylvia's tomato and goat cheese torte. Both analogies are sound on their faces. Here is Bob's analogy:

(1) Carrots and peas are savory;
(2) Tomatoes are savory;

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6. H.L.A. Hart, The Concept Of Law 155 (1961).

7. *See, e.g.*, Karl N. Llewellyn, The Bramble Bush: The Classic Lectures on the Law and Law School 68–71 (2008); Richard A. Posner, *Reasoning by Analogy*, 91 Cornell L. Rev. 761, 765 (2006); Larry Alexander, *Bad Beginnings*, 145 U. Pa. L. Rev. 57, 79–80 (1996).

8. Cass R. Sunstein, *On Analogical Reasoning*, 106 Harv. L. Rev. 741, 741 (1993) ("Reasoning by analogy is the most familiar form of legal reasoning.… [I]t is a characteristic part of brief-writing and opinion-writing as well.").

(3) Carrots and peas are vegetables;
(4) Therefore, tomatoes are vegetables.

And Sylvia's:

(1) Blueberries and strawberries have seeds;
(2) Tomatoes have seeds;
(3) Blueberries and strawberries are fruits;
(4) Therefore, tomatoes are fruits.

To decide which analogy is more compelling, you must decide whether flavor or seed structure is a more relevant consideration for the dispute. In this context, a dinner party where a guest promised to bring a dessert, flavor likely trumps seeds. Bob's anger is justified.

But in a different context, an agricultural study, say, a tomato's reproductive system would be of primary importance. Seeds would then trump flavor.

The broader context thus controls whether you consider a tomato more like a carrot or like a blueberry. In legal reasoning, too, the purpose of the comparison, the context in which it appears, determines which of two analogies is more compelling. Steven Burton called this the judgment of importance.[9] Each case has some similarities and differences from every other case. An attorney's job is to decide (or argue) that relevant similarities outweigh relevant differences, or vice versa.

And just like the dinner-party context controlled the judgment of importance in our tomato fiasco above, so too does the legal context control the judgment in your legal writing. This legal context is made up of several considerations: (1) the procedural posture, (2) the relevant legal rule, and (3) the policy underlying the legal rule. We discuss each contextual frame below.

## 1. Procedural Posture

The procedural posture of your case is a crucial contextual consideration because it sets the outer boundaries of relevant facts. As discussed in Chapter 2, certain facts are off-limits at different stages of a litigation. For example, if you are writing a motion to dismiss, arguing that the plaintiff has failed to state a claim upon which relief can be granted under Rule 12(b)(6), then you are limited to the facts as asserted in the complaint. You need to accept these

9. Steven J. Burton, An Introduction To Law And Legal Reasoning 57 (3d ed. 2007).

facts as true; your motion will be wildly unsuccessful if you argue the facts in the complaint are false.[10]

An analogy based on facts that are off-limits will fall apart. Thus, it is crucial that you know not only the procedural posture of your own case, but also the procedural posture of the precedent cases. An opinion deciding a post-trial issue in a civil litigation, after the factfinder has resolved factual disputes, is of limited help to a practitioner looking to determine whether her case will survive a motion to dismiss. The circle of available facts is much wider in a post-trial case than it is at the motion-to-dismiss stage, and any analogy between the two is open to attack. The strongest analogies are formed between cases with the same procedural posture; if those cases are unavailable, move on to cases where the procedural standard applied to facts is most similar. The further you travel from the same procedural standard, the more susceptible your analogies are to critique.

## 2. Legal Rule

While procedural posture is part of the judgment of importance, the applicable legal rule is the North Star of your analogy. Just as the dinner-party context determines whether a tomato is a vegetable or a fruit, so does the legal rule determine whether the facts of your case are similar to or different from the precedent.

Say you were asked to determine whether a court would rule for your client, a farmer, when he failed to deliver a promised bushel of tomatoes to a buyer following a drought. The buyer sued for breach of contract, but the contract contained a provision excusing the parties from their obligations if an "act of God, such as a flood or other natural disaster" intervened. In one previous case, a court ruled for the defendant when the contract contained the same language and the defendant, a farmer, did not deliver a bushel of apples after a hurricane destroyed his apple trees.

One possible legal rule here: An act of God excuses performance. The precedent tells you that a hurricane qualifies as an act of God. The case also notes that the defendant was a farmer, just like your client is a farmer. But nowhere does the legal rule applied in the case mention, or even imply, the defendant's occupation. This common fact is therefore irrelevant. Your focus should be on what qualifies as an act of God, and your analogy should be between droughts and hurricanes.

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10. *See Iqbal*, 556 U.S. at 678 ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, *accepted as true*, to 'state a claim to relief that is plausible on its face.'" (emphasis added) (internal citation omitted)).

How do you craft such an analogy? Look to the reasoning that led to the result in the precedent case. On the one hand, both hurricanes and droughts are natural disasters that cause significant harm to crops. On the other, a hurricane is a sudden event, while a drought takes place over a long period of time. If the precedent case focused on the extent of the harm caused by natural disasters, then a severe hurricane and a massive drought are analogous. If, however, the judge focused on the sudden nature of the hurricane, then a hurricane and a drought are distinct.

Yet, sometimes, the legal rules and the pertinent precedents do not fully answer the question. Suppose your client had a tank full of reserve water and refused to use it, allowing his tomato crop to wither and die. The precedent case focused only on the massive harm caused by a hurricane and made no mention of whether an individual must take action to protect his crop. Blindly applying the legal rule and the precedent case would lead to an outcome where individuals would be excused from performance when they had the means and ability to fulfill their obligations. When the legal rule and precedents have left a blind spot, then lawyers may turn to the policy underlying the legal rule.

## 3. Policy

The policy advanced by a legal rule is a third consideration. One possible policy goal in the act-of-God example from above would be to honor the language of the contract as written. The dependability of contracts relies on enforcing the language agreed to by the parties. And since the language here made no mention of a party's duty to offset the harm caused by a natural disaster, the fact that your client did nothing to protect his crops would be irrelevant.

But if the policy goal instead were to ensure that parties to a contract would not be held responsible for their obligations under the contract when disasters beyond their control occur, then the fact your client did not water his plants becomes relevant to the outcome.

Where would a lawyer find the policy undergirding a particular rule? Statutes often contain their purpose in the text itself; if it's not contained there, then a look through the cases interpreting the statute may provide an answer. For common law rules, cases also provide the best resource for determining the policy the rule is supposed to support. If those resources yield nothing, turn to secondary sources, such as treatises, encyclopedias, or law review articles, for clues as to what the legal rule was intended to accomplish.

Sometimes, there is one clearly stated policy rationale for a particular legal rule; these cases are easy. Other times, there is more than one policy rationale, and the potential rationales conflict. When faced with these harder cases, you

must choose which principle best satisfies the goals of the legal rule and construct an analogy based on that principle. The strategies for making this choice differ depending on whether you are predicting an outcome or advocating for an outcome. We'll address those strategies in later chapters on objective and persuasive writing.

## B. Crafting Analogies and Distinctions

Once a practitioner has made the judgment of importance and has decided whether the similarities or differences between sets of facts control, she must then construct a case comparison to convince others that her analysis is correct. To do this effectively, you must include the facts, reasoning, and holding of the precedent, then compare those facts to the facts of the current case, before concluding that the holding in your case should be the same as in the precedent (or different from the precedent). Case comparisons can either take the form of analogies or distinctions, and your construction of the comparison differs depending on whether you are trying to convince the reader that these cases are alike or different. The difference lies in the level of detail you use to describe the facts of each case.

### 1. Analogies

With analogies, your goal is to show the reader the connection between the precedent case and the current case. Sometimes, these two sets of facts are identical. These are the easy cases that are often resolved before they ever see the inside of a courtroom (or a lawyer's office). The cases that require lawyerly assistance are often far more difficult. In your writing, your goal is to make concrete the sometimes-abstract connections between precedent and current facts. To do so, you must: (1) identify the specific relevant facts, and (2) generalize out from those facts until the tie between the two cases is clear.

The judgment of importance will help with the first task. You decided which facts were relevant when you decided on the similarities that outweighed the differences. An effective analogy focuses the reader's attention on those facts. The tendency for many beginning law students is to include all the facts they know in the analogy. But experienced attorneys know that technique overwhelms the reader and leads to confusion. Irrelevant facts clog up an analogy; a streamlined analogy that focuses attention only on the relevant information is the goal.

Analogies are at their easiest when the two sets of facts closely track one another. When one farmer milks his neighbor's cow without permission, it's

easy to draw the connection between that case and the next farmer-milking-cow case that comes along. But those easy cases are usually resolved well before a complaint crosses a court clerk's desk. Often, there is daylight between the precedent case and the new one. A cow becomes an iPad. Neighbors become strangers. A resource taken for convenience becomes one taken in an emergency.

When facts change, when the line from Case A to Case B is no longer straight and direct, then the analogy needs to contain both the specific facts from the precedent and a tie that shows the exact point of overlap between the two cases. To create this tie, a practitioner generalizes out from the specific details of the precedent and the specific details from the current case until the two fact sets overlap. For example, to make an analogy between a cow and an iPad, you could describe both as "things," but that describes a whole host of objects not relevant to the dispute. You could narrow the generalization by describing them as "possessions" of the farmer. Even more specifically, you could describe these objects as "business possessions" of the farmer, or items that help the farmer in his work. Finding the most specific way to connect the two ideas is key; to be overinclusive is to open your analogy up to devastating hypotheticals from your opponent. One scholar has called this finding the lowest common denominator between the facts of the two cases.[11]

The below example demonstrates the weakness of analogies without clear ties. This paragraph comes from a memo analyzing a potential false light claim against an artist who had publicly displayed a photo of an unconscious man with a bottle of whiskey at his kitchen table; his wife stares into the camera with a black eye. The photo was taken over a decade ago but was misdated as the current year. In the meantime, the man had recovered from his alcoholism and reunited with his wife, whom he no longer abused. The writer argues that this partial falsity is enough to satisfy the tort's requirement that the information presented be false:

> In *Jonap*, the falsity element was satisfied when an employer published a letter under an employee's name espousing both opinions the employee did hold and opinions he did not hold. Similarly, Fisher's photo showed Stall as currently an alcoholic and wife beater, when he had only been an alcoholic and abuser in the past.

That analogy places two sets of specific facts next to one another and leaves it to the reader to draw the connection between the two. The connection may be obvious to you, the writer, but it needs to be made concrete for the reader.

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11. Paul T. Wangerin, *Skills Training in "Legal Analysis": A Systematic Approach*, 40 U. Miami L. Rev. 409, 451–52 (1986).

A more effective analogy finds the lowest common denominator between two sets of facts and uses that denominator to tie together the cases. In this example, the tie between these two cases is that, in both instances, part of the document that allegedly placed the plaintiff in a false light was true and part was false. The below analogy generalizes out from the specific facts to make that tie between the two cases explicit:

> While some of the letter attributed to the plaintiff in *Jonap* was true to his beliefs, other portions falsely characterized his beliefs. Similarly, Fisher's photograph simultaneously presented some truth about Tom Stall, while also falsely characterizing his activities.

Sandwiching this generalized tie between the specific facts of each case will create an effective case comparison, e.g.,

> A representation that is true in some respects, but untrue in others, qualifies as "false" for the purposes of the false light tort. In *Jonap*, the falsity element was satisfied when an employer published a letter under an employee's name espousing both opinions the employee did hold and opinions he did not hold. Although some of the letter was true to the plaintiffs' beliefs, other portions falsely characterized his beliefs. Similarly, Fisher's photograph simultaneously presents some truth about Tom Stall, while also falsely characterizing his activities. Fisher's photo showed Stall as currently an alcoholic and wife beater, when he had only been an alcoholic and abuser in the past.

A successful lowest common denominator will not only be specific enough to avoid overinclusivity, but it will also connect back to the legal rule or the policy underlying the rule. Many beginning law students draw a legal rule from a case, then construct an analogy to that case that does not apply the legal rule. For example, in our act-of-God contract case, a novice paragraph could look something like this:

> Nonperformance under a contract is excused when an Act of God occurs. An Act of God is a natural disaster that the plaintiff could not have foreseen and could have taken no action to prevent. *Bell*, 534 F.2d at 64. In *Bell*, the farmer was excused from performance because a flood destroyed his entire spinach harvest. This complete destruction was an act of God. Here, the farmer should also be excused from performance because his entire tomato harvest was destroyed.

This is not an effective analogy because it misses the point. The legal rule the writer is seeking to prove is not "complete destruction is an act of God."

Instead, it is "an act of God is a natural disaster the plaintiff could not have foreseen and could have taken no action to prevent." The facts relevant to foreseeability and prevention, and the lowest common denominator related to those facts, should have been the focus of the analogy. Compare that to the Jonap analogy above, where the lowest common denominator tied back to the "partial falsity" legal rule.

## 2. Distinctions

When crafting analogies, identifying the lowest common denominator provides a connection between the cases. Zooming out from the specific details allows you to find the similarity necessary to convince a reader that they are, in fact, analogous.

But when you instead want to distinguish a case, or show why the outcome under the current set of facts should be different than the outcome under a past case, you generally need to zoom in and show each case in crisp detail. By identifying these specific differences, you show how the lines of the cases do not touch.

An example of this zoom in/zoom out style can be found when comparing district court decisions in lawsuits against the NSA's metadata collection program. Judge William Pauley found that the program did not violate the Fourth Amendment and rested his analysis on an analogy to *Smith v. Maryland*,[12] a Supreme Court case that held using a pen register, which collected and recorded the telephone numbers dialed from the defendant's home, did not violate the Fourth Amendment because the caller did not have a reasonable expectation of privacy in that information. The connection between the two cases—the zoom out—was that an individual "has no legitimate expectation of privacy in information provided to third parties."[13] Because the telephone numbers in *Smith* were provided to the phone company, and the information in *ACLU* was provided to the phone company, callers had no expectation of privacy in that information.[14]

But in a different case, on nearly identical facts, Judge Richard Leon found that these two cases were distinct, and the NSA did violate the Fourth Amend-

12. 442 U.S. 735, 745–46 (1979).

13. Am. Civil Liberties Union v. Clapper, 959 F. Supp. 2d 724, 749, 752 (S.D.N.Y. 2013) (internal citation omitted), *aff'd in part*, *vacated in part*, *remanded*, 785 F.3d 787 (2d Cir. 2015).

14. *Smith*, 442 U.S. 735, 744–45.

ment through its bulk collection program.[15] He did so by focusing on the specific details of the cases, rather than the generalized "communication to third parties" highlighted by Judge Pauley. He conceded that the types of information at issue—phone numbers dialed, dates, times, and length of call—was limited, as was the information in Smith.[16] But the ubiquity of phones and, more specifically, mobile phones, "has dramatically altered the quantity of information that is now available and, more importantly, what that information can tell the Government about people's lives."[17] He went on to catalogue the various ways in which individuals' relationships to their phones had changed over the thirty-four years since *Smith* had been decided.[18]

Thus, by focusing on the specific facts of *Smith* (one landline telephone, a targeted investigation) and the specifics of the current case (almost every cellphone and landline in the United States, a bulk collection) Judge Leon crafted a distinction that showed why the rule of *Smith* should not apply to the NSA program. As he stated, "[T]he Smith pen register and the ongoing NSA Bulk Telephony Metadata Program have so many significant distinctions between them that I cannot possibly navigate these uncharted Fourth Amendment waters using as my North Star a case that predates the rise of cell phones."[19]

15. *Klayman v. Obama*, 957 F. Supp. 2d 1, 42 (D.D.C. 2013), *vacated and remanded*, 800 F.3d 559 (D.C. Cir. 2015).

16. *Id.* at 35.

17. *Id.* at 36.

18. *Id.*

19. *Id.* at 37.