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# Thinking Like a Lawyer: The Heuristics of Case Synthesis

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# THINKING LIKE A LAWYER: THE HEURISTICS OF CASE SYNTHESIS

by Jane Kent Gionfriddo\*

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## I. INTRODUCTION

In a common law system where cases play an important role in legal problem-solving, lawyers must be able to synthesize ideas from groups of cases to determine a jurisdiction's law at a particular point in time. In reality, however, not all lawyers are able to synthesize well enough for sophisticated law practice. Some lawyers understand and use this skill intuitively but do not consciously think about the steps they actually take. Lawyers in this group often do not sufficiently value case synthesis because this skill seems so obvious, and thus they do not necessarily use this skill to its full potential. Other lawyers do not intuitively understand how to synthesize cases and have never learned a methodology to do so. Lawyers in this group simply are not able to manipulate case law adequately and consequently fail to produce the necessary depth of analysis to represent their clients effectively.

This Article's goal, therefore, is to promote a better understanding of the theory behind synthesizing cases as well as an awareness of the methodology necessary to use this skill properly and to its full potential. This Article is written from the point of view of lawyers synthesizing cases in law practice for the obvious reason that lawyers must draw on this skill all the time. However, this Article is equally valuable for teachers in law schools who must prepare their students for their careers.<sup>1</sup>

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1. Only law school courses, whether doctrinal or legal writing or clinical or legal method, that use a curriculum based on simulated or actual problems in particular jurisdictions are able to teach students the analytical skill of case synthesis as presented in this Article—synthesizing cases to determine the particular law of a particular jurisdiction at a specific point in time. Law school courses that teach the doctrine of a specific subject area in a traditional manner are not able to instruct students in this skill because this type of course focuses on “national law” where students work with legal authority from multiple jurisdictions. Working with thematic ideas from cases across jurisdictional lines results in syntheses that necessarily capture the broad strokes of doctrine and policy underpinnings of the particular legal subject area, which is a process that is obviously valuable for teaching law students how to think about the law. It does not, however, allow students to work within the boundaries of synthesizing cases of a particular jurisdiction as lawyers must do to represent clients in practice. See A.B.A. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, SOURCEBOOK ON LEGAL WRITING PROGRAMS 7-8 (Eric B. Easton ed., 2d ed. 2006) (discussing the complementary nature of traditional doctrinal and legal analysis and writing courses' approaches to teaching analytical skills in the first-year law school curriculum); see also Jane Kent Gionfriddo, *The “Reasonable Zone of Right Answers”*: Analytical Feedback on Student Writing, 40 GONZ. L. REV. 427, 432 n.17 (2004-2005) (comparing the approaches of traditional doctrinal and legal writing courses to teaching analytical skills); cf. Richard K. Greenstein, *Teaching Case Synthesis*, 2 GA. ST. U. L. REV. 1, 8-14 (1985-1986)

Part II provides general background about how lawyers synthesize legal authority, with a particular focus on synthesizing cases and why this skill is so important for the practice of law.<sup>2</sup> Part III describes a methodology for lawyers synthesizing cases that is thorough, yet flexible enough to generate the subtle nuances of analysis necessary for sophisticated problem-solving.<sup>3</sup> Part IV illustrates this methodology using a group of hypothetical cases that have been carefully designed to demonstrate the complex permutations of synthesizing cases in an actual problem-solving context.<sup>4</sup>

## II. BACKGROUND

The word “synthesis” comes from the Greek word “syntithenai” which means “to put together.”<sup>5</sup> A modern definition of “synthesis,” therefore, is “the composition or combination of parts or elements so as to form a whole.”<sup>6</sup> In the law, this idea of synthesis comes into play as lawyers, in their many roles, analyze groups of legal authority to determine reasonable interpretations of law.<sup>7</sup>

Lawyers begin this process of synthesis by first identifying the pieces of authority relevant to a legal issue and then fitting these pieces together to determine the overall analytical framework they reasonably support.<sup>8</sup> This step requires understanding the nature and hierarchy of authority in our legal system.<sup>9</sup> Our system, for example, mandates that a legal issue is governed first by a relevant constitutional statute.<sup>10</sup> Here, cases become important only secondarily to provide judicial interpretations of the statute and its application.<sup>11</sup> This situation, then, is different from one when the legislature of

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(criticizing the traditional doctrinal course approach to teaching students how to synthesize cases in comparison to the approach in a problem-based course). *But see* Dan Hunter, *No Wilderness of Single Instances: Inductive Inference in Law*, 48 J. LEGAL EDUC. 365, 380-91 (1998); Paul T. Wangerin, *Skills Training in “Legal Analysis”: A Systematic Approach*, 40 U. MIAMI L. REV. 409, 442-48 (1986) [hereinafter Wangerin, *Skills Training*] (discussing the process of synthesizing cases but failing to adequately distinguish between the situation of synthesizing cases from different jurisdictions, as occurs in a traditional doctrinal course, and the situation of synthesizing cases from one jurisdiction, as a lawyer would do).

2. *See infra* Part II.

3. *See infra* Part III.

4. *See infra* Part IV.

5. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1296 (11th ed. 2004).

6. *Id.*

7. *See, e.g.*, KENNETH J. VANDELDE, THINKING LIKE A LAWYER: AN INTRODUCTION TO LEGAL REASONING 39 (1996) (discussing the process of synthesizing “rules of law into a single, coherent framework”); Wangerin, *Skills Training*, *supra* note 1, at 442-43 (stating that synthesizing “means bringing together two, three, four, or more decided cases and other legal authorities as support for a single legal idea or proposition”).

8. *See infra* Part IV.B.

9. LAUREL CURRIE OATES & ANNE ENQUIST, THE LEGAL WRITING HANDBOOK: ANALYSIS, RESEARCH, AND WRITING 26-27 (4th ed. 2006).

10. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 14 (Yale Univ. Press 1964) (1921).

11. VANDELDE, *supra* note 7, at 23; CARDOZO, *supra* note 10, at 14.

the jurisdiction has never addressed the area of law, and when the legal issue falls squarely under the common law developed by the courts.<sup>12</sup>

Once lawyers determine this overall analytical framework, they must take the next step of fleshing out its various components and their interrelationships. Sometimes, one particular piece of authority in the jurisdiction—either a statute or an appellate level case—sufficiently articulates the relevant law, and a lawyer need go no further. For instance, the legislature might have enacted a statute that unequivocally dictates a result for the lawyer’s problem. Similarly, in a single case, a court might have fully articulated the relevant common law doctrine, including its requirements, standards, and underlying reasoning; or a court might have explicitly set out its interpretation of a vague term in a statute and why it reached that conclusion. In these situations, the court has explained its ideas with the kind of specificity that gives clear guidance to lawyers in future cases, despite the fact that the addition of each new case changes the law to some degree.

Often, however, whether interpreting a statutory term or developing the common law, no single case in a jurisdiction sets out the entire approach to a particular area of law; instead, over time different cases add individual ideas that must be combined, or in other words synthesized, to see the entire picture of the analysis. Each individual case is less important as a discrete unit than as a component of the entire group. For this reason, lawyers must be able to analyze not only individual cases and what they may add to a particular area of law as a single case, but also groups of relevant cases for the same purpose.<sup>13</sup>

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12. CARDOZO, *supra* note 10, at 18-19.

13. See K.N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 41-49 (Oceana Publ’ns, Inc. 1996) (1930). Lawyers must begin by reading critically and analyzing each one of the relevant cases as a separate, individual unit. This step requires the ability to break a case down into logical, discrete parts; to understand each part; and then to put all the parts back together again in a manner that explains the case’s significance between the parties and lays the foundation for understanding the role it will play, in conjunction with other cases, in the applicable law of the jurisdiction. See *id.* Professor Llewellyn, in his lectures to first-year law students, described the process of a lawyer synthesizing cases as follows:

*That no case can have a meaning by itself! Standing alone it gives you no guidance. It can give you no guidance as to how far it carries, as to how much of its language will hold water later. What counts, what gives you leads, what gives you sureness, that is the background of the other cases in relation to which you must read the one. They color the language, the technical terms, used in the opinion. But above all they give you the wherewithal to find which of the facts are significant, and in what aspect they are significant, and how far the rules laid down are to be trusted.*

See *id.* at 48; see also DEBORAH A. SCHMEDEMANN & CHRISTINA L. KUNZ, *SYNTHESIS: LEGAL READING, REASONING, AND WRITING* 41 (2d ed. 2003) (“Rarely is any single case so similar to the client’s situation that the lawyer can ignore other cases on the same topic. Rather, the lawyer needs to take account of multiple close cases, ‘fusing’ them into a single rule or pattern on that topic that then can be applied to the client’s facts.”); DAVID S. ROMANTZ & KATHLEEN ELLIOTT VINSON, *LEGAL ANALYSIS: THE FUNDAMENTAL SKILL* 40 (1998) (“[C]ase synthesis provides an effective tool for lawyers to integrate a large body of case law into one holistic analysis. It helps lawyers identify the common denominator among the precedents and streamlines the body of law into a workable cornerstone of analysis.”).

A judge’s process of synthesizing cases is similar to that of a lawyer. While comparing literary interpretation of a text to the process of judges’ analyzing legal precedents, Professor Dworkin observed:

Each judge must regard himself, in deciding the new case before him, as a partner in a complex

Only in making sense of all of the cases will a lawyer be able to formulate a clear picture of the law to determine an appropriate solution to the legal problem at issue.<sup>14</sup> In contrast, a lawyer may not develop a sufficient analysis by focusing on a single case that appears to be the most factually similar to a legal problem because synthesizing all the relevant cases may show the lawyer possibilities that analyzing one case does not.<sup>15</sup>

The fact that so much of our case law requires synthesizing ideas from a group of cases is the result of the role of judges in our legal system. The ultimate responsibility of a judge is to resolve the issue between the parties before the court.<sup>16</sup> As part of this responsibility, a judge must make sense of precedent that is relevant to the decision, given the fundamental concept of *stare decisis* in our legal system;<sup>17</sup> “making law” for future cases is secondary, or even irrelevant, to this goal. For these reasons, judges are more likely to write opinions that include a sufficient degree of reasoning to support the immediate decision, but this reasoning may not completely clarify what the case specifically adds to the relevant area of law.<sup>18</sup>

Given the level of reasoning that lawyers often encounter, lawyers themselves must have the ability to synthesize ideas from a group of decisions

chain enterprise of which these innumerable decisions, structures, conventions, and practices are the history; it is his job to continue that history into the future through what he does on the day. He *must* interpret what has gone before because he has a responsibility to advance the enterprise in hand rather than strike out in some new direction of his own. So he must determine, according to his own judgment, what the earlier decisions come to, what the point or theme of the practice so far, taken as a whole, really is.

Ronald Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527, 543 (1982); *see also* CARDOZO, *supra* note 10, at 31 (observing that “[g]iven a mass of particulars, a congeries of judgments on related topics, the principle that unifies and rationalizes them has a tendency, and a legitimate one, to project and extend itself to new cases within the limits of its capacity to unify and rationalize”).

14. *See* Greenstein, *supra* note 1, at 1, 7; *see also* Henry Weihofen, *Types of Questions*, 23 ROCKY MTN. L. REV. 110, 115 (1950-1951) (observing, as part of a symposium on exam testing, that “legal synthesis is the ability to take a mass of cases, as a lawyer has to do, and fit them into a pattern to find the law”).

15. *See* SCHMEDEMANN & KUNZ, *supra* note 13, at 42.

16. LLEWELLYN, *supra* note 13, at 40 (“[T]he court must decide the dispute that is before it. It cannot refuse because the job is hard, or dubious, or dangerous.”); *see also* Richard A. Posner, *Reasoning by Analogy*, 91 CORNELL L. REV. 761, 770 (2006) (“From the standpoint of the judge, . . . it is the activity of deciding cases. The duty to decide is primary.”) (reviewing LLOYD L. WEINREB, *LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT* (2005)).

17. *See generally* VANDEVELDE, *supra* note 7, at 32-35 (discussing the concept of *stare decisis*).

18. *See* LLEWELLYN, *supra* note 13, at 87. In discussing the role of judges in making and dealing with precedent, Professor Llewellyn reasoned:

A judge makes his rule in and around a specific case, and looking backward. The case shapes the rule; the judge’s feet are firmly on the particular instance; his rule is commonly good sense, and very narrow. And any innovation is confined regularly within rather narrow limits—partly by the practice of trying hard to square the new decision with old law; it is hard to keep daring innovations even verbally consistent with old rules. And partly innovation is confined through conscious policy: case law rules (though new) are applied as *if* they had always been the law; this derives from our convention that “judges only declare and do not make the law.” Knowing that the effect of their ruling will be retroactive, and unable to foresee how many men’s calculations a new ruling may upset, the judges move very cautiously into new ground.

*Id.*

to use the law in a sophisticated manner and, therefore, to represent their clients well in a wide range of situations.<sup>19</sup> For instance, in a transactional situation, lawyers able to synthesize cases are more likely to craft document language that sufficiently anticipates, and therefore protects clients against, future problems.<sup>20</sup>

Similarly, lawyers able to synthesize cases are more likely to make creative arguments that will influence a court to reach a favorable outcome for a client.<sup>21</sup>

In addition to representing their clients well, lawyers able to synthesize cases play a critical role in developing the law in their jurisdictions. A lawyer's well-reasoned arguments assist the court in writing opinions in which the court's rationale is spelled out more explicitly.<sup>22</sup> In the same vein, judges who consciously use a sophisticated process of synthesizing prior case law may be more likely to write opinions that develop, in greater depth and specificity, a particular area of law and that explain why that approach requires the court's disposition.<sup>23</sup> These types of opinions provide better guidance to all citizens on the parameters of the specific area of the law, even though those parameters continue to change as new and different factual situations come before the courts.<sup>24</sup> Also, legislators who are able to synthesize cases in a sophisticated manner are better able to craft legislation that takes into account important nuances in prior case law and that is, therefore, more likely to achieve the desired results for the citizens of the jurisdiction.

Thus, to operate successfully in their many roles, lawyers must be able to synthesize groups of cases effectively. To do so, they must understand the theory behind a sound and sophisticated methodology for this important analytical skill and be able to use it. This understanding requires more than an intuitive sense of the process; it requires fully comprehending the complexities of synthesizing cases and practicing the methodology properly. Part III describes this methodology,<sup>25</sup> which is illustrated in a hypothetical problem in Part IV.<sup>26</sup>

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19. See Greenstein, *supra* note 1, at 5-6.

20. *Id.*

21. VANDEVELDE, *supra* note 7, at 31 (stating that synthesizing a group of cases to determine the underlying implicit policies allows the "creative lawyer" to better represent a client before the court); Greenstein, *supra* note 1, at 5-6 (stating that a lawyer must determine a synthesis of cases from the relevant jurisdiction that is both plausible and helpful in representing the client in an adversary process); cf. Kristen K. Robbins, *The Inside Scoop: What Federal Judges Really Think About the Way Lawyers Write*, 8 LEGAL WRITING: J. LEGAL WRITING INST. 257, 264-72 (2002) (discussing the results of a survey where federal judges ranked the analytical foundation of a brief as most important).

22. VANDEVELDE, *supra* note 7, at 31.

23. See Posner, *supra* note 16, at 761-65. In criticizing an approach to legal reasoning too focused on reasoning by analogy, Judge Posner made clear the importance of lawyers and judges synthesizing prior cases to come up with the rules and underlying reasoning and policies that those cases support. *Id.* Implicit in Judge Posner's reasoning is that this process is important for lawyers to represent their clients well and for judges to come to well-reasoned decisions. See *id.*

24. See *id.* at 769 (stating that "[g]reater judicial candor would make law easier for practitioners to understand and apply").

25. See *infra* Part III.

26. See *infra* Part IV.



### III. SYNTHESIZING CASES

#### A. Introduction

Although lawyers must synthesize cases in a variety of contexts in the legal profession, the context that best illustrates this skill is the foundational one—a lawyer analyzing a group of cases to develop an objective analysis of the current status of a jurisdiction’s law to neutrally predict what that law means for a client’s situation. For this reason, this Article focuses on the objective analysis context in Part III.B, and then discusses case synthesis in the context of making arguments to a court in Part III.C.<sup>27</sup>

#### B. *The Process in an Objective Analysis of the Current Status of a Jurisdiction’s Law*

##### 1. Overview

Lawyers must often objectively analyze the current status of an area of law in a particular jurisdiction. When synthesizing a group of cases in this context, lawyers may find that much of the courts’ approach—the general principles that set out the courts’ doctrine and underlying reasoning—is explicitly articulated.<sup>28</sup> In many situations, however, these explicit ideas will not be sufficient by themselves, either because they are too general as stated or because the courts simply leave important ideas unstated.<sup>29</sup> When these situations occur, lawyers must look beyond the courts’ explicit statements and analyze what the group of cases implies about the courts’ approach.<sup>30</sup>

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27. See Judith B. Tracy, “*I See and I Remember; I Do and Understand*”: *Teaching Fundamental Structure in Legal Writing Through the Use of Samples*, 21 *TOURO L. REV.* 297, 303-04 (2005). Professor Tracy discussed the reasons behind viewing “objective analysis” as the foundation for analysis directed at persuading:

[L]awyers first objectively analyze a client’s legal situation before advising that client about an appropriate adversarial position and course of action. Lawyers consider the client’s facts in conjunction with a thorough and objective analysis of the relevant law . . . . Only then can the lawyer assess the client’s possible and practical options and provide advice. The best choice, ranging from a vigorous adversarial pursuit of the matter to a recognition that immediate resolution would be best, will be determined by the objective analysis as applied to the facts, and this will dictate what advocacy documents the lawyer prepares.

*Id.* In addition, lawyers need to objectively analyze the relevant law and its implications as a foundation for sound and creative representation of clients in transactional situations. *Id.*

28. See *infra* Part III.B.2.

29. See Posner, *supra* note 16, at 763 (noting that “a legal rule may be inchoate, intuited rather than articulated, and vaguely bounded, because the judge has to decide a case even if he is unsure what the rule governing it is and even if he is reluctant to declare a new rule”).

30. See Greenstein, *supra* note 1, at 10 (stating that the “principles that emerge from this process [of synthesizing cases] might or might not be thoroughly and accurately articulated in the instant opinion” (emphasis added)); Posner, *supra* note 16, at 764 (“judicial reasoning . . . expressed or implied in previous cases” (emphasis added)).

Whether based on ideas that are explicit, implicit, or both, a synthesis in an objective analysis must be consistent with the relevant group of mandatory cases from the jurisdiction, especially those decided by the highest appeals court.<sup>31</sup> Under the doctrine of *stare decisis*, lawyers must presume that these cases form a rational approach to an area of law, even if some aspects are only inferentially supported.<sup>32</sup> In contrast, one must discard a synthesis when it does not adequately take into account all relevant cases existing at that time, because such a synthesis would be a deficient articulation of the current status of the law in that jurisdiction.<sup>33</sup>

Adequate synthesis in this context, therefore, requires a lawyer to follow a sophisticated methodology that takes careful account of a jurisdiction's case law.<sup>34</sup> Under this methodology, a lawyer should work with the courts' explicit

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31. See SCHMEDEMANN & KUNZ, *supra* note 13, at 42; Greenstein, *supra* note 1, at 7. Determining which cases are "relevant" to the specific focus of a lawyer's analysis involves a series of analytical skills; however, a discussion of these skills is beyond the scope of this Article.

32. See LLEWELLYN, *supra* note 13, at 51. In his lectures, Professor Llewellyn focused on synthesizing cases from different jurisdictions (as students do in doctrinal courses focused on particular subjects) but he never let students forget that they must still be sensitive to the constraints of jurisdictional boundaries when doing so. *Id.* Thus, he observed:

[I]n your matching of cases, you may, as a last resort when unable to make the cases fit together, fall back upon the answer: here is a conflict; these cases represent two different points of view. You must, however, before you do that, make sure that they come from different jurisdictions, else one will have to be regarded as flatly overruling the other.

*Id.* at 51-52.

33. Of course, a lawyer could encounter situations that are exceptions to the rule that a synthesis must take into account all relevant cases in the jurisdiction. For instance, in rare situations a lawyer may encounter a completely anomalous decision that simply cannot be reconciled with the rest of the relevant cases from the jurisdiction. Here, the lawyer would proceed through the same methodology of attempting to synthesize the explicit and implicit ideas from the group of relevant cases, but would ultimately recognize that a case's reasoning and decision on the facts before the court is not consistent with the rest of the cases in the group. In this circumstance, then, the lawyer would decide that future courts in the jurisdiction would not be persuaded by the anomalous precedent and would consequently exclude the decision from the synthesis. Of course, the lawyer must come to this conclusion with great care—evaluating the authority of the case, the date of the decision, and any other indications that the case is either foreshadowing a change in doctrine and reasoning of the courts or that there really are conflicting possible approaches developing in the jurisdiction.

A second possible exception is when there is a conflict in approaches between intermediate appeals courts of the same jurisdiction on an issue not yet addressed by the highest appeals court. Here, a synthesis would be different: it would need to include both approaches, and the lawyer would need to evaluate which approach, if either, appeared more consistent with ideas of the highest appeals court's relevant decisions.

A third possible exception is when the courts state that they are applying a certain approach in a group of decisions, yet the facts and results of some or all of the cases contradict the courts' assertions. In this kind of situation, then, a lawyer must synthesize the cases by explaining what the courts are doing, even if contradictory to ideas expressed explicitly on the pages of some or all of the decisions.

34. The process of synthesizing cases from one jurisdiction with persuasive cases from another jurisdiction is beyond the scope of this Article. However, in an objective analysis of the law, lawyers may sometimes find it beneficial to synthesize these two types of cases together. Incorporating ideas from persuasive cases adds needed support, for instance, when an analysis of a group of cases from the lawyer's own jurisdiction is based on inferential reasoning, *see infra* Part III.C.3, and these ideas have been explicitly articulated by courts from other jurisdictions. In this situation, lawyers may choose to include persuasive cases, depending upon their usefulness. If a persuasive case is incorporated, though, the same overall methodology to synthesize the group of cases should be followed. Thus, ideas in the overall explanation of the synthesis of the jurisdiction's cases must still reasonably test back on the facts and results, as well as the

reasoning as well as with ideas that have not been directly expressed by the courts but that may be carefully inferred by evaluating the facts, decisions, and explicit reasoning of the entire group of relevant cases.<sup>35</sup> Both of these steps are described further in Part III.B.2-3, although working with any particular group of cases may not necessarily follow such a linear progression as illustrated by the application of this process to the hypothetical problem in Part IV.<sup>36</sup>

## 2. *Beginning the Process of Synthesis: Working with the Courts' Explicitly Expressed Ideas*

Lawyers begin the process of synthesizing ideas from a group of cases by working with the courts' explicit statements about the area of law. If the courts say they are using certain principles, lawyers should begin their analysis with this foundation of ideas.<sup>37</sup> Judges do, of course, tend to express some ideas unambiguously and explicitly as they reason to a decision for the parties before the court.<sup>38</sup> These ideas then join with the explicit ideas from the other relevant cases to articulate, at least to some degree, that jurisdiction's approach to an area of law—its general analytical framework and some or all of its components and their interrelationships.<sup>39</sup> In synthesizing these explicitly articulated ideas, lawyers may encounter several situations, each of which requires a somewhat different methodology.<sup>40</sup>

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explicit reasoning of the persuasive cases, and vice versa. Only in this way do the persuasive cases adequately support a lawyer's synthesis of his own jurisdiction's case law.

35. The Legal Reasoning, Research & Writing faculty at Boston College Law School teach the methodology described in this section to all first-year students as part of a curriculum on foundational analytical skills. See generally Judith B. Tracy, *Constructing an Analytical Framework that Captures and Verifies Implicit Reasoning*, 14 SECOND DRAFT: BULL. OF THE LEGAL WRITING INST., May 2000, at 6-7, available at <http://www.lwionline.org/publications/seconddraft/may00.pdf> (outlining a method of teaching students how to analyze and synthesize cases).

36. See *infra* Part III.B.2-3, IV.

37. Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 579-80 (1987). In his in-depth analysis of the role of precedent in our judicial system, Professor Schauer noted that there is an

important distinction between decisions containing and those not containing canonical language. At times a decision will be accompanied by an articulated and authoritative characterization of the decision and its underlying facts. This *articulated characterization* . . . constrains the use of subsequent and inconsistent characterizations. . . . [T]hat language cannot absolutely prevent a subsequent interpreter from recharacterizing the first case. But that interpreter must at least confront an argumentative burden not present without an articulated characterization.

*Id.*; see also LLEWELLYN, *supra* note 13, at 36 (“[T]he court in its opinion has laid down a rule, or five. These, too, have been pronounced, as things we are to reckon with. We shall do well to heed them.”).

38. OATES & ENQUIST, *supra* note 9, at 222.

39. See SCHMEDEMANN & KUNZ, *supra* note 13, at 41-49.

40. See *id.* at 44-45 (discussing “textual fusion,” and dividing it into the four inquiries of “material that is identical in all rules, material that is similar in all rules, material that appears in only some rules, or material that differs from rule to rule”); see also VANDEVELDE, *supra* note 7, at 39-48 (discussing a method to synthesize rules that have already been articulated in a group of cases).

In some instances, several cases not only explicitly articulate a central idea but also describe this idea using the same words or phrasing.<sup>41</sup> Synthesis in this situation simply requires recognizing the thematic use of the same idea expressed in the same way in two or more cases.<sup>42</sup> Reading the cases, the lawyer compares and contrasts words and phrasing, examines how the words and phrasing are used in each case, and decides whether the courts are using the words and phrasing in a consistent manner.<sup>43</sup>

In other situations, the courts will articulate the same idea but will use different words to express it.<sup>44</sup> On the one hand, it is seemingly irrational for courts from the same jurisdiction, given the doctrine of stare decisis, not to express the same idea in the same words.<sup>45</sup> On the other hand, because case law develops over a period of time and decisions by the same court may actually be decisions of entirely different groups of judges, it is understandable that different courts, even in the same jurisdiction, might use different words to explain the same idea.<sup>46</sup> This situation is especially likely to occur when the courts are struggling to articulate a difficult idea and try different formulations in different cases over time until they decide on the best phrasing to communicate a particular concept.<sup>47</sup>

When the courts appear to be using different words to express the same idea, a lawyer needs to identify those words that seem to express the same idea and compare their meaning carefully.<sup>48</sup> The lawyer must then test back the word or phrasing within the analytical framework of each individual case in the relevant group to be sure that each of the courts are, or reasonably appear to be, using the term in the same manner.<sup>49</sup> The doctrine of stare decisis requires an initial presumption that the use of similar words is an attempt to express the same idea, or that the words fit together in some other rational way to develop

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41. See OATES & ENQUIST, *supra* note 9, at 222 (“Make sure you understand the law. For some areas of law, this part of the process is easy: the courts have set out, clearly and concisely, the rules that they apply in determining whether a particular element is met, and the courts apply those rules consistently.”); SCHMEDEMANN & KUNZ, *supra* note 13, at 44 (discussing when a group of decisions includes “material that is *identical* in all rules”).

42. See SCHMEDEMANN & KUNZ, *supra* note 13, at 44-45.

43. See *id.*

44. See *id.* (discussing the situation when a group of cases includes “material that is *similar* in all rules”).

45. See *id.* at 25-26, 44.

46. See *id.*

47. See EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 8-9 (1949). Professor Levi described the time period when courts are working out a concept in the law over several cases as follows:

The first stage is the creation of the legal concept which is built up as cases are compared. The period is one in which the court fumbles for a phrase. Several phrases may be tried out; the misuse or misunderstanding of words itself may have an effect. The concept sounds like another, and the jump to the second is made.

*Id.*

48. See ROBIN WELLFORD SLOCUM, LEGAL REASONING, WRITING, AND PERSUASIVE ARGUMENT 155-56 (2d ed. 2006).

49. See *id.*; see also SCHMEDEMANN & KUNZ, *supra* note 13, at 44-45.

an aspect of the law at issue in that jurisdiction.<sup>50</sup> When synthesizing explicit ideas in this manner, for instance, a lawyer must distinguish between the situation when the courts are expressing the same idea in two different ways and the situation when the courts are using a specific phrase to explain a more general concept and are thus describing two different pieces of the analysis.<sup>51</sup>

If all cases in the group include explicit language that the lawyer determines is consistent in content and phrasing, or is consistent in content even though not in phrasing, then the process ends.<sup>52</sup> However, if some cases do not contain the explicit language at all, then the lawyer must test back the synthesized language on these cases' facts, results, and relevant explicit reasoning to be sure all cases reasonably support the synthesis.<sup>53</sup>

Still another scenario may occur when the courts explicitly articulate many key ideas but clarify different points in different cases within the group.<sup>54</sup> Judges cannot choose the cases that come before them but instead must wait until specific factual situations randomly arrive at their doorstep.<sup>55</sup> For this reason, courts in a particular jurisdiction tend to "worry at" an area of law and add different pieces to the overall puzzle of the analysis over time,<sup>56</sup> but do not necessarily develop the law holistically enough to provide sufficient guidance to lawyers.<sup>57</sup>

In this situation, a lawyer must discover each important idea by reading through the cases and picking out significant pieces of the overall analytical

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50. See generally BLACK'S LAW DICTIONARY 1443 (8th ed. 2004) (providing a basic definition and discussion of *stare decisis*).

51. See SLOCUM, *supra* note 48, at 159.

52. See SCHMEDEMANN & KUNZ, *supra* note 13, at 44-45.

53. See *id.*

54. See *id.* (discussing "[t]extual fusion"—a synthesis of explicit ideas "*appearing in only some cases*"); see also ROMANTZ & VINSON, *supra* note 13, at 22 (stating that in some circumstances courts may "articulate a piece of a rule, and other opinions [in the jurisdiction] are needed to complete the legal thought").

55. See SCHMEDEMANN & KUNZ, *supra* note 13, at 44-45. Because appellate courts must wait until important legal issues arrive at their doorstep to make a decision, many jurisdictions have special procedures whereby the highest appeals court may expedite a case's appeal process directly to the highest court. See, e.g., MASS. R. APP. P. 11(f) (Massachusetts Supreme Judicial Court's direct appellate review process).

56. I am indebted to my colleague at Boston College Law School, Dan Barnett, for coming up with this vivid image. With his students, he elaborates on this jigsaw puzzle analogy to illustrate that different individuals have different processes to determine the overall analytical structure to a legal problem. "Some people begin at the edges and finish all of that part of the puzzle before proceeding to begin work on the middle of the picture," he says. "Some people begin in the middle of the puzzle and only work on the edges toward the end of the process. And some people work back and forth from edges to middle and from middle to edges until the whole picture is complete." I have found that this illustration is a compelling way to explain to students the process of developing the analytical structure of any legal problem because it makes it clear that different individuals may reasonably follow a different sequence of analytical skills and reach equally valid results.

57. See ROMANTZ & VINSON, *supra* note 13, at 22. At certain points in the development of a body of law in a jurisdiction, the courts fully articulate their doctrine, including the policy rationales that support that doctrine. See *id.* Such a decision will be significant for a lawyer when analyzing that area of law because it will develop and articulate the courts' approach, even though each new factual situation that comes before the courts will test out the parameters of that doctrine and reasoning. See *id.* Additionally, each new case begins to further develop and refine the courts' articulated approach, and the process begins all over again. See *id.*

framework, which will be explicit in some cases, but not in all.<sup>58</sup> The lawyer must then decide how to fit the pieces together into a coherent description of the courts' overall approach, even though no single case sets it out holistically.<sup>59</sup> This description, however, must then test back as consistent with all cases in the entire group,<sup>60</sup> both as to what the courts explicitly say they are doing and why, and inferentially as to explaining each court's outcome on the facts before it.<sup>61</sup>

### 3. *Continuing the Process of Synthesis: Working with Ideas That Are Completely Implicit in a Group of Cases*

In many circumstances, lawyers must look beyond the courts' explicit ideas and consider ideas that are not yet articulated in any of the relevant cases and therefore completely implicit.<sup>62</sup> This step is necessary to uncover important ideas in the analysis that the courts have not yet discussed but were arguably implicitly using to reach their decisions.<sup>63</sup> For instance, a lawyer might need to determine the courts' underlying policy concerns, or a necessary piece of the courts' doctrine.<sup>64</sup>

To work with ideas in an objective analysis, lawyers must follow a careful methodology to ensure that their inferences are reasonably supported by relevant cases in the jurisdiction and therefore fall within a "reasonable zone of right explanations" of the courts' implicit meaning.<sup>65</sup> To begin the process,

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58. *Id.*

59. VANDELDELDE, *supra* note 7, at 39-44 (discussing different possible relationships between rules).

60. See SCHMEDEMANN & KUNZ, *supra* note 13, at 44-45 (discussing the situation when the lawyer is dealing with "material appearing in only some cases" and noting that the lawyer must test whether this material explains the whole group of cases); Kevin H. Smith, *Practical Jurisprudence: Deconstructing and Synthesizing the Art and Science of Thinking like a Lawyer*, 29 U. MEM. L. REV. 1, 40, 46 (1998) (stating that "[s]ynthesis involves . . . the creation of general propositions from the results of specific cases" and illustrating this process with an examination of a series of hypothetical cases).

61. *Cf. supra* note 33 (discussing exceptions to this statement).

62. The common usage definition of "implicit" is consistent with its meaning in terms of synthesizing cases: "capable of being understood from something else though unexpressed." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 5, at 624.

63. SCHMEDEMANN & KUNZ, *supra* note 13, at 47 (noting that looking "for patterns in the cases' facts, results, and reasonings, including policies" is important when there are "hidden rules" because "the court has not articulated the rule fully or clearly"); VANDELDELDE, *supra* note 7, at 48 (observing that "[s]ituations arise in which the lawyer wishes to establish the existence of a rule not previously recognized in explicit terms"); Smith, *supra* note 60, at 40 (stating that "[s]ynthesis" is imperative when there is more than one case dealing with a particular legal issue, and the courts have not stated any general legal rule that governed their disposition of the cases").

64. See SCHMEDEMANN & KUNZ, *supra* note 13, at 47.

65. See Gionfriddo, *supra* note 1, at 432-33. A lawyer's analysis must fall within a reasonable zone of right answers to be useful. *Id.* "The law practitioner depends on writing whose ideas are accurate because they fall within a range of analysis—even if creative or novel—that 'reasonably' interprets relevant, controlling legal authority, and 'reasonably' argues how that interpretation affects the client's problem. Ideas outside this 'reasonable zone' are incorrect." *Id.*; see also SLOCUM, *supra* note 48, at 157 (describing case synthesis as combining common elements in cases and bringing them together as a broad rule that accurately depicts the cases as a whole).

lawyers must evaluate the significance of each case in relationship to all other cases in the group and then hypothesize possible explanations of the court's implicit meaning.<sup>66</sup> Depending on the particular group of cases, more than one explanation might reasonably be inferred from the cases.<sup>67</sup>

Any explanation must then test back on all cases in the group or relevant subgroup.<sup>68</sup> While an explanation does not need to have been articulated by any one court within the group,<sup>69</sup> it must make logical sense in relationship to the facts and results of each individual case and its explicitly articulated doctrine and reasoning, especially when those cases are decided by the

66. Groups of cases may fall into two distinct patterns, and this result affects how lawyers must analyze the cases. On the one hand, a lawyer may encounter a group of cases in a jurisdiction where each court made a fact-specific decision but failed to articulate all aspects of the courts' doctrine and reasoning. In this situation, a lawyer must synthesize the cases as a group to determine the courts' approach because each case only adds nuances to the overall analysis and does not provide a complete picture. Here, the law is not necessarily evolving from one approach to another; the courts simply are not fully articulating their approach, and the lawyer must make inferences from the group of cases to determine the courts' approach. On the other hand, a lawyer may encounter the situation in which the courts have decided cases in an evolutionary fashion by developing the law over time in a series of decisions and then finally coming to a conclusion, which might be radically different from where they began. In this circumstance, once the final case has been decided, much of the doctrine and reasoning is articulated for a lawyer, although the common law process begins again with each new case. See Greenstein, *supra* note 1, at 11-13 (illustrating a lawyer's synthesis of case law by comparing a group of New York criminal law cases with the famous series of New York products liability cases, which ends with *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916), to illustrate the court's evolutionary approach).

67. See VANDEVELDE, *supra* note 7, at 50 (observing that synthesizing cases "is not mechanical" and "is a process that . . . can lead to more than one result").

68. See LLEWELLYN, *supra* note 13, at 50. In discussing how students should synthesize cases in a doctrinal class when "all the cases everywhere can stand together," Professor Llewellyn's words mirrored the general process of hypothesizing and testing back as a lawyer would do with cases from one particular jurisdiction. See *id.*

[T]o test the rule laid down in either case, as also to test our tentative formulation which we have built to cover both, we do two things. First and easiest is to play variations on the facts, making the case gradually more and more extreme until we find the place beyond which it does not seem sense to go. . . . We may find the stopping-place much sooner than we had expected, and thus be forced to recast and narrow the generalization we have made, or to recast it even on wholly different lines. The second and more difficult way of testing is to go to the books and find further cases in which variations on the facts occur, and in which the importance of such variations has been put to the proof. The first way is the intuitional correction of hypothesis; the second way is the experimental test of whether an hypothesis is sound. Both are needed. The first, to save time. The second, to make sure.

*Id.*; cf. Peter W. Gross, *On Law School Training in Analytic Skill*, 25 J. LEGAL EDUC. 261, 288 (1973) (describing how to synthesize material). Professor Gross does not use "hypothesis and test back" in specific relationship to synthesizing the implicit reasoning in a group of cases in a particular jurisdiction, but he does use it in a more general way to describe how a law student should work with the content from material included in the student's Research Notes, developed during the research process, to come up with the applicable law:

At some point . . . [the student] hypothesizes a rule of law which (i) answers a question posed in the Work Notes [which should include the projected research strategy based on a preliminary analysis of the legal problem] and (ii) seems consistent with the research materials, as reflected in the Research Notes. The student then tests his hypothesis against the research materials. This hypothesis-test sequence is functionally similar to inquiry in empirical science . . . .

Peter W. Gross, *On Law School Training in Analytic Skill*, 25 J. LEGAL EDUC. 261, 288 (1973).

69. See Smith, *supra* note 60, at 40.

jurisdiction's highest appeals court.<sup>70</sup> In general, if any authoritative case in the jurisdiction contradicts the explanation of the courts' implicit meaning, then the lawyer must go back to the drawing board and refine the hypothesis. In addition, even if an explanation is not inconsistent with any of the cases, it must still test back on a sufficient foundation of facts in the decisions; otherwise, the cases do not provide adequate support for the explanation.<sup>71</sup>

Using this methodology, the lawyer is able to distinguish between an explanation that is reasonably supported by the cases in the jurisdiction, even though implicit, and an explanation that is outside the reasonable zone and must be discarded.<sup>72</sup> Thus, the lawyer ensures that the inferred ideas are consistent with all relevant precedent and, therefore, in harmony with the concept of *stare decisis*.<sup>73</sup> This result is true even though an individual case

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70. See LLEWELLYN, *supra* note 13, at 71-72. When describing this process of hypothesizing and testing back on the facts, decisions, and reasoning of the case, Professor Llewellyn stated:

[I]t becomes clear that whereas the deductive aspects of your *application* of a rule once made may be, ideally, perfectly certain, your induction, which precedes, is one which *begins* not with definite, but with indefinite material: one therefore into which elements of judgment, hunches, prediction enter as you freeze it into definite arbitrary form to make possible its logical manipulation; and it is clear that in choosing the definite form you give it, you must be guided by the desire that your conclusion may work out in fact, in life. You must therefore cut the raw material of your single cases according to your *expectation* about how courts will handle each one of them as precedent.

*Id.*; see also ROMANTZ & VINSON, *supra* note 13, at 40 (stating that the synthesis "must be germane to the reasoning and holdings of the precedents"); VANDELDE, *supra* note 7, at 50-53 (stating that the lawyer must use careful judgment about the level of generality of a synthesis inferred from a group of cases and about the synthesis's consistency with the courts' explicitly articulated policy concerns); Greenstein, *supra* note 1, at 5 (observing that, within a discussion of the process of synthesizing a group of cases in a particular jurisdiction, "it can be said that while there may be no single synthesis that all lawyers would agree is correct, there will be many syntheses that are clearly wrong").

71. Smith, *supra* note 60, at 43 (noting that "[a] limitation of inductive reasoning [when synthesizing cases] is that the generalizations which can be drawn from the specific facts are bounded by the specific facts").

72. Gionfriddo, *supra* note 1, at 432-33; see also LLEWELLYN, *supra* note 13, at 71-72. The author believes that "hypothesizing and testing back" is a more useful way to describe the process of working with implicit ideas in a group of cases than the more prevalent phrase of "deductive and inductive reasoning." It is true, of course, that synthesizing a group of cases does require both deductive and inductive reasoning. For instance, hypothesizing an explanation from the facts and results of a group of cases requires inductive reasoning—inducing from the specific facts and results of a group of cases and coming up with a possible general explanation or explanations. Testing this hypothesis back, then, is deductive reasoning—deducing whether the synthesized explanation does, in fact, explain the facts and results of all relevant cases and is consistent with any relevant explicit ideas in the cases. While this hypothesis and testing back model can be accurately explained in terms of deductive and inductive reasoning, the author believes that such a complex process is not made any easier by adding additional labels to the steps that need to be taken. Simply describing the process in a straightforward manner by using the steps of the process, as the Article does, is much more effective. *But see, e.g.*, VANDELDE, *supra* note 7 (discussing deductive and inductive reasoning); Hunter, *supra* note 1, at 380-91 (analyzing inductive reasoning when working with case law); Anita Schnee, *Logical Reasoning "Obviously,"* 3 LEGAL WRITING: J. LEGAL WRITING INST. 105 (1997) (analyzing the relationship between inductive and deductive legal reasoning).

73. See Hunter, *supra* note 1, at 380-91, 400. This process of hypothesizing and then testing back an explanation on the group of cases addresses a concern of Professor Hunter that inductive reasoning is not sound if based on incomplete or incorrect empirical evidence. *See id.* Professor Hunter raises this issue because he fails to adequately distinguish between inductive reasoning when there is insufficient concrete



may eventually stand for ideas that were never articulated by an authoring judge and that may even transcend the judge's actual reasoning in coming to the decision.<sup>74</sup>

*C. Synthesizing Cases in Different Contexts: Objective Analysis Versus Argument*

Synthesizing ideas is different when a lawyer is working with a group of cases to make an objective analysis of the current status of the law, as opposed to when a lawyer is generating arguments on behalf of a client or anticipating arguments from the opponent.<sup>75</sup> In an objective analysis, the reasonable zone may include more than one explanation,<sup>76</sup> but all of the explanations should be reasonably supported by the current body of case law, even if the lawyer has moved into inferential reasoning. Thus, as described above, these explanations should strictly test back on the cases in the sense of being consistent with each case's relevant facts, results, and explicit reasoning.<sup>77</sup> Only then will an explanation accurately describe the current status of the jurisdiction's law, which is the goal of an objective analysis.<sup>78</sup>

Explanations that strictly test back in this manner also serve as an excellent foundation for arguments to persuade a court to view a jurisdiction's case law in a particular way.<sup>79</sup> An argument with this type of foundation, even

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evidence to back up the hypothesis and the inductive reasoning that lawyers do. *See id.* In the context of synthesizing implicit ideas from a group of precedent cases from one particular jurisdiction, the evidence includes the facts, decisions, and explicit reasoning of all relevant cases. While in many circumstances this process may allow more than one explanation to fall within the reasonable zone, it does differentiate between explanations that are reasonable and those that are not. Gionfriddo, *supra* note 1, at 432-33; *see also supra* note 72 and accompanying text.

74. *See* LEVI, *supra* note 47, at 2-3 (observing that “[i]t is not what the prior judge intended that is of any importance; rather it is what the present judge, attempting to see the law as a fairly consistent whole, thinks should be the determining classification”); Dworkin, *supra* note 13, at 542 (stating that when “the argument turns on which rules or principles of law ‘underlie’ the related decisions of other judges in the past,” each judge “must read through what other judges in the past have written not simply to discover what these judges have said, or their state of mind when they said it, but to reach an opinion about what these judges have collectively *done*”).

Any law school professor who has constructed a problem for students that includes the underlying legal authority will have had an experience analogous to that of a judge writing words in a judicial opinion that take on a life beyond the judge's meaning when lawyers begin to synthesize the cases as a group. In my own experience of working with four cases that I had constructed as a hypothetical problem for my students, I added one word to one of the four cases merely to make the case read more smoothly. In fact, I did not intend to change the meaning of that case or what the four cases together indicated. In practice, however, that one word, when analyzed in conjunction with the other three cases, created a second legal issue for my students. I resisted my students' repeated attempts to introduce this new piece of analysis because I certainly had not intended it as the author of the cases, but in the end my students were correct. That one word, given the four cases as a group, had changed the analysis in ways I, as the author, had not anticipated.

75. *See generally* VANDEVELDE, *supra* note 7, at 53-55.

76. *See supra* note 67 and accompanying text.

77. *See supra* Part III.B.2-3.

78. *See supra* Part III.A.

79. In addition, lawyers may also need to convince others, such as opposing counsel, of the validity of

when based on inferential reasoning, is likely to make a court feel comfortable in following an argument's point of view because that point of view is based on a reasonable interpretation of prior case law.<sup>80</sup>

In contrast, when lawyers craft arguments that push the parameters of the current case law, testing back explanations may take on a somewhat more expansive role that results in a broader reasonable zone of right explanations. Under the doctrine of *stare decisis*, arguments in these circumstances need to generally consider the current body of precedent but do not necessarily need to test back on the cases in the same strict manner required in an objective analysis.

For instance, an argument might suggest the next step to the courts' current approach but have no specific foundation in the relevant cases. The courts might not have explicitly discussed such a next step, perhaps because no prior case was based on facts that raised the issue. This type of argument, therefore, could not technically test back as strictly as an objective analysis because it would not test back on any specific explicit reasoning or even any facts that any court relied on to reach its decision. However, this argument could still reasonably test back on the group of cases if this next step were consistent with the courts' general policy concerns in that area of law.<sup>81</sup>

In another situation, a lawyer might argue that the courts' current approach should be rejected and another adopted, given shifting norms in society or other cogent rationales for overturning established doctrine and overruling long-term precedent.<sup>82</sup> This kind of argument also does not technically test back on the cases as written, although it does reasonably take prior precedent into consideration.

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their analysis or the likelihood that the client, on the basis of that analysis, will prevail before a court.

80. See VANDEVELDE, *supra* note 7, at 53 (“[When making an argument to a court,] the lawyer attempting to create the [new] rule . . . wants to generalize from as many cases as possible . . . . The more cases that have recognized the rule, the more the rule looks like a well-established rule of law that the court must apply and the less the court feels that it has ventured onto new terrain.”); Paul T. Wangerin, *A Multidisciplinary Analysis of the Structure of Persuasive Arguments*, 16 HARV. J.L. & PUB. POL’Y 195, 216-17 (1993) [hereinafter Wangerin, *A Multidisciplinary Approach*] (“[R]ules [based on a synthesis of a group of cases] are accompanied, almost by definition, by more ‘backing’ than are [individual] cases. Because of that fact, the results brought about by the application of rules to a new set of facts tend to be viewed as more credible than results brought about by extrapolating the result in a single past case to a present problem.”).

81. See VANDEVELDE, *supra* note 7, at 82 (noting that a “technique for arguing that a rule applies to a case is to demonstrate that the policies underlying the rule would also be furthered by applying the rule to the current case”); Wangerin, *A Multidisciplinary Analysis*, *supra* note 80, at 219 (discussing how an advocate might use “policy-based reasoning to contradict the results seemingly called for by case-based [comparison of precedent to the situation before the court] and rule-based [synthesis of ideas from a group of cases] reasoning”).

82. See CARDOZO, *supra* note 10, at 136-37. Justice Cardozo discussed this situation from a judge's point of view: “Insignificant is the power of innovation of any judge, when compared with the bulk and pressure of the rules that hedge him on every side. Innovate, however, to some extent, he must, for with new conditions there must be new rules. . . . [W]ithin this narrow range of choice he shall search for social justice.” *Id.*

#### IV. SYNTHESIZING CASES ILLUSTRATED: METHODOLOGY APPLIED TO HYPOTHETICAL PROBLEM

##### A. Introduction

The discussion below illustrates the process of synthesizing a group of cases, including all of its component sub-skills. The illustration uses a relatively simple problem based on hypothetical law relevant to a legal issue of when toys are dangerous for young children. This problem was chosen as a vehicle to highlight the methodology and not to explore underlying substantive aspects of tort law or to accurately describe an actual jurisdiction's approach to products liability law.<sup>83</sup> (Important note to the reader: You should consider actively working through, instead of merely passively reading, the discussion that follows.)

##### B. Client's Situation, Relevant Law, and Initial Analysis

Imagine that the research and development department of a toy manufacturing company has designed a toy truck that they intend to market to young children. This truck is to be made out of heavy, soft rubber and constructed so that it would have a rounded cab section and an open truck bed that would be square in shape. The company has asked their lawyer for advice on whether the toy's design might raise any liability issues concerning safety for young children.

As an initial step, the lawyer examines the law of the relevant jurisdiction. The legislature has not addressed this issue, but the jurisdiction's highest appeals court has decided seven cases concerning toy safety and whether the toy before the court, if marketed for young children, would be dangerous.

In the first case, the *Frisbee case*, the court found that a Frisbee made out of soft, lightweight plastic was not dangerous. The court reasoned:

The attributes of the material a toy is made of are among the primary motivating factors in our decisions on the dangerousness of the object. This factor obviously affects whether a product would tend to lacerate, knock unconscious, or otherwise seriously injure young children if the object encountered their bodies.

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83. See Smith, *supra* note 60, at 40-46 (using a hypothetical problem to illustrate the process of synthesizing fact-specific holdings to create rules); see also Charles R. Calleros, *Using Classroom Demonstrations in Familiar Nonlegal Contexts to Introduce New Students to Unfamiliar Concepts of Legal Method and Analysis*, 7 LEGAL WRITING: J. LEGAL WRITING INST. 37, 42 (2001) (using everyday situations to illustrate analytical skills); Jeremy Paul, *A Bedtime Story*, 74 VA. L. REV. 915, 928-29 (1988); cf. Greenstein, *supra* note 1, at 2-7 (using a group of actual New York cases interpreting a statute to illustrate the process of synthesizing cases from a particular jurisdiction).

In the second case, the *Beanie Baby case*, the court concluded that a Beanie Baby stuffed animal was not dangerous, citing the *Frisbee case*. The court stated that “we begin our analysis by assessing what the object is made from.”

In the third case, the *Toy Sword case*, the court decided that a toy sword, described as a “toy sword made of lightweight, firm rubber with a rounded handle and sword tip” was not dangerous. The court reasoned that “the fact that the toy is made with this material helps prevent, among other things, the object from harming young children,” and cited the *Frisbee case* and the *Beanie Baby case*.

In the fourth case, the *Baseball Bat case*, the court found “a heavy, rigid metal baseball bat” was a “dangerous object, if marketed for young children who might be injured by an object with such a composition.” Again, the court cited all prior cases.

In the fifth case, the *Nesting Boxes case*, the court came to the conclusion that “boxes that nested inside each other were dangerous.” “Even though these boxes have an acceptable composition of lightweight, rigid plastic,” the court reasoned, “the angled corners create a toy that might injure young children.” The court cited all prior cases as support.

In the sixth case, the *Ball case*, the court determined that “a ball of lightweight, hard metal” was not dangerous, reasoning that “metal is not always a dangerous material for toys for young children.” The court specifically distinguished the *Baseball Bat case* and cited the *Frisbee case*, the *Beanie Baby case*, and the *Toy Sword case* as supporting authority.

In the seventh case, the *Blocks case*, the court held that the toy before the court was not dangerous. Beyond describing the toy as “oval blocks made out of soft cloth and filled with a heavy mixture of beans,” the court did not further develop its reasoning, although it cited the *Frisbee case* and the *Ball case*.

After analyzing each of the seven cases individually,<sup>84</sup> the lawyer concludes that none of them are directly on point with the truck proposed by the client, and, therefore, that no individual case answers the question of whether a future court would view the truck as dangerous. To advise the client, the lawyer must synthesize the relevant ideas in the entire group of cases to determine the courts’ approach in this area of law in this jurisdiction.<sup>85</sup> The

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84. See *supra* note 13 and accompanying text. When deciding which case to analyze first, the lawyer would have a choice. He might begin with the case decided first and work forward because the first case might set out a foundation of ideas that later cases build on. He might, instead, begin with the most recent case, the seventh case, because that case might provide the courts’ latest, and possibly most developed, reasoning in this area of law in this jurisdiction, or demonstrate that the court had significantly changed its analysis in some manner. However, because the cases in this jurisdiction do not follow an evolutionary progression in the sense that they build to a fairly well-articulated final analysis, the lawyer could begin with any case and work through them as a group. This approach is the difference between synthesizing cases that are evolutionary and those that must be analyzed as a group because each case adds its own “piece” explicitly, and perhaps implicitly, to what the cases as a whole group will ultimately stand for. See Greenstein, *supra* note 1, at 11-13; Wangerin, *Skills Training*, *supra* note 1, at 445; *supra* note 66 and accompanying text.

85. See *supra* notes 12-15 and accompanying text.

lawyer would begin by evaluating what the courts have explicitly articulated.<sup>86</sup> If these explicit ideas do not provide sufficient guidance, however, the lawyer would proceed to work with ideas inferentially supported by the seven cases.<sup>87</sup>

*C. Beginning an Analysis of a Group of Cases: The Courts' Explicit Reasoning*

*1. Introduction*

The courts in these seven cases have explicitly expressed a good deal of analysis on when toys for young children are dangerous. These ideas, then, provide the foundation for the following conclusions about the courts' current approach: (1) that the courts use a factor concerning the composition of or the material that the toy is made from;<sup>88</sup> (2) that they analyze this factor first;<sup>89</sup> and (3) that they do so because of a policy concern about toys injuring young children.<sup>90</sup>

*2. One Piece of Explicit Analysis: The Courts Use a Factor That Evaluates the Composition of or Material That a Toy Is Made of*

The lawyer recognizes that "material that a toy is made of" and "composition of" are two explicit phrases used in the cases and begins the analysis by hypothesizing that the courts were using these phrases interchangeably for the same idea.<sup>91</sup> Four of the courts explicitly rely on the idea of "material that a toy is made of," phrased in the same, or very similar, manner to reach a decision on whether the toy before the court was dangerous. The court in the *Frisbee* case clearly identified "the material a toy is made of" as a particular piece of its analysis—a factor. Moreover, in the *Beanie Baby* case, the court stated that it assesses "what the object is made from." Further, the courts in the *Toy Sword* case and the *Ball* case each relied on this concept to reach their decisions and phrased it similarly. In *Toy Sword*, the court stated

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86. See *infra* Part IV.C.

87. See *infra* Part IV.D.

88. See *infra* Part IV.C.2.

89. See *infra* Part IV.C.3.

90. See *infra* Part IV.C.4.

91. Any description of an analytical process must begin somewhere and must be set forth in a fairly linear fashion. However, any particular lawyer's actual process of choosing where to begin the analysis with a particular group of cases might be different for a range of reasons, including what the lawyer encounters in the particular analysis and the lawyer's own personal style of proceeding through the necessary steps of the analysis. Here, in this dangerous toy analysis of the seven cases in this jurisdiction, the lawyer might have begun, as described above, with the courts' language—"composition" and "material of." However, the lawyer might have also begun with the courts' articulated policy concerns. Beginning at either point would have resulted in the same analysis. See *supra* notes 44-53 and accompanying text (discussing how a lawyer synthesizes explicit reasoning when courts use inconsistent phrasing for the same idea).

the “toy is made with this material,” and the court in the *Ball* case stated “metal is not always a dangerous material for toys for young children.”

In comparing the phrase “material that a toy is made of” to the explicit use of the word “composition” in the *Baseball Bat* case and the *Nesting Boxes* case, the lawyer feels fairly sure that the same ideas were used consistently, despite the change in terms. For instance, in the *Baseball Bat* case, the phrase “an object with such a composition” appears to refer to the fact that the baseball bat was made from heavy metal. The court clearly relied on this idea when making its decision that the toy was dangerous for young children. In the *Nesting Boxes* case, the court connected what the nesting boxes were made out of to the term “composition” by using the phrase “composition of lightweight, rigid plastic.” Holding that this factor was acceptable, the court proceeded to find the toy dangerous on other grounds.

Having worked through these steps, the lawyer concludes that six of the seven cases reasonably support a hypothesis that the courts use a factor that evaluates the material that the toy is made of, even though two of the courts describe this concept as “composition.” This hypothesis also tests back on the final case, the *Blocks* case, even though that court, unlike the other six, did not explicitly articulate a focus on material or composition.<sup>92</sup> In the *Blocks* case, the court did not explain why it found the blocks not dangerous. However, the court described the toy as “blocks made out of soft cloth and filled with a heavy mixture of beans,” and this description supports a reasonable inference that the court was focusing on the blocks’ material in making its decision that the toy was not dangerous. This inference is further strengthened by the fact that the court cited the *Frisbee* case and the *Ball* case—both cases in which the courts explicitly addressed the toys’ material.

### 3. A Second Piece of Explicit Analysis: The Courts Analyze This Factor First

As a possible next step, the lawyer hypothesizes that the courts first look to the factor of the toy’s material or composition in their analyses of whether a toy is dangerous and bases this hypothesis on the explicit reasoning in the *Frisbee* case and the *Beanie Baby* case. In the *Beanie Baby* case, the court stated that “we begin our analysis by assessing what the object is made from.” This idea is then supported by the explicit reasoning in the *Frisbee* case that “[t]he attributes of the material a toy is made of are among the primary motivating factors in our decisions on the dangerousness of the object.”

Even though none of the other five decisions explicitly articulate that they start at this point, these cases implicitly support this hypothesis because they each begin their analysis by evaluating the “material that a toy is made of” or its “composition.” The *Toy Sword*, *Baseball Bat*, and *Ball* cases explicitly do so

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92. See *supra* notes 44-53 and accompanying text.

by referring to the factor of material or composition, and the *Blocks* case implicitly does so in the way the court focuses on the facts when making its decision. In the *Nesting Boxes* case, the court first concluded that the composition of the nesting boxes was satisfactory by using the word “acceptable,” and then it went on to find the toy dangerous on another ground. Thus, the lawyer concludes that the hypothesis that the courts begin their analysis with this factor does test back on the explicit ideas, facts, and decisions of the entire group of seven cases.

#### 4. *A Third Piece of Explicit Analysis: The Courts’ Policy Concerns Behind Using the Factor of Material or Composition*

To proceed, the lawyer works with another explicit theme in the cases—the courts’ policy concerns behind why the factor of material or composition is important when evaluating a toy’s dangerousness. In fact, the lawyer might have decided to begin with this piece of analysis because it explains why the courts chose this factor in the first place.<sup>93</sup>

The court in the *Frisbee* case explicitly set out its policy concern about injuries to young children and linked it directly to the “material the toy is made of”—an idea that all subsequent cases appear to adopt: “This factor obviously affects whether a product would tend to lacerate, knock unconscious, or otherwise seriously injure young children if the object encountered their bodies.” Several of the other cases explicitly rearticulate this idea in some form, as seen in the *Toy Sword* case (“that the toy is made with this material helps prevent . . . the object from harming young children”); the *Baseball Bat* case (“young children . . . might be injured by an object with such a composition”); and the *Nesting Boxes* case (“toy that might injure young children”). Several cases support this idea implicitly, as in the *Beanie Baby*, *Ball*, and *Blocks* cases, in which the facts and decisions of the courts are consistent with this rationale, especially given their citation to the *Frisbee* case. Thus, all of the cases either explicitly or implicitly relied on these policy concerns when deciding whether the toy before the court satisfies the factor of material or composition and therefore is not dangerous for young children.

#### D. *Moving to Ideas That Are Completely Implicit in a Group of Cases*

##### 1. *Introduction*

After working with the explicit reasoning of these seven cases, the lawyer would have reasonably concluded the following about the courts’ approach to evaluating a toy’s danger to young children: The courts consider a factor that

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93. See *supra* note 91 (discussing that a lawyer’s particular analytical process with this dangerous toy problem might begin at a different point and yet still end up with the same result).

addresses the toy's material or composition; their analysis begins with this factor; and this factor is consistent with the courts' policy concerns about preventing injuries to young children.

The analysis to this point, however, does not sufficiently explain why the courts find some toys' material or composition acceptable. The cases themselves do not articulate this next level of more specific reasoning that is necessary to predict how a court would react to the client's proposed toy. To successfully advise the client on the design of the toy truck, the lawyer will need to move beyond what the cases explicitly address and infer what the decisions implicitly support.<sup>94</sup>

The lawyer needs to now use inferential reasoning to hypothesize an explanation (or explanations) for why the courts decided the way they did about the acceptability of the toys' material or composition. This explanation must test back on the facts, results, and any relevant explicit reasoning of all seven cases to fall within a reasonable zone of right explanations for the courts' current analysis in this jurisdiction.<sup>95</sup> More than one explanation might be reasonable, but any explanation contradicted by some or all of the relevant cases would need to be discarded as insufficiently supported by the jurisdiction's law at this point in time.<sup>96</sup>

Assuming that all seven cases are mandatory authority in this particular jurisdiction and must be accounted for, following this procedure is important.<sup>97</sup> Again, the lawyer should assume that the appellate courts had a rational set of reasons to make the distinctions they did about the dangerousness of the different toys—based on their material or composition, and potentially other factors—even if the court did not explicitly articulate these reasons.<sup>98</sup>

## *2. Developing an Explanation About the Specific Aspects of a Toy's Material or Composition That Make It Acceptable*

### *a. Charting out the Courts' Decisions in Preparation for Hypothesizing a More Specific Explanation of What Satisfies This Factor*

To begin the next step in the analysis, the lawyer could chart out the cases in the following manner and then look for implicit themes to explain the specific aspects of a toy's material or composition that make it acceptable or unacceptable. The lawyer must identify those toys that did not “tend to lacerate, knock unconscious, or otherwise seriously injure young children,” and that were therefore not dangerous, as well as those toys about which the courts reached the opposite conclusion.

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94. *See supra* Part III.B.3.

95. *See supra* Part III.B.3.

96. *See supra* Part III.B.3.

97. This is true except in unusual circumstances. *See supra* note 33.

98. *See supra* Part III.B.3.



Chart 1		
Material or Composition	Determination	Case Name
Plastic	Acceptable	<i>Frisbee</i>
Cloth and stuffing	Acceptable	<i>Beanie Baby</i>
Rubber	Acceptable	<i>Toy Sword</i>
Plastic	Acceptable	<i>Nesting Boxes</i>
Metal	Acceptable	<i>Ball</i>
Cloth and beans	Acceptable	<i>Blocks</i>
Metal	Not acceptable	<i>Baseball Bat</i>

*b. Initial Hypothesis: The Cases Support an Inference That the Courts Look Only at the Specific Substance That a Toy Is Made from to Evaluate the Acceptability of the Toy's Material or Composition*

An initial hypothesis could be that the courts are categorizing the toys by the specific kind of substance used, and that this fact alone determines whether a toy satisfies the factor of material or composition. Although none of the courts explicitly discuss such an explanation, it is an obvious inference from the words “material” and “composition,” which on their face reasonably appear to refer to whether a toy was made of metal, plastic, or any other substance.<sup>99</sup>

This explanation, though, does not test back on the seven relevant cases and therefore must be discarded as outside the reasonable zone of right explanations for the courts’ approach.<sup>100</sup> First, it does not test back on the facts and results of all the cases because it cannot explain why the *Baseball Bat* case and the *Ball* case reached opposite conclusions when the toys in front of both courts were made from the same substance. In the *Ball* case, the court found a metal ball acceptable, but in the *Baseball Bat* case, the court found a metal baseball bat unacceptable. Unless these two decisions are simply irrational, the courts must have been influenced by more than the mere fact that the toys in front of them were made from metal, even though neither court articulated what specifically influenced its decision.

Second, this explanation does not clarify why the main factor of material or composition helps the court with its explicitly articulated policy concerns. Only by investigating the specific nature of a toy’s substance can the court determine whether it would likely “lacerate, knock unconscious, or otherwise seriously injure young children if the object encountered their bodies.”

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99. At some point in the analysis, the lawyer must decide whether to use the courts’ label of “material” or “composition.” Both terms test back on the cases, and therefore are accurate descriptions for this first factor. Thus, the lawyer would pick the term that best communicated the courts’ meaning.

100. See *supra* Part III.B.3.

Recognizing that this hypothesis is outside the zone of reasonable explanations is critical to an accurate prediction of how a court would view the acceptability of the client's proposed toy design. Under the discarded hypothesis that the courts evaluate only the specific substance used, the client's truck made from rubber would automatically satisfy the material or composition factor under the *Toy Sword* case, in which the toy made of rubber was found not dangerous. A lawyer who is unable to follow a careful methodology for working with inferential reasoning, then, might initially reach a faulty conclusion about the analysis that these cases reasonably support, and might then reach an equally faulty conclusion on how a future court would view the client's design.<sup>101</sup>

By using the appropriate methodology, in contrast, the lawyer would discard this initial explanation and continue to work with the cases to determine exactly what it is about a toy's material or composition that helps prevent harm to young children, and therefore makes it acceptable. This refinement lays the foundation for a more accurate prediction on a future court's reaction to his client's design.<sup>102</sup>

*c. Hypothesis: The Cases Support an Inference That the Courts, When Concluding That the Material or Composition Is Acceptable or Unacceptable, Use Two or More Sub-factors to Evaluate the Specific Characteristics of the Substance a Toy Is Made from*

The lawyer might hypothesize at this point that the main factor of material or composition depends upon an evaluation of sub-factors that address specific characteristics of the substance a toy is made from. In testing back this idea on the seven cases' explicit ideas, the lawyer will realize that the *Frisbee* case, in fact, unambiguously refers to "[t]he attributes of the material the toy is made of." The plural "attributes" supports the inference that the court in this case viewed the general category of material or composition as breaking down into two or more specific aspects of the substance. The question then becomes just what attributes the seven cases implicitly support because none of the seven courts explicitly investigates this idea further.

*i. Charting out the Courts' Decisions as a Foundation to Inferring What Specific Attributes of a Toy's Material or Composition May Be Implicit in the Seven Decisions*

As a first step to hypothesizing the sub-factors, the lawyer should address particular attributes of a toy's material or composition that are implicit in these cases and again charts out, in a more detailed fashion, the facts and results of

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101. See *supra* notes 13-15 and accompanying text.

102. See *supra* notes 13-15 and accompanying text.

the seven cases. The attorney must first look to the materials or compositions that were found acceptable and then to those that were not.

Chart 2		
Material or Composition	Determination	Case Name
Soft, lightweight plastic	Acceptable	<i>Frisbee</i>
Soft cloth and stuffing	Acceptable	<i>Beanie Baby</i>
Lightweight, firm rubber	Acceptable	<i>Toy Sword</i>
Lightweight, rigid plastic	Acceptable	<i>Nesting Boxes</i>
Lightweight, hard metal	Acceptable	<i>Ball</i>
Soft cloth and a heavy mixture of beans	Acceptable	<i>Blocks</i>
Heavy, rigid metal	Not acceptable	<i>Baseball Bat</i>

*ii. Hypothesis: The Cases Support an Inference That the Courts Use a Sub-factor That Evaluates the Flexibility of the Toy's Substance, in Terms of Its Soft or Hard Nature*

As a next step, the lawyer might hypothesize that, when evaluating the toy's material or composition, the courts are concerned with the flexibility of the substance used, in terms of its soft or hard nature.<sup>103</sup> The lawyer might further hypothesize that the courts find the toy's material acceptable when it is soft and do not find it acceptable when it is hard.

The lawyer would have likely come up with this explanation by reading the cases and using Chart 2 to discover the ideas that appear to run through the cases on whether the facts satisfy the main factor of material or composition.<sup>104</sup>

For instance, the lawyer might focus on the terms used to describe many of the toys, even though the courts never explicitly identify the flexibility of the substance as a sub-factor in their analysis. The lawyer might notice that two cases use the term "soft": the *Frisbee* case (soft plastic) and the *Blocks* case (soft cloth). In contrast, four cases use either the word "hard" or words that are arguably synonyms: the *Ball* case (hard metal); the *Toy Sword* case (firm

103. The lawyer might have begun with this hypothesis, or with the hypothesis that the weight of the toy was a factor. Again, most legal analyses have many junctures at which different lawyers could legitimately choose to take one step over another, yet would ultimately reach the same result. *See supra* note 91.

104. Professors Romantz and Vinson discussed this kind of synthesis that requires inferring a general principle of law from the facts of a group of cases:

[This kind of] case synthesis requires extrapolating the common significance among the critical facts of several cases. Identify the common thread among the cases by extrapolating the critical facts from the numerous precedents until some commonality is identified. This commonality should be a characteristic that is shared by the critical facts in all of the precedents. The commonality found, however, must be germane to the reasoning and holdings of the precedent.

ROMANTZ & VINSON, *supra* note 13, at 40; *see also* VANDEVELDE, *supra* note 7, at 50-51 (discussing "judgments concerning which facts to include in the factual predicate and the level of generality at which to state a rule" when synthesizing implicit ideas from a group of cases).

rubber); the *Nesting Boxes* case (rigid plastic); and the *Baseball Bat* case (rigid metal).

The lawyer would likely conclude that this hypothesis also makes sense in terms of the courts' explicit policy concerns. Again, in the *Frisbee* case, the court fully spelled out its reasoning on its concerns about the danger toys pose for young children: "Whether a product would tend to lacerate, knock unconscious, or otherwise seriously injure young children if the object encountered their bodies." Clearly, the flexibility of the substance used, in terms of its soft or hard nature, would either increase or decrease the risk of knocking children unconscious or otherwise seriously injuring young children if the object encountered their bodies.

But tested back on not only the facts but also the results of the cases, this hypothesis does not fall within a reasonable zone of right explanations for the analysis these seven courts were implicitly using.<sup>105</sup> In fact, the pattern of the courts' decisions contradicts an explanation that only toys made from a soft substance will be found not dangerous and those from a hard or rigid substance will be automatically labeled as dangerous.

The courts do find a toy's material or composition acceptable if the substance used is soft—a soft plastic Frisbee; "blocks made out of soft cloth"; and a Beanie Baby stuffed animal that is made of cloth and therefore implicitly soft. However, whether a toy was made of a substance that was hard or rigid turns out not to be dispositive of whether the court viewed the toy's material or composition as acceptable. For instance, a baseball bat of rigid metal was dangerous, but a ball of hard metal and nesting boxes of rigid plastic did not make the toys' material or composition unacceptable.

Thus, by testing back this hypothesis, the lawyer is able to conclude that the courts do seem to focus on the attribute of flexibility of the substance, in terms of its hard or soft nature, but that this attribute by itself cannot sufficiently explain the results in these seven cases, and that once again the lawyer must continue with the analysis.

*iii. Hypothesis: The Cases Support an Inference That, in Addition to Flexibility, the Courts Evaluate the Weight of the Substance*

Reading these cases, and working with Chart 2 again, might cause the lawyer to wonder whether the weight of the substance used, in addition to its flexibility, might be important when evaluating the toy's material or composition. None of the courts in the seven cases explicitly identify the weight of the material as an important idea in their analysis, yet language in some of the decisions describing the toys before the courts and the courts' policy concerns suggest an inference that the toys' weights were an important motivating factor in the courts' decisions.

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105. Gionfriddo, *supra* note 1, at 456; *supra* notes 65-74 and accompanying text.

When beginning to work with this possible sub-factor, the lawyer might initially focus on the cases in which the court explicitly describes the toy with the designation “lightweight” or “heavy.” That these courts describe the toy in this manner indicates their possible reliance on the weight of the substance when deciding whether the toy’s material or composition is acceptable, even though none of the courts explicitly identified this idea as a particular piece of their analysis.

The lawyer might then evaluate the pattern of decisions, in relation to the courts’ explicit policy concerns, to gather possible support for the inference that the courts are using this sub-factor of weight. The lawyer might first compare the *Baseball Bat* case with the *Ball* case. In the *Baseball Bat* case, the court describes the toy as a “heavy, rigid metal baseball bat” and finds the toy dangerous because of its composition. In contrast, in the *Ball* case, the court finds a “ball of lightweight, hard metal” not dangerous because “metal is not always a dangerous material for toys for young children.” The difference in the results of these two cases, the lawyer will likely conclude, is the weight of the toy. Both toys are made of metal, which by its nature tends to be an unyielding substance and which the respective courts describe as “hard” and “rigid.” Both toys could, therefore, knock a child unconscious—the consistent concern of the courts—if they encountered the child’s body. This risk, however, is decreased if the metal is lightweight as in the *Ball* case, and this decrease in risk reasonably explains the difference between the two courts’ decisions.

Testing back this factor of weight on the other cases demonstrates that it is consistent with the decisions on the facts in the *Frisbee* case, the *Beanie Baby* case, and the *Toy Sword* case. In these cases in which the material or composition was found acceptable, the toys are all described as “lightweight.” The Frisbee was “made of soft, lightweight plastic,” and the toy sword was “made of lightweight, firm rubber.” While the court in the *Beanie Baby* case did not use the word “lightweight” to describe the toy, the lawyer may reasonably assume, given common knowledge, that a Beanie Baby is a small stuffed animal that is filled with material that is always lightweight.<sup>106</sup>

However, comparing the decisions in the *Nesting Boxes* case and the *Blocks* case illustrates that this sub-factor of weight, even though apparently important to the courts’ analysis, could not be dispositive by itself. Courts in both of these cases found the toy’s material or composition acceptable, but the substance used was not necessarily lightweight. In the *Nesting Boxes* case, the toy was made from plastic that was lightweight but rigid. In contrast, in the *Blocks* case, the toy was filled with a heavy mixture of beans but made with soft

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106. There is a critical difference between using an easily verified fact that is common knowledge and assuming a fact that is not before the court. Here, a Beanie Baby is a particular kind of stuffed animal that is verifiably small and light. Therefore, making an assumption here is quite different from the situation in which a court simply has a toy before it described generally as a “stuffed animal.” With such a general description, the toy could be large or small, and filled with different kinds of material; therefore, the lawyer could not assume that the toy was either heavy or light.

cloth. This pattern of decisions provides conclusive evidence that the acceptability of a toy's material or composition does not solely depend upon its being lightweight, and raises a question concerning the precise relationship of the weight of the substance and the substance's flexibility, in terms of its soft or hard nature.

*iv. Hypothesis: The Cases Support an Inference That, for the Toy's Material or Composition to Be Acceptable, the Courts Require Only That a Toy's Substance Satisfy the Weight Sub-factor or the Flexibility Sub-factor*

At this point in the analysis, the lawyer would have likely developed a strong sense that the relationship between these two implicit sub-factors of weight and flexibility must be confronted.<sup>107</sup> While working through the hypotheses on each of these sub-factors, the lawyer would have probably begun to suspect that neither sub-factor by itself was dispositive of the courts' ultimate conclusions on the acceptability of the toys' material or composition. The *Baseball Bat* case illustrated that rigid and heavy material was not acceptable, while the *Frisbee* and *Beanie Baby* cases, respectively, illustrated that soft and lightweight material was acceptable.

However, the other four cases involved toys made of materials that were either soft and heavy or hard and lightweight, and in both of these situations, the courts found the toys' material or composition acceptable. In two cases the material was hard but lightweight—nesting boxes made of plastic that was rigid but lightweight and a ball made of hard but lightweight metal. And in another case the material was heavy but soft—blocks made of soft cloth but filled with a heavy mixture of beans.

Thus, the pattern of these decisions reveals that the courts only require a toy to satisfy one of the two sub-factors of weight and flexibility for its material or composition to be acceptable. This hypothesis not only explains the pattern of the seven decisions but also fits with the courts' expressed concerns about toys injuring young children. In general, toys that satisfy one or both sub-factors would be less likely to "lacerate, knock unconscious, or otherwise seriously injure young children if the object encountered their bodies." This delicate balance is tipped to unacceptable, however, when the toy's substance is both heavy and hard, as in the *Baseball Bat* case when the court found a heavy, rigid metal baseball bat to be dangerous.

In terms of the client's proposed toy truck, the lawyer would conclude that the analysis to this point indicates that the truck's material or composition is acceptable because it satisfies one of the two sub-factors. While the rubber is heavy and therefore would not satisfy the weight sub-factor, the heavy rubber is also soft and therefore would satisfy the flexibility sub-factor.

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107. The lawyer could have reasonably confronted the relationship between the two sub-factors of weight and flexibility earlier in the analysis. See *supra* note 91.

3. *Analyzing a Second Main Factor, in Addition to the Factor of Material or Composition*

a. *Initial Hypothesis: The Cases Support an Inference That the Courts Use a Factor Evaluating the Toy's Shape, Particularly in Terms of Whether It Is Rounded or Has Angles*

Despite the analysis so far, the lawyer would probably have a strong sense that the analysis is still incomplete and cannot yet adequately predict whether the courts will view the client's proposed truck as dangerous. When continuing to work with the cases, the lawyer might next hypothesize that, in addition to a toy's material or composition, the courts might also consider a toy's shape.

The lawyer might have considered other factors when he read statements in the cases that support such an inference. For instance, the court in the *Frisbee* case states that "[t]he attributes of the material a toy is made of are among the primary motivating factors" when determining a toy's danger to young children. The court's use of the word "primary" indicates that the toy's material or composition is important, but its use of the plural "factors" indicates that there could be additional aspects of a toy's design that might affect the court's conclusion.

Phrasing in the *Toy Sword* case also supports this possibility. In that case, the court stated that "the fact that the toy is made with this material helps prevent, among other things, the object from harming young children." The word "helps" in relation to "among other things" shows that the factor being applied in the case—the material the toy was made of—was not the only factor that could prevent harm to young children.

More specific evidence is found in the two-tier structure of the decision in the *Nesting Boxes* case and the court's reasoning. In that case, the court found the nesting boxes' composition of lightweight, rigid plastic acceptable but went on to find the toy dangerous because the boxes' "angled corners create a toy that might injure young children." The explicit reference to "angled corners" supports the inference that the court in this case found the toy's shape unacceptable because the angles on the corners of the boxes contravened the courts' articulated policy concerns.

A factor of shape is not only generally consistent with these policy concerns but also addresses specific aspects of "danger to young children" that the factor of material or composition does not. The substance that a toy is made of, including its flexibility and weight, affects whether the toy would knock a young child unconscious, but neither sub-factor measures whether the toy would lacerate the child—an important aspect of the courts' articulated concerns. In contrast, the proposed factor of shape—whether the toy was rounded or angled—makes more sense when assessing whether a toy might lacerate a child.

However, the possibility of this second factor still must test back on the facts and results of all seven cases. The following chart would help with this process:

Chart 3			
Material or Composition	Shape	Determination	Case Name
Soft, lightweight plastic	Round	Not dangerous	<i>Frisbee</i>
Soft cloth and stuffing	No angles	Not dangerous	<i>Beanie Baby</i>
Lightweight, firm rubber	Rounded edges	Not dangerous	<i>Toy Sword</i>
Lightweight, hard metal	Round	Not dangerous	<i>Ball</i>
Soft cloth and a heavy mixture of beans	Oval	Not dangerous	<i>Blocks</i>
Heavy, rigid metal	Rounded	Dangerous	<i>Baseball Bat</i>
Lightweight, rigid plastic	Angled corners	Dangerous	<i>Nesting Boxes</i>

The facts and decisions from the *Frisbee*, *Beanie Baby*, *Toy Sword*, *Ball*, *Blocks*, and *Baseball Bat* cases reasonably support the possibility of a second factor of shape, even though none of the courts openly discussed or decided whether the toy before the court satisfies this factor. For one thing, the facts of these cases are based on toys with a rounded shape that did not have angles. In some cases, the courts explicitly described the shape of the toy. In the *Toy Sword* case, the court specifically noted that the toy had “a rounded handle and sword tip,” and the court in the *Blocks* case described the toy as “oval.” In the other four cases, the toys’ shapes are common knowledge. Everyone knows that the Frisbee and the metal ball are round, that the baseball bat is rounded, and that the Beanie Baby is made out of cloth and therefore has no angles.

These facts, in relationship to the courts’ policy concerns, explain why the six courts did not look beyond the material or composition and discuss the issue of shape, while the court in the *Nesting Boxes* case did. In the *Frisbee*, *Beanie Baby*, *Toy Sword*, *Ball*, *Blocks*, and *Baseball Bat* cases, the toys before the courts had shapes that were rounded and without any angles. The toys’ shape did not raise specific concerns about injuries to young children and therefore made it unnecessary for the courts to discuss the toys’ shape in considering the toys’ potential dangerousness. In contrast, the court in the *Nesting Boxes* case was confronted with a toy that had angled corners, a shape that raised a red flag in relationship to safety for young children. The court, therefore, proceeded to evaluate the shape of the toy, despite the fact that it had already found the toy’s material or composition acceptable.

No single piece of evidence discussed above is sufficient to indicate that the courts in these seven cases were applying a second factor of shape. These



pieces taken together, however, strongly support the inference that the courts were considering shape, even though none of these courts did so explicitly.<sup>108</sup>

*b. Hypothesis: The Cases Support More Than One Possible Explanation of the Precise Analytical Relationship Between the Factors of Material or Composition and Shape*

The question, then, would arise about the precise relationship between the two main factors of material or composition and shape of the toy. The lawyer would likely conclude that two possible relationships could be reasonably supported by the seven cases.<sup>109</sup> One reasonable inference could be that the courts were using the material or composition factor as a threshold requirement, and only if this first factor was satisfied—either by the sub-factor of weight or the sub-factor of flexibility—would the courts proceed to evaluate a second factor of shape. A second reasonable inference could be that the courts were first evaluating the material or composition factor, and if the court found that the toy's substance was hard or rigid but satisfied the material or composition sub-factor of weight, it would evaluate whether the hard or rigid nature interacted with the toy's shape to create a toy that was too dangerous for young children. The fact that there are two possible interpretations of the relationship between these two factors would be important to the lawyer's predicting how a future court would evaluate the client's toy and, therefore, how the lawyer would advise the client on liability issues arising from its proposed design for the toy truck.

The structure of the court's decision in the *Nesting Boxes* case, the only decision that directly addresses the relationship between the two factors, indicates the following possible relationship: The material or composition factor is a threshold requirement, and only if this first factor is satisfied will the court proceed to separately evaluate a second factor of shape. The court in this case began by evaluating the nesting boxes' material or composition. Only after finding the toy's material or composition acceptable did the court go on to decide that the toy was still dangerous on the basis that the shape—the toy's angled corners—made the toy more likely to injure young children. This reading of the *Nesting Boxes* case is consistent with the fact that the toys in the other six cases all had shapes that were rounded with no angles and therefore did not raise the same concerns about a toy's shape. For this reason, these courts would not have explicitly addressed the factor of shape and thus reached a decision on this issue.<sup>110</sup>

Given that only one of the seven cases directly raised this issue of shape, another explanation of the relationship of shape to the factor of material or

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108. See *supra* Part III.B.3.

109. See *supra* note 67 and accompanying text.

110. The court in the *Baseball Bat* case had already decided that the toy's material or composition was dangerous, and therefore it did not need to analyze the bat's shape.

composition could fall within the reasonable zone of right explanations.<sup>111</sup> For instance, the lawyer might hypothesize that a court would first evaluate the toy's material or composition. If the court then found that the toy's substance was acceptable because it satisfied the sub-factor of weight but not the sub-factor of flexibility, the court would then proceed to evaluate the rigid or hard nature of the substance in relationship to the rounded or angled shape of the toy.

The *Nesting Boxes* case also supports this second hypothesis. There, the boxes had a composition of lightweight, rigid plastic, which the court found was acceptable on the implicit basis that one of the two sub-factors of material or composition was sufficient. The sub-factor of weight was satisfied because the plastic was lightweight, and therefore, it did not matter that the boxes' plastic was rigid. Despite the fact that the composition was acceptable, the court might have been influenced by the fact that the rigid nature of the plastic would have arguably increased the danger to young children in specific relationship to the boxes' angled corners. Under this hypothesis, the court moved on to evaluate shape only because something in the material or composition analysis triggered this second inquiry.

This second explanation of the relationship between these two factors also explains why the *Nesting Boxes* case is the only case that directly addresses the factor of shape. In three of the other cases, the substance used was not hard or rigid, and therefore, this issue of shape would not have been raised. In two other cases, the substance used was hard or rigid, but the toys' shapes were rounded and had no angles, and so, again, the issue would not have been the focus of the courts' concern. In the final case, the court found that the baseball bat failed both sub-factors of material or composition because it was made of heavy and rigid metal. The bat was already considered a toy that directly conflicted with the courts' policy concerns; therefore, the rounded nature of the bat's shape was irrelevant.

This second possibility of the courts' relying on shape when the toy's substance is hard or rigid would be consistent with the courts' concern for the safety of young children. However, given the seven cases in the jurisdiction to date, there is no way to be sure which approach the courts might take. Though the courts in all the cases except the *Nesting Boxes* case begin their analyses with the factor of material or composition, they provide little definitive guidance on the relationship between this first factor and the possible second factor of shape.

In addition, the *Nesting Boxes* case has insufficient explicit reasoning to allow a lawyer to predict the actual analysis the court was using. On the one hand, the court might have considered the factors of material or composition and shape independent—the first as a threshold requirement for the second. On the other hand, the court might have decided that the toy's lightweight but rigid

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111. See Gionfriddo, *supra* note 1, at 432-33; *supra* notes 65-74 and accompanying text.

substance satisfied the material or composition factor, yet still could have found that the rigid nature of the plastic triggered an evaluation of the toy's shape with particular attention given to any angles in the rigid material and whether they created any sharp aspects to the toy. Thus, the lawyer would have to conclude that the reasonable zone of right explanations could include more than one possible explanation of the relationship between these two factors.

The lawyer would be unable to predict how a future court in this jurisdiction would view the design of the client's toy truck because the reasonable zone includes more than one possible explanation. If the court analyzes these two factors separately, the court might label the truck a dangerous toy for young children. The truck would satisfy the first factor of material or composition because its rubber would satisfy one of the two sub-factors. While the rubber is heavy and thus does not appear to satisfy the sub-factor of weight, it is also soft and does meet the sub-factor of flexibility in terms of its hard or soft nature. However, the truck might not meet the second factor of shape if it is evaluated separately from material or composition. The truck is designed with a rounded cab section but with an open truck bed that is square in shape. If the court views any toy with angles as automatically increasing the possibility of injuries to young children, then the truck will not satisfy this second factor.

On the other hand, the lawyer could advise his client that the design of the proposed toy truck would not be problematic if an evaluation of the toy's shape is only triggered when the court encounters a toy whose substance is hard or rigid. Again, the truck was made of soft rubber and not from a hard or rigid substance. The fact that the composition of the toy truck would not trigger the second inquiry of shape makes sense—given the truck's overall composition, the angles on the truck bed would probably not raise specific concerns that the truck would present a high likelihood of lacerating children.

#### *4. Analyzing a Possible Factor That Evaluates a Toy's Use by Young Children*

##### *a. Hypothesis: The Cases Support an Inference That the Courts Use a Third Factor That Evaluates How Children Use the Toy*

It might also occur to the lawyer that the courts were using a third main factor to assess the dangerousness of a toy—the use of the toy. This consideration makes sense because the normal use of a toy, or how it is designed to be used, could directly affect whether certain materials and certain shapes would result in a toy with the potential to “lacerate, knock unconscious, or otherwise seriously injure young children.”

In testing back this possible factor on the seven cases, the lawyer might initially find support in the *Toy Sword* court's explicit reference to the phrase “helps prevent, among other things,” as well as to the *Frisbee* court's phrasing

of “one of the primary motivating factors.” This explicit phrasing in both cases supports the inference that courts are considering the use of the toy as a factor—just as those phrases did for the prior hypothesis that the courts were using the factor of shape.

Despite these general references, however, the cases do not support an inference that the courts use a factor that evaluates the use of the toy. First, none of the seven cases includes any facts indicating how a toy was used or designed to be used. Without this foundation, testing back the hypothesis on the cases has little meaning, even though none of the cases’ facts and decisions actually contradict the possibility of a third factor. In comparison, the factor of shape was better supported because of how some of the courts explicitly described the toys.

Second, the explicit rationale of the courts—their policy concerns—does not specifically address the use of toys or why such a factor would measure the danger to young children. Instead, the courts merely state that they are concerned with whether the toy would “lacerate, knock unconscious, or otherwise seriously injure young children if the object encountered their bodies.” This hypothesis is therefore unlike the court’s analysis in the *Frisbee* case in which it directly linked up the “material a toy is made of” to “whether a product would tend to lacerate, knock unconscious, or otherwise seriously injure young children.” It is also unlike the court’s analysis in the *Nesting Boxes* case in which the court connected the angled corners of the nesting boxes to the policy concern that such a toy “might injure young children.”

Thus, this hypothesis must be discarded because it is insufficiently supported by the seven relevant cases in the jurisdiction because these cases do not explicitly raise, or even implicitly support, the possibility that the courts were considering a toy’s use. This is true even though the idea of a toy’s use is lurking behind the courts’ analyses in these cases and even though the courts will probably incorporate such a factor in the future as they develop their approach to this area of law.<sup>112</sup>

For these reasons, a lawyer could make creative arguments to a future court that the law of the jurisdiction should include such a factor. While an analysis of the current status of law could not reasonably incorporate such an inference, a lawyer could argue to change or develop the current law to include an evaluation of a toy’s use.<sup>113</sup> This argument might be persuasive and convince the court, especially if it were based on supporting analyses from persuasive cases from other jurisdictions and authoritative secondary authority.

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112. The lawyer should have also gone through the same process and come to the same conclusion about a possible factor of the size of the toy.

113. See *supra* Part III.C.

## V. CONCLUSION

The hypothetical discussed in Part IV illustrates that synthesizing groups of cases is a complex analytical skill, one that is critical to a lawyer's ability to work with the law in a sophisticated fashion. Only by seeing what a group of cases explicitly says and determining what they reasonably support inferentially will a lawyer develop all important ideas, including their subtle nuances. To achieve this result, a lawyer must consciously think about and use a sound methodology. Having done so, the lawyer will develop the depth of analysis necessary for high caliber law practice, regardless of what role the lawyer plays in the profession.