

Boston College Law School
Digital Commons @ Boston College Law School

Boston College Law School Faculty Papers

November 1997

Using Fruit to Teach Analogy

Jane Kent Gionfriddo

Boston College Law School, gionfrid@bc.edu

Follow this and additional works at: <https://lawdigitalcommons.bc.edu/lspf>

 Part of the [Legal Education Commons](#), [Legal Profession Commons](#), and the [Legal Writing and Research Commons](#)

Recommended Citation

Jane Kent Gionfriddo. "Using Fruit to Teach Analogy." *The Second Draft: Bulletin of the Legal Writing Institute* 12, no.1 (1997): 4-5.

This Article is brought to you for free and open access by Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law School Faculty Papers by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

A new conceptual issue arises: a tort problem. Here, the class recognizes immediately that our house has no rules to govern the situation, but I tell them that the house across the street has had a similar situation that has been decided in a certain way. We think about whether we like that rule and its reasoning. We talk about whether our house has to do what the house across the street does. And we move into variations on the idea of precedent and its limits through differences in our facts as well as in what we wish to accomplish in creating our own precedent.

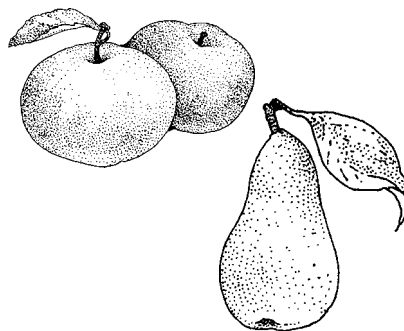
Then we set the house into the fictional “Hofstra” country with its safeguards for individual rights. When a dispute arises, ostensibly resolved by the rules, the defense argues that “it’s a free country, I can do what I want.” We talk about how the Constitution can prevent legislatures from creating unconstitutional rules and that courts are called upon to interpret and apply constitutional principals.

We finish the exercise with a burden of proof, fact/law distinction situation. Here, the person appears to be caught red-handed possessing food in his room and is accused of breaking a rule that requires food to be eaten only in the kitchen. A court makes a legal decision that the rule does not apply to “possessing” food, only eating it. The “defendant” says that he brought the food into his room, he did not “eat” it there. But it is half-eaten, and some people saw it whole while it was in his room. Who decides whether or not he “ate” in his room? How does a fact finder make such a decision?

This exercise is fun. It teaches the students a lot about the broad themes of law and starts to introduce them to some of its vocabulary, but it accomplishes more than that. They come to law school expecting to be ignorant — they read cases they do not understand and get more confused as they walk into many of their classes. This exercise reminds them that their lives before here and the knowledge they have acquired in those lives are useful tools for learning about law. They also learn that they can participate without peril — there is no case hanging over them that contains the “right” answers. All they are being asked to do is think. By participating in the class discussion, they learn also about the interactive nature of law learning. Thus, the exercise provides a valuable tool for a first law school class.

Contact Donna Hill at <lawdlh@hofstra.edu> if you would like a copy of the exercise.

Using Fruit to Teach Analogy



Jane Kent Gionfriddo
Boston College Law School

One of my very creative colleagues, Lis Keller, came up with the following exercise to introduce students to the correct

method of comparing precedent cases with the client’s case in an objective memorandum. We had been frustrated that students seemed to think that comparing the “facts” of a precedent case with the “facts” of the client’s case, without more, was sufficient. Too often we would get analysis like, “The court would view doing laundry in our case as similar to watching TV in the case of ‘X.’” And as much as we would tell students that comparing “facts” with “facts” was just the first step in predicting what a future court would do, they didn’t seem to understand what the problem was.

Of course, we had already discussed the analytical process that students were doing in what we call the “application-prediction” section of an objective memo. We had worked through the process in the abstract and even in the case they were working on. “You’re tracking the reasoning of the future court,” we had said, “and to do that you must show WHY, using the court’s reasoning in prior cases, that the future court will view the facts of precedent cases as similar or dissimilar to the facts of your client’s case.” But still students didn’t seem to catch on.

So Lis decided to come up with an exercise that would take this complicated analytical concept and simplify it. She felt that a simple exercise was a good first step because it would help students intuitively see why a “facts to facts only” comparison was analytically insufficient. “What about fruit?” she asked, and constructed the following exercise.

We come into class with four objects—a basket (my meager contribution), and several real or

“silk” pieces of fruit—a Granny Smith apple (which, if you remember, is green), a MacIntosh apple (red), and a Bartlett pear (green).

Holding up the MacIntosh apple, we say, “The court finds that this object belongs in the basket.” Holding up the Bartlett pear, we say, “The court finds that this object does not belong in the basket.” Then, holding up the Granny Smith apple, we say, “this object is now before the court. Predict: Will the court find that it ‘belongs in the basket,’ or not?”

Of course, given the simple and visual nature of this demonstration, all students are immediately clear that they can’t predict unless they come up with the court’s reasoning concerning why the MacIntosh apple did belong in the basket and the Bartlett pear did not. Was it concerned about the *color* of the object? Then the court would view the Granny Smith apple as similar to the Bartlett pear and find that it doesn’t belong in the basket. But if the court’s *reasoning* was based on *kind of fruit* or *shape of object*, then it would view the Granny Smith apple as belonging with the MacIntosh apple in the basket.

We’ve found that this exercise so clearly introduces this concept that students are much better prepared to handle the more complicated process of comparing the facts of legal precedent to their client’s facts in figuring out what a future court would conclude for their client. Moreover, the fruit exercise becomes a wonderful vehicle as we give written feedback to students who continue to make inadequate comparisons in their memos. When the student writes, “doing laundry in our case is similar to TV

watching in case ‘X,’” it becomes so easy to write, “but WHY? Remember the fruit. You know you can’t figure out whether the court would view a Granny Smith apple as like or unlike a Bartlett pear until you figure out what the court was concerned about—kind of fruit, or color of object, or shape of object, or something else. The same is true for ‘doing laundry’ and ‘watching TV.’ Only the courts’ *reasoning* in the precedent cases— ‘activities that go on inside a home’—shows WHY the future court could see ‘doing laundry’ and ‘watching TV’ as similar activities.” The “fruit exercise” then becomes a short-hand way throughout the year, both in class and in written feedback, to get students to think about the analytical process they are “capturing” in spelling out a comparison of precedent and client’s facts in an objective memo.

Drawing Persuasive Comparisons

Ben Brown
John Marshall Law School

Drawing analogies is a very commonsensical activity. Since it seems so natural, students often fail to make their analogies persuasive by systematically comparing facts in their memorandums. They often rely on mere assertions to prove that their memo facts and the precedent facts are comparable or distinguishable. This exercise is designed to encourage a discussion about what makes a factual comparison persuasive. This exercise is often most effective after the students have attempted at least one memorandum project. The ultimate lesson here is that factual comparisons, to be persuasive, must be specific, direct and comprehensive. After each example in the exercise, I encourage students to discuss the

strengths and weaknesses of the attempt to make a persuasive comparison.

Reasoning by Analogy: Since reasoning by analogy is a unique way of deciding crucial issues, it is not often taught. As a legal writer, you need to give some thought to how best convince a sophisticated reader that your analogy is, indeed, sound.

The basic rule is: The more direct, specific and comprehensive you can make the comparison, then the more persuasive it will be.

Example:

I am trying to convince you that a professor’s commute to school is longer than a student’s commute to school.

First — I could just assert it.

The professor has a longer commute than his student.

Does this convince you?

If I am in a position of power, you might accept this statement as true; thus courts can get away with this type of sloppy analogizing. But if you have no compelling reason to trust me — that is, if you are a skeptical reader as you must assume all legal readers are — then the mere assertion will not suffice to convince you of this proposition.

Second — I could add some general facts that support my claim.

Since professors make more money than most students, they can afford to live in the suburbs and thus take longer to get to school. Generalities might add some