Chapter 1

The Foundations of Legal Analysis

Objectives

When you finish this chapter and complete the exercises, you will be able to

- understand the role of statutes
- understand the role of case law
- understand the relationship between the common law, precedent, and *stare decisis*
- describe the hierarchy of court systems
- understand jurisdiction
- identify different types of authority

Lawyers serve as advocates for their clients. They are hired to represent people, partnerships, corporations, property, and estates on a wide variety of issues ranging from the mundane to the complex. Lawyers are required to analyze an ever-increasing body of law that includes cases, statutes, ordinances, rules, and regulations and to apply that law to an infinite variety of fact scenarios. But how do lawyers craft meaningful legal arguments when the body of law and facts are so large and ever-changing? How do lawyers argue before a court with conviction? Can lawyers anticipate how a court would likely rule in a given case? The answers to these questions lie in an understanding of the foundations of legal analysis.

This chapter introduces the foundations of legal analysis. The foundations of legal analysis are the set of principles that lawyers use to analyze the law, devise legal arguments, and predict legal outcomes. Understanding these rules and principles is a crucial step towards becoming an effective advocate.

The foundations of legal analysis do not require attorneys to know the law by heart. The body of jurisprudence is too large and always changing. The rules and principles of legal analysis, however, allow attorneys to fashion credible and persuasive arguments on almost any legal issue. The key is to understand how the lawmakers, typically courts and legislatures, make and change the law.

This chapter introduces two important sources of law—statutes and case law. It also discusses three seminal principles of case-law analysis: (i) common law; (ii) precedent; and (iii) *stare decisis*. In addition, this chapter discusses the structure of court systems, basic principles of jurisdiction, and the weight or significance of legal authority. Together, these concepts form the foundation of American jurisprudence. They serve as some of a lawyer's most powerful tools.

A. Statutes

Statutes are one source of law that lawyers use to analyze problems. Typically, students in their first year of law school spend the majority of their time reading and analyzing judicial opinions. As a result, they often fail to recognize the importance of statutes. A statute is an act of a legislature that, among other things, proscribes and governs conduct. It is a formal written enactment of the legislative body. Statutes are only one kind of enacted law. Other enacted law includes ordinances, or municipal law, and regulations, or law derived from administrative bodies.

Legislatures have the exclusive constitutional authority to enact statutes. The federal legislature, the United States Congress, enacts laws that affect every person or legal entity across the country. In addition, each state has its own legislature with authority to enact laws that regulate conduct within that state's borders. Congress and the various state legislatures are independent, separate lawmaking bodies. Most legislatures are bicameral. They consist of two chambers, a Senate and a House of Representatives or Assembly.

The process of enacting a federal statute involves several stages. First, a legislator introduces a bill in his or her chamber of the legislature. The bill is then referred to a committee consisting of members from that chamber. A committee can be either permanent, called a standing committee, or temporary, called a special or ad hoc committee. The legislature's committee structure is organized so that each committee considers only legislative ideas of the same or similar subject matter. For example, the House of Representatives' Committee on Agriculture considers bills that relate to farm policy and nutrition.

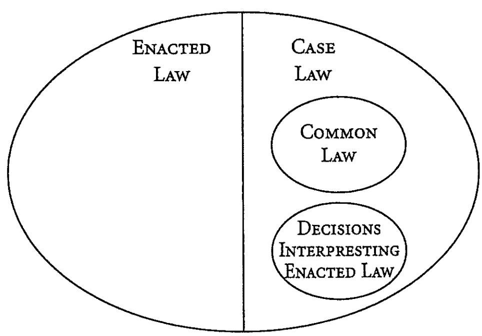
Once a bill is assigned to a committee, the committee reviews the bill and invites experts and other interested parties to testify on the impact of that legislation. More importantly, the committee debates each section of the proposed law and amends, or marks up, the bill. After careful consideration, the committee votes up or down on the bill. If the bill wins support from a majority of committee members, then the bill is reported out of committee to the full chamber. If the bill fails to win a majority, then the bill is deemed "dead in committee." When a bill survives a committee vote, the committee issues a report, including a revised version of the bill. That report recommends whether the full chamber should approve the bill. The full chamber then considers, debates, amends, and finally votes on the bill. If the bill passes in the originating chamber, it goes through a similar process in the opposite chamber. When both chambers pass an identical bill, the bill is then presented to the President. If the President signs the bill, it becomes law. If the President does not sign the bill within ten days, it still becomes law. If the President vetoes the bill, the bill goes back to the legislature. There, the veto may be overridden by a two-thirds vote in each chamber. Barring a congressional override, the bill could be re-drafted to incorporate the President's objections or shelved.

State legislatures largely echo the federal model. In every state the governor must sign a bill into law and reserves the right to veto an objectionable bill. Once enacted, each statute becomes an independent source of law. Federal statutes govern persons and entities throughout the United States, while the reach of state statutes usually ends at the state's borders. Once enacted, a statute remains fixed unless changed or abolished by the legislature or declared unconstitutional by a court of competent jurisdiction. While courts can and do interpret the meaning and application of a statute's terms, they cannot amend its language.

B. Case Law

Another source of law is case law. Case law is law derived from the opinions of courts. Case law consists of both the common law and judicial decisions that interpret statutes and other enacted law.

The Law



Courts make law in at least three ways.

First, a court may fashion a general legal doctrine or principle if it is required to resolve a case but no binding law exists to determine the matter. That new legal doctrine or principal is enforceable only within that court's geographic reach. By adopting or creating a new legal doctrine, a court creates binding law absent any legislative debate or vote. But, a court can create new law only in the absence of enacted law because enacted law trumps case law. For example, if neither the United States Congress nor a state legislature has enacted a law to protect victims of negligent infliction of emotional distress, a court may create a legal doctrine that recognizes the harm and provides a remedy to victims.

Second, a court also makes law by deciding cases that interpret existing legal doctrines. A court makes new law with each case it decides because each case comes before the court with a unique set of facts. When the court applies the law to a new set of facts, a new precedent is born that adds to the growing body of case law. An opinion that incorporates a new fact to an existing legal doctrine creates new law for the purpose of deciding future cases that include the same or materially similar facts.

Suppose a court decided that a plaintiff could recover for a defendant's negligent infliction of emotional distress. In that case, a defendant was liable to a mother when he accidentally shot and killed her young child in plain view of her mother. The court in that case limited its holding to allow only parents to recover, reasoning that the defendant knew or should have known that his negligent acts would harm a parent witnessing the shooting of her child. In a later decision, the court allowed a foster parent to recover under a similar set of facts. From that point forward, potential plaintiffs included all parents and foster parents. In a subsequent case, the court held that siblings were also included in the pool of potential plaintiffs. Each case added to or modified that state's case law by expanding the class of plaintiffs who could sue under a negligent infliction of emotional distress theory.

Third, courts make law by interpreting ambiguous or vague language in enacted law, such as statutes, ordinances, or administrative regulations. Sometimes, a legislature or other rule-making body will enact a law with terms that have more than one meaning or with terms whose meaning depends on context. Before a court can apply that law to the facts before it, it must construe the indefinite terms. The court's interpretation of ambiguous terms in enacted law determines how a later court should apply that law to similar cases in future disputes. Suppose a court interpreted a state statute regarding recycling. The relevant statute states that "all newsprint shall be collected and recycled." The issue before the court was whether magazines are considered newsprint. The court concluded that magazines were not newsprint for the purposes of the statute. In that case, the court added to the body of case law by construing an ambiguous term in a legislative enactment. That opinion now has the force of law on all similar cases.

Courts do not render decisions in a vacuum. Instead, courts abide by an important set of concepts to aid in their resolution of cases. Among these concepts are the common law, precedent, and *stare decisis*. In contrast to legislatively enacted statutory law, the common law consists of the rules and legal principles derived from judicial decisions rendered in the absence of enacted law. A precedent is any judicial decision or opinion that serves as an example of how a subsequent court can resolve a similar question of law under a similar set of facts. Finally, *stare decisis* is a time-honored maxim that requires courts to follow precedent when deciding similar cases.

1. Common Law and Precedent

Generally, the common law is case law rendered in the absence of enacted law. Under federal and state constitutions, only the legislature is empowered to make law. As such, courts can make law only to fill a void left by the legislature. The common law is derived from the body of judicial opinions.

A precedent is a judicial opinion that illustrates the application of legal rules and doctrines to the facts of a specific case. A precedent, if it examines a common-law rule, becomes part of the common law. Thus, a case can be both a precedent and part of the common law. Some precedents, however, interpret enacted law and not common-law principles. While these cases are not part of the common law, they are still precedents because they illustrate the application of a statute to a set of facts.

Generally, a judicial opinion resolves only the facts and issues raised in the action. That same opinion, however, becomes an authoritative source of law for future cases. Courts, when deciding issues, will look to those opinions for guidance. Each new decision, then, follows logically from the existing body of precedents. Each new decision becomes part of the larger body of case law and takes on precedential weight.

2. The Power of Precedent and *Stare Decisis*

The famous Latin maxim, *stare decisis et quieta non movere,* translates into "those things which have been so often adjudged ought to rest in peace." *Stare decisis* is the controlling doctrine governing the ability of judges to make law. *Stare decisis* is a principle that requires courts to follow precedent when deciding similar cases. It gives prior judicial decisions the force of law. These decisions are binding on some courts hearing later analogous cases. Courts ordinarily adhere to this doctrine and will only depart from *stare decisis* when absolutely necessary to avoid an injustice, to protect the general welfare, or to change the law to reflect contemporary values.

Stare decisis is a key maxim in American jurisprudence because it promotes stability, predictability, and fairness in the application of law. It promotes fairness because a court will treat parties with similar claims and facts in the same way. It also allows a lawyer to predict legal outcomes by analyzing prior decisions that resolve the same legal issue on the same or similar facts. If a lawyer can find controlling authority, or precedent, that speaks to her client's case, then she can anticipate how a court will likely rule in the matter. *Stare decisis* ensures stability in the law because courts are required to follow prior decisions instead of rendering decisions in a vacuum.

The power of *stare decisis* is directly related to the notion of judicial error. Generally, a party who was aggrieved by a court's mistake on a matter of law, fact, or procedure has a right to appeal that legal, factual, or procedural ruling to a higher court. If the higher court agrees with the complaining party, then the higher court may correct the error and reverse the original court's determination. A court that violates *stare decisis* by failing to apply a controlling precedent may be reversed on appeal. Hence, a court typically will honor *stare decisis* or risk a higher court reversing its holding or ruling on appeal.

Stare decisis and precedent are related, but different, concepts. *Stare decisis* requires courts to follow prior decisions when determining the outcome of like cases. Precedent is the prior decision itself.

For example, in *Palsgraf v. Long Island Railroad,* 162 N.E. 99 (N.Y. 1928), a railway company's conductor pushed a passenger carrying a package of fireworks. The conductor did not know the package contained fireworks. The package fell. As a result, the fireworks exploded, causing a shockwave, which knocked down heavy scales located at the other end of the train platform. The scales struck the plaintiff, causing injury. The plaintiff sued to recover for her damages. The New York Court of Appeals, the court of last resort in New York, held that there is no duty, hence no liability, to an unforeseen victim of negligence. The court held that the defendant could not have foreseen injuring the plaintiff, and was, therefore, not liable.

By itself, the *Palsgraf* opinion decided the outcome of one case. The holding is legally binding only on the parties in the lawsuit. The court's reasoning, however, and the legal rules employed to determine the outcome of that case, are binding on everyone within that court's jurisdiction. Under the doctrine of *stare decisis, Palsgraf* became a precedent. After *Palsgraf,* New York courts were required to look to that case to decide any lawsuit that raised the same legal issue with the same or similar facts. Why? *Stare decisis et quieta non movere*—once properly decided, a legal issue should not be decided again. If a later trial court chooses to ignore *Palsgraf* and hold that a defendant is liable to an unforeseen plaintiff, then a higher court could reverse the trial court to correct the mistake. As such, the *Palsgraf* opinion became a predictable and reliable basis to assess liability in future like cases.

Imagine a system without *stare decisis* or precedent. If judges decided each case without regard to prior cases, litigants would indeed be at the mercy of the court. Judges would have the power to reach conclusions without the aid of a sustainable, predictable body of law. Litigants would have no reliable basis to determine whether a particular act had any culpable consequence. Without *stare decisis* and precedent, the ability of lawyers to predict a legal result would be nearly impossible. And without *stare decisis* and precedent, a lawyer's ability to argue cases before a tribunal would be difficult, if not impossible. The stabilizing impact of precedent and *stare decisis* is integral to the foundations of legal analysis.

C. Hierarchy of Courts

The authoritative weight, or value, of a particular precedent depends on which court within the *hierarchy* of courts rendered the opinion. A hierarchy represents the different levels of courts within a jurisdiction. The federal court system and the court systems of most states consist of three levels: a trial court, an intermediate court of appeals, and a court of last resort. A court is bound by a decision of a higher court within its line of appeal. A decision rendered by a court of last resort, the highest court of appeals within a jurisdiction, is binding on all other courts within that same jurisdiction. A decision by an intermediate appellate court is binding on a trial court when the highest court of appeals is silent or has not conclusively decided an issue.

STRUCTURE OF THE COURT SYSTEMS

	FEDERAL		STATE
COURT OF LAST RESORT	U.S. SUPREME COURT	◄-------	STATE SUPREME COURT
	↑		↑
INTERMEDIATE COURT OF APPEALS	U.S. COURT OF APPEALS		STATE INTERMEDIATE COURT OF APPEALS
	↑		↑
TRIAL COURT	U.S. DISTRICT COURT		STATE TRIAL COURT

Under our system of federalism, each state and the federal system is an independent, autonomous, and sovereign judicial system with one important exception—the United States Supreme Court. An opinion of the United States Supreme Court interpreting federal law is binding on every court in the United States, both federal and state, because it is the highest court in the land deciding a question of federal law. A decision rendered by a state's highest court of appeals, however, is usually the last word on most state issues.

Consider the following scenarios:

An Arizona trial court is bound by decisions of Arizona's highest court of appeals; Arizona's intermediate court of appeals,

> *when the state's highest court of appeals is silent on an issue; and the United States Supreme Court interpreting federal law.*
>
> *The Connecticut trial court is bound by Connecticut's highest court of appeals; the Connecticut intermediate court of appeals, when the state's highest court of appeals is silent; and the United States Supreme Court interpreting federal law.*
>
> *A federal trial court considering a federal issue is bound by the United States Circuit Court of Appeals for the circuit in which the federal trial court is located and the United States Supreme Court.*

D. Jurisdiction

Stare decisis requires courts to look to previous decisions, or precedent, for authoritative guidance in resolving legal disputes. Not all courts, however, are bound by every authoritative precedent. Jurisdiction is an important limit on the precedential impact of a particular decision.

Jurisdiction limits the ability of a court to exercise its authority. Jurisdiction restricts the power of a court to resolve legal issues in two ways. First, jurisdiction limits courts geographically. Second, jurisdiction limits courts by the subject matter they are allowed to consider. Geographic jurisdiction limits the power of a court to a particular territory. These limitations are drawn, for example, along municipal boundaries, county lines, or state borders. Subject matter jurisdiction limits the types of actions a court is authorized to hear. For example, a federal bankruptcy trial court does not have jurisdiction, and, therefore, cannot consider a state criminal action.

Jurisdiction limits the reach of precedent because it controls which judicial decisions, or precedents, a particular court is obliged to follow. Generally, state courts are bound only by controlling opinions derived from courts that are located within the same jurisdiction, as well as opinions derived from the United States Supreme Court when it renders a decision on federal law. For example, a trial court in Massachusetts is not bound by the opinions of the Supreme Court of Tennessee. A trial court in Massachusetts is bound by the Supreme Judicial Court of Massachusetts because that trial court is within the geographical jurisdiction of Massachusetts' court of last resort. The courts in both Massachusetts and Tennessee, however, are bound by opinions of the United States Supreme Court when it opines on federal law.

Courts may, but are not required to, follow precedent of other jurisdictions. Suppose the court of last resort in Alaska rendered a decision holding bar owners liable for injuries caused by their inebriated patrons. Subsequently, a case with similar facts alleging the same legal issue is heard by a trial court in Tennessee. The court of last resort in Tennessee has not decided the issue. The Tennessee trial court considering the issue must decide the matter and render a decision that will have precedential value for that jurisdiction. Under *stare decisis*, that decision would be binding in Tennessee until the Tennessee Supreme Court changes, reverses, or overrules the decision. The court in Tennessee could look to the Alaska court's decision for guidance, but Tennessee's court is not bound to follow that court's holding. The court, however, may be persuaded by the logic and reasoning of the Alaska court's decision and adopt all or part of that court's opinion. Alaska's decision, while not binding on Tennessee, may be persuasive.

Consider these other examples. Is the trial court of West Virginia considering a state issue bound by the court of last resort in Texas? No, because they are different jurisdictions. Is the court of last resort in New Jersey considering a state issue bound by the court of last resort in California? No, they are also in different jurisdictions. Is the court of last resort in New Hampshire considering a state issue bound by the United States Court of Appeals for the First Circuit, the federal circuit court of appeals that has jurisdiction over the federal trial court of New Hampshire? No, a state court is not bound by a federal court of appeals. Does the United States Supreme Court interpreting the United States Constitution trump all other state and federal courts? Yes, because all courts, both state and federal, are bound by the United States Constitution and the United States Supreme Court is the final arbiter of federal constitutional matters.

State courts may hear questions of both state law and federal law. A state court may consider federal law when the litigants raise a federal issue in addition to a state issue. State courts may also decide suits that raise issues of law from other states. These determinations are never binding on the other state's judiciary or the federal court because the deciding court sits in a different jurisdiction.

Federal courts may decide cases that raise federal or state issues. Federal issues arise under federal case law, federal statutes, federal regulations, treaties, or the United States Constitution. A federal district court, the trial court of the federal judiciary, has jurisdiction to hear state issues when the dispute is between citizens of different states and the amount of the claim exceeds $75,000.

In some situations, a federal court is bound by a state court's ruling. Suppose a federal court is asked to resolve a state issue. The federal court would defer to the state court's determination of the issue and not decide the issue on its own. This deference recognizes that state courts are better positioned to resolve state matters.

In other situations, a case is brought before a federal court that raises a state issue, but no precedent exists from that state's courts to guide the federal court's opinion. Perhaps the case is one of first impression or has not been conclusively decided by the state court. In these situations, the federal court either stands in the shoes of that state's court of last resort and decides the matter by interpreting state law, or *certifies* the issue to the state's highest court of appeals.

Certification, a procedure allowed only by authority of state law, allows a federal court to refer a state issue originally brought in federal court to that state's court of last resort. The state court may then conclusively decide the matter. The federal court is bound by the state court's determination of the state issue. The federal decision ultimately reached is authority for the federal court, but is not binding authority for state cases, even if a subsequent state case involves identical facts under the same law as the prior federal case. Why? The federal court and state court are independent judiciaries. Federal decisions on state law do not override decisions of a state's court of last resort. Analogous federal decisions may have persuasive impact on the state court, but are not binding.

E. Types of Authority

An *authority* refers to any cited source courts and attorneys use to oppose or support a legal proposition. Several different types of authority exist, such as cases, statutes, regulations, law review articles, legal encyclopedias, and legal newspapers. An authority can refer to either a source that is binding on a court or a source that merely persuades the court to rule in a particular way. Generally, courts and lawyers divide authorities into two groups: primary authority and secondary authority.

Primary authority is any source of law. Examples of primary authority include case law, statutes, or constitutions. Sources other than the law are secondary authority. Secondary authority is any source that comments on or editorializes about the law. Law reviews, legal treatises, newspapers, and legal encyclopedias are all examples of secondary authority.

The type of authority determines whether a source must be followed, or whether it merely serves to guide the court. Secondary authority is never binding on a court; it is only persuasive. Remember, it is not the law.

Primary authority, however, can be either binding or persuasive authority. Primary *binding* authority is any source of law that a court must follow. Primary binding authority includes any statute, regulation, constitution, or ordinance enacted in the jurisdiction, or case law rendered by the court-of-last resort in the jurisdiction. For example, a California trial court considering a state issue is bound by case law rendered by the California Supreme Court, California statutes, and the California Constitution. Primary authority from other jurisdictions is merely persuasive.

Primary *persuasive* authority is law that is not binding on a court. Primary persuasive authority can include statutes and case law from other jurisdictions. For example, a California court may look to a Nevada case for guidance, but that decision is not binding on the California court, it is only persuasive.

Persuasive authority includes primary persuasive authority, law that is not binding on a court and all secondary authority. Not all persuasive authority, however, has equal weight. Some sources are more compelling than others. Primary persuasive authority is generally more persuasive than secondary authority because primary authority is the law as opposed to a comment or opinion on the law. Even persuasive material derived from the same or similar source can have different persuasive value. For example, an article written by the seminal authority on property law would likely be more convincing to a judge than an article written by a lesser known scholar or a student. Keep in mind this simple rule—the more legally authoritative the source, the more persuasive the authority.

Consider the following sources used to support an argument before a state trial court:

An article from a legal newspaper;
An article from a prestigious law review;
An opinion from a federal court of appeals;
An opinion from the court of last resort in another state.

All of the authorities are persuasive authorities and not binding. Of the sources listed above, an opinion from the court of last resort of another state would likely rank as "most persuasive," followed closely by an opinion from a federal court of appeals. The state court's opinion was rendered by the court of last resort in that jurisdiction, not an intermediate appellate court. A federal court of appeals opinion and an opinion rendered by the highest court of another jurisdiction are more authoritative than the other sources and more persuasive because they are law. Opinions from any court usually outrank authority derived from articles or books that merely comment on the law. The law review ranks third, followed by the legal newspaper. The law review article, a scholarly commentary on the law, is more authoritative than an article merely reporting on the law.

The persuasive weight of an opinion rendered by another jurisdiction sometimes depends on how that court reached its decision. Was the persuasive opinion a unanimous decision of the court? A split decision? A court sitting *en banc*? Was a dissenting or concurring opinion included? Are you citing to that part of an opinion that bears directly on the relevant issues in dispute, or are you citing to *dicta*, the part of the opinion that was not necessary to the court's holding?

Suppose you are researching a legal issue and find three cases from another state's court of last resort that support your legal position. One decision consists of an opinion that includes a concurring opinion joined by two justices, and the proposition of law you need is found in the concurring opinion. The second decision is a unanimous opinion of the court. The third opinion consists of a majority opinion and a dissenting opinion filed by one judge, but the proposition of law you need is found in the dissenting opinion. How would you rank the persuasive weight of these authorities?

The unanimous opinion would likely rank as "most persuasive" because it represents the agreement of the entire bench on the resolution of the issue. The weight of the other two opinions is less clear. Their persuasive weight depends on the nature of the case decided and the language of the opinions filed. With that said, the concurring opinion would likely rank as "more persuasive" than the dissenting opinion because the concurrence agreed with the majority's holding albeit for different reasons. The dissenting opinion in the third case would likely rank as "least persuasive" because a dissent does not represent the law and is akin to secondary authority.

Some measure of experience is required before an attorney or student is able to accurately identify and weigh the various authorities. Sometimes the difference between authorities is quite subtle. Distinguishing between persuasive and binding sources and the relative weight of persuasive sources, however, is only one part of legal analysis. The challenge lies in crafting a meaningful way to incorporate the authority into cogent, persuasive, and well-reasoned analysis.

Practice Exercises

Complete the following exercises to reinforce your understanding of this chapter.

1. What are two sources of law in the American legal system?
2. Discuss the purposes behind *stare decisis.*
3. Consider the following questions about the court systems:
   a. What are the three levels of courts that exist in the hierarchy of the federal court system?
   b. What are the three levels of courts that exist in the hierarchy of most state court systems?
4. Answer the following questions about jurisdiction:
   a. How do courts determine what law binds them?
   b. Why must lawyers consider a court's jurisdiction?
5. Can a court amend or change language in a statute? Why or why not?
6. Explain three ways courts make law.
7. A legislator has proposed a bill that prohibits physician-assisted suicide.
   a. What stages must this bill go through before it can be passed into law?
   b. If enacted into law, can a court amend its language?
8. You are arguing a state issue before a New Mexico trial court. Which of the following cases are binding on that court?
   a. Decision from the court of last resort in Texas
   b. Decision from the court of last resort in New Mexico
   c. Decision from the federal circuit court of appeals in New Mexico
9. Identify whether the following sources are primary or secondary authority:
   a. Statute
   b. Case
   c. Legal newspaper article
   d. Legal encyclopedia article
   e. *Dicta* from a United States Supreme Court opinion

10. You are arguing a case before a North Dakota trial court. Rank the persuasive weight of the following sources:
    a. Law review article written by a law professor
    b. Legal newspaper article
    c. Decision from the court of last resort in New Jersey
    d. Dissenting opinion from the court of last resort in Indiana

Chapter 2

Rules

Objectives

When you finish reading this chapter and complete the exercises, you will be able to

- identify expressed rules in cases
- identify implied rules in cases
- understand rule synthesis
- distinguish between legal tests

A rule is a legal principle established by an authoritative body that proscribes or governs conduct. Rules include law enacted by legislative bodies such as statutes, treaties, ordinances, regulations, and constitutions. Rules also include law derived from judicial opinions, when courts render a common-law ruling or interpret enacted law. Both enacted law and case law form the body of law in American jurisprudence.

When a lawyer first analyzes a client's case, she typically applies a rule or rules of law to a set of facts presented by a client. Through this analysis, the lawyer attempts to predict how a court or tribunal would likely rule in the matter, and then, based on that objective analysis, decide how best to proceed. The rules, and how they apply to a client's case, often determine whether a case has merit or not. Identifying the applicable law or rule, however, can be challenging. Rules come in a variety of guises. Some rules are enacted by a legislature, others are rendered by a court, and still others are promulgated by an administrative or regulatory agency. Some rules, like statutes, are readily apparent. Other rules, like some judicial rules, are not so obvious.

A. Enacted Law

Enacted laws are rules established by an authoritative act of a legislative body. Both state and federal constitutions govern how the legislative branch makes law. The enactment of a law typically requires both bicameralism and presentment. Bicameralism requires both chambers of a legislature to pass the same bill. In the federal legislative model, for example, both the House of Representatives and the Senate must each pass an identical bill. The presentment requirement commands the legislature to present the bill to the chief executive for his or her approval or veto. If both constitutional requirements are satisfied and the chief executive approves the law, then the bill becomes law.

The resulting law or statute is binding on all legal entities within the jurisdictional reach of the legislature. A state statute governs within the state's borders, and a federal statute governs the nation. If both a state statute and a federal statute cover the same subject matter, the federal statute may preempt the state statute if the subject matter is of national, as opposed to local, importance. Once enacted, the language of a statute is immutable; it can be amended only through another act of a legislature. Courts, then, are constitutionally prohibited from changing or amending statutory text—courts cannot "legislate from the bench." Courts, however, can and do interpret statutory language, particularly when the language in a statute is ambiguous or vague, and the court must construe the language in order to resolve a legal dispute.

Another form of enacted law is regulatory or administrative law. Both state and federal legislatures enact statutes that create administrative or regulatory agencies. These statutes define the goals and purposes of the agency and may authorize the agency to promulgate rules or regulations to effectuate the purposes of the statutory grant. As such, some state and federal agencies act as quasi-legislatures and promulgate regulations that carry the same force as legislatively enacted law. For example, in 1970 the federal Occupational Safety and Health Act authorized the creation of the Occupational Safety and Health Administration (OSHA) to prevent work-related injuries or death. OSHA promulgates and enforces rules on workplace health and safety that almost all employers in the United States must obey.

All enacted laws share two common and important characteristics. First, enacted law is promulgated only by an authorized legislative body. Courts and other judicial tribunals cannot enact law. Second, enacted law is immutable. Once properly enacted, a court cannot change or alter an enacted law. And while the United States Supreme Court is entitled to exercise judicial review—the power to strike down laws that violate the Constitution—the Court cannot amend statutory language by fiat. Both state and federal courts, however, may interpret or construe ambiguous or vague language in a statute or regulation to resolve a legal dispute. A court's interpretation of an ambiguous word or phrase in a statute or regulation is not enacted law, but it is law nonetheless—case law.

B. Case Law

A published case is an important source of rules. A case is a judicial proceeding between parties. A published case is a written statement by a court explaining how it reached its decision, which is published in a case reporter. While courts do not adhere to a set format when drafting opinions, a judicial opinion typically consists of seven component parts: the procedural history of the case, the factual circumstances surrounding the case, the issue(s) in contest, the holding of the court, the rules employed by the court to decide the matter, the court's reasons to support its holding, and the court's disposition of the case.

The *procedural history* of a case traces the treatment of the case as it worked its way through the court system. The *facts* consist of all the legally significant events or things that relate to the ultimate resolution of the matter before the court. The *issue* is the legal question(s) that the court is asked to resolve. The *holding* answers the question(s) presented to the court. The *rules* are the principles of law employed or adopted to resolve the issue. The *reasoning* ex-

Components of a Case

Procedural history: traces the case as it worked its way through the court system
Facts: describes the events, circumstances, or objects that relate to the ultimate resolution of the matter
Issue: states the legal question(s) that the court is asked to resolve
Holding: resolves the question(s) presented to the court
Rules: states the principles of law employed or adopted to resolve the issue
Reasoning: explains how the court reached its decision
Disposition: states the ultimate resolution of the matter

plains how the court reached its decision. Finally, the *disposition* is the ultimate settlement of the matter.

Rules in cases can be either express or implied. An expressed rule is clear and manifest in the body of the opinion. An implied rule is not articulated in the body of the opinion.

1. Express Rules

In some opinions, the court clearly expresses the relevant rules. Perhaps the issue raised in the opinion involved enacted law or a settled common-law principle. The court may also expressly articulate a rule that resolves ambiguous language in a statute or a rule that alters or informs an existing common-law principle. While not necessarily flagged as "rules" within the narrative of the opinion, expressed rules will describe a principle of law employed or adopted by the court to resolve the legal issue. Because expressed rules are clear and manifest in the body of the opinion, they generally are obvious and easy to identify. For example, consider the following opinion:

> *The issue before us today is whether the city police entrapped the defendant, John Hooks, into committing the*

crime charged. On October 6, 2007, an undercover officer from City Police Department approached the defendant on Main Street and offered to purchase a quantity of cocaine hydrochloride. According to the trial transcript, the undercover officer found the defendant waiting outside a local bar. The officer approached the defendant and said, "I'm interested in purchasing powder cocaine. Can you help me?" The defendant immediately reached into his coat pocket and produced a clear plastic bag containing a white powder. The defendant then said, "OK. Two thousand dollars." The officer handed the defendant twenty $100 bills and accepted the plastic bag in exchange for the cash. The officer then placed the defendant under arrest for the possession and sale of a controlled substance in violation of state laws 18.4.1(b) and 18.4.2(c)(1). At trial, the defendant asked the trial court judge to instruct the jury on the defense of entrapment. The trial judge refused the instruction, ruling that the evidence presented at trial failed to show that the police officer induced the defendant to commit the crime. The jury returned a guilty verdict, and the trial court judge sentenced the defendant to eighteen months in the state penitentiary.

The trial court judge correctly declined to instruct the jury on the entrapment defense. State Statute 14.3.4 allows a defendant to argue that police entrapped him into committing the crime or crimes charged in an indictment. State Code 14.3.4 (2005). The statute states, in relevant part, "if a state actor induces another to commit a crime that he was not predisposed to commit, the defendant may aver the absolute defense of criminal entrapment." <u>Id</u>. This court, in <u>State v. Elliott</u>, explained that "police must do more than merely solicit a defendant to commit a crime to allow a defendant to raise the entrapment defense." <u>State v. Elliott</u>, 45 State 456, 462 (1998). In this case, the undercover officer merely requested that the defendant help him to procure cocaine. This lone request is insufficient to support the entrapment defense. We affirm the decision of the trial court.

In this case, the court relied on both enacted law and case law in its opinion. First, the court described the relevant state statute on the defense of entrapment. The court then cited to an earlier precedent, the *Elliott* case, that announced a rule to determine when a state actor induces another to commit a crime. Both rules were apparent from the opinion and are thus expressed rules. The difficulty, however, lies in identifying rules of law that are not expressed clearly in an opinion.

2. Implied Rules

Unlike expressed rules, implied rules are unspoken or unexpressed principles of law employed by a court to resolve a legal issue. These rules are embedded within the body of the opinion but are not articulated. Enacted laws or laws established by an authoritative act of a legislative body rarely are unexpressed. Similarly, established common-law doctrines usually are fully expressed in an opinion. Sometimes, however, a court neglects to articulate a rule that is important to the resolution of a case. Perhaps the court did not consider the rule important enough to warrant full expression. Whatever the reason, an unexpressed rule can have the same authoritative weight as an expressed rule. Therefore, lawyers must learn to extract these rules from an opinion.

Identifying unexpressed rules in an opinion requires some measure of intellectual flexibility and creativity. Because the rule is implied and not expressed, lawyers must extrapolate the missing legal principle from the expressed parts of an opinion. For example, suppose you are invited to a friend's house for dinner. As you approach the front door to her house, you observe six pairs of shoes lined up to the side of the front door. When your friend opens the door to invite you inside, you observe that the host and the other invited guests are not wearing shoes. You quickly surmise that shoes are not allowed inside the house. The "no shoes" rule is an unexpressed rule that you were able to induce from the surrounding circumstances. The same type of intellectual analysis is required to extrapolate unexpressed rules from judicial opinions. Consider the following case:

The defendant, Jane Michaels, appeals her conviction in the state trial court for the possession of a controlled substance in violation of state law 18.4.1(b). The defendant argues that the trial court erred when it refused to instruct the jury on the defense of entrapment. On August 18, 2007, an undercover police officer posing as a drug dealer approached the defendant outside of the Quickie Food Mart on Main Street. The officer brandished his revolver, waived it in her face, and asked the defendant if she wanted to purchase marijuana. At trial, the officer testified that he was "in character" and brandished his gun to establish street credibility with the defendant. The defendant purchased a quantity of marijuana from the officer and was arrested. At trial, the defendant requested a jury instruction on the defense of entrapment, but the trial court denied that request. The jury returned a verdict of guilty, and the trial court judge sentenced the defendant to one month in the county correctional facility.

The trial court judge erred when she declined to instruct the jury on the entrapment defense. State Statute 14.3.4 allows a defendant to argue that police entrapped her into committing the crime or crimes charged in an indictment. State Code 14.3.4 (2005). The statute states, in relevant part, "if a state actor induces another to commit a crime that he was not predisposed to commit, the defendant may aver the absolute defense of criminal entrapment. The burden is on the defendant to prove that the state actor did induce the crime." <u>Id.</u> This court, in <u>State v. Elliott</u>, explained that "police must do more than merely solicit a defendant to commit a crime to allow a defendant to raise the entrapment defense." <u>State v. Elliott</u>, 45 State 456, 462 (1998). In this case, the undercover officer brandished his weapon when he asked the defendant to purchase drugs. But for the gun, the defendant may not have committed the crime. Therefore, the trial court should have allowed the jury to consider whether the officer entrapped the defendant. We reverse the decision of the trial court and remand for further proceedings consistent with this opinion.

In this case, like the previous case, the court relied on an expressed statute and an expressed case rule in its opinion. But, the court also relied on an unexpressed rule of law to reach its conclusion. The issue before the court involved the construction of the term "induces" in the state statute. According to the statute and the *Elliott* case, if a defendant satisfies his burden of proof to show that the police induced him to commit the crime, the defendant may properly raise the entrapment defense. The court in this case was asked to resolve whether the defendant met her burden. The court concluded that she had. But how? What unexpressed rule of law did the court apply to the facts of the case to determine that the police officer may have induced the crime? Like the "no shoes" rule, the trick is to think through the expressed portions of the opinion and extrapolate a rule of law that fleshes out the court's holding. Consider the following unexpressed rules derived from the opinion:

> **Rule 1:** A police officer who brandishes a gun as he requests another to commit a crime has induced the crime for the purpose of an entrapment defense.
>
> **Rule 2:** A state actor who uses coercion to persuade another to commit a crime has induced the crime for the purpose of an entrapment defense.
>
> **Rule 3:** A police officer who threatens another with death or serious bodily harm to persuade another to commit a crime has induced the crime for the purpose of an entrapment defense.

All three rules fairly express the court's implied intent to determine how a state actor unlawfully induces another to commit a crime. The first rule narrowly tracks the facts of the case. This rule, however, may be too narrowly focused on the facts. A rule is a general legal principle that a court can apply in future cases to resolve the issues presented. Because the first rule is tailored to fit the facts of one case, its applicability to future cases is questionable. The rule could be applied only to future cases where a police officer brandishes a gun as he requests another to commit a crime.

The second rule is broader than the first but perhaps too broad. It merely requires a state actor to coerce another to commit a crime. Should this rule apply, all a defendant would need to prove is some measure of police coercion, no matter how slight, to raise the entrapment defense. This rule would likely broaden entrapment beyond its intended scope. The rule also fails to consider a key portion of the case where the court opined that "[b]ut for the gun, the defendant may not have committed the crime." While the court failed to explain the significance of the gun, it is fair to extrapolate that the court believed that the threat of a gun could coerce a defendant into committing a crime.

The third rule strikes a balance between rules one and two by focusing on the significance of the gun without too narrowly focusing on the facts of the case. Under rule three, a police officer who threatens another with death or serious harm to commit a crime induces the crime. This rule fairly gauges the implied meaning of the court without broadening the scope of entrapment beyond its intended limit. The rule can also be applied to later analogous cases because it is not too factually limited in scope. Because the rule focuses on the implied significance of the brandished weapon and not the weapon itself, it could serve as a useful unexpressed rule of law.

To ensure that the rule is credible and fairly represents the meaning of the court, lawyers test the rule in other prior analogous cases. Here, lawyers apply the unexpressed rule to similar prior cases and determine whether the rule could serve as the unexpressed statement of law from the body of cases on point in a jurisdiction. In our example, a lawyer would apply rule three to all like previous cases on entrapment in her jurisdiction. If the rule works in analogous cases because it fairly represents the unexpressed meaning of the opinions, then the rule is credible and could be applied to resolve future cases.

Unexpressed rules share two important characteristics. First, they are never enacted. A court will almost always fully express enacted law in an opinion. Second, unexpressed rules are mutable. Because these rules describe the unexpressed legal significance of a court's holding, lawyers are free to extrapolate the language the court could have expressed had it chosen to fully express the rule. So long as the rule fairly expresses the court's implied meaning and so long as a lawyer cites to the originating opinion(s) to establish the authority and credibility of the rule, a lawyer can use the implied rule to the same extent as an expressed rule.

3. Rule Synthesis

As we have seen, some opinions reach a conclusion without expressly articulating a rule of law. In other instances, courts express a rule but not fully. In still other cases, a court will express a piece of a rule but other opinions are needed to complete the legal thought. Rule synthesis is a process that describes a complete expressed or unexpressed rule from its component parts. Using rule synthesis, lawyers synthesize a rule of law that incorporates the rules of several cases.

Synthesizing a rule requires extrapolating expressed or unexpressed rules from the various cases and constructing a single legal expression that covers the area. Similar to a single unexpressed rule, identifying a synthesized rule requires some measure of intellectual flexibility and creativity. The idea is to build a holistic rule from its component parts or cases. Consider the following cases:

> Case 1: The defendant spray-painted an obscene message on a public sidewalk. Held: The defendant is not guilty of felony mischief. Felony mischief requires a defendant to destroy private not public property.
> Case 2: The defendant destroyed his neighbor's mailbox after his neighbor blocked his driveway. Held: The defendant is guilty of felony mischief.
> Case 3: The defendant accidentally destroyed his neighbor's rose bush when the defendant installed a pool in his backyard. Held: The defendant is not guilty of felony mischief.
> Case 4: The defendant intentionally ran over his mother-in-law's lawn statue, after she refused to loan him money. Held: The defendant is guilty of felony mischief.
> Case 5: After learning that his neighbor flirted with his wife, the defendant threw a rock at his window. It missed. Held: The defendant is not guilty of felony mischief.

> **Case 6:** The defendant had a fight with her roommate. She thought she destroyed her roommate's stereo, but it actually belonged to her. Held: The defendant is not guilty of felony mischief.

Each of these six cases deals with the crime of felony mischief. But, only Case 1 offers expressed rules. Case 1 explains that a defendant must (1) destroy (2) private but not public property. To fully express the crime of felony mischief, we must synthesize the full rule from the remaining cases. In Case 2, the defendant destroyed private property and therefore satisfies the rules expressed in Case 1. But, Case 2 also suggests that the defendant must act with ill will or malice, because the opinion included the fact that the defendant acted after the neighbor blocked his driveway. Case 3 adds credence to our "malice" rule because that court refused to convict a defendant who unintentionally destroyed his neighbor's rosebush. Case 4 appears to corroborate the "malice" rule in Case 2 because that opinion suggests that the defendant destroyed his mother-in-law's statue after she refused to loan him money. Case 5 suggests that a defendant must actually destroy property—a failed attempt is not felony mischief. Finally, Case 6 further refines the unexpressed rule in Case 5 and suggests that a defendant must actually destroy property that belongs to another. By analyzing each separate opinion, we can construct a full rule from both its expressed and unexpressed parts. Taken together, a defendant commits felony mischief when he destroys with malice the private property of another.

Then, to test the rule's credibility, a lawyer would apply the synthesized rule to each of the separate opinions she used to construct the rule as well as to any other case on point. If the synthesized rule works in analogous cases, then it fairly represents the holistic legal thought of the court. Without synthesizing the full legal expression from all the applicable authority, a lawyer would not fully understand the sometimes unexpressed parameters of a legal doctrine—a serious error.

C. Tests

A court will sometimes refer to a legal rule or principle as a "test." A test is an inquiry that determines whether a party has satisfied her burden of proof to support or defend against a cause-of-action or criminal charge. Rules are framed in several different types of tests, including the element test, the balancing test, and the totality of the circumstances test. Some tests include various parts or sub-parts, such as elements or factors. Elements are separate requirements of a test that a party must satisfy to meet her burden of proof. Factors, in contrast, are considerations that guide the court. Every factor need not weigh in favor of a party, so long as some factors do weigh in favor of a party.

1. Element Test

One type of test, the element test, is an inquiry that requires the court to consider several parts or subparts of a rule in order to satisfy the whole. Courts sometimes refer to these parts as elements. A party must satisfy each element to meet her burden of proof. For example, to commit the crime of burglary, the prosecution must prove that a defendant broke and entered a dwelling at night with the intent to commit a felony therein. This element test has four sub-parts or elements. A defendant must (1) break and enter (2) a dwelling (3) at night (4) with the intent to commit a felony therein. A court can only convict the defendant if the prosecution meets its burden on all four parts.

2. Balancing Test

A balancing test is another type of legal inquiry. A balancing test consists of several factors that a court will weigh to reach its conclusion. In a balancing test, a court will balance several considerations, looking at the quality or quantity of evidence supporting each. A very strong showing of one factor may lessen the importance of the other factor(s). Consider the following example:

Suppose a criminal defendant claimed the government violated her right to a speedy trial under the Sixth Amendment of the United States Constitution. When considering this claim, a federal trial court will balance four factors: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of her right to a speedy trial, and (4) the prejudice that the defendant suffers due to the delay. The court must weigh all of these factors to determine the outcome of the case. But a stronger showing on one or more of the factors could outweigh a weaker showing on the other factors.

3. Totality of the Circumstances Test

A totality of the circumstances test is another legal inquiry that courts use to determine the outcome of cases. Unlike an element test or a balancing test that have a set number of sub-parts, a totality of the circumstances test requires the court to consider all of the relevant circumstances of a particular case and not any one circumstance. Unlike the balancing test and the element test, which provide a specific framework for the analysis, the totality of the circumstances test loosely frames the analysis by indicating the scope of the court's consideration.

Consider the following totality of the circumstances test:

A law states that criminal defendants' confessions are admissible only if they are voluntary and not coerced. To determine whether a defendant's confession is voluntary, courts apply a totality of the circumstances test. The court considers the totality of all the circumstances surrounding the confession, not merely one isolated component. For instance, the court may consider circumstances regarding the confession, such as the mental state of the defendant when he confessed, the demeanor of the officers, or whether the defendant was denied food, sleep, or counsel. Thus, the analysis is broadly framed by including all the circumstances surrounding the confession.

Practice Exercises

Complete the following exercises to reinforce your understanding of this chapter.

1. How do attorneys identify rules in cases?
2. How does a rule frame legal analysis?
3. Answer the following questions:
   a. Name one type of legal test.
   b. Explain the test you have identified in part (a).
4. What is the difference between an element and a factor?
5. Identify the rule in the following opinion.

   Naomi owned several acres of land. She prided herself on her beautiful gardens. Periodically, intruders would enter her property and ruin her gardens. Naomi decided to take action in order to protect her property. She built an electrified fence around her land. One night, Ariel attempted to enter Naomi's land. He tried to climb over the electric fence and suffered a severe electric shock. Ariel was hospitalized for his injuries and may die. He is now suing Naomi for battery. This court must decide whether Naomi has a defense to the battery claim.

   Held: Naomi is liable for battery. Naomi did not use reasonable force in this case to protect her property. Ariel's invasion of property did not threaten harm to any person, yet Naomi used excessive force causing serious bodily harm or death. Naomi's use of force to defend her property was inappropriate.
6. Identify the rule of law in the following opinion.

   On his sixteenth birthday, John agreed to sell his bicycle to Ms. Lupo for one hundred dollars. Two weeks later, John decided to keep his bicycle and would not sell it to Ms. Lupo. Ms. Lupo sued. We hold that John did not breach the contract. Children eighteen years or younger cannot be held responsible for any contract they enter into. They are too young to appreciate the magnitude of a contractual promise.
7. Synthesize a rule for trespass from the following cases.

Case 1: The defendant entered the plaintiff's land. The defendant did not know the plaintiff owned the land. Held: The defendant is liable for trespass.
Case 2: The defendant was pushed onto the plaintiff's land. Held: The defendant is not liable for trespass.
Case 3: The plaintiff invited defendant to enter her land. Held: The defendant is not liable for trespass.

8. Synthesize a rule for the crime of conspiracy from the following cases:
   Case 1: The defendant and Todd agreed to commit a crime on the following evening. Held: The defendant entered into a conspiracy.
   Case 2: The defendant agreed to help Shelly commit a crime on the following evening, but the defendant thought Shelly was joking. Held: The defendant did not enter into a conspiracy.
   Case 3: Daniel agreed to help Paul commit a crime on the following evening. Paul was an undercover police officer who never intended to complete the crime. Held: Paul did not enter into a conspiracy.
9. Suppose a law exists that requires courts to consider several factors when determining the amount and duration of alimony. These factors include:
   - the standard of living of the parties during the marriage;
   - earning potential of the spouses;
   - contributions of spouses during marriage;
   - length of marriage;
   - income and assets of each spouse; and
   - age and health of spouses.

   You represent a client in a divorce action who is seeking alimony from her husband. A number of months before the divorce action, she discovered her husband's infidelity. She and her husband have been married for twenty years. Your client is fifty-five years old. Her husband is fifty-three years old and a college-educated accountant. Your client was a homemaker and never worked outside the home. The couple enjoyed a middle-class lifestyle. Your client has a high-school education. You seek to persuade the court to award your client alimony.

Using the law articulated above, how would a lawyer organize and frame an analysis of whether a court will award her client alimony?

10. Consider the following problem:

    Your client has a fatal disease that is highly contagious and was warned about the different ways this disease can be transmitted. One way the disease could be transmitted is when bodily fluids of the infected person mix with bodily fluids of another. The more your client struggled with his illness, the more bitter he became. He felt that he was a good person and it was unfair that he should be struck with a fatal disease. He vowed that he would not die quietly and that somehow he would get revenge. One day, your client was walking down the street. A man pushed your client aside and continued walking. Your client became angry and confronted the man. They began to fight. Your client bit the man's hand. As a result, your client transmitted his fatal disease to the man. The man subsequently died.

    Your client has been charged with murder. Murder is defined as the unlawful killing of a person with malice aforethought. Malice aforethought can be shown by demonstrating: (1) a specific intent to kill, (2) a specific intent to cause grievous bodily injury, or (3) in circumstances known to the defendant, a reasonable person would have known there was a substantial likelihood that death would result. Explain how you would frame the analysis of your client's case.

11. The test used to establish undue influence consists of three elements: (1) the existence of influence, (2) the exertion of influence that resulted in corrupting the mind of the deceased, and (3) the provisions at issue in a will would not have been drafted but for the influence. The plaintiff's brother inherited the bulk of their mother's estate through her will. The plaintiff claims her brother unduly influenced their mother.

    How will the test for undue influence frame your analysis of this legal problem?

Chapter 3

Inductive Analysis and Analogical Reasoning

Objectives

When you finish reading this chapter and complete the exercises, you will be able to

- understand analogical reasoning
- identify critical facts
- understand case synthesis
- understand the structure of an analogical argument
- apply narrow analogies
- apply broad analogies

The unique way a lawyer analyzes legal problems has developed over many years in many courts. While seemingly combative and argumentative, legal argument requires careful analysis of a client's case and the controlling authority. Measured reason, creativity, and dispassionate logic are far more important than courtroom drama or a "smoking gun."

This chapter discusses one form of analysis—inductive analysis or analogical reasoning. Inductive analysis allows a lawyer to induce a conclusion by establishing a legal analogy between the key facts in the controlling cases and the facts in the client's case. Also called reasoning by analogy, inductive analysis focuses on the material facts of the controlling case law. Generally, reasoning by analogy includes two types of analyses: the narrow analogy and the broad analogy. Narrow analogies focus on direct fact comparisons between the controlling authority and the client's case. Broad analogies focus on the common significance of the material facts in a variety of cases and how they compare to the facts in a client's case. The nature of the action, the complexity of the issues involved, the number of controlling cases, and the facts all help to determine which analogical strategy is best suited to a particular case.

A. Analogical Reasoning

Analogical analysis focuses on fact analogies. An analogy is an inference that if two or more facts or characteristics are similar in one respect, then they will be similar in other respects. A legal analogy is an inference that if the determinative facts in the controlling authority are similar to the determinative facts in the client's case, then the holdings or legal conclusions ought to be similar.

Analogy: a logical inference that if two or more things are similar in some respects, they will be similar in other respects.
Legal Analogy: a logical inference that if two or more cases in the same jurisdiction are similar with respect to facts and legal issues, they will be similar with respect to their holdings.

Analogical analysis is grounded in the fundamental principles discussed in chapter 1. Chapter 1 explored precedent and *stare decisis*. Under *stare decisis*, once a court decides how a legal principle ought to be applied to a set of facts in a particular case, that resolution or holding ought to be repeated in subsequent like cases. Hence, a court must look to prior cases when deciding cases before it. A legal analogy contends that if the key facts found in a precedent and the key facts in your case are similar, and the legal issues addressed in both are the same, then the court should rule similarly in both cases or risk violating *stare decisis*. In cases where the facts of a controlling case and your case are not readily comparable or are dissimilar, the analogy contends that the court is not required to adhere to *stare decisis* and need not rule similarly in both cases.

While a court is free to ignore controlling authority and disregard *stare decisis*, a party aggrieved by the court's failure to apply controlling authority could appeal to a higher court to challenge the lower court's ruling. All jurisdictions have a court of appeals charged with correcting errors made by lower courts. An appellate court has jurisdiction to consider whether a lower court failed to apply the correct law in a case before it. If an appellate court decides that the lower court failed to apply the controlling precedent and the appellate court finds no good reason to change the law, then the appellate court could "correct the error" and reverse the lower court's ruling. As such, courts are inclined to follow precedent and will disregard precedent only if they have very good reasons to support the change.

1. The Three Triggers: Jurisdiction—Legal Issue—Facts

In order for a court to honor *stare decisis*, a lawyer must establish three criteria. First, a lawyer must demonstrate that the court is bound to follow a prior decision because the court sits in the same jurisdiction, or line of appeal, as the court that decided the earlier case. A party can proceed up the line of appeal so long as the higher court has jurisdiction to hear the case. As you recall, a court is only bound to follow precedent decided by a court in the line of appeal. Otherwise, the case is not controlling but is merely persuasive. A lawyer demonstrates that a case is controlling when she cites to that authority. A case citation includes information about the court that decided the earlier case. For example, if a lawyer tries a case in an Ohio state trial court, and she cites to an opinion from the Supreme Court of Ohio, *Smith v. Johnson*, 134 N.E.2d 234, 243 (Ohio 1996), she is purporting to establish the *Smith* case as controlling authority on the trial court.

Second, a lawyer must demonstrate that the legal issue decided in the earlier case is the same legal issue raised in the case-at-bar. *Stare decisis* applies only when the legal issue in both the precedent and case-at-bar are identical. If the legal issue decided in the earlier case is similar to but not the same as the issue raised in the case-at-bar, then the prior case is merely persuasive and not controlling. For example, suppose a lawsuit asks a Tennessee trial court to construe the term "part-time employee" in a state unemployment compensation statute. The lawyer cites to a Tennessee Supreme Court opinion that defined the exact term, but in the context of a state income tax statute, not in the context of the state unemployment compensation statute. That case, then, would not trigger *stare decisis* because the legal issue is not the same as the issue raised in the case-at-bar. The case is persuasive but not controlling.

Third, a lawyer must demonstrate that the facts in the case-at-bar are the same or similar to the facts in the controlling authority. Here, the determinative facts in the controlling authority must be legally analogous to the determinative facts in the case-at-bar. Facts are legally analogous if they share a common trait, characteristic, or quality. For example, if a lawyer finds a case in Tennessee that analyzes when a full-time employee qualifies for state unemployment compensation, that case could not be controlling because the determinative facts are different. The determinative fact in the case-at-bar is that the employee was part-time, not full-time. The prior case could serve as valuable persuasive authority, but a Tennessee court is not bound to follow it because the critical facts are not analogous.

2. The Analogical Model

If all three triggers are met, then a lawyer employs an analogy to argue that a prior case is or is not controlling. To establish that a case is controlling, the lawyer argues that the case was decided in the same jurisdiction, raised the same legal issue, and shares the same or similar facts as the case-at-bar. Stated above, an analogy is an inference that if two or more things are similar in one respect, they will be similar in other respects. A legal analogy is an inference that if controlling case law and the case-at-bar share the same or similar facts on the same legal issue and are located in the same jurisdiction, the court hearing the present case ought to hold similarly as the controlling case law. The hearing court ought to hold in the same way as the earlier court or risk violating *stare decisis*. Conversely, a lawyer could argue that a prior case is not controlling because one of the three triggers is absent and thus the court is not bound by *stare decisis.*

Consider the following example. In order to constitute common-law battery, a defendant must unlawfully touch a plaintiff. Suppose the senior partner of your firm asked you to determine whether a defendant committed a battery against your client when the defendant hit your client with his umbrella, causing injury. After a careful review of the applicable case law in your jurisdiction, you discover one case that is "on-point" or dispositive of your legal issue, the *Cane* case. In that case, the court ruled in favor of the plaintiff and held that when the defendant hit the plaintiff with a cane, she "touched" the plaintiff for the purposes of common-law battery. The *Cane* court reasoned that the defendant was liable even though the defendant never touched the plaintiff with her person, but with an instrumentality that was within her control.

The *Cane* case is relevant because that court considered common-law battery, the same issue raised in your case. The court held in favor of the plaintiff, a result you want. In addition, the reasoning of the *Cane* opinion is applicable to your facts. That court reasoned that a cane was an instrumentality within the control of the defendant. The cane satisfied the touching requirement of common-law battery, although the defendant never touched the plaintiff with her person. Your case also involves an instrumentality, and not a direct touching, so the *Cane* opinion is applicable to your case.

Also, the facts of your case lend themselves to a reasonable fact analogy. An analogy is appropriate in this scenario because the reasoning of the precedent is applicable to your issue, and the facts are readily comparable. A cane and an umbrella share meaningful and significant attributes. Both objects are an extension of the bearer's arm and within his direct control. If you can persuade the court that the reasoning of *Cane* is applicable to your case, and the facts in the *Cane* case are similar to the facts in your case, then under *stare decisis,* that court should rule in your favor because the two cases are legally analogous.

Bear in mind that a precedent is a double-edged sword. Both a plaintiff and a defendant can use the same case, employ an analogy, and reach dramatically different conclusions. If the precedent's holding is favorable to a client's legal position, then the lawyer aims to draw a positive analogy between the facts in the precedent and the facts in the case-at-bar. Conversely, if the holding harms a client's position, then the lawyer attempts to draw a distinction between the facts in the precedent and the facts in the case-at-bar. Both sides try to persuade the court that their position is more persuasive and better supported by the case law. The lawyer who presents the more significant comparison likely prevails. For example, the defendant could use the *Cane* case to argue that an umbrella and a cane are not similar enough to trigger *stare decisis*. The defendant could argue that because the facts are not analogous, the court is not bound to apply *stare decisis*.

Legal analogies are useful when the facts of the controlling authority, or the significance of those facts, are comparable to the case-at-bar. A lawyer makes these determinations on a case-by-case basis. Successful analogies, however, depend on two fundamental skills: (1) accurately identifying the critical facts of the controlling authority and the case-at-bar; and (2) correctly synthesizing the facts of the cases.

3. Critical Facts

Critical facts are facts from the controlling precedent that a court found important when it resolved a legal dispute. Generally, most trials involve the application of law to a set of facts, and courts apply the law only to the particular facts before it. A dispute is resolved when the court determines that a particular result is required under the law and facts of the case. A lawyer must carefully read cases to identify the facts that the court needed to reach its final determination of the matter. Those determinative facts or some characteristic of those facts can be used to draw a legal analogy between the controlling case law and a client's case.

To identify critical facts, a lawyer examines the reasoning of the controlling cases. The reasoning explains the legal basis of the court's decision. In most instances, a lawyer cannot correctly identify the key facts without first understanding how the facts relate to the ultimate disposition of the case. The reasoning of the case determines which facts are significant and important. Some facts in the precedent, although seemingly important to the deciding court, may not be critical facts if they are not germane to the court's reasoning.

Consider the following facts:

Daughter Mother Aunt

Suppose a prior court considered whether the words daughter and mother belonged in the same category and held that both words did fit in the same category. But what was the court's reasoning? Did the court classify the words together because of the number of syllables in each word, or perhaps because the words represent the same gender, or because of some other consideration?

Another court subsequently was asked to determine whether the word aunt belonged in the same category as mother and daughter. If the prior court based its reasoning on the number of syllables in a word, then the word aunt would not belong in the category. Based on the reasoning of the prior court, the critical fact in this scenario could be that a word is multi-syllabic. Unlike the words daughter and mother, which consist of two syllables, aunt consists of only one syllable and would not belong in the same category.

If the prior court, however, reasoned that only words that represent the same gender belong in the category, then the word aunt would belong. The word aunt would be consistent with the court's reasoning. Based on this reasoning, the critical fact in this scenario is that the words represent the female gender. Like the words daughter and mother, which represent females, the word aunt also represents females and belongs in the category.

The example above illustrates the importance of identifying the court's reasoning in order to identify the critical facts. Although the words mother, daughter, and aunt could be categorized in at least two ways, by the number of syllables or by gender, you cannot identify the critical facts without first understanding the reasoning of the court. The court's reasoning determines which facts in a case are critical or determinative.

Lawyers sometimes attempt to draw analogies to any similar fact shared by both the precedent and the case-at-bar. But *stare decisis* will apply only when a prior case is legally analogous to the case-at-bar. A case is legally analogous only when the critical facts or some characteristic of the critical facts are similar. Drawing a fact comparison using a non-critical fact by pointing to a random fact similarity is not a persuasive analogy. Consider the following arguments derived from the *Cane* case previously discussed in this chapter:

> **Argument 1:** Like the defendant in *Cane*, who carried liability insurance, the defendant in the present case also carried liability insurance.
> **Argument 2:** Like the defendant in *Cane*, who touched the plaintiff with her cane, the defendant in the present case touched the plaintiff with his umbrella.

The first argument is unpersuasive because it compares a non-critical fact. Whether the defendant in *Cane* carried liability insurance had no bearing on the ultimate disposition of the case regarding whether the defendant committed a battery. The second argument is persuasive because it does compare the critical facts of the controlling authority to the critical facts in the case-at-bar.

Some lawyers may be tempted to compare the holding or conclusion of a case instead of comparing the critical facts. This analysis is illogical. A legal analogy compares the facts of a decided case to the facts of your case. *stare decisis* is triggered when the facts are legally analogous. Hence, an argument should not compare conclusions or holdings; instead, it should compare facts that compel a holding.

Consider the following arguments derived from the *Cane* case:

> **Argument 1:** The Court will likely hold that the defendant is liable because like the defendant in *Cane*, who was liable when she touched the plaintiff with her cane, the defendant in the present case touched the plaintiff with his umbrella.
> **Argument 2:** The Court will likely hold in favor of the plaintiff because like the defendant in *Cane* who was li-

> able to the plaintiff, the defendant in the present case is also liable to the plaintiff.

The second argument is unpersuasive. Instead of comparing critical facts, it merely requests a particular result. The lawyer is merely asking the court to find in favor of the plaintiff because some other case also found in favor of a plaintiff. The lawyer is not demonstrating any reason why the court is required, under *stare decisis*, to follow the precedent.

The first argument is persuasive. Here, the lawyer identified the critical fact and compared it to the facts of her case. The lawyer is arguing that the *Cane* holding must apply because the key facts, a cane and an umbrella, are legally analogous. Therefore, under *stare decisis*, the court should find that the defendant is liable to the plaintiff.

Unlike the *Cane* example, cases rarely turn on one critical fact derived from one case. Comprehensive analysis requires an examination of all the critical facts in a case. Courts usually weigh a variety of sometimes disparate facts when reaching a decision. Some controlling authority may include both favorable facts and unfavorable facts. In these situations, the court may conclude that one fact or a group of facts outweighs others. Careful and repeated readings of the cases help a lawyer differentiate highly determinative facts from less determinative facts in each case.

Moreover, the *Cane* example analyzed only one case. Comprehensive legal analysis, however, rarely relies on one precedent. Often a lawyer analyzes a number of cases, analogizing to some while distinguishing others. One technique that allows a lawyer to analyze several cases at once is called case synthesis. Case synthesis permits a lawyer to incorporate an entire body of law into a concise and comprehensive analysis.

4. Case Synthesis

Case synthesis is related to rule synthesis previously discussed in chapter 2. Both skills require an examination of the body of case law that addresses a particular issue. Rule synthesis blends several cases to form one holistic rule. Case synthesis blends several cases to identify a common factual denominator among the controlling authority that can serve as the basis of an analogy.

For many legal issues, a lawyer finds numerous opinions that are on-point or dispositive of a legal issue. While the number of cases may seem overwhelming, case synthesis is an effective tool that allows a lawyer to integrate a large body of case law into one holistic analysis. To perform case synthesis, a lawyer carefully reads the applicable opinions that are needed to resolve a legal issue. The lawyer needs to understand the critical facts, holdings, reasons, and any rules articulated in the authority. Next, the lawyer studies the critical facts to identify a common denominator or thread among the various opinions that incorporates the holdings and reasons of the various precedents. Finally, the lawyer builds a legal analogy around that common factual thread. When done properly, case synthesis allows an attorney to organize the analysis around a common factual denominator derived from the precedents, instead of organizing the analysis around individual cases.

Case synthesis requires lawyers to extrapolate the common significance among the critical facts of several cases. The idea is to study the facts until some commonality is identified. This commonality should be a characteristic that is shared by the critical facts in the analogous cases. The commonality must be germane to the reasons and holdings of the precedents. The common denominator must be legally significant and focus on the key factual quality that the cases deemed important.

To discover the common factual denominator, a lawyer analyzes the facts to find the first level of similarity between the critical facts in the controlling cases and the case-at-bar. Next, she lists the characteristics of the critical facts, abstracting from the specific to the general. Each abstraction should eliminate a specific trait without losing the legal significance of the original fact. Consider the following example:

As you recall, the senior partner of your firm asked you to determine whether a defendant committed a battery against your client when the defendant hit your client with his umbrella, causing injury. Your research revealed the following opinions:

> Case 1: The defendant is liable for a common-law battery. In this case, the defendant hit the plaintiff with his wooden cane. When the defendant hit the plaintiff with a cane, she "touched" the plaintiff for the purposes of a common-law battery. The defendant is liable even though the defendant never touched the plaintiff with her person, but rather with an instrumentality that was within her control.
> Case 2: The defendant is not liable for a common-law battery. Here, the plaintiff tripped over the defendant's briefcase that the defendant had placed next to him on the floor in a busy restaurant. The plaintiff suffered a broken arm due to the fall. The defendant is not liable because no part of the defendant's person was involved in the incident.
> Case 3: The defendant is liable for a common-law battery. In this case, the defendant threw a stone at the plaintiff, causing injury. The defendant is liable because the stone was under the defendant's control when he threw it toward the plaintiff.

To synthesize these cases, identify the common factual denominator in the cases. The common denominator must relate to the holdings and reasons in the authority. In the above example, study the critical facts, the reasons supporting the holdings, and the holdings to identify the common denominator.

Critical Facts

Case 1: Cane→ Under control of the defendant→ Liability
Case 2: Briefcase→ Not under control of the defendant→ No liability
Case 3: Stone→ Under control of defendant→ Liability

Identify the common thread among these dissimilar critical facts that relate to the reasons and holdings of the opinions. Extrapolate the critical facts in the cases. Eliminate a specific characteristic or trait until you reach a general characteristic that is shared by the critical facts in all the cases without losing the legal significance of the facts.

Case 1	Case 2	Case 3
Held Object	Placed Object	Thrown Object
Held Instrument	Placed Instrument	Thrown Instrument
Within Control	Without Control	Within Control
↓	↓	↓
↓	↓	↓
↓	↓	↓

Objects or instrumentalities within the control of the defendant

In the example above, some measure of intellectual flexibility and creativity is required to discover the common factual thread between the objects. The commonality between Cases 1, 2, and 3 could be that a person commits a common-law battery if he unlawfully touches a plaintiff with an instrumentality under his control. This fact, then, can become the basis of a legal analogy.

Using case synthesis, you would employ a legal analogy that compares the common factual significance of the critical facts in the controlling cases to the critical fact in the case-at-bar. You would likely argue that like those cases where the defendants committed a battery when they touched another with instruments under their control, the defendant in the present case hit the plaintiff with his umbrella, an instrument under his control.

Both case synthesis and rule synthesis purport to blend the facts, reasons, and holdings of a variety of cases into one holistic legal thought. Rule synthesis blends relevant cases to develop a holistic rule of law that incorporates the facts, reasons, and holdings of the applicable cases. Case synthesis combines the facts of several cases to identify a common factual thread that relates to the reasons and holdings of the cases. Because the underlying mechanics of case synthesis and rule synthesis are similar, a properly identified common factual denominator often can be expressed as a synthesized rule. For example, in the hypothetical situation above, a lawyer could express the common factual denominator as a synthesized rule of law: a defendant who injures another with an instrumentality under his control commits a common-law battery.

B. Analogical Strategies

An analogy is a legal argument that infers a legal conclusion based on a comparison of facts between the controlling authorities and the case-at-bar. This section focuses on two analogical strategies: the narrow analogy and the broad analogy. A narrow analogy focuses on direct fact comparisons between a precedent and the case-at-bar, while broad analogies compare facts from the case-at-bar to a synthesized common factual denominator derived from the controlling cases.

1. Narrow Analogy

One analytical strategy, the narrow analogy, compares the facts in your case directly to the facts of a controlling case. Utilizing a narrow analogy, a lawyer seeks to persuade a court to reach a particular holding because the controlling case law has substantially similar facts to the facts present in the case-at-bar. After the similarity is identified and the reasoning of the precedent is applied to the facts of your case, the argument concludes that the court should reach the same holding as the prior case or risk violating *stare decisis*. The lawyer constructs a logical paradigm that suggests if the case-at-bar and the controlling case raise the same legal issues and share the same or substantially similar facts, then the hearing court ought to reach the same holding as the prior case.

Alternatively, a lawyer also uses narrow analogies to distinguish the facts of the case-at-bar from the precedent. Here, the lawyer argues that the key facts of the precedent are distinguishable from the case-at-bar. This argument implies that the court is not obliged to follow *stare decisis* because the facts are not analogous, thus the precedent should have no bearing on the outcome of the case. Whether drawing distinctions or similarities, narrow analogies examine the critical facts of the controlling case law and compare those facts with the facts of the case-at-bar.

When constructing an argument, the objective is to persuade a court that the controlling authority is either analogous to the case-at-bar or that the controlling authority is factually dissimilar to the case-at-bar. A properly structured argument ought to fully prove the legal analogy. That argument typically requires four component parts: (1) the point of the analysis; (2) the direct or narrow fact comparison, (3) the application of the court's reasoning, and (4) a conclusion.

The Four-Part Argument: Narrow Analogy

Step One:	State the point of the analysis
Step Two:	State the narrow fact comparison
Step Three:	Apply the court's reasoning to your case
Step Four:	Conclude

a. Part One—State the Point of the Analysis

The first step in formulating an argument is to state the point of the argument. The point sentence of the argument is similar to stating the topic sentence of a paragraph. The point sentence introduces the reader to the topic or point of the analysis. The sentence may also describe the general reasons that support the argument's conclusion. Consider the following examples of point sentences derived from the *Cane* example:

> **Argument 1:** The defendant did commit a common-law battery because he harmed the plaintiff with an instrumentality under his control.
>
> **Argument 2:** The plaintiff will prevail.

Argument 2 is not a point sentence; it merely predicts the outcome of a case. The sentence did not introduce the topic of the analysis or identify the general reasons that support the argument. The first argument, however, is a point sentence. It identified the point of the argument—the defendant committed a common-law battery—and the general premise of the analysis—because he harmed the plaintiff with an instrumentality under his control.

Most legal writing is deductive in nature. A lawyer begins a written argument by first stating the point or conclusion followed by the particulars necessary to support that conclusion. The point statement offers a reference point or context through which the reader can fully understand the rest of the analysis. An argument without a point statement weakens the persuasive impact of the argument.

b. Part Two—State the Narrow Fact Comparison

The second step in formulating an argument is to state the direct fact comparison. Here, a lawyer builds the analogy by describing how the critical facts in the case-at-bar compare to the critical facts in the controlling precedent. The fact comparison should be clear, precise, and significant. The goal is to select a fact or facts that bear on the ultimate disposition of the case. Selected facts should directly relate to the reasoning of the court. When stating the narrow fact comparison, point to specific facts rather than loose generalizations or tenuous characterizations.

Consider the following arguments derived from the *Cane* example:

> **Argument 1:** The defendant did commit a common-law battery because he harmed the plaintiff with an instrumentality under his control. Like the defendant in *Cane*, who was liable when he harmed the plaintiff, the defendant in the present case also harmed the plaintiff.
>
> **Argument 2:** The defendant did commit a common-law battery because he harmed the plaintiff with an instrumentality under his control. Like the defendant in *Cane*, who was liable when he hit the plaintiff with his cane, the defendant in the present case hit the plaintiff with his umbrella.

The first argument is unpersuasive because the fact comparison is unclear, imprecise, and not related to the reasoning of the precedent. The *Cane* case considered whether the defendant harmed another with an instrumentality within his control. Merely arguing that both defendants harmed the respective plaintiffs, without specifying how, will not convince the court to follow the prior decision. The analogy should instead focus on the instrumentality of harm, rather than the harm itself.

The second argument is persuasive. It compares instrumentalities within the control of the respective defendants. It likens a cane to an umbrella. It compares the critical fact of the case-at-bar to the critical fact in the controlling case. The lawyer is building a legal analogy by showing how the cases share key attributes.

c. *Part Three—Apply the Court's Reasoning*

The third step in a narrow analogy explains the reasoning of the precedent and why the fact comparison is significant. Merely pointing to a fact similarity or distinction by itself is inadequate. To sufficiently argue a point of law, a lawyer must not only persuade the court that the facts are analogous, but also why that fact comparison is important to the court. The lawyer must show how the fact comparison connects to the prior court's reasoning.

The reasoning used to support an argument can be either explicitly or implicitly stated in an opinion. In some cases, a court will expressly state the reasons that support its holding. In other cases, however, lawyers must infer the reasoning that supports a court's holding. To make sure a lawyer's inference is credible or plausible the lawyer must test it back on previous cases to see if it is consistent with the rationale of those controlling cases.

Remember that a precedent is a double-edged sword. It can be used either to draw an analogy or a distinction depending on the lawyer's legal position. The distinction or analogy unfolds when lawyers demonstrate how the fact comparison relates to the reasoning of the precedent.

Consider the following arguments derived from the *Cane* example:

> **Argument 1:** The defendant did commit a common-law battery because he harmed the plaintiff with an instrumentality under his control. Like the defendant in *Cane*, who was liable when he hit the plaintiff with his cane, the defendant in the present case hit the plaintiff with his umbrella. The court will follow the reasoning of the *Cane* court, that an instrumentality within the direct control of a defendant can form the basis of common-law battery if

> that instrumentality is an extension of the bearer's arm. An umbrella, like a cane, is also an extension of the bearer's arm and within his direct control.
>
> **Argument 2:** The defendant did not commit a common-law battery because he did not harm the plaintiff with an instrumentality under his control. Unlike the defendant in *Cane*, who was liable when he hit the plaintiff with an object under his control—his cane, the defendant in the present case did hit the plaintiff but with an object not under his direct control—an umbrella. The court will follow the reasoning of the *Cane* court, that an instrumentality within the direct control of a defendant can form the basis of common-law battery if that instrumentality is an extension of the bearer's arm. While a cane is within the direct control of the bearer and is an extension of the bearer's arm, an umbrella is neither. An umbrella is susceptible to the forces of rain and wind and is not a direct extension of the bearer's arm.

This example illustrates how to use the court's reasoning to support a legal analogy. It also demonstrates how the same case can be used to support either party's legal position. A cane and an umbrella have both similar and different properties and characteristics. The similarities and differences, however, must relate to the reasoning of the precedent. In Argument 1, the lawyer argues that the precedent, the *Cane* case, ought to apply to the case-at-bar because the facts are analogous. In Argument 2, however, the lawyer argues that the *Cane* case does not apply because the facts are not similar enough. The lawyer who presents the more significant fact comparison that most closely connects to the reasoning and facts of the prior case should prevail.

d. Step Four—Conclude

The fourth and final step of a narrow analogy completes the argument. The conclusion typically reminds the reader of the outcome of the issue or the general demand for relief. The logical progression of the argument culminates with a conclusion.

Review both the plaintiff's and the defendant's argument in their entirety:

> **Argument 1:** The defendant did commit a common-law battery because he harmed the plaintiff with an instrumentality under his control. Like the defendant in *Cane*, who was liable when he hit the plaintiff with his cane, the defendant in the present case hit the plaintiff with his umbrella. The court will follow the reasoning of the *Cane* court that an instrumentality within the direct control of a defendant can form the basis of common-law battery if that instrumentality is an extension of the bearer's arm. An umbrella, like a cane, is also an extension of the bearer's arm and within his direct control. The court will hold that the defendant is liable for a common-law battery.

> **Argument 2:** The defendant did not commit a common-law battery because he did not harm the plaintiff with an instrumentality under his control. Unlike the defendant in *Cane*, who was liable when he hit the plaintiff with an object under his control—his cane, the defendant in the present case did hit the plaintiff but with an object not under this direct control—an umbrella. The court will follow the reasoning of the *Cane* court that an instrumentality within the direct control of a defendant can form the basis of common-law battery if that instrumentality is an extension of the bearer's arm. While a cane is within the direct control of the bearer and is an extension of the bearer's arm, an umbrella is neither. An umbrella is susceptible to the forces of rain and wind and is not a direct extension of the bearer's arm. The court will hold that the defendant is not liable for a common-law battery.

The *Cane* case involved only one issue, one case, and the application of only one critical fact. Legal analysis, however, rarely relies on one argument derived from one precedent. Typically, lawyers make arguments from a number of cases, analogizing to some while distinguishing others. Narrow analogies focus on direct fact comparisons between a precedent and the case-at-bar. The analogy is supported by the proposition that courts are bound to follow decisions that have already decided the same legal issue under the same or similar facts. Some cases, however, are not amenable to a narrow analogy. These cases might require a broader analytical strategy.

2. Broad Analogy

Although narrow analogies are effective in many cases, a broader analogical strategy may be necessary to fully analyze a legal issue. Narrow analogies examine specific critical facts in a controlling case that are closely parallel to the facts in the case-at-bar. This analytical approach requires attorneys to draw narrow comparisons focused on material facts. In contrast, a broad analogy draws general comparisons between cases that relate to but are not necessarily parallel to the critical facts. The crux of the broad analogy is not the critical fact itself, but rather a common denominator derived from the critical facts in the controlling authorities. As previously discussed, case synthesis is the process that identifies the common denominator among various precedents. Broad analogies require some measure of intellectual flexibility in order to devise persuasive arguments that incorporate less obvious comparisons.

Broad analogies are appropriate in at least two situations. First, broad analogies are appropriate when the case-at-bar raises unique or unusual facts. These cases may not have the factual characteristics necessary for a narrow analogy because facts of the cases may not be amenable to a direct fact comparison. Second, broad analogies are appropriate when the analysis requires the integration of a large body of case law. A broad analogy allows a lawyer to compare his case to the body of authority and not just a single precedent. As such, a broader analytical approach is more comprehensive and less repetitive than a more narrow approach.

Like narrow analogies, broad analogies also require a close examination of the courts' reasoning. Merely identifying some characteristic common to a critical fact in both the controlling cases and the case-at-bar is not persuasive. The comparison must relate to the underlying reasons of the controlling cases.

The broad analogy compares the common characteristic of the facts in the controlling cases to the facts in the case-at-bar the same way the narrow analogy compares the specific critical facts in a single case to the case-at-bar. The structure of both narrow and broad analogies is similar: (1) state the point of the analysis; (2) state the broad comparison, (3) apply the court's reasoning, and (4) conclude. These steps are identical to the four-part argument used for the narrow analogy, except part two focuses on a broad, as opposed to a narrow, comparison.

The Four-Step Argument: Broad Analogy

Step One:	State the point of the analysis
Step Two:	State the broad comparison
Step Three:	Apply the courts' reasoning to your case
Step Four:	Conclude

Consider the following example:

> Your client, the plaintiff, dug a well on the defendant's property. The plaintiff claims he owns the land through adverse possession. In this jurisdiction, adverse possession is a legal doctrine that awards ownership of property to a possessor who openly, actually, exclusively, adversely, notoriously, and continuously possesses the land of another for twenty years. The only issue in your case is whether your client can establish that he actually used the property—one element of an adverse possession.

You find the following opinions:

> **Case 1:** The plaintiff has not shown adverse possession of the defendant's property because she failed to satisfy the actual use element. Adverse possessors must demonstrate actual use of the property in order to establish ownership through adverse possession. Actual use is demon-

> strated by acts of dominion and control by the adverse possessor. Here, the plaintiff placed a picnic table and shade umbrella on the defendant's property. This use did not establish dominion and control because the objects could be easily removed from the property.
>
> Case 2: The plaintiff has demonstrated ownership of the property through adverse possession. Adverse possession is established when an adverse possessor demonstrates dominion and control over the contested property. The plaintiff built a three-story brick house on an unused portion of defendant's property. This structure did show dominion and control over defendant's property.
>
> Case 3: The plaintiff has established adverse possession. The adverse possessor must show actual use of the adversely possessed property. Actual use is best shown by evidence of dominion and control over the property. The plaintiff built an in-ground swimming pool on the locus and placed numerous beach chairs around the perimeter of the pool. While the beach chairs are not evidence of dominion and control, the in-ground pool is evidence of dominion and control.

To analyze whether the plaintiff in your case satisfies the actual use element of adverse possession, identify the critical facts in the controlling authorities. In Case 1, the critical facts include a picnic table and shade umbrella. In Case 2, the critical fact is a three-story brick house. In Case 3, the critical facts are an in-ground swimming pool and lounge chairs.

Next, identify the holdings and reasoning of the authorities. The court held that the plaintiffs in Cases 2 and 3 satisfied the actual use element of adverse possession because a house and an in-ground swimming pool demonstrated dominion and control over another's property. The plaintiff in Case 1 failed to show actual use because a picnic table and shade umbrella did not establish dominion and control of the property.

Third, identify the common factual denominator between all the critical facts of the controlling authority. That commonality must relate to the holdings and reasoning of the controlling cases. As you recall, a lawyer discerns the commonality by extrapolating the common denominator among the critical facts, paying close attention to the significance the courts gave to those facts. Under the cases described above, a brick house and an in-ground swimming pool demonstrated dominion and control of the property. On the other hand, a picnic table, a shade umbrella, and lounge chairs did not exhibit dominion and control of the property. What is the common characteristic shared among these disparate facts? An in-ground swimming pool, and, by analogy, a brick house, demonstrated dominion and control because they are not easily removable from the locus. They are not easily removable because they are permanent improvements or changes to property. A shade umbrella, lounge chairs, and a picnic table did not demonstrate dominion and control because they are easily removable from the locus. They are easily removable from the locus because they are not permanent improvements to property. The common factual denominator—the basis of a broad analogy—is the permanent character of improvements made to another's property.

Using the four-part argument described above, consider the following argument:

> *The plaintiff showed actual use because he made a fixed improvement to the property. Like the plaintiffs in the controlling case, the plaintiff in the present case demonstrated the actual use of another's real property when he dug a well on the defendant's property, which is a permanent improvement on the defendant's land. The plaintiff has shown actual use of the defendant's property because the plaintiff's well is a permanent improvement that is not easily removable from the locus. As such, the Court will rule that the plaintiff has satisfied actual use, an element of adverse possession.*

Even though a well, a swimming pool, lounge chairs, a picnic table, a brick house, and a shade umbrella are not readily comparable facts, finding a common characteristic that is consistent with the court's reasoning can be used to devise effective legal arguments. In this example, a permanent improvement to property was the common characteristic shared by all the critical facts. A well, swimming pool, and a brick house are all permanent improvements to property. This characteristic also comports with the reasoning articulated by the court. The court ruled that dominion and control demonstrates actual use, one element of adverse possession. The court reasoned that improvements that are easily removable from the property do not satisfy actual use. Permanent improvements are, by definition, not easily removable and, thus, could satisfy the actual use requirement.

Narrow analogies and broad analogies are similar analytical strategies. Both use the court's reasoning and compare facts. The difference is the specificity of the facts compared. A narrow analogy compares closely parallel facts, while a broad analogy compares more general common characteristics. Deciding which strategy to use depends on the controlling cases, the specific issues raised, and the facts in your case.

Understanding narrow and broad analogies is an important step in developing the skills necessary to become an effective advocate. These strategies are not mutually exclusive. In fact, lawyers often incorporate variations of both narrow and broad analogies in a single argument.

Practice Exercises

Complete the following exercises to reinforce your understanding of this chapter.

1. Define critical facts.
2. How do lawyers identify critical facts in a case?
3. How can both a plaintiff and a defendant use the same precedent to support their arguments?
4. When is it appropriate to use narrow analogies?
5. When is it appropriate to use broad analogies?
6. Why is it important to compare a precedent to your client's case?
7. Consider the following opinion:

   The defendant and his roommate got into an argument. The defendant then lit a cigarette and used it to burn his roommate's arm by holding him down and thrusting the cigarette into his arm eight times. Held: The defendant is guilty of assault and battery with a dangerous weapon.

   An assault and battery with a dangerous weapon is a criminal battery inflicted with an inherently dangerous weapon, or an object used as a weapon in a dangerous or potentially dangerous way. Some inherently dangerous objects, such as a gun or knife, designed to inflict serious bodily harm or death, are inherently dangerous weapons. Other objects may still be considered dangerous if they are used in a dangerous or potentially dangerous manner. Considering the manner that the lighted cigarette was handled and controlled by the defendant, and the violent circumstances of the assault, we hold that the lighted cigarette was used as a dangerous weapon. Therefore, the defendant is liable for assault and battery with a dangerous weapon.

   a. What are the critical facts of the opinion?
   b. What is the reasoning of the court?
   c. What is the holding of the court?

   Your client is charged with assault and battery with a dangerous weapon. Your client was looking for a parking *space in front of a store. She saw an empty parking space, and signaled with her directional to indicate that she was intending to pull into the space. Just before your client pulled into the space, another driver cut in front of your client with her car, and drove into the parking space. Your client then got out of her car and began to argue with the other driver. A scuffle ensued. Your client poked the other driver's eyes with her car keys.*

d. Draft the defendant's argument analyzing whether the court should hold that car keys are not a dangerous weapon.

e. Draft the prosecutor's argument analyzing whether the court should hold that car keys are a dangerous weapon.

8. Consider the following:

Your client was charged with arson. You find one precedent on point. That court articulated a four-part test for arson. That test requires: 1) the intentional or reckless disregard of an apparent risk, 2) burning, 3) of a dwelling, 4) of another. The only element at issue was whether the element of burning was satisfied. The facts of the precedent revealed that a defendant started a fire that caused the charring of two walls in a building. The court held that charring was sufficient to satisfy the burning element. The court reasoned that some damage to the structure caused by fire is required. The court noted that substantial damage or destruction of the structure is not required to commit arson.

In your client's case, the only issue is whether the burning element is satisfied. Your client threw a match into a wastepaper basket. The basket smoldered. Even though smoke blackened the walls in the building, the walls were not charred. The heat from the fire activated the fire sprinklers, which doused the fire.

a. Draft an argument analyzing why the burning element of arson is not satisfied.

b. Draft an argument analyzing why the burning element of arson is satisfied.

9. Consider the following:

   You are prosecuting a defendant for receiving stolen property. Your research reveals that the elements of receiving stolen property are: (1) possession and control, (2) of stolen property, (3) known to be stolen, (4) by another, (5) with intent to permanently deprive the owner of the property. Your research uncovers a precedent concluding that even though the defendant did not actually possess the stolen property, the defendant still possessed stolen property when he instructed another to place it in a location that the defendant selected.

   In your case, the defendant is charged with receiving stolen property. The defendant used a telephone to fence stolen property. Fencing is when one arranges the sale of stolen property to another. The defendant never physically possessed the property. The only issue in your case is whether the defendant possessed the property.

   a. Draft the prosecutor's argument analyzing why the possession element is satisfied.
   b. Draft the defendant's argument analyzing why the possession element is not satisfied.

10. Consider the following opinion:

    Presenting the defendant with a diamond ring, the plaintiff asked the defendant to marry him. She agreed. The defendant later broke the engagement. We hold that the plaintiff can reclaim the engagement ring. The plaintiff should recover because the defendant broke the engagement.

    a. What are the critical facts of the opinion?
    b. What is the reasoning of the court?
    c. What is the holding of the court?

    Your client, the plaintiff, was engaged to be married to the defendant. The defendant later broke the engagement with your client. The plaintiff wants to recover the diamond stud earrings that he bought the defendant a month before their intended wedding. He bought her the earrings to wear on her wedding day.

    d. Draft the plaintiff's argument.

e. Can you predict how a defense attorney will distinguish the precedent? Draft the defense attorney's argument.

11. Consider the following opinion:

The defendant was charged with involuntary manslaughter. The defendant found a revolver in an alley and brought it to work to show his friends. He did not check to see if the revolver was loaded. In jest, he pointed the revolver at a co-worker and pulled the trigger. The gun fired and killed his co-worker. The defendant is guilty of involuntary manslaughter. We reason that the defendant is guilty because a death resulted from the defendant's wanton and reckless conduct. A reasonable person standing in the shoes of the defendant would recognize the risk to human life.

a. What are the critical facts of the opinion?
b. What is the reasoning of the court?
c. What is the holding of the opinion?

Your client, a building manager, has been charged with involuntary manslaughter. A number of weeks ago, she locked the fire exit in the building she manages, hoping to prevent a rash of burglaries in the building. That night, a fire broke out in the building. Many residents were unable to escape because of the locked fire exit. One resident died of smoke inhalation.

d. Which strategy, narrow or broad analogy, would be most effective here?
e. Draft your client's legal argument.

12. Case Synthesis Exercise

You are an Assistant District Attorney. The defendant is charged with receiving stolen property. She is challenging the police's search and seizure of a handwritten note she posted on the front door of her apartment. The note advertised the sale of a car and listed the defendant's name and phone number. The defendant knew the car was stolen. The police seized the note in order to prove that the defendant possessed the stolen car, an element of the offense. The defendant claims that the police violated her Fourth Amendment right against unreasonable searches and seizures.

Your research revealed the following opinions:

Case A: The defendant cannot challenge the government's seizure of garbage that he discarded for collection. Under the Fourth Amendment, the defendant had no reasonable expectation of privacy with respect to the garbage. To challenge a search and seizure under the Fourth Amendment, a defendant must have a reasonable expectation of privacy concerning the place searched or the object seized.

Case B: Police dogs smelled the defendant's luggage in an airport and found drugs. The smell of the defendant's luggage in the public airport, however, did not violate his Fourth Amendment right. The defendant did not have a reasonable expectation of privacy concerning the smell of his luggage, because anyone in the airport could have smelled it.

In the above example, synthesize the critical facts to identify the common denominator.