

**PERSUADING WITH PRECEDENT:
UNDERSTANDING AND IMPROVING ANALOGIES
IN LEGAL ARGUMENT**

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I. INTRODUCTION

When writing persuasive briefs, attorneys use comparisons—metaphors or case-based analogies—to help explain their analyses and support their positions.¹ Cognitive science shows that readers process information both by metaphor and by analogy in much the same way.² But attorneys use the two types of comparisons for very different purposes.³ Metaphors occasionally can be helpful in certain briefs, but case-based analogies are critical in most briefs⁴ because of the American legal system’s reliance on precedent and *stare decisis*.⁵

Several legal scholars have explored how attorneys use metaphors in their legal writing.⁶ Although the existing scholarship on legal metaphors is

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¹ GEORGETOWN UNIV. WRITING CTR., WHAT DO YOU MEAN “THERE’S MORE THAN ONE WAY TO DO IT”? SELECTING METHODS OF LEGAL ANALYSIS THAT WORK BEST 1 (2004), <https://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/legalanalysismethods.pdf>.

² See MICHAEL R. SMITH, ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING 199 (2d ed. 2008) (quoting EDWARD P.J. CORBETT & ROBERT J. CONNORS, CLASSICAL RHETORIC FOR THE MODERN STUDENT 396 (4th ed. 1999)).

³ See *id.* at 206–18; Dan Hunter, *Teaching and Using Analogy in Law*, 2 J. ASS’N LEGAL WRITING DIRECTORS 151, 155 (2004).

⁴ See Hunter, *supra* note 3, at 152–53.

⁵ *Stare decisis* is defined as “[t]he doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation.” *Stare Decisis*, BLACK’S LAW DICTIONARY (10th ed. 2014). See Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 572 (1987) (“Reliance on precedent is part of life in general.”).

⁶ In fact, Professor Michael R. Smith began a 2007 article by stating, “The role of metaphor in the law has been a hot topic among legal scholars in recent years.” Michael R. Smith, *Levels of Metaphor in Persuasive Legal Writing*, 58 MERCER L. REV. 919, 919 (2007).

excellent, it is not sufficient to properly understand how to best draft case-based analogies. Unfortunately, legal analogies have been surprisingly understudied despite their critical role in persuasive legal briefs. Not surprisingly, many attorneys are unaware of how far short their analogies fall from reaching their persuasive potential.⁷

Cass Sunstein explored the role analogies play in legal reasoning.⁸ He focused on the role of analogies in shaping the law and developing legal principles, and he compared analogical reasoning to other forms of reasoning, such as economic analysis of law.⁹ He did not examine analogies from a cognitive science perspective, nor did he examine practicing attorneys' use of analogies in brief writing.¹⁰

A decade later, professor of legal studies Dan Hunter and professor of psychology Barbara Spellman each examined legal analogies in their respective articles.¹¹ Professor Hunter's and Professor Spellman's articles considered analogies in terms of cognitive science and what may make one analogy more effective than another.¹² These articles reached some interesting conclusions and are an excellent starting point to advance this topic. However, it has now been over a decade since those articles were published, and in-depth examination of legal analogies, especially based on substantive and doctrinal underpinnings, have not been continued. This Article seeks to change that, to restart the conversation, and to advance the analysis in more depth, especially focusing on applying the information learned in other disciplines to legal writing in practical and concrete ways.

Although legal scholars have not sufficiently studied analogies in persuasive briefs, scientists have extensively studied analogies in non-legal contexts.¹³ This Article explores what studies in other disciplines can teach legal minds about how judges and attorneys process analogies, connecting existing science in concrete ways to the legal context of brief writing. Part II provides cognitive scientists' descriptions of how people learn through analogies. Learning about these concepts allows attorneys to understand

⁷ See David L. Lee, *Analogizing Your Case to a Precedent*, L. OFFS. DAVID L. LEE (2016), <http://www.davidleelaw.com/articles/caselawana.html>.

⁸ See Cass Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 742 (1993).

⁹ *Id.*

¹⁰ See generally *id.*

¹¹ See generally Hunter, *supra* note 3; Barbara Spellman, *Judges, Expertise, and Analogy*, in *THE PSYCHOLOGY OF JUDICIAL DECISION MAKING* (David Klein & Gregory Mitchell eds., 2010).

¹² Hunter, *supra* note 3, at 152; Spellman, *supra* note 11, at 1189.

¹³ Donald R. Kretz & Daniel C. Krawczyk, *Expert Analogy Use in a Naturalistic Setting*, 5 FRONT. PSYCHOL. 1, 1 (2014).

how a reader's brain processes analogical information. After explaining how information provided through metaphors and analogies is processed similarly, this Article focuses on the differences between metaphors and analogies in legal writing. Understanding the differences will allow attorneys to think more strategically about what they want to accomplish when employing a metaphor or an analogy.

After discussing the differences between metaphors and analogies, the remainder of the Article focuses on case-based analogies. Part III discusses studies conducted by scholars in other disciplines that focus on what people perceive when provided with an analogy. Following the description of each study, this Article connects the theory, studies, and conclusions about analogies to the realm of legal analysis, reasoning, and persuasion.¹⁴ This information will allow attorneys to get the maximum effect out of their analogies to help the reader see the analogical strength in the same way that the writer, who is much more familiar with the precedent, perceives it.

Finally, Part IV provides several examples of effective and ineffective case-based analogies based on the insight explained in Part III. By exploring the results and conclusions from the experiments in other disciplines and applying it to the realm of legal analysis, this Article explores how attorneys can become more conscious of their approach to crafting analogies. As a result, attorneys can greatly improve their skills as brief writers and advocates.

II. UNDERSTANDING ANALOGIES AND METAPHORS THROUGH COGNITIVE SCIENCE

Trial and appellate briefs routinely involve facts that fall into gray areas of the law. When this occurs, attorneys often use comparisons as the main tool to persuade judges to rule in their clients' favor.¹⁵ These comparisons consist primarily of either metaphors or case-based analogies.¹⁶ First, by examining cognitive science, this Part explains how humans process information presented in metaphorical and analogical formats. Second, this Part explains the different uses of metaphors compared to case-based analogies in briefs. Thus, this Part demonstrates that although metaphors and analogies are two tools attorneys use in their briefs to help explain

¹⁴ See *infra* text accompanying note 187–203.

¹⁵ Gerald Lebovits, *Persuading the Judge Through Writing: How to Win*, NYSBA J., Feb. 2009, at 64, 57, <http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=55008>.

¹⁶ See Ken Lopez, *List of Analogies, Metaphors and Idioms for Lawyers*, A2L CONSULTING (Mar. 16, 2012), <http://www.a2lc.com/blog/bid/54079/Lists-of-Analogies-Metaphors-and-Idioms-for-Lawyers>.

concepts and educate readers, they play significantly different roles in briefs. What makes a metaphor effective in a brief is very different from what makes an analogy effective. These differences help demonstrate why case-based analogies must be studied as carefully as metaphors have been.

A. *The Cognitive Scientist's Explanation of How Humans Process Information Provided as a Metaphor or Analogy*

A metaphor is “an implied comparison between two things of unlike nature that yet have something in common.”¹⁷ An analogy is “a non-identical or non-literal similarity comparison between two things, with a resulting predictive or explanatory effect.”¹⁸ Through the cognitive science lens, metaphors and analogies are largely alike. They both involve comparing a new, abstract concept to an old, understood concept to help the reader understand the new concept in a certain way—the way in which the attorney wants the judge to understand it.¹⁹ Cognitive scientists state that comparisons are the “primary vehicle of cognition”: the unknown, the new, the unclear, and the remote are understood by one’s perception of the familiar.²⁰ As Professor Linda Berger wrote, “When we consciously use metaphor[s] . . . , we provide concrete images that make it easier to think about and manage abstract or unfamiliar concepts.”²¹ This understanding, studied extensively by modern cognitive scientists, was noted over two thousand years ago when Aristotle proclaimed that analogies “give names to nameless things.”²²

When an attorney drafts a metaphor, the “concrete image” is a concept that is familiar to the judge (such as a highway system), and the “abstract or unfamiliar concept” is something about which the judge may not be knowledgeable (such as how the internet works).²³ When an attorney drafts

¹⁷ SMITH, *supra* note 2, at 199.

¹⁸ Hunter, *supra* note 3, at 152.

¹⁹ *See id.*; SMITH, *supra* note 2, at 199.

²⁰ *See* Stephanie A. Gore, “A Rose By Any Other Name”: *Judicial Use of Metaphors for New Technologies*, 2003 U. ILL. J.L. TECH & POL’Y 403, 411 (2003).

²¹ Linda L. Berger, *The Lady, or the Tiger? A Field Guide to Metaphor and Narrative*, 50 WASHBURN L.J. 275, 278–79 (2011).

²² SMITH, *supra* note 2, at 199 (citing LANE COOPER, *THE RHETORIC OF ARISTOTLE* 188 (1932)).

²³ Gore, *supra* note 20, at 425. The prevalence of metaphors to help explain computers and the internet will be discussed in more length later in this section. *See infra* notes 57–63 and accompanying text.

a case-based analogy, the concrete image is a precedent case, and the “unfamiliar concept” is the undecided present case before the judge.

Comparing a new, unclear, legal concept to a familiar, concrete, non-legal concept to help the judge understand the legal concept in a particular way (via metaphor)—or comparing the present case to a precedent case to “educate” the judge that a particular outcome is appropriate (via analogy)—is effective because humans go through daily life gaining knowledge just this way.²⁴ Humans understand new concepts by comparing them to already-established concepts, an idea that is “deeply embedded in our consciousness.”²⁵ This is called “analogical transfer.”²⁶ In fact, “[a]nalogical reasoning . . . is a fundamental aspect of human cognition. . . . It is a core process in . . . problem-solving . . . and decision-making.”²⁷

As explained by cognitive scientists, humans “make sense out of new experiences by placing them into categories and cognitive frames called schema or scripts that emerge from prior experience.”²⁸ A schema is an image that a person can easily visualize.²⁹ A script is event or sequence of events with which a person is familiar (e.g., when a person thinks of going to a restaurant, that person would expect a particular sequence of events to occur: to be seated, to be approached by a waiter, etc.).³⁰ When providing a metaphor or an analogy, two domains are established: a source and a target.³¹ The source is the schema or script.³² In other words, the source is the concrete image or the prior, familiar concept the judge understands from past experience.³³ The target is the “abstract or unfamiliar concept”—the new legal concept the judge must learn and apply, or the new case the judge must decide.³⁴

²⁴ See Berger, *supra* note 21, at 279–80.

²⁵ *Id.* at 279.

²⁶ Spellman, *supra* note 11, at 150 (describing the process of “taking a situation that is well understood . . . and using it to help explicate a situation that is less well understood . . .”).

²⁷ D. Gentner & L. Smith, *Analogical Reasoning*, in *ENCYCLOPEDIA OF HUMAN BEHAVIOR* 130 (V.S. Ramachandran ed., 2d ed. 2012), http://groups.psych.northwestern.edu/gentner/papers/gentnerSmith_2012.pdf.

²⁸ Berger, *supra* note 21, at 280.

²⁹ See *id.* at 290.

³⁰ See Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103, 1138–39 (2004).

³¹ Berger, *supra* note 21, at 278.

³² See *id.* at 280.

³³ See *id.* at 278–80.

³⁴ See *id.* at 278–79 (the “reader” or “audience” is often the judge).

If the metaphor or analogy is effective, the source will have features that the judge understands and that the judge will apply to the target, helping the judge understand the target.³⁵ Drafting an effective analogy or metaphor is difficult because although the source has features the attorney wants the judge to apply to the target, the source typically has additional features that the attorney does not want the judge to attribute to the target.³⁶

Analogical transfers involve the following two steps:³⁷ retrieval and mapping.³⁸ In retrieval, the attorney must find and provide the judge with a proper source domain.³⁹ Thus, the attorney must choose an effective concrete image (for a metaphor) or precedent case (for an analogy) that the judge understands.⁴⁰ Then, for the comparison to be effective, mapping must occur.⁴¹ Mapping is the process of connecting the features from the source to the target.⁴² In simple terms, it means the judge “makes the connection” between the source and the target. When these two steps occur, the target, which began as an unfamiliar and abstract concept, now makes sense to the judge.⁴³

Two types of features can be retrieved and mapped from the source to the target.⁴⁴ One type is called the “surface features” (or “superficial

³⁵ See *id.* at 279.

³⁶ See, e.g., Gore, *supra* note 20, at 448–54 (providing two examples of metaphors criticized as wrong by the courts).

³⁷ As psychology professor Barbara Spellman points out, analogical reasoning can also be broken down into three, four, or five steps. See Barbara Spellman, *Reflections of a Recovering Lawyer: How Becoming a Cognitive Psychologist—and (In Particular) Studying Analogical and Causal Reasoning—Changed My Views About the Field of Psychology and Law*, 79 CHI.-KENT L. REV. 1187, 1192 n.16 (2004). Some scholars point to other steps, including “creating a mental representation of the source analog[ue],” extending knowledge about the source to “construct inferences about the target,” and “generalizing two or more analog[ue]s to form an abstract schema.” *Id.* at 1192 n.16, 1193. This Article focuses on the steps of retrieval and mapping, at times collapsing the steps of mapping and extending into one, as in accord with some of the literature.

³⁸ See Spellman, *supra* note 11, at 150.

³⁹ See *id.*

⁴⁰ See, e.g., *id.* (using three previous cases as sources to recall memory and provide images of the abstract concept).

⁴¹ See *id.* at 150–51 (mapping corresponds elements of the source to the target to draw the connection).

⁴² See *id.* at 150.

⁴³ See Berger, *supra* note 21, at 278–79.

⁴⁴ See Spellman, *supra* note 11, at 151.

features” or “attributes”).⁴⁵ The surface features are the features that are often tangible or visible.⁴⁶ In a legal, case-based analogy, the surface features are the facts from the precedent case (i.e., the source) and the similar facts in the present case (i.e., the target).⁴⁷

The second type is called “relational features.”⁴⁸ Relational features often are not as obvious as surface features. They are beneath the surface and “must often be inferred,”⁴⁹ and they link the source and the target in ways more important than the superficial similarities.⁵⁰ In a case-based analogy, the relational features may be the effect that the facts have on the parties or on the law.⁵¹ For example, an analogy may be strong—even if the facts do not seem similar—if both sets of facts could cause similar harm to the public, or if both sets of facts would further the same purpose underlying the applicable statute.⁵²

Both types of features are important. Surface similarities often play a more important role in retrieval (in the audience remembering the source), while relational similarities play a more important role in mapping (in connecting features from the source to the target, and thus in convincing the audience that the target is similar to the source in important ways).⁵³

Learning, processing information, and simply viewing the world are often based on comparisons.⁵⁴ It is inherent in how we think: “[H]uman cognition is essentially metaphorical.”⁵⁵ For example,⁵⁶ people associate the concept of “up” with being alive, conscious, healthy, happy, and in control. We “wake up,” our “spirits are high,” we listen to “uplifting music,” we want to be in “top shape,” and we want to have control “over a situation” or “rise above” a negative situation. Similarly, we associate the concept of “down” with being dead, unconscious, sad, or controlled by others. For example, we may feel “down in the dumps” and “depressed.” Our spirits may “sink.”

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *See id.* at 150.

⁴⁸ *Id.* at 151.

⁴⁹ *Id.*

⁵⁰ *See id.* at 151–52.

⁵¹ *See id.* at 152.

⁵² *See id.*

⁵³ *Id.* at 151.

⁵⁴ *See Gore, supra* note 20, at 404.

⁵⁵ Chad M. Oldfather, *The Hidden Ball: A Substantive Critique of Baseball Metaphors in Judicial Opinions*, 27 CONN. L. REV. 17, 20 n.8 (1994).

⁵⁶ Many of the following examples are found in SMITH, *supra* note 2, at 217.

When we get sick, we “fall ill” or “come down with the flu.” A person may “fall from power.” A person may be “under pressure.” We use these expressions all the time without thinking about their meaning, yet they are all metaphorical. We are not literally falling, but that familiar concept helps us quickly and easily understand the concept of going from a position of health to sickness, or of being in power to being controlled by others.

Another excellent example of analogical transfer in metaphor form can be found in attempts over the past few decades to understand computers and the internet.⁵⁷ First, consider how people use the internet. They connect to the “information superhighway”⁵⁸ and “surf the net.”⁵⁹ While on the internet, users visit web “pages.”⁶⁰ If they find a website they like, they may set a “bookmark.”⁶¹ In addition, they may enter into a “chatroom.”⁶² All the while, they hope not to encounter any “viruses,” “worms,” or “Trojans.”⁶³ These are all metaphors. No one literally uses a highway, but the metaphor helps conceptualize the once-abstract notion of the internet. No one places an actual bookmark on a web “page,” but this metaphor is a shorthanded way to visualize the concept of setting a quick reference point from which you may revisit a place on the internet. And computers are not “infected” by living “viruses” or “worms,” but the metaphor allows comprehension of the concept of a computer being harmed by computer code that, without the analogy, may be too technical to understand.

In a legal context, courts have also relied on metaphors to help grasp and discuss concepts regarding computers and the internet. For example, courts have compared the internet to a phone,⁶⁴ a newspaper,⁶⁵ a thriving city,⁶⁶ and a set of encyclopedias.⁶⁷ One court stated that the internet is “[l]ike

⁵⁷ See Gore, *supra* note 20, at 425.

⁵⁸ See *id.* at 426.

⁵⁹ See *id.* at 427.

⁶⁰ See *id.* at 425.

⁶¹ See *id.*

⁶² See *id.* at 427.

⁶³ See Tara Mythri Raghavan, *In Fear of Cyberterrorism: An Analysis of the Congressional Response*, 2003 U. ILL. J.L. TECH & POL’Y 297, 299 (2003).

⁶⁴ See Gore, *supra* note 20, at 428–29 (citing *EDIAS Software Int’l, L.L.C. v. BASIS Int’l Ltd.*, 947 F. Supp. 413, 419 (D. Ariz. 1996)).

⁶⁵ *Id.* at 423.

⁶⁶ *Id.* at 429 (citing *Playboy Enters., Inc. v. Chuckleberry Publ’g, Inc.*, 939 F. Supp. 1032, 1037 (S.D.N.Y. 1996)).

⁶⁷ *Id.* at 436 (quoting *Mainstream Loudoun v. Bd. of Trs. of the Loudon Cty. Library*, 2 F. Supp. 2d 783, 793–94 (E.D. Va. 1998)).

railroads, trucks, and highways” because it “serves as a conduit for transporting . . . goods.”⁶⁸ Courts have likened chatroom conversations to answering machine tapes.⁶⁹ One court stated that online retailer eBay, Inc. is like a “brick and mortar” storefront.⁷⁰ These comparisons were not meant to be taken literally. Instead, the attorneys used something familiar to the court (i.e., a source analogue) to help explain or describe an abstract concept (i.e., the target analogue, which in these examples includes computers, websites, or the internet generally). Attorneys retrieve concrete examples familiar to the judge, and then expect the judge to map relevant characteristics from the source to the target.⁷¹ Through these comparisons, nearly everyone can understand the concepts about computers that the attorneys wish to highlight. Without the metaphors, the literal, technical description of how computers store, process, and transmit information could take countless pages to explain and still be incomprehensible to most readers.⁷²

Examples of legal concepts being portrayed metaphorically are almost endless. For example,⁷³ consider the following terms of art: long-arm statutes, forum shopping, parent corporations, piercing the corporate veil, lemon laws, balancing tests, safe-harbor provisions,⁷⁴ and sunset

⁶⁸ *Id.* at 432 (quoting *Am. Libraries Ass’n v. Pataki*, 969 F. Supp. 160, 173 (S.D.N.Y. 1997)).

⁶⁹ *Id.* at 433 (citing *Commonwealth v. Proetto*, 771 A.2d 823, 830 (Pa. Super. Ct. 2001)).

⁷⁰ *Id.* at 450 (citing *eBay, Inc. v. Bidder’s Edge, Inc.*, 100 F. Supp. 2d 1058, 1065–66 (N.D. Cal. 2000)).

⁷¹ As will be discussed later in this Article, relational similarities are often more important than surface similarities. See *infra* Part III.A. These computer metaphors provide good examples of relational similarities. For example, a computer may not have many surface similarities in common with a filing cabinet (that they both have metal shells is not important). Instead, it is the underlying, relational features that map, or transfer, from the concept of a filing cabinet (that it provides a system to store, organize, and retrieve information easily) to a computer.

⁷² See *Gore*, *supra* note 20, at 408.

⁷³ Unless otherwise noted, these examples are found in SMITH, *supra* note 2, at 207, 212.

⁷⁴ Statutes even refer to provisions as “safe harbors.” See, e.g., 15 U.S.C. § 6503 (2012) (entitled “[s]afe harbors”); *id.* § 78u-5 (entitled “[a]pplication of safe harbor for forward-looking statements). In a Westlaw search for federal statutes that include the term “safe harbor” run on April 17, 2015, 410 results were returned where the term was used in the title of a statute, in the body of a statute, or in the statute’s “Notes of Decisions.”

provisions.⁷⁵ These metaphors make it easy for the reader to grasp the concepts being discussed. The first time a law student learns about forum shopping, the concept is new and abstract. Through the metaphor, students are able to relate it to something already understood (shopping at different stores until finding the best deal). The mind transfers characteristics of shopping to the concept of choosing a more desirable forum in which to file a lawsuit. This comparison makes it easier to conceptualize and remember the concept of forum shopping.

Metaphors and analogies generally serve the same function: they both educate the reader about a new, abstract concept through the retrieval and mapping of shared characteristics from a source to a target.⁷⁶ The cognitive process that helps people learn through either metaphorical or analogical comparisons is essentially the same.⁷⁷ A plethora of excellent articles has examined metaphors in legal writing.⁷⁸ However, although many scholars have used cognitive science to discuss and explain metaphors in legal writing, most have not probed into case-based analogies.⁷⁹ Yet, in legal briefs, metaphors and analogies usually serve different purposes.⁸⁰ Understanding these differences is important for realizing the need to explore analogies separately and in more depth than previously has been done.

⁷⁵ For example, at least seventeen sections of the *Code of Federal Regulations* use the term “sunset provision,” either in the title or within a section of a regulation. See, e.g., 17 C.F.R. § 20.9 (2015); 42 C.F.R. § 403.756 (2015); 47 C.F.R. § 101.79 (2014).

⁷⁶ See Spellman, *supra* note 11, at 1190–91; Linda L. Berger, *What Is the Sound of the Corporation Speaking? How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law*, 2 J. ASS’N LEGAL WRITING DIRECTORS 169, 169 (2004).

⁷⁷ See Berger, *supra* note 76, at 174.

⁷⁸ See, e.g., Berger, *supra* note 76; Linda L. Berger, *Of Metaphor, Metonymy, and Corporate Money: Rhetorical Choices in Supreme Court Decisions on Campaign Finance Regulation*, 58 MERCER L. REV. 949 (2007); Clay Calvert, *Regulating Cyberspace: Metaphor, Rhetoric, Reality, and the Framing of Legal Options*, 20 HASTINGS COMM. & ENT. L.J. 541 (1998); Robert C. Cumbow, *Cyberspace Must Exceed Its Grasp, or What’s a Metaphor? Tropes, Trips and Stumbles on the Info Highway*, 20 SEATTLE U. L. REV. 665 (1997); Gore, *supra* note 20; Oldfather, *supra* note 55; Michael J. Yelnosky, *If You Write It, (S)he Will Come: Judicial Opinions, Metaphors, Baseball, and “The Sex Stuff”*, 28 CONN. L. REV. 813 (1996). See also Berger, *supra* note 21. Further, Professor Michael R. Smith devoted Chapters 9 and 10 of his textbook *Advanced Legal Writing* to metaphors. SMITH, *supra* note 2, at 199–248. For an even more comprehensive list of sources addressing metaphors, many in a legal context, see Smith, *supra* note 6, at app. A at 945–47.

⁷⁹ See text accompanying *supra* notes 8–12.

⁸⁰ See Hunter, *supra* note 3, at 155; SMITH, *supra* note 2, at 206–18.

B. Differences Between Analogies and Metaphors

Understanding the differences between analogies and metaphors is valuable. Each are tools attorneys should use when advocating. Understanding the differences helps to more fully understand each tool individually; that is, when and why to use metaphors in legal writing versus when and why to use analogies. Further, understanding the differences allows analysis to reach beyond the prior scholarship on metaphors, pushing forward our understanding of the much more unexplored use of analogies as a tool in legal advocacy. After discussing the differences, the remainder of this Article focuses solely on analogies: on examining and developing current knowledge of how to effectively craft case-based analogies.

1. Difference No. 1: Source Analogues

The first difference between metaphors and analogies concerns the source analogue.⁸¹ With metaphors, attorneys have endless options for a source analogue. The concrete image on which the attorney bases her metaphor can be anything she believes the reader will be familiar with and will have a relational correspondence to the new, abstract concept she is attempting to explain.⁸² The attorney could compare a scared employee to a “deer caught in the headlights.” The attorney could compare a lazy employee to a “sloth,” a “bump on a log,” or “dead weight.” The attorney could compare an employee who “rides the coattails of others” (itself a metaphor) to a “leech.” The attorney could compare an employee who has been “framed” (again, itself a metaphor) to a “sacrificial lamb.” The attorney could compare a spiteful supervisor to a “schoolyard bully” or a “tyrant.” The attorney could compare a deceitful employee to a “politician” or to a “wolf in sheep’s clothing.” The attorney could describe the work environment as “heaven” or “hell.” The attorney could describe a tense situation at work as a “storm brewing” or a “ticking time bomb.” The examples are endless. Thus, when drafting a metaphor, the attorney can be creative and can base her metaphor on almost anything from the real world.⁸³ The source analogue may be based in the law, but it can also be based on anything from the world that is easy for the reader to understand.⁸⁴

Legal analogies, on the other hand, have a highly-limited source set. The “source” for analogies is limited to precedent: prior cases decided by

⁸¹ Compare Berger, *supra* note 76, at 205, with Spellman, *supra* note 11, at 150.

⁸² See Berger, *supra* note 76, at 169.

⁸³ See *id.* at 205.

⁸⁴ See *id.* at 169.

courts.⁸⁵ Although the attorney could compare the present case to precedent from any jurisdiction, the persuasive value of the analogy will diminish significantly if the precedent case is from a non-binding jurisdiction.⁸⁶ Therefore, attorneys often have cases from only one state or federal circuit from which to choose an analogy.⁸⁷ Moreover, often only a limited number of cases that address a relevant issue based on relevant laws and involving relevant facts are available to the attorney to form his or her analogy.⁸⁸ Additionally, only those cases that resulted in the same outcome as the attorney is seeking in the present case provide beneficial sources for analogy.⁸⁹ Thus, in many situations, attorneys may have only one or two source analogues (i.e., precedent cases).⁹⁰

2. *Difference No. 2: Implied Versus Explicit Mapping*

Metaphors are often most effective when the connection, or the relational mapping, between the source and the target is unstated. Instead, the reader must connect the dots.⁹¹ The reader should be able to transfer

⁸⁵ See Spellman, *supra* note 11, at 150.

⁸⁶ See LINDA H. EDWARDS, LEGAL WRITING: PROCESS, ANALYSIS & ORGANIZATION 56–57 (5th ed. 2010) (stating that precedent from a non-binding jurisdiction is not mandatory to follow).

⁸⁷ See Eric Voigt, *Choosing the Best Cases: Five Reminders for New Lawyers*, LEGAL WRITING ED. (Dec. 4, 2013), <http://legalwritingeditor.com/2013/12/04/choosing-best-cases-five-rules-new-lawYERS>.

⁸⁸ See *id.*

⁸⁹ Case-based analogies are useful tools because of the doctrine of *stare decisis*. Under the doctrine of *stare decisis*, courts attempt to reach outcomes consistent with those reached in prior cases from the same jurisdiction in which the court addressed a similar issue based on similar facts. See *id.*; Schauer, *supra* note 5, at 571. Thus, attorneys analogize to similar precedent cases with favorable outcomes. If a precedent case has a damaging outcome, attorneys try to distinguish, rather than analogize to, that case. See Eugene Volokh, *Analogizing and Distinguishing Cases*, WASH. POST BLOG (Aug. 10, 2009, 2:26 PM) <http://www.volokh.com/posts/1249928819.shtml>. Examples of fleshed-out analogies, and a distinction, are found in Part IV of this Article.

⁹⁰ In a common area of law, such as search and seizure, an attorney may have scores of relevant cases from which to choose. But, in an uncommon or very narrow area of law, an attorney may have no helpful precedent case at all. In those situations, the attorney may turn to using a metaphor to help fill the gap.

⁹¹ SMITH, *supra* note 2, at 200 (stating that “while the language involves a comparison, it does not include explicit words of comparison.”). Because of this, metaphors are effective when they are “simple, concrete, . . . and concise.” Julie A. Oseid, *The Power of Metaphor:*

attributes or relations quickly from the source to the target. For example, if an attorney states that an employee was a deer caught in the headlights, the attorney should not have to pause and explain what it is about a deer in the headlights that is similar to the employee. The attorney should not have to explain that, when looking at oncoming headlights, deer are wide-eyed and paralyzed by fear and confusion while staring at the approaching danger. The attorney assumes the reader's worldly experiences provide an understanding of how deer often act when looking into an approaching car's headlights.⁹² If the attorney chooses the source wisely, the reader will transfer those concepts to the source—the employee—without having to provide any explicit mapping.⁹³

Legal analogies, on the other hand, take that next step and explicitly explain the connection between the source (the precedent case) and the target (the present case).⁹⁴ In effective analogies, the attorney carefully explains the details about the precedent case and then explicitly explains what it is about that case that relates to the present case: that is, which fact from the precedent case is like which fact from the present case, how or why those facts are similar, why those facts are important for similar reasons, what benefit or policy those facts both further.⁹⁵ Or, at least, attorneys *should* do this. Whether an attorney includes this explicit explanation often differentiates an effective analogy from an ineffective one.

Persuasively providing this explicit explanation is difficult. Cognitive science shows that it is important to do, but doing it effectively is a skill and a step many attorneys unknowingly omit.⁹⁶

3. *Difference No. 3: Availability*

The third difference between metaphors and analogies is that metaphors fill in where analogies are not useful or possible.⁹⁷ Both metaphors and analogies help the reader understand something new by comparing it to

Thomas Jefferson's "Wall of Separation Between Church & State", 7 J. ASS'N LEGAL WRITING DIRECTORS 123, 125 (2010).

⁹² See Berger, *supra* note 21, at 276.

⁹³ See SMITH, *supra* note 2, at 200.

⁹⁴ See Hunter, *supra* note 3, at 155.

⁹⁵ See Stephanie Roberts Hartung & Shailini Jandial George, *Promoting In-Depth Analysis: A Three-Part Approach to Teaching Analogical Reasoning to Novice Legal Writers*, 39 CUMB. L. REV. 685, 688–89 (2009).

⁹⁶ See Hunter, *supra* note 3, at 152–53.

⁹⁷ See *id.* at 152; SMITH, *supra* note 2, at 199.

something already known.⁹⁸ Metaphors connect a new, abstract concept to a known concrete image⁹⁹ to help the reader understand the abstract concept.¹⁰⁰ Analogies connect a new, undecided case to a precedent case to help persuade the judge that the new case should have the same outcome.¹⁰¹

If useful precedent exists, analogies provide the primary vehicle for comparison.¹⁰² This is true because of *stare decisis*.¹⁰³ However, what if no useful precedent exists? For example, if the court addresses an issue of first impression, there may be no precedent cases that provide a helpful comparison.¹⁰⁴ In these situations, attorneys are simply unable to use the tool of analogy. However, because metaphors can be based not only on prior legal decisions but also on nearly anything from the real world, attorneys may still be able to reach into their toolbox and draft a metaphor that will help push the reader toward the outcome the attorney seeks.

This is not to say that a metaphor will always be effective. The attorney still has to find a concrete source image that the reader will understand and that will have relational properties that can map to the target.¹⁰⁵ But, the realm of sources from which an attorney can draw a metaphor is essentially anything in the world.¹⁰⁶ Thus, a creative attorney may be able to craft a useful metaphor when no useful analogy exists.

4. *Difference No. 4: Purpose*

Unlike analogies, metaphors typically are not used to predict the outcome of cases.¹⁰⁷ Metaphors function outside of the concept of applying

⁹⁸ See Hunter, *supra* note 3, at 152; SMITH, *supra* note 2, at 199.

⁹⁹ See Berger, *supra* note 76, at 169.

¹⁰⁰ See Berger, *supra* note 21, at 278–79.

¹⁰¹ See Hunter, *supra* note 3, at 152–53.

¹⁰² See Spellman, *supra* note 11, at 150.

¹⁰³ See Schauer, *supra* note 5, at 577 n.13 (citing RUPERT CROSS, PRECEDENT IN ENGLISH LAW 182–92 (3d ed. 1977)) (discussing that “although in later stages judges are often misled in their reliance on precedent, the first stage in judicial reasoning by analogy is the determination of the relevant likeness between the previous case and the one before the court”).

¹⁰⁴ *Case of First Impression*, BLACK’S LAW DICTIONARY (10th ed. 2014) (a “case of first impression” is a “case that presents the court with an issue of law that has not previously been decided by any controlling legal authority in that jurisdiction.”).

¹⁰⁵ See Berger, *supra* note 21, at 278–79.

¹⁰⁶ See Berger, *supra* note 76, at 169.

¹⁰⁷ See Hunter, *supra* note 3, at 155. See also SMITH, *supra* note 2, at 206–18. Professor Smith lists four uses of metaphors in legal writing: (1) doctrinal metaphors (representing substantive legal rights in “figurative, symbolic, [and] metaphoric terms,” such as “piercing

precedent to invoke *stare decisis*.¹⁰⁸ Consider the computer and internet examples provided previously.¹⁰⁹ In all of those examples, the attorneys provided the metaphor to help explain the concept of the internet in the way the attorneys wanted the court to understand.¹¹⁰ On the other hand, analogies are usually (if not always) included to either predict the outcome of a new case (if the attorney is writing an inner-office predictive legal memorandum) or to advocate for a particular outcome (if the attorney is writing a court brief).¹¹¹

To put it simply, metaphors are often used to explain a *concept*.¹¹² Analogies do not serve this purpose. Instead, attorneys use analogies to explain why the judge should reach a particular *outcome* in a new, ongoing case.¹¹³

5. *Difference No. 5: Emphasis*

Metaphors can be used for emphasis.¹¹⁴ Think of a reader who is reading a long legal brief about a new or abstract concept. The reader may be struggling to grasp the analysis. Likely, the brief has provided several pages of facts for the reader to remember, legal concepts for the reader to wrestle with, statutes to interpret, case law to decipher, etc. Legal briefs can be dense, dull, and tedious to read, as the reader is drowned in information. But, if the writer can then introduce a catchy metaphor, which enables the reader to step outside the legal realm and connect with something familiar from “the real world,” the writer creates a change of pace in the substance. The metaphor interjects a familiar, non-legal source into the otherwise legal, and possibly dry, conversation. This change of pace may catch the reader’s

the corporate veil”); (2) legal method metaphors (“concepts of legal method and legal analysis expressed” through metaphor, such as “balancing” tests); (3) stylistic metaphors (using metaphors not to address substantive concepts but to add a style to the writing); and (4) inherent metaphors (metaphors that are unintentionally crafted but occur in our writing because they are inherent to the way people communicate about certain things, such as saying the brief will “cast light on a subject”). *Id.* None of the uses for metaphors that Professor Smith identified include using metaphors as a way to predict a legal outcome or to demonstrate how the present case is controlled by a precedent case. *See id.*

¹⁰⁸ *See* Berger, *supra* note 76, at 169.

¹⁰⁹ *See supra* Part II.A; Gore, *supra* note 20, at 425–27.

¹¹⁰ *See* Gore, *supra* note 20, at 425–27. *See also supra* Part II.A.

¹¹¹ *See* Hunter, *supra* note 3, at 152–53.

¹¹² *See* Berger, *supra* note 21, at 279.

¹¹³ *See* Hunter, *supra* note 3, at 155.

¹¹⁴ *See* SMITH, *supra* note 2, at 235.

attention, provide a well-appreciated “break” from the legalese, and thus draw emphasis to the concept. If the metaphor is chosen well, it will be a memorable part of the brief and its analysis.

For example, if an attorney compared a person to “the boy who cried wolf,”¹¹⁵ most readers would be transported out of the brief, even for a moment, to their childhood when they learned the story about the boy who cried wolf too many times when no wolf was present.¹¹⁶ Even if the attorney chronicled several instances of a person lying, the use of the reference to the boy who cried wolf may allow the reader to step outside of the brief and into a childhood story, which would be unexpected and perhaps entertaining to the reader. That, in turn, may stick with the reader and thus crystallize a belief of the person’s actions. The writer did not make the comparison to prove that the person lied or to prove a legal outcome; instead, the comparison emphasized the person’s actions.

Analogies, on the other hand, are not used to emphasize a point.¹¹⁷ Instead, they are used to *prove* a legal outcome.¹¹⁸ An attorney would not take the time or effort to explain a prior case and then to compare the present case to the precedent simply to emphasize a concept. Instead, when presenting a legal analogy to a precedent case, the attorney is using the doctrine of *stare decisis* to prove that the similarities between the two cases are strong enough that the court must (or at least should) reach the same outcome in the present case.¹¹⁹ Within an analogy, the attorney includes facts or reasoning that leads to an outcome for which the attorney is advocating.¹²⁰ The purpose and function of the analogy is not to emphasize but rather to explain the legal analysis and to prove the desired outcome is legally appropriate.¹²¹

6. *Difference No. 6: Emotion*

As Professor Michael Smith states in his book *Advanced Persuasive Writing*, an “apt metaphor can greatly enhance the emotion generated in

¹¹⁵ Aesop, *The Shepherd’s Boy*, in THE FABLES OF AESOP 210 (Joseph Jacobs ed., 1894).

¹¹⁶ *See id.*

¹¹⁷ *See* Grant Lamound, *Precedent and Analogy in Legal Reasoning*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward Zalta ed., Spring 2014), <http://plato.stanford.edu/archives/spr2014/entries/legal-reas-prec>.

¹¹⁸ *See id.*

¹¹⁹ *See* Spellman, *supra* note 11, at 150.

¹²⁰ *See id.*

¹²¹ *See* Lamound, *supra* note 117.

readers.”¹²² Professor Smith provides the following example: “Each oppressive practice is one wire in a birdcage; while no one wire could prevent the bird’s escape, the wires woven together make a thoroughly effective prison.”¹²³ As Professor Smith explains:

In the document from which this excerpt was taken, the writer advances a highly emotional argument: the devastating cumulative effect that results from numerous individual acts of oppression. The writer’s use of the birdcage metaphor contributes greatly to the feelings of dread and sorrow the argument is designed to evoke in the reader.¹²⁴

It is easy to think of metaphors that could have the similar purpose of eliciting an emotional response. For example, his employer “ratcheted up the heat” on him; his overbearing tactics “smothered” her; and she “drowned him with guilt.” With each, the metaphor invokes a palpable response; engaging a reader’s emotions touches on *pathos* (i.e., passion and emotion), which, along with *ethos* (i.e., credibility) and *logos* (i.e., logic and legal reasoning), form the three pillars of persuasion.¹²⁵

On the other hand, legal analogies are not used to invoke emotional responses.¹²⁶ Instead, a legal analogy goes straight to the *logos*, or legal reasoning.¹²⁷ As noted above, attorneys construct the analogy to prove that the facts justify a particular legal outcome, just as similar facts lead to the same result in a prior case.¹²⁸

7. *Difference No. 7: Possibility to Annoy*

Metaphors can annoy a reader.¹²⁹ As one example, “[o]veruse of metaphor is a serious, yet common problem in persuasive writing.”¹³⁰ Professor Smith believes that “many writers undermine their documents’ overall effectiveness by using metaphors indiscriminately. The truly

¹²² SMITH, *supra* note 2, at 234.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ See SMITH, *supra* note 2, at 233–35. See generally LANE COOPER, THE RHETORIC OF ARISTOTLE (1932).

¹²⁶ See Hunter, *supra* note 3, at 152–53.

¹²⁷ See SMITH, *supra* note 2, at 234–35.

¹²⁸ See Hunter, *supra* note 3, at 155.

¹²⁹ See SMITH, *supra* note 2, at 236.

¹³⁰ *Id.*

effective stylist uses metaphor selectively to emphasize particular points.”¹³¹ Beyond being overused, metaphors can annoy readers when used inappropriately or ineffectively.¹³² For example, mixed metaphors¹³³ can be confusing or distracting.¹³⁴ As illustrated in Part IV, metaphors where the connection between the source and target is not obvious can be confusing or even frustrating to a reader.¹³⁵ Such metaphors fail to provide the explanatory effect that metaphors should deliver, and they may alienate a reader who feels annoyed that he does not “get it.”¹³⁶

Analogies, on the other hand, largely avoid the above problems. Whereas with metaphors the writer should leave the connection between the source and target unstated for the reader to realize on his own, with analogies the writer should explicitly state and explain the connections between the precedent case and the present case.¹³⁷ Thus, unless the analogy is poorly written, the reader will never be confused or frustrated that he does not “get” the comparison made through an analogy.¹³⁸ The judge may ultimately disagree that the prior case is controlling, but if the analogy is presented properly, the reader should always be able to at least understand the comparison and the point the writer is making.

8. *Difference No. 8: Use to Entertain*

Unlike analogies, writers may incorporate metaphors into a legal brief simply to entertain the reader.¹³⁹ Understanding a metaphor, or “making the mental connection between two seemingly dissimilar things[,] is often pleasing to a reader.”¹⁴⁰ This charming and entertaining effect can make the reader more receptive to the brief; “[o]nce the reader falls into this positive and receptive mood, the writer’s substantive point will be more welcome.”¹⁴¹

¹³¹ *Id.*

¹³² *See id.*

¹³³ *Id.* (defining a mixed metaphor as a metaphor that contains incompatible references, such as, “[a] careful reading of the contract reveals a loophole that we can hang our hat on”).

¹³⁴ *See id.* at 236–37.

¹³⁵ *See id.*

¹³⁶ *See id.*

¹³⁷ *See id.* at 200; Hunter, *supra* note 3, at 153, 155.

¹³⁸ *See* Hunter, *supra* note 3, at 153.

¹³⁹ *See* SMITH, *supra* note 2, at 234.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

Analogies, on the other hand, are not included to entertain the reader.¹⁴² They are much more practical: they do not charm or entertain a reader, they carry the analysis;¹⁴³ they prove the legal conclusion;¹⁴⁴ and they justify the advocated-for result.¹⁴⁵ Metaphors can be helpful tools in some briefs, but analogies are crucial components in most briefs, especially those in which the facts fall into a gray area in the law and the outcome is not obvious.¹⁴⁶

III. ANALOGICAL STUDIES APPLIED TO LEGAL WRITING

Though humans process information received in metaphorical or analogical form similarly, there are significant differences in how to draft each.¹⁴⁷ This Part discusses studies from two different disciplines that have examined how people, when presented with analogical information, make connections and process the information. This Part describes each study and then extrapolates what attorneys can apply to their legal writing based on the results of each study. This Part then discusses how attorneys can use this information in their approaches to legal research and when they begin drafting analogies.

¹⁴² See Spellman, *supra* note 11, at 1191.

¹⁴³ See *id.*

¹⁴⁴ See *id.*

¹⁴⁵ See *id.*

¹⁴⁶ This section explains the differences between analogies and distinctions when attorneys include them in briefs. Although additional differences exist between analogies and metaphors, *see, e.g.*, Smith, *supra* note 6, at 921–23, some of the additional differences are not as relevant to brief writing, and thus are not included in this section.

For an example of an additional difference, Professor Smith discusses how certain legal concepts have become known more by the metaphor used to describe them than they have the wording of the actual law itself. *See id.* Interestingly, over time, the understanding of the law can sometimes change based on how the metaphor itself is understood. *See* Louis J. Sirico, Jr., *Failed Constitutional Metaphors: The Wall of Separation and the Penumbra*, 45 U. RICH. L. REV. 459, 461 (2011). The focus becomes the metaphor rather than the underlying statute. *See id.* at 459. Such a concern would not occur with analogies because an analogy is specific to the one present case for which the briefs are being filed. *See* Hunter, *supra* note 3, at 153. Even if the outcome is determined by the strength or persuasiveness of the analogy, attorneys in a subsequent case will have to create a new analogy to incorporate the new target (the facts of the new case). *See id.* Outside of this footnote, this Article will not address any differences beyond those that are relevant to their uses within an attorney's specific brief.

¹⁴⁷ *See* Hunter, *supra* note 3, at 152; SMITH, *supra* note 2, at 199.

A. *Psychology Studies*

Psychologists and cognitive scientists Dedre Gentner and Arthur Markman, both leaders in the study of analogies,¹⁴⁸ conducted the following study.¹⁴⁹ A set of pictures showed a car being towed by a tow truck, and that same car now towing a motorboat.¹⁵⁰ The subjects were shown the two pictures and asked to match the object from the first picture with its corresponding object from the second picture.¹⁵¹ When subjects were asked to answer quickly, they often pointed out the cars as being the match.¹⁵² Thus, these subjects were spotting and connecting the items that had surface (i.e., factual, explicit, or visual) similarities.¹⁵³ However, subjects who were given more time to answer often matched the car from the first picture and the motorboat from the second picture.¹⁵⁴ Thus, these subjects were spotting and connecting the relational similarities.¹⁵⁵ The subjects identified and valued the role each item was playing and the purpose for the items; both the car in the first picture and the tow truck in the second picture were serving the same role and function of towing another vehicle.¹⁵⁶

Other research supports this outcome, suggesting that people under time-induced stress, or people trying to process a large amount of information at once, notice surface similarities more readily than relational similarities.¹⁵⁷ For example, in a series of three experiments, psychologists Robert Goldstone and Doug Medin measured what similarities subjects noted between various pictures depending on the deadlines given to the subjects to respond.¹⁵⁸ Goldstone and Medin observed that if a person is

¹⁴⁸ See Curriculum Vitae of Arthur B. Markman, U. TEX. DEP'T PSYCHOL., <http://www.utexas.edu/cola/psychology/faculty/markman> (last visited Jan. 22, 2016); Curriculum Vitae of Dedre Gentner, NW. U. DEP'T PSYCHOL., <http://www.psychology.northwestern.edu/people/faculty/core/profiles/dedre-gentner.html> (last visited Jan. 22, 2016).

¹⁴⁹ See generally Arthur B. Markman & Dedre Gentner, *Structural Alignment During Similarity Comparisons*, 25 COGNITIVE PSYCHOL. 431 (1993).

¹⁵⁰ See Spellman, *supra* note 11, at 151.

¹⁵¹ See *id.*

¹⁵² See *id.*

¹⁵³ *Id.*

¹⁵⁴ See *id.*

¹⁵⁵ *Id.*

¹⁵⁶ See *id.* This study is described and discussed in detail by cognitive scientists Arthur B. Markman and Dedre Gentner. See Markman & Gentner, *supra* note 149, at 437–39.

¹⁵⁷ See Gentner & Smith, *supra* note 27, at 134.

¹⁵⁸ For a detailed discussion and description of this study, see generally Robert Goldstone & Doug Medin, *Time Course of Comparison*, 20 J. EXPERIMENTAL PSYCH.: LEARNING,

under time pressure, that person is more likely to match surface similarities instead of relational similarities.¹⁵⁹

This observation is especially noteworthy because prior research has shown that strong relational similarities make more effective analogies than do strong surface similarities.¹⁶⁰ As stated by leading cognitive scientist Dedre Gentner, “[R]elational mapping is the essence of analogy.”¹⁶¹ Carrying this concept into legal writing, what makes a precedent case useful to draw an analogy to depends more so on the relational similarities the attorney can draw than it does between the surface similarities the attorney may point out.¹⁶² In other words, it is much more important *why facts matter*—what it is *about the facts* that lead the same conclusion—than what the facts themselves are. However, it is easier for many people to identify surface similarities than it is to notice relational similarities.¹⁶³

Thus, to draft effective analogies, attorneys must focus more on relational similarities than surface similarities. This is especially true when, as often happens, the facts in the precedent cases do not line up perfectly with the facts in the present case being briefed. Persuasive analogies can be drawn between a present case and a precedent case, even when there is little on the surface, factually, that seems similar.¹⁶⁴ The following hypothetical demonstrates this.

Consider a person arrested for burglary after he broke the window of a homeless person’s car and stole a gun out of the car. Assume the burglary statute requires that a person break into a dwelling with the intent to commit a crime (as many burglary statutes do). All of the elements of this burglary statute are satisfied except for the “dwelling” requirement.

To determine if the dwelling requirement is met, the court must determine whether a homeless person’s car is a dwelling. Aside from easy cases in which the “dwelling” requirement was not disputed (such as when an individual’s current home was broken into), precedent exists in which

MEMORY & COGNITION 29 (1994). For a summary of this study, see Gentner & Smith, *supra* note 27, at 134.

¹⁵⁹ See Gentner & Smith, *supra* note 27, at 134.

¹⁶⁰ See Spellman, *supra* note 11, at 151; Markman & Gentner, *supra* note 149, at 431, 433, 441.

¹⁶¹ Gentner & Smith, *supra* note 27, at 130.

¹⁶² See Spellman, *supra* note 11, at 152.

¹⁶³ See *id.* at 151–52.

¹⁶⁴ See Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312, 363 (1997).

suspects broke into seasonal cabins or unoccupied rental properties.¹⁶⁵ Assume that courts typically have held that summer cabins are dwellings, but that unoccupied rental properties are not dwellings. Additionally, assume there is one precedent in which a person broke into another person's car parked on the curb while the person was in his home. For purposes of the burglary statute, assume the court in that case held that the car was not a dwelling.

To draw analogies to those cases, especially in a prosecutor's effort to persuade the judge that the homeless person's car was a dwelling, the attorney must consider and highlight relational similarities underlying the facts (rather than the surface similarities of the facts) between the present case and the precedent cases. On the surface, the case that seems most similar is the case in which the defendant broke into another person's car. Especially for a reader who is reading quickly, the "car cases" seem similar because they are the only two cases in which the property broken into was a car. On the other hand, the cases in which the defendants broke into homes seem very different factually. Not only did those precedent cases involve *houses* while the present case involves a *car*, the victims in the precedent cases were *homeowners*, while the victim in the present case was *homeless*. How can a person break into a *dwelling* when he broke into a *car*, and the victim was *homeless*? On the surface, the precedent cases involving burglaries in homes do not seem similar at all. Instead, on the surface level, the precedent in which the defendant broke into a car seems most similar.

However, the skilled attorney may be able to convince the reader that the precedent cases involving homes are actually very similar (i.e., analogous) by focusing the reader away from the obvious surface facts that the reader may have identified and, instead, to the relational aspects. In addition, by focusing the reader on the relational similarities, the attorney may be able to prove that the precedent involving the car is very different from the present case.

To focus on the relational similarities, the attorney has to think in terms of what it is *about* the facts that matter; that is, not what the facts are but why they matter. Why is a home a dwelling? A home is a dwelling because it is the person's primary shelter; that is, the place where the person keeps

¹⁶⁵ The concept for this hypothetical is based generally on cases discussed in the following two *American Law Reports* annotations: *Occupant's Absence from Residential Structure as Affecting Nature of Offense as Burglary or Breaking and Entering*, 20 A.L.R. 4TH 349 (1983); Jeffrey F. Ghent, Annotation, *Burglary, Breaking, or Entering of Motor Vehicle*, 72 A.L.R. 4TH 710 (1989).

most of his or her personal property and sleeps at night.¹⁶⁶ In the present case, because the person was homeless, he relied on his car for shelter, he kept what few possessions he had locked in his car, and he slept in the car each night. The fact that it is a car does not make it a dwelling. Instead, it is the role that the car plays in his life—the purpose of the car for him—that matters. It is not the fact itself that matters, but it is the *thing* about the fact that matters. And, it is precisely that function, that role, that thing about the fact that makes his car like a homeowner's house for purposes of what constitutes a "dwelling." Thus, it is the relational similarities that make the precedent about houses more controlling than the precedent about the car, despite that the precedent about the car may have a more obvious surface similarity. Focusing on and explaining the relational similarity makes the analogy stronger.¹⁶⁷

As the psychology experiments demonstrated, when making choices quickly, people identify surface similarities.¹⁶⁸ However, when readers take more time to contemplate similarities, they may then identify relational similarities.¹⁶⁹ Moreover, when and if they do take more time, those relational similarities will be important and will become the driving force

¹⁶⁶ If a court states these reasons, then the attorney should cite to these reasons in an illustration of the case that precedes the analogy. Then, in the subsequent analogy, the attorney should state the facts from each case (the precedent case and the present case) that share a relational similarity. Then, the attorney should explicitly explain the relational similarity by stating why the reasoning from the prior case also applies to the present case. However, even if the precedent cases do not state these reasons, attorneys can still identify and explain relational connections to support their analogies. The attorney would still want to illustrate the precedent case so the reader learns its facts and outcome. Then, the attorney still should state the facts from each case that share a relational similarity. Then, the attorney should still explicitly describe the relational similarity underlying both sets of facts that lead to the same outcome. Like anything in legal writing, the analogy will be more persuasive if the relational similarities are based on reasons courts have identified as being important. But, even if the relational connection is based on an attorney's own observation instead of being based on important reasons courts have identified in prior cases, providing a relational connection is critical to improving the strength and persuasiveness of the analogy. See Spellman, *supra* note 11, at 151; Markman & Gentner, *supra* note 149, at 431, 433, 441.

¹⁶⁷ "In cases where a highly systematic relational structure can indeed be mapped into the target domain, we have a powerful analogy." Dedre Gentner & Russell Landers, *Analogical Reminding: A Good Match is Hard to Find*, in PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON SYSTEMS, MAN AND CYBERNETICS 5 (1985).

¹⁶⁸ See Spellman, *supra* note 11, at 151.

¹⁶⁹ See *id.*

behind what makes the items similar.¹⁷⁰ With legal writing, legal readers are usually overloaded and in a hurry.¹⁷¹ Whether the reader is a partner reading an associate's predictive memo, or whether the reader is a judge reading an attorney's brief, the reader wants to read and understand the document quickly because that memo or brief is just one of many tasks the reader has to shift his attention to throughout the day. It is possible, or even likely, that the reader will read the document when the reader's attention and focus are challenged, such as quickly before a client meeting or court hearing, during interrupted spurts between phone calls, near the end of a long workday, or on the train home. It is dangerous to assume that the reader will be reading slowly, focusing intently, and contemplating carefully each piece of information provided in a thirty-page brief. It is dangerous to assume the reader will naturally comprehend the relational connections between items. Instead, when in a hurry, the reader may spot and focus on the surface similarities instead.¹⁷² The surface similarities between cases are often not significant; they often will not support the argument nearly as well as the deeper, relational similarities.¹⁷³ Thus, it is important that the writer make the effort to state the relational similarities explicitly for the reader.

Even if the relational similarities seem obvious to the writer, the writer takes a big risk by assuming the relation is obvious to the reader. The writer has researched the cases, decided why certain cases provide helpful support, considered why some may be more helpful than others, and ultimately chosen those to which analogies can be drawn. During this process, the writer must realize two things. First, the writer must make these decisions by looking past surface similarities and instead look for the more important relational similarities.¹⁷⁴ Second, this process puts the writer in the position of the second group of subjects in the tow-truck study—those given more time to contemplate the similarity between the two pictures.¹⁷⁵ The reader, on the other hand, has not gone through this process of carefully considering the precedent. Instead, the reader is learning about the precedent cases (and perhaps the facts of the present case) for the first time while reading the memo or brief. And, the reader is likely hoping to read the document

¹⁷⁰ See *id.*

¹⁷¹ See Jennifer Bendery, *Federal Judges Are Burned Out, Overworked, and Wondering Where Congress Is*, HUFFINGTON POST (Oct. 1, 2015, 2:15 PM), http://www.huffingtonpost.com/entry/judge-federal-courts-vacancies_us_55d77721e4b0a40aa3aaf14b.

¹⁷² See Spellman, *supra* note 11, at 151.

¹⁷³ See *id.*

¹⁷⁴ See *id.*

¹⁷⁵ See *id.*

quickly. Therefore, the reader will often be more in the position of the first group of subjects in the tow-truck study—those who identified the similarity quickly.¹⁷⁶ Thus, readers may identify the surface similarity instead of the deeper, underlying relational connection.

It is possible that the reader will slow down, focus, and contemplate the analysis as he or she is reading, especially in appellate briefs when a clerk may be the audience. But, especially with state trial-level briefs, it is also possible that the reader will not have the time or the concentration to slow down, focus, and contemplate the analysis deeply. It is risky for a writer to simply illustrate a precedent case and assume the reader will “see the connection” or “make the match” at the deeper, relational level. If the reader fails to do so, the writer has failed to communicate the analysis as persuasively as she could have. The writer has failed to get the value out of the precedent in a way that will benefit her client’s position. In fact, what the writer thinks the reader is learning from the brief and what the reader actually learns may be two different things.

Thus, a well-executed analogy in legal writing should always go beyond discussing past cases; the writer must explicitly connect each precedent case to the present case. Additionally, when doing so, the writer must not simply say the cases are analogous and point out the factual similarities. Instead, the writer must take the next step and map the relational similarities for the reader. Relational similarities are the most important, but they are also the similarities that a reader (who is less familiar with the precedent case and the present cases than the writer is) is more likely to miss when reading a brief quickly.

B. Physics Study

Physicists Michelene Chi, Paul Feltovich, and Robert Glaser performed an experiment to study expertise and problem solving in people.¹⁷⁷ In the experiment, the physicists grouped subjects into two groups: experts and novices.¹⁷⁸ The experts were eight advanced Ph.D. physics students, and the novices were eight undergraduate students who had just completed one semester of mechanics.¹⁷⁹ The physicists asked each subject to categorize

¹⁷⁶ *See id.*

¹⁷⁷ *See generally* Michelene T. H. Chi, Paul J. Feltovich & Robert Glaser, *Categorization and Representation of Physics Problems by Experts and Novices*, 5 *COGNITIVE SCI.* 121 (1981).

¹⁷⁸ *See id.* at 121.

¹⁷⁹ *Id.* at 123.

twenty-four physics problems, each of which were typed on index cards.¹⁸⁰ The subjects were asked to sort the “problems into groups based on similarities of solution.”¹⁸¹ Then, the subjects were required to sort the cards simply by viewing them, not by solving them first and then grouping them.¹⁸²

By examining the results, the physicists learned that the novices grouped the cards based on surface similarities.¹⁸³ By surface similarities, the physicists meant “(a) the objects referred to in the problem (e.g., a spring, an inclined plane); (b) the literal physics terms mentioned in the problems (e.g., friction, center of mass); or (c) the physical configuration described in the problem (i.e., relations among physical objects . . .).”¹⁸⁴ In other words, the novices grouped the problems based on the “facts” involved in each.

On the other hand, the physicists observed that, “[f]or [the] experts, surface features do not seem to be the bases for categorization. . . . It appears that the experts classif[ied] according to the major physics principle governing the solution of each problem,” such as Conservation of Energy or Newton’s Second Law ($F=MA$).¹⁸⁵ The experts grouped the problems based on the “deep structure” (i.e., the underlying principle) of each problem.¹⁸⁶ In other words, the novices grouped the cards based on surface similarities between the problems, while the experts grouped the cards based on relational similarities.

This study indicates that experts value, think in terms of, and find importance in the reason for things.¹⁸⁷ This can have interesting implications for legal writing.

C. Application of the Studies to Legal Brief Writing

First, to become an expert at legal analysis and writing, attorneys must look for precedent cases that exhibit relational similarities rather than surface similarities.¹⁸⁸ This is difficult because the relational similarities do not expose themselves as clearly as surface similarities.¹⁸⁹ However, until an attorney develops that ability, the attorney will operate closer to the level

¹⁸⁰ *Id.* at 123–24.

¹⁸¹ *Id.* at 124.

¹⁸² *See id.*

¹⁸³ *Id.* at 125.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *See id.* at 130.

¹⁸⁸ *See Spellman, supra* note 11, at 153.

¹⁸⁹ *See id.* at 151.

of a novice, rather than that of an expert, in legal analysis and persuasive writing.

Second, the attorney writing a brief to the court must understand that the reader—the judge—will be an expert at analyzing legal issues. The judge may not be an expert about the facts of the present case, the area of law (or specific laws) pertinent to the legal dispute, or the precedent cases discussed in the brief. However, through years of practice, the judge is likely an expert at considering legal arguments and making legal conclusions about issues presented. Thus, the judge will be more interested in—and persuaded by—precedent with important relational similarities to the present case instead of precedent with just surface similarities.¹⁹⁰ Knowing that a judge will likely find relational significance most important, attorneys will be most persuasive when presenting precedent cases as analogous to the present case if they focus on and explain those relational similarities.

Interestingly, some question whether judges are experts at legal analysis. For example, Professor Barbara Spellman writes that “[j]udges have had lots of practice using analogy; yet, they might not actually be ‘experts’ because just as there is no real generalized expertise in ‘problem solving’ it is not clear that there can be a generalized expertise in analogy use.”¹⁹¹ However, it is safe for practitioners to write briefs viewing judges more as experts than as novices in solving legal issues. Not only do judges spend years grappling with legal issues as practitioners, but also they spend years reading briefs, listening to arguments, and making conclusions about legal issues as judges. Even if judges are not experts, Spellman notes that “[b]ecause analogical reasoning is a core component of IQ, and because judges are likely to be a more intelligent group than a random collection of folks, judges are more likely to be better than average at analogical reasoning.”¹⁹² Spellman then writes, “More important, however, judges . . . know that when using analogies it is important to look for relational similarities and—because of their specialized training in legal content—they know which relational similarities matter within their domains of expertise.”¹⁹³ Thus, when writing to an audience who looks for and values relational similarities (i.e., judges), an attorney will provide a more thorough, reliable, credible, and thus persuasive argument when she highlights and explains the relational similarity between helpful precedent cases and the present case.

¹⁹⁰ *See id.* at 162.

¹⁹¹ *Id.*

¹⁹² *Id.* at 152.

¹⁹³ *Id.* at 162.

Further, even if judges are not experts at legal analysis, this does not mean attorneys should not bother explicitly stating the relational similarity. If judges are not experts, and thus may not identify the relational similarity themselves, that is even more reason to explain the relational similarity explicitly to ensure the important point does not go unrealized. If the judge has already identified the relational similarity on her own, the attorney can increase his ethos, or credibility, with the judge by confirming that he also understands the precedent and analysis on a deeper level than the superficial facts. On the other hand, if the judge has not already identified the relational similarity, then the attorney can help the judge to see and understand the analysis on that deeper level. Thus, the psychology studies¹⁹⁴ and the physics study,¹⁹⁵ when applied to legal analysis, indicate that an attorney can improve her persuasiveness by explicitly connecting and explaining the relational similarities between cases.

In addition, if judges are not experts at legal analysis, then many practicing attorneys with much less experience are not either. But, a practicing attorney can become an expert much more quickly—or at least become much more effective—if he or she understands how humans process analogical information and can focus on relational connections.¹⁹⁶

Realizing and appreciating the importance of relational similarities in effective and persuasive analogies is critical. Additionally, realizing that judges may not connect the relational similarities on their own is similarly important. The sooner an attorney understands and focuses on it during research—choosing precedent cases based as much or more on relational similarities than surface similarities—the sooner the attorney will become a more effective brief writer and persuasive advocate. Consider the attorney in a fast-paced legal environment who must research and write briefs quickly while juggling myriad demands on her time and attention. That attorney may go years, or possibly much of her career, without understanding the crucial importance of identifying helpful cases by searching beneath the surface and seeking out relational comparisons. Alternatively, even if the attorney understands this concept, a hurried attorney may not actually be executing it in practice when writing briefs.

This understanding is crucial for an attorney in two distinct aspects of legal writing. First, it is crucial in case selection. Thus, it affects what an attorney looks for when researching helpful case law. As noted, studies have

¹⁹⁴ See Markman & Gentner, *supra* note 149, at 431.

¹⁹⁵ See Chi et al., *supra* note 177, at 130.

¹⁹⁶ See Spellman, *supra* note 11, at 153.

shown that factual similarities are easier to spot, even though decision makers find relational similarities more important.¹⁹⁷ In addition, studies have shown that experts are more effective than novices are at retrieving and using analogies from different domains.¹⁹⁸ Translated to legal writing, experts are more effective than novices are at noticing relational similarities and applying precedent cases that do not share similar facts with the present case. Stated in reverse, novices are not as skilled at spotting analogous cases when the precedent case does not share obvious surface similarities with the present case.

It is easy to see how this negatively affects novice (or hurried) attorneys when researching for the best precedent to support their arguments. While researching, the novice (or hurried) attorney may analyze his research results and skim the cases looking only for cases with the closest factual similarities to the present case. The attorney may end his research after being satisfied that he has found a few favorable cases that “match up” fairly well factually. The attorney may skim over cases that, on the surface, did not match up factually as well. But, if the attorney had dug deeper, had been looking for not only factual similarities but also cases in which the court explained the significance of the facts (i.e., why the facts mattered, why the facts led to the court’s outcome, why the facts satisfied the purpose or intent underlying a rule, etc.), then the attorney may have found cases better supporting his client’s position.

Consider the dwelling example again.¹⁹⁹ The cases that upon a quick review may have seemed most factually similar (e.g., precedent in which a car was broken into) would not end up as the best cases to analogize to for support. Analogizing to cases with surface similarities may prove helpful, but being able to support the argument with favorable cases that share relational similarities is crucial. A novice attorney may quickly dismiss cases when the facts do not seem to line up on their face or, even worse, never find the cases in the first place. However, the expert attorney will seek out those cases in her research.

Second, after choosing a better set of precedent cases, the attorney who understands the importance of relational similarities must then highlight and explicitly explain the relational similarities when the attorney drafts the brief. After noting the important facts from the precedent case and the

¹⁹⁷ See Keith J. Holyoak & Kyunghye Koh, *Surface and Structural Similarity in Analogical Transfer*, 15 *MEMORY & COGNITION* 332, 338 (1987).

¹⁹⁸ See *id.*

¹⁹⁹ In that hypothetical, a homeless person’s car was broken into, and the question for the court was whether the car is a “dwelling.” See *supra* Part II.A.

reasons why the court found those facts important, the attorney must then identify the corresponding important facts from the present case and demonstrate why the reasons noted in the precedent case apply to the facts in the present case as well. Surface similarities may catch a judge's attention, but the relational similarities will prove to the judge that the cases are indeed analogous.

Choosing cases this way, and then explaining the similarities in this way, distinguishes an effective legal writer or advocate from a less effective one. The sooner an attorney learns, understands, and applies this concept to research and writing, the sooner the attorney will improve at legal analysis, persuasion, and brief writing, and the more effective at those tasks he or she will be.

Effective legal writers must be good at several skills, but an attorney's skill at identifying and explaining relational similarities is crucial and can be the difference between a winning and a losing brief. Some skills, such as executing accurate grammar, are obvious to most readers.²⁰⁰ Choosing cases and explaining analogies with a focus on relational similarities are less obvious, but considerably more important, to the success of the brief.²⁰¹ A judge may be annoyed by poor grammar, but a judge will overlook poor grammar if the judge perceives the law as favoring one party over the other.²⁰² Providing effective and persuasive analogies goes directly to the substance of the law and helps convince a judge that the case law favors or requires a particular outcome.²⁰³

IV. EXAMPLES OF LESS-EFFECTIVE AND MORE-EFFECTIVE ANALOGIES

The prior Part discusses how humans process information through analogies and how attorneys can use that information in the context of legal writing. With that background, this Part applies the concepts discussed above to three concrete examples of case-based analogies, demonstrating the differences between weak analogies (i.e., those that fall short of incorporating the above-mentioned knowledge) and strong analogies (i.e., those that apply the above-mentioned knowledge effectively).

²⁰⁰ See Mark Matthewson, *In-House Editors: Letting the Experts Do It*, 1 SCRIBES J. LEGAL WRITING 152, 152–53 (1990).

²⁰¹ Lamound, *supra* note 117.

²⁰² Poor grammar, though, can harm your credibility, which hurts your persuasiveness. See SMITH, *supra* note 2, at 182, 186–87.

²⁰³ Lamound, *supra* note 117.

A. *Comparing Surface Similarities*

The first step in crafting a strong analogy is choosing a strong source domain, i.e., a strong precedent case. As discussed in Part II, the best precedent may not appear factually similar on its face, but the court may have explained why the facts in that case led to its outcome, and those reasons may apply well to the facts in the present case, too.²⁰⁴ That relational similarity may make that case a very persuasive case for the attorney to discuss and compare. Alternatively, the attorney may find precedent cases with very similar facts but in which the court did not explain why those facts matter. Instead, the court just stated the rules, the facts, and then the outcome. If the attorney is lucky, she will find a case that checks all the boxes: a case that has strong factual similarities and in which the court explained why those facts are important. That is the ideal case. But, regardless of which type of case the attorney has available to her, the process of working through the analogy in the brief is the same.²⁰⁵ The attorney has to first explicitly state the facts from each case that are similar.²⁰⁶ Second, the attorney has to explicitly explain why those facts are important, i.e., what it is about those facts that lead to the advocated outcome.²⁰⁷

When the significant fact from each case is a direct match, this comparison can be as simple as saying, for example, “In both cases, the assailant slammed the victim’s head onto a concrete sidewalk.” Notice the attorney still explicitly stated the factual similarity. The attorney did not say that the cases are analogous and leave it up to the reader to spot the similarity (even if the similarity seems obvious to the attorney).

When the significant fact from each case is not a direct match, then the attorney especially has to point out the fact from each case that the attorney is comparing: For example, “In *Smith*, the assailant slammed the victim’s head onto a concrete sidewalk, and in the present case, Johnson held the defendant’s head under the water in the ocean.” This surface similarity is not a direct match, but the attorney has realized there is something about slamming a person’s head onto concrete that is similar to holding a person’s head under water. The similarity is relational. What is it that is the same about both of those facts? Though the defendants cannot control or possess the sidewalk or the ocean, both are still deadly weapons because the

²⁰⁴ See *supra* Part II.

²⁰⁵ See Hartung & George, *supra* note 95, at 688–89.

²⁰⁶ See *id.* at 689; EDWARDS, *supra* note 86, at 110; DAVID S. ROMANTZ & KATHLEEN ELLIOTT VINSON, LEGAL ANALYSIS: THE FUNDAMENTAL SKILL 45 (1998).

²⁰⁷ See Hartung & George, *supra* note 95, at 690; ROMANTZ & VINSON, *supra* note 206, at 46–47.

defendants used each to inflict serious bodily injury on the victim. If done well, the attorney will next explain that relational similarity. But, the attorney has to first explicitly state the specific facts that share a relational similarity.

The less obvious the relational similarity, the more the point is exemplified. Take the following example: “In *Wilson*, the assailant was carrying a butcher knife in his hand when he approached the victim, while in the present case the defendant had his brother by his side when he approached the victim.” It is very possible that the facts, on their face, seem so different that the reader may not see any factual similarity and thus not look for or realize any relational similarity that may exist.

Though the need to explicitly state the surface-level similarity increases as the less similar the facts appear, the attorney should still begin *every* analogy by stating the factual similarity. This helps cement the first part of processing an analogy, the retrieval process.²⁰⁸ Especially if the attorney has discussed multiple precedents, aligning the facts at the beginning of the written analogy helps the reader retrieve the appropriate precedent (and the specific facts) in his or her mind. And, it sets the foundation for the second part of processing an analogy: the mapping process.²⁰⁹

In addition, this explicit factual comparison becomes even more important if there are several important facts from the precedent case, several important facts from the present case, or several important facts from both cases. Further, this explicit factual comparison becomes even more important if there are multiple precedent cases that the attorney explained to the reader before analogizing to them. In either of those situations, the explicit factual comparison is important to help the reader with the retrieval process.²¹⁰ Even if the facts seem like an obvious match to the attorney, the reader may not have spotted the surface similarities on his own. It is never wise to assume the reader made the connection on his own.²¹¹ The attorney should make it easy for the reader. The reader is not likely to mind when the attorney makes his job easier. And, if the attorney assumes the reader would spot the factual similarities and thus did not bother to highlight them, but the reader (reading quickly) in fact did not make the connection, then the analogy that could have supported the argument will be missed.

²⁰⁸ See Spellman, *supra* note 11, at 150.

²⁰⁹ See *id.*

²¹⁰ See EDWARDS, *supra* note 86, at 106.

²¹¹ See Hunter, *supra* note 3, at 153, 155.

This is the first crucial step in drafting a strong analogy for the reader: explicitly stating the factual comparison. Yet, often the attorney fails to accomplish this, even if he or she attempts to do so.²¹² For example, attorneys will often begin an analogy by comparing things that are not really facts at all. Instead, the attorney references a factual comparison without stating the actual facts, assuming that the reader will see the comparison. Several examples of this follow.

1. *Comparing a Fact to a Rule*

Consider the following hypothetical analogy:

The *Harmon* case is analogous to the present case with respect to a private setting. Like in the present case, in which the student assaulted his girlfriend under the bleachers at a basketball game, the court in *Harmon* stated that settings are private, even if other people are nearby, as long as nobody is likely to see the incident occur.

This attempt at comparing surface similarities fails because it compares being “under the bleachers at a basketball game,” which is a fact, with a rule: “settings are private, even if other people are nearby, as long as nobody is likely to see the incident occur.” The rule is important, and it is appropriate to apply the facts to the rule, but not in the first part of the analogy, which is expected to first link together the facts from the two cases. In this example, the attorney is relying on the reader to retrieve the proper facts and to map them between the source (precedent case) and the target (present case). But, if the reader does not do so (especially if there were several other facts involved, and especially if other precedent had been discussed), then the mapping process will be incomplete and the analogy will be weakened. The writer may still prove his point by way of rule-based reasoning (applying facts to a rule),²¹³ but the writer lost the opportunity to do what he was intending, which was to support and prove his point with case-based reasoning (comparing the present case to precedent cases and thus using *stare decisis* to support the argument).²¹⁴ The reader may still do this on her own. Because the analogy is not executed properly, the writer has left it to the reader to retrieve and map from the *Harmon* case to the present case. If the reader fails to, or does so inaccurately, the attorney’s argument becomes

²¹² Anne Enquist, *Teaching Students to Make Explicit Factual Comparisons*, 12 PERSP.: TEACHING LEGAL RES. & WRITING 147, 147 (2004).

²¹³ See EDWARDS, *supra* note 86, at 5.

²¹⁴ See *id.* Professor Edwards refers to this concept as “analogical reasoning.” *Id.*

weaker than it otherwise would have been if truly based on a fully-explained analogy to favorable precedent. It is the writer's task to directly and explicitly articulate the surface similarities first and the relational similarities second.

2. *Comparing a Fact to Reasoning*

Now consider this hypothetical example:

The *Harmon* case is analogous to the present case with respect to a private setting. In the present case, the student assaulted his girlfriend under the bleachers at a basketball game, and in the *Harmon* case, the court noted that people are not likely to look behind them during a movie.

This shares a similar problem as the comparison in the prior example: there is no factual comparison. The court reasoned that people are not likely to look behind them during a movie. This reasoning is very important; it is what makes the analogy work. It is the beginning of the explanation of the relational similarity: why the facts are similar and why they are important. But, the attorney must start the analogy by identifying the specific source and the specific target,²¹⁵ and only *then* map from the source to the target by explaining why both sets of facts share the same relational components.²¹⁶ Without the act of working through these steps, the analogy is incomplete.²¹⁷ As in the prior example, the analogy only works if the reader fills in the gaps, which is a dangerous expectation for the writer to rely on. The connections may seem obvious to the attorney who spent hours drafting the brief and thinking about which cases to use. However, the connections may not be obvious to the reader who, for example, may have been reading quickly while juggling the facts and several precedent cases or who is skeptical because she knows the writer is trying to persuade her.

3. *Comparing a Fact to a Holding*

Now consider this hypothetical example:

²¹⁵ In broad terms, the source is the *Harmon* case and the target is the present case. In narrow terms, the source in this analogy is the facts from the *Harmon* case (that the assault occurred in the back of a dark movie theater) and the target is the facts from the present case (that the assault occurred under the bleachers during a basketball game).

²¹⁶ The relational component is that people are unlikely to look under the bleachers during a basketball game, just as people are unlikely to look behind them during a movie, making the people in both situations out of view of others, and thus in a "private" setting.

²¹⁷ See Spellman, *supra* note 11, at 150.

The *Harmon* case is analogous to the present case with respect to a private setting. Like in the present case, in which the student assaulted his girlfriend under the bleachers at a basketball game, in *Harmon*, the assault occurred in a private setting.

As above, there is no factual comparison. The attorney states the holding from the *Harmon* case (that the assault occurred in private). The purpose of the analogy is to prove why the court should find that the assault under the bleachers occurred in a private setting. The comparison, though, is similar to circular reasoning. It states that the cases are analogous because the court in *Harmon* found that the assault occurred in private. However, the attorney does not state the facts from *Harmon* that are similar to the facts in the present case; the attorney only states the conclusion. Even if the analogy was preceded by an explanation of the *Harmon* case, the attorney is assuming the reader will match the surface similarities. Perhaps the reader will. But, even if the reader does, the analogy is incomplete and sloppy when the surface similarities are not explicitly matched.²¹⁸

The examples above are intended to highlight common errors in the construction of analogies within briefs. The examples show a failure of the attorney to connect both sets of facts that the attorney is explicitly comparing. A case-based analogy should start with a fact-to-fact comparison.²¹⁹ Often, attorneys compare things that are not actually facts and thus omit this first step. However, the examples above assume that the attorney followed up with subsequent explanation of how the facts lead to the suggested outcome: the relational connection. That part is omitted from the above examples because they were only intended to highlight ways in which attorneys fail to make factual comparisons. In reality, attorneys often fail to effectively complete that second part of the analogy. The below examples highlight the part of the analogy that focuses on relational explanations.

B. Comparing Relational Similarities

Below are three examples demonstrating how much stronger an analogy is when the writer explicitly explains the relational similarities between the precedent case and the present case.

²¹⁸ See Hunter, *supra* note 3, at 153, 155.

²¹⁹ See EDWARDS, *supra* note 86, at 106.

1. *Example #1*

Below are two versions of the same analogy. Consider which is more persuasive.

Version 1:

The *Harmon* case is analogous to our client's case with respect to a private setting. Like in *Harmon*, in which the sexual assault took place at the back of a dark movie theater, in our client's case the assault took place under the bleachers at a basketball game. Thus, the assault under the bleachers occurred in a private setting.

Version 2:

The *Harmon* case is analogous to our client's case with respect to a private setting. Like in *Harmon*, in which the sexual assault took place at the back of a dark movie theater, in our client's case the assault took place under the bleachers at a basketball game. Despite that the movie theater had ten other people in it, the victim was in the back and everyone else was looking at the screen. Similarly, an assault under basketball bleachers, during a game, is out of the view of everyone else in the gym because the spectators are looking at the basketball court, not under the bleachers. Even though the assaults occurred in public places, they both occurred at a place within the building where nobody would be looking. Thus, the assault under the bleachers occurred in a private setting.

Both versions successfully accomplish the first part of an analogy by stating an explicit fact-to-fact comparison.²²⁰ However, that is where the first version stops. Unfortunately, that is common in legal briefs, especially when the attorney explains the case before providing the analogy. Attorneys often state the surface level, factual comparison and assume the reader will automatically see the relational similarity. In other words, the attorney seems to assume that the reader will automatically transfer the reasoning from the precedent case to the present case and understand how that reasoning applies to the facts in the present case. This may occur if the important facts in the precedent case are identical to the facts in the present

²²⁰ See *id.* at 106.

case. However, it is a dangerous assumption when the facts are not identical. Keep in mind, as discussed in Part II, people are more apt to identify surface similarities than relational similarities, especially if the reader is busy, distracted, or reading quickly.²²¹

It is possible that some attorneys assume the reader will make these relational connections. However, it is likely that readers, at times, do not. Further, it is also possible that a judge (i.e., an expert) looks for the relational connection but identifies something other than what the attorney was intending. The relational connection the judge realizes may be a weaker connection than what the attorney had presumed but failed to express. Even worse, the relational connection that first enters the judge's mind may hurt the analogy rather than explain it. The judge may spot something about the facts that would support opposing outcomes. If the attorney does not fill in this gap, the attorney loses control of the analogy and is placed at the mercy of a reader who is naturally skeptical because she knows the attorney's job is to persuade her. The attorney must control the analogy by expressing both the surface-level, factual comparisons followed by the relational-level explanation, i.e., why the same reasoning applies to both sets of facts.

Only by doing so can the attorney ensure the reader perceives the similarities in the same way as the attorney. The second version executes this. The second version begins with an explicit fact-to-fact comparison and then follows with a step-by-step explanation of why those facts are similar, why they are important, and why both sets of facts lead to the same outcome. The second example is more persuasive because it proves the cases are analogous at both the surface and the relational levels. The attorney drafting the second version increases the odds that the reader will see the two cases in the same light that the attorney does (or at least that the attorney wants the reader to). It is a more thorough, complete, accurate, and persuasive analogy. By explicitly stating the surface similarities and walking through an explanation of the relational similarity, the attorney controls the analogy and leaves nothing to chance.

2. Example #2

Version 1:

The *Smith* case is analogous to the present case with respect to the robber being "armed." In *Smith*, the robber held a loaded gun. In the present case, the robber held a

²²¹ See Spellman, *supra* note 11, at 151–52; *supra* Part III.

five-foot long board. Thus, the robber was armed when holding a board.

Version 2:

The *Smith* case is analogous to the present case with respect to the robber being “armed.” In *Smith*, the robber held a loaded gun. In the present case, the robber held a five-foot long board. A robber with a gun is “armed” because the robber can use the gun to injure and overpower a victim. Similarly, a robber could use a board to break a victim’s bones or knock a victim unconscious with one blow. Both a board and a gun give a robber a decisive advantage over the victim in any physical altercation. Both allow a robber to injure a victim at a distance from which the victim could not touch the robber. Because both a board and a gun provide a tool that a robber can use to overpower a victim’s potential resistance, a robber who possesses a board is “armed.”

When comparing the two cases, neither the surface similarities nor the relational similarities are patently obvious. In Version 1, the attorney did a good job of comparing facts but stopped short by immediately jumping to the conclusion. In Version 2, however, the attorney provided an explicit explanation of the relational similarity. Thus, Version 2 presents a more complete and persuasive analogy.

In both versions, the attorney properly lays the foundation for the analogy by making sure the reader focuses on the analogical facts that the attorney will attempt to connect. Nevertheless, plenty of characteristics about a gun separate it from a board. The attorney does not leave it to the reader to self-identify the favorable relational similarities, and the attorney helps focus the reader on relational similarities instead of possible differences (such as that the gun can shoot bullets *from a distance* while a board cannot shoot bullets and requires that the user, in large part, be able to overpower the victim with the user’s own strength).

3. *Example #3*

In this third example, below, the attorney compares the present case to *Olsen*, a precedent case in which the court held that a seasonal cabin was not a dwelling because fuses and bathroom fixtures had been removed, indicating that the cabin was not ready for immediate habitation. In the present case, the seasonal cabin had no electricity or running water. The

surface similarities are obvious: no electricity or running water available in either cabin. Thus, the *Olsen* case controls, the analogy works, and the court in the present case should also conclude that the cabin is not a dwelling, right?

Wrong. This example demonstrates the value of being able to focus on and explain the importance of the facts, why the facts matter, and the relational significance. However, in this last example, the attorney draws a distinction. A case-based distinction is the same as an analogy, except it attempts to prove that two cases are different, not similar,²²² and thus the judge should reach opposite outcomes in each (or at least the judge is not required by *stare decisis* to reach the same outcome). In form and structure, it is the same as an analogy.²²³ It is a comparison of two cases (i.e., a source, precedent case; and a target, present case).²²⁴ The attorney articulates which facts from each case she is comparing.²²⁵ Then, the attorney explains why the facts are different, and most importantly, what it is about the facts that should lead to opposite outcomes.²²⁶ It is both the opposite of an analogy (because it supports opposite outcomes instead of the same outcome) and the same as an analogy (because it compares two cases, extracts and compares significant facts, and explains the relational comparison to support the conclusion).²²⁷ The example is provided below:

Olsen is distinguishable from the present case with respect to maintenance for immediate occupancy. The homeowners in *Olsen* removed the fuses and disconnected the bathroom fixtures. Wilhelm's cabin, on the other hand, has never been connected to water or electricity. An owner that has removed fuses and disconnected water has taken active steps to disable the utilities. Such an owner has voluntarily left the premises unsuitable for occupancy. However, an owner of a building that has never had running water or electricity has not made this choice. This owner has decided that utilities are unnecessary for his use of the cabin. The cabin remains in the same condition when he is absent as when he is present. Wilhelm's cabin is a dwelling

²²² See Volokh, *supra* note 89.

²²³ See *id.*

²²⁴ See *id.*

²²⁵ See *id.*

²²⁶ See *id.*

²²⁷ See *id.*

because he has not taken active steps to leave his cabin unsuitable for occupancy.

As you can see, the facts on their face seem similar. In both cases, neither cabin had working electricity or running water at the time of the break in. However, the importance (and effect) of those facts differs. In *Olsen*, those facts meant that the owners could not immediately occupy the cabin. But, in the present case, those similar facts do not affect whether the owners could immediately occupy their cabin. By explaining the relational differences, the attorney is able to overcome the surface similarities and prove that the cases are very different. It is the “thing about the facts”—the reasons why they do or do not satisfy the rule—that is more important than the bare facts. And, it is crucial to explain that relational aspect. The hurried reader or the novice attorney may spot the similar facts and immediately conclude the cases are similar. Only by refocusing the reader on the relational differences can the attorney overcome the reader’s initial impression.

C. Comparing Groups of Facts

Another common mistake attorneys make when drafting an analogy is to compare a group of facts from the precedent case to a group of facts from the present case. Such an analogy may look like this example (presented as a distinction), in which the attorney is trying to persuade the court to find that a police officer “stopped” the defendant, meaning the defendant reasonably believed he could not leave:²²⁸

Version 1:

The State may attempt to argue that facts in this case are analogous to those in *Maxwell*. However, the situations are dramatically different. The officers in *Maxwell* approached the man, whom they had dealt with before concerning previous crimes, during the middle of the day in a crowded restaurant and stood at the side of his table. After approaching him and speaking to him, the officers shined a flashlight on his hands. In the present case, Officer Bartlett approached Anderson at 4 a.m. on a desolate street and initiated the contact with Anderson by shining his flashlight into Anderson’s trunk. Officer Bartlett then stood just a couple feet in front of Anderson, with Anderson’s back

²²⁸ See, e.g., *California v. Hodari D.*, 499 U.S. 621, 627–28 (1991) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)).

against his car's trunk. Also, Officer Bartlett's previous interactions with Anderson had always been as friendly neighbors. *Maxwell* is distinguishable because while a person may feel free to leave if an officer stands by his table midday, a person would feel less free to leave if an officer stands less than five feet from the person, with the person's back against a car, at night. Therefore, in evaluating the totality of the circumstances and what a reasonable person would believe, the Court should find that the encounter between Bartlett and Anderson was a stop.

In this comparison, the writer grouped the important facts from *Maxwell* together and compared the group to a group of facts from the present case. This approach can be appropriate where each fact is unimportant on its own but is significant in conjunction with the others. But, if each fact has its own independent significance, then the writer should work through the comparisons one fact at a time.

The table below demonstrates this visually. In the table, A, B, C, and D represent the significant facts from the precedent case, and 1, 2, 3, and 4 represent the comparable, significant facts from the present case.

Table 1

Proper analogy format when facts from each case are not important alone, but instead are important only when combined with others		Proper format when facts have their own independent significance	
<u>Precedent</u>	<u>Present</u>	<u>Precedent</u>	<u>Present</u>
A } B } C } D }	{ 1 { 2 { 3 { 4	A ←→ 1 B ←→ 2 C ←→ 3 D ←→ 4	1 2 3 4

The distinction between the *Maxwell* case and the present case in the example above follows the format in the left column of the table. The writer grouped all the significant facts together from *Maxwell* and then listed all the similar facts from the present case. However, each fact was important for different reasons; thus, each fact would have been significant toward the

outcome, even without the other facts. By grouping them, however, the writer loses the opportunity to explain the significance of each fact and to emphatically or persuasively highlight the differences between the two cases. Returning to Version 1, the reader did attempt to follow the comparison of the surface differences by explaining the relational difference. But, because the writer grouped the facts together, the writer is not able to flesh out the relational component as significantly.²²⁹ Either the writer overlooked some of the relational significance, or the writer was not able to articulate it because the focus was no longer on specific facts, thus significantly diluting the explanation of the relational significance.

In Version 2 below, the writer works through the comparisons one fact at a time instead of grouping all of the important facts from each case together. Notice how this emphasizes the differences by allowing the reader to more easily see the many differences. Unfortunately, the writer still did not flesh out the relational significance effectively. But, by working through the facts one at a time, the number of structural differences is more apparent, and the odds of the reader self-identifying relational differences increases.

Version 2:

The State may attempt to argue that facts in this case are analogous to those in *Maxwell*. However, the situations are dramatically different. First, the officers in *Maxwell* approached the man during the middle of the day in a crowded restaurant. Officer Bartlett, on the other hand approached Anderson at 4 a.m. on a desolate street. Second, whereas the officer in *Maxwell* stood to the side of the table, Officer Bartlett stood only a few feet in front of Anderson, with Anderson's back up against the trunk of his car. Third, the officers in *Maxwell* had dealt with the man before concerning his previous crimes. Officer Bartlett's previous interactions with Anderson had always been as friendly neighbors. Fourth, the officers in *Maxwell*, who were inside a lit restaurant, shined a flashlight on the man's hands after the encounter had commenced. Officer Bartlett, on the other hand, shined the light on the trunk when he initiated his contact with Anderson. In evaluating the totality of the circumstances and what a reasonable person would believe,

²²⁹ It could still be possible for the writer to flesh out the relational differences, but when writers group facts together, they often fail to fully flesh out all of the relational differences.

the Court should find that the encounter between Officer Bartlett and Anderson was a stop.

The persuasive value of the comparison between the two cases is still strongly limited because the writer failed to explain the relational differences. However, the comparison is an improvement over Version 1 because, if nothing else, the reader can easily see how many factual differences there are, and exactly what the factual differences are, between the two cases. In Version 3, below, the writer improves the analogy even more by explaining the relational significance of each factual difference.

Version 3:

The State may attempt to argue that facts in this case are analogous to those in *Maxwell*. However, the situations are dramatically different. First, the officers in *Maxwell* approached the man during the middle of the day in a crowded restaurant. Officer Bartlett, on the other hand approached Anderson at 4 a.m. on a desolate street. A person is much more likely to be intimidated when approached by someone in the dark on an empty street than when approached in the afternoon with people all around. When a person feels intimidated by an officer, the person would feel more scared to leave. Second, whereas the officer in *Maxwell* stood to the side of the table, Officer Bartlett stood only a few feet in front of Anderson, with Anderson's back up against the trunk of his car. In *Maxwell*, the defendant could have easily stood up and left. Anderson, on the other hand, would have felt "pinned" between Bartlett and his car. Third, the officers in *Maxwell* had dealt with the man before concerning his previous crimes. Officer Bartlett's previous interactions with Anderson had always been as friendly neighbors. Thus, it would be alarming for Anderson to have Bartlett now questioning him, telling him he was suspicious, saying, "Don't BS me," and asking what was in his bag. Because this is different from their prior encounters, Anderson would feel that Bartlett was acting as an investigating cop, not a friendly neighbor. Fourth, the officers in *Maxwell*, who were inside a lit restaurant, shined a flashlight on the man's hands after the encounter had commenced. Officer Bartlett, on the other hand, shined the light in the trunk

When cases have several facts to compare, writers often fall short of squeezing the most benefit out of their comparisons when they compare the facts from each case as groups of facts. By instead working through each fact individually, the writer can better present the comparison in the way that will be most effective for the reader. The writer can pinpoint and highlight every surface attribute the writer wants the judge to consider. When the writer instead groups facts together, the writer runs the risk that the judge may focus on certain facts and overlook others.

Once the writer isolates each surface attribute, the writer can then more explicitly explain the relational connections in a more effective, thorough, and persuasive way. As Version 2 likely demonstrates, without this explicit explanation, the reader may not self-identify what it is about the facts that matter. Why is shining a light in a trunk different than shining a light on a person's hands? A hurried, distracted, or tired reader may not stop and think about why those situations are different. The writer must take this step to maximize the value of the comparison. In Version 3, the writer has completed the comparison by explaining the significance of each fact. The reader may agree or disagree with the explanation. But, at least the explanation enters the reader's mind, which studies demonstrate might otherwise never occur.²³¹ By explicitly stating the relational significance, the reader makes the comparison much more persuasive to a judge, who will be more persuaded by the relational component of the comparison than the factual, superficial component.

V. CONCLUSION

Studies in various disciplines have explained how readers process information delivered in analogical format.²³² By considering the results from those studies and applying that information to the world of legal writing, attorneys can greatly improve the persuasiveness of the analogies in their briefs. The results of those studies indicate that attorneys writing legal briefs (especially busy or novice attorneys) may fail to find and select the most helpful cases, properly set up their analogies, recognize and focus on the most important information, and format their comparisons effectively.²³³

When this happens, the analogies have less influence on the judge than the attorney expects. This shortcoming is important given the central role that *stare decisis*, and thus case-based analogies, play in legal advocacy. When an attorney begins to tackle research and writing with a fuller

²³¹ See Markman & Gentner, *supra* note 149, at 431; Chi et al., *supra* note 177, at 130.

²³² See Markman & Gentner, *supra* note 149, at 431; Chi et al., *supra* note 177, at 130.

²³³ See Markman & Gentner, *supra* note 149, at 431; Chi et al., *supra* note 177, at 130.

understanding of analogies and implements the advice given in this Article, the attorney will quickly become a more effective—and potentially an expert—advocate for his client.