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Paradigm Lost: Recapturing Classical Rhetoric to Validate Legal Reasoning

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PARADIGM LOST: RECAPTURING CLASSICAL RHETORIC TO VALIDATE LEGAL REASONING

Kristen K. Robbins*

INTRODUCTION

At the inception of their careers, most lawyers have little or no background in logic or classical rhetoric.[1] The vast majority of first year law students at Georgetown, for example, are Political Science, History, or English majors. So few law students have majored in the Classics that admissions offices do not even keep track of this information. Despite the fact that modern legal argument is a direct descendant of these disciplines,[2] law schools do little to bridge this gap in their matriculating students' education.

Yet legal argument was considered an art form until the late 1800s.[3] In those days, American lawyers learned their trade by apprenticeship[4] or exposure to a classical liberal arts education.[5] In 1870, when Christopher Langdell announced his theory that law was a science, and thus should be taught scientifically, everything changed.[6] Law schools started to teach legal doctrine using the case method, which was thought to teach both rules of law and analytical skills. By the early 1900s, the case method became "entrenched as the pedagogical model of American legal education and it

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1. Logic is considered the science of inductive and deductive reasoning. Classical rhetoric is the practical art of persuasive discourse. As Aristotle defined it, rhetoric encompasses all available means of persuasion, including appeals to logic as well as to an audience's emotion and a speaker's character. EDWARD P.J. CORBETT, CLASSICAL RHETORIC FOR THE MODERN STUDENT 23, 544 (3d ed. 1990); Linda Levine & Kurt M. Saunders, *Thinking Like a Rhetor*, 43 J. LEG. EDUC. 108, 112 (1993); ERIKA LINDEMANN, A RHETORIC FOR WRITING TEACHERS 41–43 (3d ed. 1995).

2. Corax of Syracuse was the first to formulate the rules of rhetoric in the second quarter of the fifth century, B.C. They were designed to help Sicilian citizens argue their cases against Thrasybulus, a deposed tyrant who had confiscated their land. CORBETT, *supra* note 1, at 540; LINDEMANN, *supra* note 1, at 42. Aristotle viewed rhetoric as the art of oratory, which consisted of three types of discourse: political debate, legal (and other types of) argument, and inspirational speech. CORBETT, *supra* note 1, at 28–29; LINDEMANN, *supra* note 1, at 42.

3. *See* Levine & Saunders, *supra* note 1, at 110–11; Nancy L. Schultz, *How Do Lawyers Really Think?*, 42 J. LEG. EDUC. 57, 57–58 (1992).

4. Levine & Saunders, *supra* note 1, at 110; Schultz, *supra* note 3, at 57–58.

5. *See* Kurt M. Saunders & Linda Levine, *Learning to Think Like a Lawyer*, 29 U.S.F. L. REV. 121, 128 (1994) ("[E]arly academic law study combined readings from legal treatises with readings from rhetoric, history, philosophy, literature, science, and econom[ics].").

6. Charles R. McManis, *The History of First Century American Legal Education: A Revisionist Perspective*, 59 WASH. U. L.Q. 597, 632–33 (1981); Saunders & Levine, *supra* note 5, at 128; Schultz, *supra* note 3, at 58.

remains so today despite controversy."[7] Thus, rhetoric and the recognition of the value in "learning by doing" were severed from legal education.

Many students enter law school thinking that they will receive formal training in either logic or rhetoric, but very few law schools even teach classes in these subjects.[8] Only with the advent of clinics and legal research and writing classes in the 1970s did law schools formally teach students the "practice" of law and how to construct and present arguments in writing.[9] Over the past two decades only a handful of law professors and scholars have urged law schools to inject classical rhetoric and logic into their coursework.[10] Unfortunately, they have not met with great success.

In the absence of formal training, most lawyers learn to write persuasively by imitating "good" legal writing.[11] The young litigator drafts her summary judgment motion by modeling it after a successful motion drafted by her supervising attorney. The corporate attorney uses "boiler-plate language" that gets transferred from one asset purchase agreement to the next. Scholars learn to write articles that sound "scholarly." Law students write exams, legal memoranda, and briefs by looking at samples that earned high grades.

The consequence for the legal profession is an abundance of legal writing that is not grounded conceptually in the rhetorical tradition from which it is derived. Ask a typical law student when she figured out the

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7. Saunders & Levine, *supra* note 5, at 129.

8. Terri LeClercq, from the University of Texas School of Law, and Anthony Palasota, from the Thurgood Marshall School of Law, are teaching Advanced Legal Writing Seminars that draw on principles of classical rhetoric and modern theories of argumentation. Terri LeClercq & Anthony Palasota, Legal Writing Conference Presentation, *Let's Argue About Argumentation* (Knoxville, Tenn., May 31, 2002).

9. *See* Saunders & Levine, *supra* note 5, at 130–32.

10. *See, e.g.*, RUGGERO J. ALDISERT, LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING (3d ed. 1997); STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING (1985); JAMES A. GARDNER, LEGAL ARGUMENT: THE STRUCTURE AND LANGUAGE OF EFFECTIVE ADVOCACY (1993). Aldisert, Burton, and Gardner are candid, well-written books detailing how to "think like a lawyer" by using logic in legal reasoning and writing. *See also* Levine & Saunders, *supra* note 1, at 108, 111–13; Anita Schnee, *Logical Reasoning "Obviously,"* 3 LEG. WRITING 105, 116 (1997). Levine and Saunders argue that rhetoric should be re-introduced to the law school curriculum in order to unite theory (from doctrinal courses) and practice (from methods courses). They illustrate that rhetoric can help students identify issues and invent and analyze arguments. Schnee's article is the best, most recent article I have read in terms of explaining the fundamentals of classical rhetoric in a way that students would readily understand. The problem with these articles is that they are written to law professors, and Schnee speaks somewhat critically about law student behavior. As a result, it is tough to assign these relatively short (and therefore appealing) articles to first-year law students.

11. *See* ALDISERT, *supra* note 10, at 1 ("Often students, and unfortunately, lawyers and judges, do not know exactly what is being done. They learn the exercise. They go through the motions. But most are a little shy on theory."); BURTON, *supra* note 10, at 1 ("The conventional wisdom is that one learns legal reasoning by doing it. Consequently, the student in the first year of law school proceeds largely by trial and error.").

"key" to law school. She may tell you that once she heard about IRAC (Issue, Rule, Application, Conclusion), she knew how to write both law school exams and legal memoranda. Then ask her where IRAC comes from, and she is likely to have no idea that it is a watered-down version of the syllogism. Ask a young associate where reasoning by analogy fits in the hierarchy of proof-making and see the expression on his face when you tell him that analogy *proves* nothing.

Relatively few scholars have attempted to describe good legal writing in classical rhetorical terms.[12] Only some of this work, notably that of Ruggero Aldisert, Steven Burton, James Gardner, and Jill Ramsfield, is addressed directly to law students.[13] Very few law professors assign these texts to their first year students. Legal writing courses tend to require more traditional "writing texts," the bulk of which are devoted to teaching the differences between legal memoranda and briefs, the parts of a typical legal memorandum or brief, and how to draft each of the various parts.[14] Very little space in these texts is devoted to the origins of persuasive discourse, the principles on which legal argument is based, or the complexity of writing to a given audience.[15] If we could explain adequately, from a rhetorical point of view, why a certain argument is weak, the young lawyer would stand a better chance in improving its persuasiveness.

Despite our lack of schooling in the rhetorical tradition, we are remarkably unforgiving when it comes to our colleagues' poor writing. We are quick to criticize, but we do not have a proper or common vocabulary for describing *how* or *why* legal writing is poor. Ask on-campus interviewers about the quality of young associates' writing, and they will tell you that young lawyers cannot write: "They don't understand the basics of good writing. Their analysis is not very good. And they know very little about grammar." Ask a law professor about the quality of written law school exams: "They can memorize the rules of law, but they don't know what to *do* with them."

These generalizations may very well be true, but it is no wonder—one can rarely do well that which she has not been taught. As Kurt Saunders

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12. *See supra* note 10; *see also* JILL J. RAMSFIELD, THE LAW AS ARCHITECTURE: BUILDING LEGAL DOCUMENTS 233–313 (2000).

13. ALDISERT, *supra* note 10; BURTON, *supra* note 10; GARDNER, *supra* note 10; RAMSFIELD, *supra* note 12.

14. *See, e.g.*, CHARLES R. CALLEROS, LEGAL METHOD AND WRITING (2d ed. 1994); JOHN C. DERNBACH ET AL., A PRACTICAL GUIDE TO LEGAL WRITING & LEGAL METHOD (2d ed. 1994); HELENE S. SHAPO ET AL., WRITING AND ANALYSIS IN THE LAW (4th ed. 1999); ROBIN S. WELLFORD, LEGAL REASONING, WRITING, AND PERSUASIVE ARGUMENT (2002).

15. *See, e.g.*, CALLEROS, *supra* note 13, at 117–36; SHAPO ET AL., *supra* note 13, at 95–108; WELLFORD, *supra* note 13, at 127–38.

and Linda Levine have noted, the case method has been severely criticized over the years.[16] Although it is designed to teach analytical skills, the case method often leads students to believe that law is the study of "black letter" rules rather than methodologies.[17] This long-standing pedagogical tradition helps explain why young lawyers can memorize legal rules but not know what to do with them. Ironically, teaching law as a science has produced generations of lawyers who are unschooled in logic, the most scientific component of legal discourse.

Judges, too, are critical of advocates' writing. A 1999 survey of the federal judiciary reveals that judges would like to see lawyers make better legal arguments.[18] Judges think that lawyers usually find the relevant law, but they do not use it effectively.[19] Only 56% of the judges surveyed said that lawyers "always" or "usually" make their clients' best arguments. Similarly, only 55% said that lawyers "always" or "usually" examine relevant legal issues in appropriate detail.[20] In fact, a majority of judges (58%) rated the overall quality of legal analysis in briefs as "good" as opposed to "very good" or "excellent."[21]

Judges who participated in the survey submitted the following comments:

- Frequently analysis is superficial, relying on the case or cases that the writer subjectively thinks are helpful without sufficiently recognizing and rebutting contrary readings and without explaining how the law has developed.
- Counsel tend[] to state what they think is sufficient, but often will not adequately discuss the various implications of the issues.
- Counsel often waste words on trivial issues and neglect to focus more on the application of controlling case law to the particular facts of a case.
- Most of the briefs lack proper analysis of legal and factual issues. They ignore or gloss over obvious weaknesses in their argument and fail to address the compelling counterpoints of the other side.
- Too often all lawyers do is cite cases. Rarely do they do a good job in analysis.

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16. *See* Saunders & Levine, *supra* note 5, at 129–30.

17. *Id.* "[S]tudents are often well into their education before they understand the operation of the legal method. Indeed, a law school graduate's first job is frequently reduced to an apprenticeship in the use of this method." *Id.*

18. Kristen K. Robbins, *The Inside Scoop: What Federal Judges Really Think About the Way Lawyers Write*, 8 LEG. WRITING (forthcoming 2003).

19. *Id.*

20. *Id.*

21. *Id.*

- We often get the feeling (law clerks and [judges]) that the parties are satisfied simply to identify issues and leave the rigorous research and analysis to the court.[22]

The judges' frustration with the quality of the advocates' arguments is unmistakable, but even judges have a hard time describing what makes legal analysis good. In answering this question, many judges said that the best legal writers

> "state clearly . . . what the case is about and why the court should affirm or reverse," "[m]ake things clear and interesting," "clearly and concisely identify and analyze the issues presented," and "state their positions clearly." Conversely, the worst briefs "read like a Joycean stream-of-consciousness and seem to have no theme or clear purpose," "are anything but" clear, "muddy up the water," "cloud the main issues with trivia," or contain "fuzzy, imprecise thinking and writing, leaving the reader to guess or assume as to the meaning."[23]

The "clarity" these judges yearn for remains elusive in the context of written advocacy. In fact, it is not at all clear what it means to "write clearly."[24] If "clear" literally means "easily seen through" or "transparent,"[25] What is it that can be seen once writing becomes invisible?[26] Pure thought?[27] "Pure thought" is certainly no guarantor of clarity. Legal writing courses have helped eradicate legalese and fill in gaps left by college composition courses, but as these judges recognized, even an argument written in plain English with accurate grammar, punctuation, and spelling is not necessarily clear. Without some back-ground in the fundamentals of classical (or even modern) rhetoric, some lawyers may never

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22. *Id.*

23. *Id.*

24. A comment from a teacher or supervisor that a certain passage is "unclear" is not particularly helpful because the writing is often quite clear to the writer.

25. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 247 (9th ed. 1990).

26. Although these judges said they crave clarity, my intuition tells me that what judges really want are fully developed arguments that make sense—arguments with the heft of classical rhetoric behind them. Without a vocabulary for describing the analytical weaknesses in advocates' writing, these judges are no more "clear" than the writing about which they complain.

27. The idea that unclear writing reflects a failure in translation from the mind to the written word stems from the belief that writing exists apart from ideas—that words merely express ideas; they do not create ideas. This traditional view of writing dominated writing pedagogy until the 1970s and 1980s, when the expressivists and cognitivists began to challenge and supplement this formalistic approach. *See, e.g.*, J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 49 (1994).

learn to write "clearly"; even the simplest and most plainly written argument may remain muddled.[28]

Critics have written voluminously on the subject of why legal writing is poor, but none seems to understand that for the most part, lawyers just do not know what they are doing. The most cynical critics claim that lawyers write poorly on purpose. "Lawyers write badly because doing so promotes their economic interests."[29] According to Steven Stark, lawyers use legal jargon because it helps them "convince the world of their occupational importance, which leads to payment for services."[30] Stark and others theorize that lawyers write badly because they view cases only as objective pieces to fit within a puzzle of precedent; they cannot afford to treat individual cases as involving real people.[31] Because lawyers need to fit each case within the existing puzzle, they "must ignore the attractive part of a story and be content instead to discuss the application of rules in a way that tells lawyers what doctrines they should follow."[32]

Still others blame poor legal writing on the difficulty of writing to a multi-faceted and hostile audience that includes judges, clients, and supervisors;[33] on time pressures that lawyers increasingly face;[34] and on a

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28. *See* Richard Hyland, *A Defense of Legal Writing*, 134 U. PA. L. REV. 599, 621 (1986) ("The problem is that lawyers cannot write clearly unless they can think clearly, unless they can recognize and construct a convincing legal argument—unless, in other words, they understand the structure of the law."); *see also* George D. Gopen, *The State of Legal Writing: Res Ipsa Loquitur*, 86 MICH. L. REV. 333, 353 (1987) ("[S]hallow intellectuality in the legal profession is tending to produce shallow thought, which is in turn manifested by (not merely productive of) poor writing.").

29. Steven Stark, *Why Lawyers Can't Write*, 97 HARV. L. REV. 1389, 1389 (1984); *see also* Debra R. Cohen, *Competent Legal Writing—A Lawyer's Professional Responsibility*, 67 U. CIN. L. REV. 491, 511 (1999) ("Many have accused lawyers of clinging to bad legal writing to preserve their earning potential."); Dan Seligman, *The Gobbledygook Profession*, FORBES, Sept. 7, 1998, at 174, 174–75 (describing legal writing as "god-awful" because lawyers use "incomprehensible" language and have "come to believe that this language has genuine cash value").

30. Stark, *supra* note 29, at 1389.

31. *See, e.g.*, Matthew J. Arnold, *The Lack of Basic Writing Skills and Its Impact on the Legal Profession*, 24 CAP. U. L. REV. 227, 232 (1995) (noting that legal writing is "bad" or "unclear" because of "the inherent nature of stare decisis and rule regurgitation"); Gopen, *supra* note 28, at 338–39 ("Lawyers . . . fill relatively little space with interesting, human specifics, and are forced to concentrate instead on the relatively non-human (some would say inhuman) legal concepts."); Stark, *supra* note 29, at 1391 ("[L]awyers constantly explain things in terms of the past; they reason that they are doing nothing new and only following existing precedent.").

32. Stark, *supra* note 29, at 1391.

33. *See* Gopen, *supra* note 28, at 340 ("This [multiple audience] is a great problem, not to be underestimated. No wonder lawyers are so willing to repeat themselves, to plug small holes that might not even exist, to pile on much more information than the argument requires, and in general to use a shotgun approach (instead of a crossbow approach) to rhetoric."); Cohen, *supra* note 29, at 498 ("Writing a document for multiple audiences is difficult, particularly when each audience has a different background and reads it for a different purpose.").

34. Gopen, *supra* note 28, at 341 ("[T]ime pressures neither allow for long prewriting processes . . . nor encourage patient revision; nor do they foster the kind of fruitful creative fervor

lack of basic writing skills.[35] Joseph Williams argues that poor legal writers are those lawyers who have not been fully socialized into the legal discourse community.[36] Although Williams' theory helps explain the temporary lapse in certain basic skills that occurs with new lawyers, it does not account for the "unclear writing" generated by some of the most socialized lawyers in the profession.

Regrettably, there may be *some* truth to these scholars' theories.[37] Nevertheless, the principal problem with legal writing is not that lawyers cannot write; the problem is that we have not been taught how to create and construct arguments. It is not our writing that is undeveloped or unclear; it is our thinking. In order to develop "clearer" thinking, lawyers need to know something about the rhetorical tradition from which legal argument is derived.[38] Law students, in particular, should be acquainted explicitly with the basics of classical rhetoric: the different modes of persuasion, how to invent and construct arguments, how to identify fallacies in argument, and how to appeal to one's audience.[39] Specifically, law professors "should be

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experienced by some journalists. Lawyers are regularly producing texts under conditions singularly ill-suited to the production of clear, readable prose.").

35. *See* Arnold, *supra* note 31, at 228 ("Although there are numerous texts, articles, and studies dedicated to the subject of improving lawyers' writing skills, little has been said about the core problem—a pervasive lack of elementary writing skills among law students and lawyers."); Cohen, *supra* note 29, at 515 ("Unfortunately, many lawyers lack . . . elementary writing skills.").

36. Joseph M. Williams, *On the Maturing of Legal Writers: Two Models of Growth and Development*, 1 LEG. WRITING 1, 2, 9 (1991).

37. Some of us do tend to feel a certain satisfaction in speaking in code, we do need to please both client and decision-maker with one document written preferably at break-neck speed, and some of us have never learned the difference between that and which.

38. *See* ALDISERT, *supra* note 10, at 3.

> [W]e might all be better lawyers (and, of course, better students) if we understood the rules of logic instead of simply memorizing some of the steps. . . . It's great to play the piano without being able to read music, but unless you're an Irving Berlin, you're not going to reach your full potential by merely memorizing tunes that you've heard somewhere before."

Id.

39. Although there is a vast body of work by modern rhetoricians, classical rhetoric seems to provide a better initial framework for teaching law students how to construct written legal argument. Modern rhetoric combines rule-based reasoning with the social processes of argumentation in its attempt to characterize persuasive discourse. *See, e.g.*, CHAIM PERELMAN, JUSTICE, LAW, AND ARGUMENT: ESSAYS ON MORAL AND LEGAL REASONING (Jaakko Hintikka et al. eds., John Petrie et al. trans., 1980); CH. PERELMAN & L. OLBRECHTS-TYTECA, THE NEW RHETORIC: A TREATISE ON ARGUMENTATION (John Wilkinson & Purcell Weaver trans., Univ. Notre Dame Press 1971) (1969); STEPHEN TOULMIN, AN INTRODUCTION TO REASONING (2d ed. 1984); STEPHEN EDELSTON TOULMIN, THE USES OF ARGUMENT (1958). Its aim is not to test the validity of argument but to describe what makes certain arguments persuade certain audiences. *See generally* Kurt M. Saunders, *Law as Rhetoric, Rhetoric as Argument*, 44 J. LEG. EDUC. 566 (1994) (discussing how the theories of Perelman and Toulmin can be used to teach students the practical skill of legal argument). Because this article focuses on "patterns of error" in legal writers' reasoning, it makes sense to discuss these errors in terms of logic and

teaching the sequences of logical reasoning."[40] As Levine and Saunders point out, "[e]xpert lawyers and legal educators already use many of the structures and strategies of rhetoric";[41] the least we can do is let the others in on their little secret.[42]

Novices and seasoned lawyers alike should know when they are reasoning deductively or inductively. They should know what a syllogism is, how powerful it is, and how legal argument differs from it. They should know that analogies to cases often fit within a larger, syllogistic framework and that they support the minor premise of the larger syllogism. They should know that analogies prove nothing, but that they can strongly advocate for desired outcomes.

Incorporating classical rhetoric into introductory or advanced legal writing courses would, to some extent, "systematize tacit knowledge—how [effective] lawyers think."[43] Some lawyers are smart enough to "'hear' what good writing sounds like and are then able to imitate what they think is style (but is more often structure) in their own prose. Others pick this up . . . through education. Unfortunately, those two groups combined do not represent a large percentage of the populace."[44] For most lawyers, there is simply more going on in the creation of sound and convincing arguments than they can intuit in the pressure-filled, whirlwind context of law school and legal practice.[45]

The goal of this article is to highlight the need for educating lawyers about the rhetorical tradition, to provide a brief summary of the basics in syllogistic and analogical reasoning that lawyers need to know in order to understand that tradition, and to isolate and analyze several of the problems in both types of reasoning common to legal writers. Each problem can be identified, evaluated, and improved, regardless of the lawyer's writing ability or experience level. The article creates a working vocabulary for recognizing these problems and enabling lawyers, professors, students, and judges to communicate in the same language about a critical component of

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enthymeme, the rhetorical equivalent of the syllogism. The effect that these arguments have on their intended audience in the context of litigation or any other type of practice is more properly the subject of modern rhetoric. As Professors LeClercq and Palasota are already doing, law professors could build on a foundation in classical rhetoric acquired in the first year by teaching modern argumentation theory to upper level students. *See supra* note 8.

40. Schnee, *supra* note 10, at 116.

41. Levine & Saunders, *supra* note 1, at 109.

42. *See* ALDISERT, *supra* note 10, at 23 ("[T]he person who studies logic—law student, lawyer or judge—and who has become familiar with the principles of logical thinking, is more likely to reason correctly than one who has not thought about the general concepts of reasoning.").

43. Levine & Saunders, *supra* note 1, at 121.

44. Gopen, *supra* note 28, at 345.

45. *Id.*

persuasive writing—the validity of its reasoning.[46]

Part I provides a basic definition and overview of deductive reasoning, including its mainstay, the syllogism. Part II identifies and develops a vocabulary for describing recurring problems in the deductive reasoning of first-year law students. These problems have been identified as follows: 1) *The Book Report*; 2) *The Fear of Commitment*; 3) *The Packed Paragraph*; 4) *The Deceptive Hypothetical*; 5) *Myopic Vision*; 6) *The Editorial*; and 7) *The Negative Proof*. Each problem is illustrated and then revised and improved based on principles of deductive reasoning.

Part III provides a basic definition and overview of analogical reasoning and its use within a larger syllogistic framework in legal writing. Part IV then identifies and creates a vocabulary for describing recurring problems in students' analogical reasoning. These problems are identified as follows: 1) *The Missing Link*; 2) *The House of Cards*; 3) *Insufficient Facts*; and 4) *The Problem with Totalities*. Each problem is illustrated and then revised.

The article concludes that if legal writers had a better understanding of the classical rhetorical tradition, they would write better and more persuasively. Infusing doctrinal, clinical, and writing courses with principles of classical rhetoric would go a long way toward eliminating the distinction between clear thought and clear writing. Good writing would simply reflect clear thought.[47]

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46. Of course, one could argue that an advocate has either some or no impact on a judge's ultimate decision regardless of the manner in which her argument is made or structured. However, advances in modern rhetoric alone refute an objection to teaching classical rhetoric on this ground. Logic, arrangement, and delivery of argument do affect outcome. *See, e.g.*, Bruce McLeod, *Rules and Rhetoric*, 23 OSGOODE HALL L.J. 305, 305–06 (1985).

> Legal theory can benefit from this renewed interest in rhetoric. . . . Both the formalist model of law as a system of rules and the realist renunciation of legal rules fail to consider judicial decisions as exercises in persuasion. Rhetorical analysis brings the judicial decision to the forefront by focusing upon the judge's persuasive obligation to the audience.

Id.; Saunders, *supra* note 39, at 573 ("Arguments must be based on premises that the audience accepts, or considers reasonable, because the adherence of the audience is the measure of validity."); Paul T. Wangerin, *A Multidisciplinary Analysis of the Structure of Persuasive Arguments*, 16 HARV. J.L. & PUB. POL'Y 195 (1993) (discussing work done in the field of argumentation theory and its relation to the structure of arguments).

47. "*[T]hinking like a rhetor* eliminates artificial distinctions between skills of analysis and skills of communication, as well as distinctions between doctrine and method." Levine & Saunders, *supra* note 1, at 121.

I. DEDUCTIVE REASONING AND THE SYLLOGISM

Classical rhetoric was concerned primarily with persuasive discourse: the art of using spoken or written language to inform or persuade an audience.[48] According to Aristotle, people use three modes of persuasion: they appeal to reason (logos); they appeal to emotions (pathos); and they appeal by way of their credibility and character (ethos).[49] Although a good lawyer takes advantage of all three modes of persuasion, she must appeal primarily to reason that is grounded in the law and concepts of stare decisis. As long as the lawyer's logic does not yield seemingly unfair results, an appeal to reason is likely to be her strongest tool.[50]

The bulk of written legal argument takes the form of deductive reasoning, moving from general to specific concepts. Most often, deductive reasoning applies a general rule to a specific set of facts.[51] The application of the rule arguably leads to the stated conclusion, but as we in the legal profession know, a different articulation of the same rule can easily lead to the opposite result. Indeed, the choice of the rule itself will differ based on the cases chosen and relied on by the writer in support of her conclusions. As Anita Schnee points out, legal readers can be as easily convinced by a dissent as by a majority decision.[52] Articulating the "appropriate" rule of law is a complex process that requires the writer to be a strong and creative advocate.[53]

The quintessential test of the validity of deductive reasoning is the syllogism.[54] The syllogism is comprised of three parts: a major premise, a minor premise, and a conclusion.[55] In order for the syllogism to be valid, two requirements must be satisfied:

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48. CORBETT, *supra* note 1, at 20.

49. *Id.* at 37.

50. Schnee, *supra* note 10, at 110–11.

51. Of course, the process that occurs *before* lawyers write and by which they formulate the rules they apply is often inductive in that they "discover" the rules by reading cases and building an incremental understanding of the composite rule in a given jurisdiction. *See, e.g.*, RAMSFIELD, *supra* note 12, at 234–37.

52. Schnee, *supra* note 10, at 115.

53. When a judge is faced with competing rules or interpretations of rules, neither logic nor rhetoric serve to resolve the conflict. In this situation, the judge must make "a value judgment that places a greater weight on one competing principle than another." ALDISERT, *supra* note 10, at 19.

54. CORBETT, *supra* note 1, at 43. James Gardner goes so far as to say that "all legal argument should be in the form of syllogisms." GARDNER, *supra* note 10, at 3. "The syllogism is like the physics of architectural engineering. By knowing how it works, you can use it to unravel some of your sources' strengths and evaluate your design possibilities." RAMSFIELD, *supra* note 12, at 247. For an interesting discussion on more modern analytical paradigms that can be used effectively in conjunction with syllogistic reasoning, see *id.* at 276–77, 296–98, 370–72.

55. CORBETT, *supra* note 1, at 49; GARDNER, *supra* note 10, at 4.

> First, each of the premises must be indisputably true.[56]
>
> Second, the application of the major premise to the minor premise must be logical in order for the conclusion to be valid.[57]

The most common example of a syllogism is that taught in basic Logic courses:

> Major premise: All men are mortal.
>
> Minor premise: Socrates is a man.
>
> Conclusion: Socrates is mortal.

Both requirements are satisfied because each of the premises is indisputably true, and as will be explained shortly, the application of the major premise to the minor premise produces a valid conclusion.

What makes syllogistic argument so appealing is its seemingly ironclad quality. "[T]he peculiar force of a syllogistic argument resides in this: *if* we assent to the truth of the premises and *if* we agree that the reasoning is valid, we *must* grant the conclusion."[58] No one can argue that all men are not mortal or that Socrates was not a man. Thus we, the audience, readily assent to the truth of the premises. Testing the validity of the reasoning is a much more difficult and complex task. As Gardner explains, the syllogism is based primarily on the mathematical principle of transitivity.[59] If A equals B, and B equals C, then A must equal C. If Socrates (A) is a man (B), and all men (B) are mortal (C), then Socrates (A) must also be mortal (C).[60]

A. The Validity Test and the Principle of Distributed Terms

A syllogism is generally considered to satisfy the second requirement (i.e., be valid) if:

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56. CORBETT, *supra* note 1, at 50; GARDNER, *supra* note 10, at 5 (describing premises as "general rule[s]" and "propositions").

57. GARDNER, *supra* note 10, at 5.

58. CORBETT, *supra* note 1, at 50. "When presented with the properly framed major and minor premises of a syllogism, the human mind seems to produce the conclusion without any additional prompting." GARDNER, *supra* note 10, at 6.

59. GARDNER, *supra* note 10, at 6.

60. *Id.* at 6–7.

1) only three terms of comparison are used (akin to the A, B, and C from the example above), and
2) the principle of distributed terms is not violated.[61]

"Distributed" means the extent to which a term encompasses all or some of the named objects or individuals.[62] "All men" is a distributed term, whereas "some men" is an undistributed term—something *less* than the total number of men. It is fairly easy to identify whether terms that function as the subjects of the premises are distributed. The only rule that is not necessarily intuitive is that proper names are treated as distributed terms because the predicate term usually applies to the entire subject.[63] "Socrates," therefore, is a distributed term in the minor premise of the example because one can say that the predicate term "man" applies to all of the subject term, "Socrates."

Determining if predicate terms are distributed is more difficult. Edward Corbett suggests that novice rhetoricians use the simple formula that predicate terms of affirmative propositions are undistributed, whereas predicate terms of negative propositions are distributed.[64] Both "mortal" in the major premise and "man" in the minor premise are undistributed terms because they are predicate terms of affirmative propositions.

B. Applying the Validity Test

Only three terms of comparison ("man/men," "mortal," and "Socrates") are used in the example syllogism, and it thus passes the first step of the validity test. The second step of the test is to ensure that the principle of distributed terms is not violated. As long as 1) the middle term—the term that appears in both of the premises but not in the conclusion—is distributed at least once, and 2) no term is distributed in the conclusion that was not distributed in at least one of the premises, then the syllogism is likely to be valid.[65] In our example, the middle term—men/man—is distributed in the major premise ("all men") but not in the minor premise,

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61. CORBETT, *supra* note 1, at 52.
62. *Id.* at 50.
63. *See id.*
64. *See id.*
65. Occasionally, a syllogism will fail for additional reasons. Corbett articulates three additional rules for testing syllogisms:

[1] No conclusion may be drawn from two *particular* (as opposed to *universal*) premises.
[2] No conclusion may be drawn from two negative premises.
[3] If one of the premises is negative, the conclusion must be negative.

CORBETT, *supra* note 1, at 52.

because "man" is the predicate term of an affirmative proposition.[66] Thus the middle term is distributed at least once (in the major premise).

As for the terms in the conclusion, the subject term "Socrates" is distributed in both the conclusion and in the minor premise. The predicate term "mortal" is undistributed because it is the predicate of an affirmative proposition, and therefore this rule does not apply. Because no term is distributed in the conclusion that was not also distributed in one of the premises, the example syllogism is valid.

The same rules for testing the validity of a syllogism can be used to evaluate legal writing. Student memoranda and briefs can be analyzed to determine if their reasoning is valid. Consider the following sample paragraph from a student memorandum that discusses whether the intent element required in a cause of action for fraud can be proved. The case involved the allegedly fraudulent sale of a private home where the seller failed to disclose that the furnace was faulty:

> Intent to mislead is the fourth element. See Gibbs at 207, 647 A.2d at 889. Intent can be shown by suppression of the truth or a suggestion of what is false. See Smith at 300, 564 A.2d at 189. In Smith, the seller told the buyer "not to worry about" termite damage, and that statement qualified as a suggestion of what was false and evidenced seller's intent to deceive. Storey's [the defendant's] intent to deceive was shown when he suppressed the fact that the furnace was broken and suggested it would only need annual inspection. He intended that the Wyndhams believe him and buy the house without checking the furnace, and they did.[67]

66. Affirmative propositions always encompass the total number for the subject but never for the predicate. "All men are mortal" tells you something about "all men" but only something about "some mortals." Therefore, the subject is distributed while the predicate is not. In contrast, negative propositions always say something about "all" subjects and predicates. "No cats are dogs" tells you something about all cats but also about all dogs (they are not cats). Thus, both subject and predicate of the premise are considered distributed. *See* CORBETT, *supra* note 1, at 50. Distribution is a difficult concept to grasp initially but often accounts for what seems "wrong" about an argument. *See infra* Part II. D (The Deceptive Hypothetical).

67. I have made no changes in these samples to correct for mechanical errors.

The student's syllogism can be diagrammed as follows:

> Major premise: Suppression of the truth or a suggestion of what is false demonstrates intent to deceive.
>
> Minor premise: Storey suppressed the fact that the furnace was broken and suggested it would only need annual inspection.
>
> Conclusion: Storey intended to deceive.

The first requirement for a valid syllogism is that its premises be indisputably true.[68] In legal writing, however, the premises are *never* indisputably true. Two advocates, representing opposing parties, are likely to articulate different, yet reasonable rules of law from the same statute, case, or line of cases. In that sense, neither advocate's rule or premise can be indisputably true. Moreover, the parties may advocate for the application of two different rules of law, both of which arguably apply to the same situation. These indefinite rules lead to imperfect syllogisms, properly called "enthymemes."[69] As Corbett points out, "[T]he syllogism leads to a necessary conclusion from universally true premises but the enthymeme leads to a tentative conclusion from probable premises."[70] While syllogisms are the stuff of logic, enthymemes are the stuff of legal reasoning precisely because the premises they contain are subject to debate. Syllogisms prove, but enthymemes can only persuade.[71] The premises in an enthymeme (hereafter referred to as a "legal syllogism") need only be probably true. Assume that in our example the major premise is a reasonable articulation of the law, and the minor premise reasonably describes the defendant's behavior.

In order to pass the validity test, the legal syllogism must contain no more than three terms, and the principle of distributed terms must not be violated.[72] First, there are three and only three terms of comparison: If Storey (A) suppressed the truth about the furnace and suggested it was fine (B), and suppression of truth/suggestion of falsity (B) constitutes intent to deceive (C), then Storey (A) intended to deceive (C). Second, the middle term is the term that appears in both of the premises but not in the

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68. *See supra* note 56 and accompanying text.

69. CORBETT, *supra* note 1, at 60. Enthymeme is also used to describe a truncated syllogism, where one of the premises is assumed but not stated. *Id.*

70. *Id.*

71. *See id.* at 64.

72. *Id.* at 64–65; *see supra* Part I.A.

conclusion, and it must be distributed at least once. Here, the middle term, "suppression of truth/suggestion of falsity," is distributed in the major premise because the rule of inferring intent to deceive applies to *all*—not just some—statements that suppress truth or suggest falsity. The middle term is undistributed in the minor premise because it is the predicate term of an affirmative proposition (i.e., Storey did make such a statement).

Having satisfied this rule, the reasoning is valid as long as no term in the conclusion is distributed that was not distributed in one of the premises. The subject term "Storey" is a proper noun and therefore distributed in both the minor premise and the conclusion. The predicate term "intended to deceive" is undistributed in the conclusion because it is the predicate term of an affirmative proposition. As in the Socrates example, the final rule does not apply to this term, and the legal syllogism is thus valid.[73]

Despite its inherent weakness, legal argument has a strong, psychological impact similar to that of a syllogism when presented in syllogistic form.

> Syllogistic argument provides the requisite appearance of certainty. It makes the outcome of a case seem as certain and as mechanical as the output of a mathematical equation, and it achieves this effect not by employing actual mathematical operations, but, paradoxically, by exploiting human intuition.[74]

As Gardner suggests, properly framed premises lead inexorably to the ultimate conclusion. Once presented with cogent and understandable premises, the reader jumps easily and quickly to the desired conclusion.[75] However, without some knowledge of the syllogistic form and how to approximate it, legal writers struggle to craft arguments with this kind of irresistible force.

The same intuition that makes the syllogism work often suggests to the reader that it is not working. A reader who is unfamiliar with the terms used to describe the fallacies of reasoning might be unable to articulate the argument's flaws but readily recognize it as specious. Therefore, both writer and reader are served by learning a vocabulary that enables them to evaluate and communicate about the efficacy of a given argument.

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73. The syllogism alone here is not enough to make the analysis persuasive. The student must make use of existing, mandatory case law in order to defend her minor premise that Storey "suppressed the truth."

74. GARDNER, *supra* note 10, at 4.

75. *Id.* at 6.

II. RECURRING PROBLEMS IN DEDUCTIVE REASONING

Although we rely heavily on intuition in gauging the effectiveness of argument, our intuition is not at all foolproof. As demonstrated below, young legal writers predictably construct arguments that are designed to be syllogistic in effect but are weakened by invalid reasoning and incredible premises. Over the past nine years, I have observed recurring "patterns of error" employed by novice legal writers. The similarity from year to year is striking. For ease of reference, each of these problems is given a simple, descriptive name.

A. The Book Report

The Book Report appears most often when a student attempts to apply to her case a particular legal rule that arguably has been applied in prior cases. In this context, the "rule" or major premise is usually intuited by the writer but not made explicit in the writing. Instead, the writer jumps immediately to the application of the rule by simply narrating or "reporting on" the salient facts and sometimes, but not always, including the holding of the cited case.[76] Often, the writer omits the express or implicit reasoning of the court. The student then compares the facts of the cited case to the case at hand and concludes that the same result should or should not occur.[77]

Example #1:

> The Wyndhams must also prove that the representation in question was a material fact. Id. at 209. In Westover Court Corp. v. Eley, 40 S.E.2d 177 (Va. 1946), the buyers of a home sued the sellers because of an inadequate heating plant. Ruling for the buyers, the court stated that the heating plant was "an essential portion of the house" that affected its purchase price. Id. at 179. Similar to the plaintiffs in Westover, the Wyndhams could assert that the representation of the furnace was a material fact. There is a

76. I tell my students to look for "book reports" by finding paragraphs that begin with "In Case X, here is what happened. . . . Similarly, ..."

77. Gardner describes (but does not label) this phenomenon as the situation "[w]hen an advocate loses sight of the limited role of analogies and relies on analogies rather than on the syllogisms of which they are implicit parts." GARDNER, *supra* note 10, at 11.

> need for adequate heating in the fall months in Virginia. Furthermore, the condition of the furnace affected the purchase price of the home. If the state of the furnace was misrepresented, then the Wyndhams may have been adversely affected.

Most readers find this type of comparison inadequate because critical information is missing, and it requires the reader to draw too many inferences. Here, the writer attempts to apply the Virginia rule for "material fact" in the context of a common law fraud claim. In order to succeed on that claim, the plaintiff must prove that the fraudulent representation was "material" to the transaction. The writer simply restates the "material fact" issue and then reports the facts and result in *Westover*. The rule taken from *Westover* is not expressly articulated. The reader must then infer the rule before she can judge the persuasiveness of the comparison. In the process of inferring the rule, the reader may dilute or alter the meaning intended by the writer. The second example has a similar flaw.

Example #2:

> The next element for Silverstone to prove is the falsity of the publicity. In Larsen v. Philadelphia Newspapers, Inc., the Pennsylvania Superior Court held that a newspaper's publication of selected transcript excerpts could cast the plaintiff in a false light. 543 A.2d 1181, 1189 (Pa. Super. Ct. 1988). The plaintiff, a judge, had testified before a review board and only portions of his testimony had been published that made him seem unsympathetic to the public. Similarly, the city of Fairfax has "published" only four out of five poems from Ocean Peace, and she should be able to prove this publicity was false.

The writer begins by identifying "falsity" as an element of this invasion of privacy claim. The writer then gives a "book report" on the facts and holding of *Larsen* and compares *Larsen* to her own case. The comparison is weak, however, because the rule on "falsity" is unclear. By failing to articulate the rule of *Larsen* as she sees it, the writer runs the risk of being ineffective or worse, misunderstood.[78]

78. The comparisons in Examples 1 and 2 are weak for other reasons as well. For example, neither writer demonstrates specifically *how* the facts of her case are similar to the cited case. For a

In rhetorical terms, the writer has failed to create an effective legal syllogism because the major premise is not only implicit; it is unformed in the writer's mind. The writer has not failed to express her thought clearly; she has failed to form a clear thought. In order to apply the rule effectively, the student must first form a rule; she needs to create "what amounts to a 'common law statute.'"[79] By definition, a legal syllogism can be comprised of an implicit major premise, but in these examples, there is simply not enough information for the reader to fill in the gaps. Too much is left to the reader to divine, which detracts from the effectiveness of the analysis. Without a major premise, there is simply no rule to apply, and it becomes nearly impossible to persuade the reader without a clear understanding of the rule.

We need to encourage legal writers to "extract" rules from cases that will stand as major premises in the process of reasoning deductively and as syllogistically as possible. The writer is not only entitled, she is also expected to formulate rules—in her own voice—that reflect her reading of the case or cases.[80] These rules may be stated explicitly or implicitly, but they should be consciously formed and clear in the writer's mind. Once the rule is formulated, the major premise necessary for the reasoning to work is in place. The salient facts of the cited case and the case at hand should become more obvious, and the analogy that follows can thus be better developed.

In the following revised examples, the reasoning is vastly improved simply by adding an express, articulated rule from the cited cases:

<u>Revised Example #1</u>:

> The Wyndhams must also prove that the representation in question was a material fact. <u>Id.</u> at 209. **A fact is deemed material to the transaction if it affects the purchase price of the house [major premise]**. <u>Westover Court Corp. v. Eley</u>, 40

more in depth discussion on making effective case analogies, see *infra* Part IV.C.

79. *See* RAMSFIELD, *supra* note 12, at 235.

80. Particularly when writing as advocates, different lawyers will extract different rules from the same cases. The "correct" reading of the case will differ depending on the desired outcome of the client. *See, e.g.*, Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 395 (1950) ("[T]here is no single right and accurate way of reading one case, or of reading a bunch of cases."). However, even with objective writing, students will extract different rules from the same case. They must be encouraged to practice the art of rule formation and view it as essential to their deductive reasoning arsenal.

S.E.2d 177, 179 (Va. 1946). In Westover, the buyers of a home sued the sellers because of an inadequate heating plant. Ruling for the buyers, the court stated that the heating plant was "an essential portion of the house" that affected its purchase price. Id. Similar to the plaintiffs in Westover, the Wyndhams could assert that the representation of the furnace was a material fact. There is a need for adequate heating in the fall months in Virginia. Furthermore, the condition of the furnace affected the purchase price of the home. **[minor premise]** If the state of the furnace was misrepresented, then the Wyndhams may have been adversely affected.[81] **[conclusion]**

Revised Example #2:

The next element for Silverstone to prove is the falsity of the publicity. **Where only portions of a work of art are published, those portions may misrepresent the work as a whole and thus be considered "false." [major premise]** See Larsen v. Philadelphia Newspapers, Inc., 543 A.2d 1181, 1189 (Pa. Super. Ct. 1988). The Pennsylvania Superior Court held in that case that a newspaper's publication of selected transcript excerpts could cast the plaintiff in a false light. The plaintiff, a judge, had testified before a review board and only portions of his testimony had been published that made him seem unsympathetic to the public. Similarly, the city of Fairfax has "published" only four out of five poems from Ocean Peace, **[minor premise]** and she should be able to prove this publicity was false. **[conclusion]**

81. The comparison could still be improved for reasons that are discussed *infra* Part IV.C. The purpose here is to isolate certain weaknesses, identify them, and demonstrate how they can be managed in a systematic way.

The third sample is a longer and more complicated version of the Book Report in an appellate brief. Here, the writer argues that police exceeded the scope of a search consented to by a third party:

Example #3:

> The police exceeded the scope of the consent to search by conducting a search that was broader and more general than the one they had asked for. The scope of consent was limited to what a reasonable person would have understood from the exchange. U.S. v. Patten. The police asked to enter to speak to Mr. Gates. Mr. Bradford let the police in after acknowledging that Mr. Gates was in the apartment. He then verbally directed them to Mr. Gates. A reasonable person would not have thought that Mr. Bradford consented to a general search and seizure of computer equipment or papers. A reasonable person would have understood that Mr. Bradford consented to a search for Mr. Gates.
>
> In U.S. v. Kelley, Ms. Sloan invited officers into her apartment so they could ask her a few questions. Ms. Sloan answered the detectives' questions. While she was attending to her baby, several of the officers sneaked into her bedroom and found marijuana seeds in her dresser. The court found that Ms. Sloan's consent to be questioned did not give the officers permission to conduct a general search of her apartment. U.S. v. Kelley, 6 F. Supp. 2d 1168 (Kan. D. 1998).
>
> In U.S. v. Kriegh, police knocked on a suspect's door and a boy answered. The police asked him if they could speak to his mother. The boy left the door open and went back into the home to get his mother. The court found that the boy's acquiescence to the request did not give the police permission to search the living room and

> seize drugs found in the living room ashtray.
>
> As in Kelley and Kriegh, the police in this case only asked to come in and speak to Mr. Gates. The police did not ask for consent to a general search. Therefore, the police were limited to searching for Mr. Gates. In U.S. v. Woodward, the court held that the scope of a search must be limited by the objective of that search. The court allowed the search of a microwave for drugs because the microwave was a place where drugs could be hidden. However, in this case, Mr. Gates was not going to be found inside the computer. Mr. Gates could not have hidden inside the text of a document. Therefore, the search and seizure of Mr. Gates's papers and computer equipment exceeded the scope of consent to the search.

Here again, the writer fails to utilize the cited cases effectively. There may be better cases in support of her argument, but nevertheless, the argument would be more powerful if she better understood the infrastructure of syllogistic argument. Although the key idea behind these cases ekes through to some extent, the major premise is not articulated until late in the comparison. The writer's sense of the import of these cases is contained in the statement, "As in *Kelley* and *Kriegh*, the police in this case only asked to come in and speak to Mr. Gates." However, the argument would be much more effective if rearranged to be more syllogistic:[82]

Revised Example #3:

> The police exceeded the scope of the consent to search by conducting a search that was broader and more general than the one they had asked for. The scope of consent was limited to what a reasonable person would have understood from the exchange. U.S. v. Patten. **Where police**

82. Again, I have tried to make as few changes to the writing as possible. Since citation errors are not the subject of this article, I have made no effort to correct those in this example or those that follow.

officers obtain express consent to enter a defendant's apartment for the purpose of asking him questions, they may not then surreptitiously enter for the purpose of conducting a search for evidence. [major premise] See U.S. v. Kelley, 6 F. Supp. 2d 1168 (Kan. D. 1998); U.S. v. Kriegh.

In Kelley, Ms. Sloan invited officers into her apartment so they could ask her a few questions. Ms. Sloan answered the detectives' questions. While she was attending to her baby, several of the officers sneaked into her bedroom and found marijuana seeds in her dresser. The court found that Ms. Sloan's consent to be questioned did not give the officers permission to conduct a general search of her apartment. [cite] **Similarly, in Kriegh,** police knocked on a suspect's door and a boy answered. The police asked him if they could speak to his mother. The boy left the door open and went back into the home to get his mother. The court found that the boy's acquiescence to the request did not give the police permission to search the living room and seize drugs found in the living room ashtray. [cite]

As in Kelly and Kriegh, the police in this case only asked to come in and speak to Mr. Gates; they neither requested nor obtained consent to a general search. [minor premise] When Mr. Bradford let the police in after acknowledging that Mr. Gates was in the apartment, they were limited to finding Gates and asking him questions.

A reasonable person would not have thought that Mr. Bradford consented to a general search and seizure of computer equipment or papers. A reasonable person would have understood that Mr. Bradford consented only to the police speaking to Mr. Gates. [conclusion]

> In U.S. v. Woodward, the court held that the scope of a search must be limited by the objective of that search. The court allowed the search of a microwave for drugs because the microwave was a place where drugs could be hidden. However, in this case, Mr. Gates was not going to be found inside the computer. Mr. Gates could not have hidden inside the text of a document. Therefore, the search and seizure of Mr. Gates's papers and computer equipment exceeded the scope of consent to the search.[83]

B. Fear of Commitment

The Fear of Commitment occurs when the writer feels uncomfortable drawing a conclusion from the premises she has laid out and simply fails to include one. The absence of a conclusion makes the syllogism incomplete and, as a result, dissatisfying to the reader. Because legal writers cannot afford to risk being misunderstood, they must state their conclusions. Leaving them out increases the possibility of confusion. What might seem like redundancy or inelegance might actually be necessary to convey precisely the writer's meaning. In this example, the writer analyzes whether the seller of a home intended to deceive his buyers regarding the condition of the furnace:

Example #4:

> The Wyndhams were intentionally induced by Storey's representation because he susceptibly knew the condition of the furnace. Making a false statement about a "matter susceptible of actual knowledge" is equivalent to the actual intent to deceive. **[major premise]** Henderson v. D'Annolfo, 446 N.E.2d 103, 109. In Henderson, since the defendant observed the wiring installation at the home to be purchased, his representation of the wiring was

83. *Woodward* seems to raise a different but related issue that should probably be addressed separately. *See* "The Packed Paragraph," *infra*, Part II.C.

> susceptible of his knowledge. See id. Similarly, Storey presented himself as if he would know the condition of the furnace, since he lived in the house for nineteen years and took meticulous care of it. **[minor premise]**

The absence of a conclusion is obvious. The writer states a rule from *Henderson* that functions as the major premise. The comparison to *Henderson* functions as the minor premise (i.e., that Storey's statement about the furnace and its condition was susceptible of actual knowledge). However, the conclusion is missing. The reader is left with the questions, "And so? Therefore, what? Is there intent to deceive in this case?" Although the conclusion may be implicit, it is not clear *how* Storey's statement was similar to the *Henderson* defendant's, and the ineffective analogy here may be due, in large part, to the writer's failure to state a conclusion.

Revised Example #4:

> The Wyndhams were intentionally induced by Storey's representation because he **was capable of knowing** the condition of the furnace. Making a false statement about a "matter susceptible of actual knowledge" is equivalent to the actual intent to deceive. **[major premise]** Henderson v. D'Annolfo, 446 N.E.2d 103, 109. In Henderson, **the defendant made statements about the nature of the electrical wiring at the nursing home being sold to plaintiffs. The court concluded that the condition of the wiring was susceptible of his knowledge, and therefore, he made a false statement as to its condition and intended to deceive plaintiffs.** See id. **Similarly, Storey made statements regarding the furnace, the condition of which was susceptible of actual knowledge.** [minor premise] **According to Storey, he took meticulous care of the furnace for the nineteen years he lived in the home. As in** Henderson, **Storey's false statement that the Wyndhams should**

> **continue having the furnace inspected as he had, satisfies the requirement that Storey intended to deceive them. [conclusion]**

In this example, the writer analyzes whether Storey made a false representation about the furnace to the buyers of his home. Having concluded that mere non-disclosure does not give rise to liability, the writer explores whether the false representation element is satisfied as a result of Storey's partial disclosure:

<u>Example #5</u>:

> The Wyndhams can argue, however, the statement made by Mr. Storey that he had the furnace checked every fall was a partial disclosure since he did not tell them that it was severely damaged. **[minor premise]** The Massachusetts courts have found exceptions to the false statement element when partial disclosures are told.
>
> Although there may be 'no duty imposed upon one party to a transaction to speak for the information of the other . . . if he does speak with reference to a given point of information, voluntarily or at the other's request, he is bound to speak honestly and to divulge all the material facts bearing upon the point that lies within his knowledge. Fragmentary information may be as misleading . . . as active misrepresentation, and half-truths may be as actionable as whole lies . . .' **[major premise?]**. <u>Kannavos v. Annino</u>, 247 N.E.2d 708 (Mass. 1969) (finding that selling an apartment complex located in an area, the zoning laws for which do not allow apartment complexes, and telling the plaintiff buyers that they would be able to continue letting the apartments constituted a false statement).

Here, the major premise follows the minor premise, but again, there is no real conclusion. The gist of the paragraph is that Storey made a partial

disclosure, and partial disclosures can amount to false representations. The problem is that having cited to *Kannavos* for the articulation of the major premise, the writer fails to explain its significance to the case at hand and thus leaves out her ultimate conclusion. The writer may infer that the Wyndhams' case is like *Kannavos* because the partial disclosures are somewhat similar. However, the missing conclusion leaves the reader hanging. The writer seems to say, "Here is the rule from a relevant case. You figure out how it applies in this circumstance."

Revised Example #5:

> The Wyndhams can argue, however, **that** the statement made by Mr. Storey that he had the furnace checked every fall was a partial disclosure, since he did not tell them that it was severely damaged. **[minor premise] Although a seller has** no **duty to disclose everything he knows about the subject property, once he makes a statement regarding a given aspect of the property, he must disclose all information he has or risk liability for fraud. [major premise]** Kannavos v. Annino, 247 N.E.2d 708 (Mass. 1969) (finding that selling an apartment complex located in an area that was not zoned complexes, and telling the plaintiff buyers that they would be able to continue letting the apartments constituted a false statement). **According to the Massachusetts Supreme Judicial Court, "Fragmentary information may be as misleading as active misrepresentation."** Id. **Storey's statement regarding his upkeep of the furnace obligated him to tell the Wyndhams the truth about its condition. Since Storey's statement was misleading in this regard, it was false under Massachusetts law. [conclusion]**

The revision accomplishes several tasks. First, with the addition of a conclusion, the syllogism is complete. Second, articulating a conclusion forces the writer to figure out in a very intentional way just how *Kannavos* relates to her analysis. The point of this paragraph seems to be that the

misleading nature of Storey's statement makes it *false*, and false representation is the element being analyzed. Third, it eliminates the block quote writers often hide behind in hopes that the reader will accept the visual weight of the controlling authority, figure out its relevance, apply it to the case at hand, and then arrive at the writer's intended conclusion. In fact, most readers tend to skim over block quotes hoping that the writer has distilled their meaning.[84] Of course it is usually best to paraphrase a lengthy rule of law for the reader's convenience and as a safeguard against being misunderstood. Perhaps most important, though, paraphrasing the law empowers the writer to speak in her own voice and not rely solely on the language of the court.

C. *The Packed Paragraph*

The Packed Paragraph is a paragraph that is too long. Paragraphs can be unnecessarily long for a host of reasons,[85] but here, the focus is on a paragraph that is too long because it attempts to accomplish too much. In the rhetorical sense, the writer juggles several syllogisms, only some of which get fully developed. In order to be logical, the writer must develop one idea at a time so the reader is led effectively to the writer's ultimate conclusion.

The Packed Paragraph is commonly found in objective memoranda, where the writer analyzes several elements of a cause of action in one paragraph. In the paragraph that preceded the sample paragraph below, the writer stated the elements of a cause of action for fraud: 1) a knowingly 2) false statement, 3) about a material fact, 4) made to induce action in reliance on the statement, and 5) reliance by the plaintiff on the statement 6) that causes harm or damage.

<u>Example #6</u>:

> First, the Wyndhams must prove a false statement or misrepresentation. <u>Id.</u> at 74. Knowledge of the fact's falsity is not required if its truth is reasonably susceptible. <u>See Acushnet Fed, Credit Union v. Roderick</u>, 530 N.E.2d 1243, 1244 (Mass. Ct. App. 1988). Neither does the represent-

84. LINDA HOLDEMAN EDWARDS, LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION 220 (2d ed. 1999).

85. For example, a writer might use long or run-on sentences, employ excessive passive voice, or say the same thing several times using different words.

> tation need to be intentional. See Snyder v. Sperry and Hutchinson Co., 333 N.E.2d 421, 427 (Mass. 1975). "An intentional misrepresentation is not a prerequisite to recovery for deceit . . . provided the thing stated is merely a matter of opinion, estimate or judgment, but is susceptible of actual knowledge; and in such case it is not necessary to make any further proof of an actual intent to deceive." Id. at 427. The representation in question regards Arthur Storey's inference to the fact that his furnace was in adequate condition. In negotiating the sale, Storey disclosed various instructions about the house and surrounding property. Regarding the furnace, he told the Wyndhams to continue having it inspected every fall as he had. This statement led the Wyndhams to believe that the furnace was in working condition. However, while the Wyndhams can claim there was no way for Storey to have the furnace inspected and have it fail as it had, it is reasonably susceptible that Storey did have it inspected last fall, and that the inspector just failed to uncover the defect.

Having read and tried to digest this paragraph, the reader feels somewhat at sea. As written, the paragraph spanned an entire page and touched on, but did not develop, at least three of the required fraud elements. This becomes evident when the paragraph is broken down sentence by sentence:

Topic sentence indicating the subject of the paragraph is the false statement, element (2):

> First, the Wyndhams must prove a false statement or misrepresentation. Id. at 74.

Major premise of Syllogism #1 regarding knowledge, element (1):

> Knowledge of the fact's falsity is not required if its truth is reasonably

> susceptible. See Acushnet Fed, Credit Union v. Roderick, 530 N.E.2d 1243, 1244 (Mass. Ct. App. 1988).

Major premise of Syllogism #2 regarding intent to induce reliance, element (4):

> Neither does the representation need to be intentional. See Snyder v. Sperry and Hutchinson Co., 333 N.E.2d 421, 427 (Mass. 1975). "An intentional misrepresentation is not a prerequisite to recovery for deceit . . . provided the thing stated is merely a matter of opinion, estimate or judgment, but is susceptible of actual knowledge; and in such case it is not necessary to make any further proof of an actual intent to deceive." Id. at 427.

Minor premise of Syllogism #3 regarding false statement, element (2):

> The representation in question regards Arthur Storey's inference to the fact that his furnace was in adequate condition. In negotiating the sale, Storey disclosed various instructions about the house and surrounding property. Regarding the furnace, he told the Wyndhams to continue having it inspected every fall as he had. This statement led the Wyndhams to believe that the furnace was in working condition. However, while the Wyndhams can claim there was no way for Storey to have the furnace inspected and have it fail as it had, it is reasonably susceptible that Storey did have it inspected last fall, and that the inspector just failed to uncover the defect.

The minor premise for Syllogisms #1 and #2, the major premise for Syllogism #3, and the conclusions for Syllogisms #1, #2, and #3 are missing. In addition, the writer fails to compare the Wyndham's case to any of the cited cases. As a result, it is very difficult for the reader to make sense of this paragraph and be persuaded by it. Having diagrammed the

paragraph in this manner, it becomes a simple rewriting task to develop each idea one at a time in an effective way. The writer simply needs to untangle the paragraph and write new ones to flesh out the legal syllogisms with respect to each element. Assuming the writer chose to discuss the false element first, she might begin her rewrite as follows:

Revised Example #6:

> First, the Wyndhams must prove a false statement or misrepresentation.[86] Id. at 74. The representation in question regards Arthur Storey's **implication** that his furnace was in adequate condition. In negotiating the sale, Storey disclosed various instructions about the house and surrounding property. Regarding the furnace, he told the Wyndhams to continue having it inspected every fall as he had. This statement **mis**led the Wyndhams **into believing** that the furnace was in working condition. **[analogize to case where the court held the statement was false or misleading]** However, while the Wyndhams can claim there was no way for Storey to have the furnace inspected and have it fail as it had, it is **possible** that Storey did have it inspected last fall, and that the inspector just failed to uncover the defect. **[here, the writer needs to resolve the competing arguments, make a definitive conclusion and move on to the next element for discussion]**

D. The Deceptive Hypothetical

The Deceptive Hypothetical is a bit tricky to identify in legal writing. The reader might sense something is wrong with the reasoning but cannot articulate why. In this example, the writer argues that a third party did not have authority to consent to a warrantless search:

86. Topic sentence indicating the subject of the paragraph is the false statement, element (2).

Example #7:

> Nor does the "apparent authority" rule apply to this case. The state attempts to rely on the rule from Illinois v. Rodriguez that the consent of a third party who does not have common authority may be relied on if the police reasonably believe that he does have such authority. 497 U.S. 177. In Kansas, this rule excuses the warrant requirement on the basis of consent "where the facts available to an officer would warrant a person of reasonable caution to believe the consenting party had authority" to do so. State v. Savage, 10 P.3d 765, 769 (Kan. Ct. App. 2000) (quoting Ratley). In Savage, the consenting third party told the police that he lived on the premises for about two months. Id. at 770. Similarly in Rodriguez, Fischer referred to the apartment as "ours" and claimed she had clothes and furniture there, giving no hint that she had moved out. 497 U.S. at 179. By contrast, Bradford did not tell the police anything about his authority over the premises. They inferred, wrongly and unreasonably, that he had authority from the statements of the super and from hearing his voice over the intercom, and the state cannot demonstrate that they reasonably could have believed he had such authority.

At first, the writer's logic appears to make sense: the officers had no reason to believe Bradford had authority to consent, and therefore, his consent was invalid. Put another way, the writer argues that Bradford had no authority to consent because he did not have *apparent* authority. This logic is flawed, however, because it is possible Bradford had actual authority to consent, and his lack of apparent authority would not invalidate his consent.

This invalid syllogism is often described as the "fallacy of denying the antecedent."[87] When a writer argues in the form of an "if, then" clause, she

87. CORBETT, *supra* note 1, at 56.

is arguing that the truth of the antecedent (the "if" clause) affirms the consequent (the "then" clause).[88] Where the minor premise denies the existence of the antecedent, it is not valid to also deny the existence of the consequent.[89] Here, the writer's reasoning is fallacious because Bradford's authority to consent could have derived from another source, such as his legal relationship to the premises (i.e., he could have been a tenant but have displayed no outward signs of his tenancy).

As written, the syllogism can be diagrammed as follows:

> Major premise: If a person reasonably appears to have authority, he has authority to consent to a warrantless search.
>
> Minor premise: (Compared to the third parties in *Savage* and *Rodriguez*) Bradford did not reasonably appear to have authority.
>
> Conclusion: Bradford did not have authority to consent.

The syllogism has only three terms (reasonable appearance of authority, authority to consent, and Bradford), but it violates the principle of distributed terms.[90] Although the middle term—the one that appears in the premises but not the conclusion—is distributed in both the major and minor premises, one of the terms is distributed in the conclusion but not in the major premise.[91] As a proper noun, "Bradford" is distributed in both the minor premise and the conclusion. However, "authority to consent" is distributed in the conclusion (as the predicate term of a negative proposition) but undistributed in the major premise (as the predicate term of an affirmative proposition).[92] Thus, the legal syllogism fails the validity test.

Here is another example where the writer argues that Bradford did not have authority to consent to the search of his former roommate's bedroom:

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88. *Id.*

89. *Id.* at 57.

90. *See supra* Part I.A. (defining 'distributed term' as the extent to which a term encompasses all or some of the named objects or individuals).

91. "Reasonable appearance of authority" is the middle term. It is distributed in the major premise because "authority to consent" applies without limitation to all those with apparent authority. The middle term is also distributed in the minor premise because it is the predicate term of a negative proposition.

92. *See supra* Part I. A. and note 66.

Example #8:

> Officers' search of Gates' private bedroom violated Gates' reasonable expectation that his bedroom would remain private and inaccessible. Gates maintained a reasonable and subjective expectation of privacy in his bedroom because he did not grant Bradford access to the bedroom for purposes which would legitimately entail access to every enclosed space within the bedroom. Kellum, 907 P.2d at 712. In Kellum, the defendant authorized his co-inhabitant brother to have access to the defendant's bedroom for cleaning purposes. Because the cleaning function would entail access to every enclosed space within the private bedroom, the court held that by granting his brother the right to clean the bedroom, the defendant no longer had a reasonable expectation that his brother would not have legitimate access to space under the bedroom mattress. Id. at 714.
>
> Dissimilar to Kellum, Gates had not granted Bradford access to this bedroom for any purposes. Gates allowed Bradford into the front living room of the apartment where officers initially met Bradford at the front door. Because there is no evidence even suggesting Gates had granted Bradford access to his private bedroom, Gates retained a subjective and reasonable expectation of privacy in his bedroom.

The writer's reasoning can be diagrammed as follows:

> Major premise: If the third party had authorized access to the bedroom, consent is valid.
>
> Minor premise: Bradford did not have authorized access to Gates' bedroom.
>
> Conclusion: Consent was not valid.

Again, to deny the antecedent does not make it logical to also deny the consequent. There are only three terms in the syllogism, and the middle term is distributed at least once. However, "consent is valid" is undistributed in the major premise (as the predicate term of an affirmative proposition) but distributed in the conclusion (as the predicate term of a negative proposition). As such, the legal syllogism is invalid.[93]

Once understood, this problem can easily be fixed. In the first example, the writer can argue that Bradford did not have authority to consent to the search because he did not have apparent authority, but she must be sure to prove that he did not have any *other* type of authority. The writer must make alternative arguments that foreclose the possibility that Bradford derived authority to consent from all potential sources of authority. For example, in a separate section of the brief, the author might argue that Bradford did not possess actual authority—another potential source of authority under third party consent law. In the second example, the writer could argue that consent to search the bedroom was invalid, but she needs to foreclose the possibility that any other doctrine might validate Bradford's consent.

Learning to identify the Deceptive Hypothetical can prove to be a valuable prewriting tool. Once the potential for the fallacy is identified, a writer can be sure to plan for all necessary alternative arguments to make the reasoning solid.

E. Myopic Vision

A writer has myopic vision if she fails to test the truth or validity of her argument against the argument(s) of her potential opponent(s). Arguments can be weak both because they are intrinsically weak and because they fail to take other, better arguments into account.[94] The difference is similar to that between a defendant's counter-arguments and his affirmative defenses to the same claim. For example, if a plaintiff sues the driver that hit his car in a simple negligence claim, the defendant has two options: first, she could

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93. The fallacy of this reasoning may be harder to see in some syllogisms than in others and is more obvious here:

> Major premise: If Sally is sad, she will cry.
> Minor premise: Sally is not sad.
> Conclusion: Therefore, Sally will not cry.

Here, the writer denies the existence of the antecedent (she is *not* sad) and erroneously concludes therefore that Sally will not cry. Obviously, Sally might cry for any other number of reasons, including happiness.

94. As noted earlier, if a writer argues from a hypothetical proposition ("if, then") and denies the antecedent, there may be other arguments that defeat his claim. *See supra* Part II.D (The Deceptive Hypothetical).

argue that the light was green when she entered the intersection or some other mitigating fact or rule of law that would negate her negligence; and second, she could argue that even if she were negligent, the plaintiff was contributorily negligent. Failure to anticipate either one of these arguments could result in a loss to the plaintiff.

In the following example, the writer fails to anticipate the defendant's response to her argument that the plaintiff can prove "materiality" in the fraud case against Storey. As a result, the argument is weak:

Example #9:

> The second element is materiality to the transaction at hand. See Gibbs, 647 A.2d at 889. A misrepresentation is material when it is of such character that if it had not been made, the agreement would not have been entered into. **[major premise]** McClellan v. Health Maintenance Org. of Pa., 604 A.2d 1053, 1060 (1992). In many real estate cases, materiality is evident from the buyer's claim for rescission. See Anderson v. Harper, 622 A.2d 319 (1993). In Anderson, once the buyers discovered the defect, they wanted to take the contract out of existence. The Wyndhams do not want to rescind the contract. However, since they most likely would not have bought the property for the same amount had they known about the furnace **[minor premise]**, the misrepresentation is material. **[conclusion]**

The syllogism is complete and valid,[95] but the writer has a credibility problem: she has failed to anticipate the defendant's response. The reader wonders whether there are any cases indicating that the furnace or some fixture similar to a furnace is relatively minor in the context of a whole house. If not, the writer needs to inform the reader *why* the plaintiffs' argument is so strong. As stated by the writer, the misrepresentation is "material" if the plaintiffs would not have entered into the transaction had

95. The syllogism is as follows:
Major premise: If the concealed fact was material, plaintiffs can bring a cause of action for fraud.
Minor premise: The concealed fact was material.
Conclusion: Plaintiffs can bring a cause of action for fraud.

they known the truth. The rule says nothing about entering into the transaction at a different price. The reader is left with doubts about how the writer can be so sure that the misrepresentation was "material," as she has defined that term.

The credibility problem here relates to the truth of the premises, *not* the validity of the reasoning. As stated earlier, in Logic, the premises must be indisputably true for a syllogism to be valid. In legal writing, the premises are more or less probably true, and the resulting syllogism is at best, only probably valid.[96] The reasoning in Example #9 is weak because the writer fails to establish the likelihood of the minor premise (i.e., that the concealed fact was material). Not only does she allege the existence of a fact that does not relate to the stated rule (had the plaintiffs known, they would have paid a different price vs. had the plaintiffs known, they would not have entered into the transaction), she also fails to conclude whether the concealed fact was so important that had the plaintiffs known about the condition of the furnace, they would have failed to enter into the transaction at all.

As Corbett states, "[M]ere assertion, on either side of an argument, does not constitute proof."[97] The plaintiffs would have to be willing to testify that had they known about the furnace, they would not have entered into the contract. In addition, by failing to consider Storey's argument(s) that the fact was not material (i.e., the Wyndhams knew about the furnace and went through with the transaction anyway, the cost of the furnace was minor in comparison to the value of the property as a whole, etc.), the writer's premise may likely be false. If the minor premise is false, it is a fallacy of *matter* as opposed to reasoning.[98] If the premise is a fallacy, the legal syllogism fails.[99]

Of course, no writer can be certain of the truth of her premises, but she must strive to convince her reader of the probability that the premises are true. In Example #9, the writer needs to anticipate and then refute the defendant's likely argument that the misrepresentation was not material:

Revised Example #9:

> The second element is materiality to the transaction at hand. See Gibbs, 647 A.2d

96. *See supra* Part I (Deductive Reasoning and the Syllogism). In pure logic, the truth of the premises and the validity of the reasoning are essential. In rhetoric and legal reasoning, the truth of the premises is always subject to dispute. Moreover, many successful legal arguments are technically "invalid." However, the more syllogistic the reasoning, the weightier the argument tends to seem.

97. CORBETT, *supra* note 1, at 71.

98. *Id.* at 70.

99. *Id.* at 73.

> at 889. A misrepresentation is material when it is of such character that if it had not been made, the agreement would not have been entered into. **[major premise]** McClellan v. Health Maintenance Org. of Pa., 604 A.2d 1053, 1060 (1992). In many real estate cases, materiality is evident from the buyer's claim for rescission. See Anderson v. Harper, 622 A.2d 319 (1993). In Anderson, once the buyers discovered the defect, they wanted to take the contract out of existence. The Wyndhams do not want to rescind the contract. The question is whether the Wyndhams would have entered the contract to begin with had they known about the condition of the furnace. Given their interest in suing Storey for damages, it is at least likely that they would not have bought the property for the same amount. **[minor premise]**
>
> **Storey might argue that the furnace's condition was not material to the transaction because the Wyndhams did not pay to have it inspected. However, the Wyndhams can argue that they would have inspected the furnace prior to buying the house if Storey had not misled them. Storey could also argue that the cost of the furnace is relatively low compared to the overall cost of the house and, therefore, its condition was not material to the transaction. [cite any helpful cases] In response, the Wyndhams could argue that a house without a furnace is useless in the dead of winter and that a furnace emitting noxious fumes is harmful to one's health. Given the strength of the Wyndhams' arguments, a court is likely to find that Storey's misrepresentation concerned a material fact. [conclusion]**

Young legal writers often ask whether every single premise needs to be backed up with some degree of proof. In other words, if the existence of a fact or a required element is obvious, must the writer go to great lengths to

prove its existence? Seasoned attorneys know that they need not painstakingly prove the obvious. The writer needs to know how to distinguish between those premises that are obvious and require no proof and those that require at least some degree of proof. According to Corbett, the following statements need not be substantiated:

1. "[S]tatements that most people regard as being self-evident—e.g., a whole is equal to the sum of all its parts";[100]
2. "[S]tatement[s] regarded as 'true by definition': 'Two plus two equals four' . . . . Such statements are 'true' in the sense that a consensus has defined them. . . . Most laws and statutes, for instance, can be regarded as 'true by definition.'";[101] and
3. "[S]tatement[s] about matters that even the minimally informed person should know: 'There are fifty states in the United States.'"[102]

This concept dovetails with the doctrine of judicial notice[103] and can be helpful in the writer's decision-making process. The Wyndhams might argue that the "materiality" of the furnace's condition is self-evident, but it is not likely to be "true by definition" or that which a minimally informed person would know. From the attorney's perspective, it certainly would be prudent to present some sort of proof.

Example #10 illustrates the potential for a second form of myopic vision, where the argument is weak because it fails to take other, better arguments into account. Here, the writer analyzes whether the element of reliance in the same fraud case has been satisfied:

Example #10:

> A buyer must rely on a material misrepresentation, and be justified in his reliance. See Poe v. Voss, 86 S.E.2d 47, 50 (Va. 1955).
>
> > The doctrine of caveat emptor places on buyers a duty to use ordinary care and prudence to discover defects before purchasing. Where information is equally

100. CORBETT, *supra* note 1, at 71.
101. *Id.*
102. *Id.* at 72.
103. *See, e.g.*, FED. R. EVID. 201(b) (2001) ("A judicially noticed fact must be one not subject to reasonable dispute . . . .").

> available to buyers and sellers, buyers rely on sellers' representations, fraudulent or not, at their own risk.
>
> Kuzmanski v. Gill, 302 S.E.2d 48 (Va. 1983). The Wyndhams relied on Storey's statement to mean the furnace safely worked. However, by using caveat emptor, sellers' strongest argument is the Wyndhams reliance was unjustified.
>
> [citations to cases and their holdings omitted]
>
> In the present case, sellers will argue the Wyndhams' reliance is unjustified by caveat emptor because they had access to signs of a broken furnace. The Wyndhams saw Storey's clothing, insulation on the windows, and felt the cold temperature of the house, and despite this knowledge, they did not hire an inspector or make any inquiries.

Although not the most well-constructed analysis, the reasoning is sound: if a buyer's reliance is unjustified, the plaintiff will lose in a fraud claim. Here, the writer argues that reliance was unjustified, and therefore, the plaintiffs cannot prove fraud.[104] In addition, the premises are at least probably true: the major premise is taken directly from case law and the minor premise (i.e., that reliance was unjustified because the Wyndhams did not use ordinary care to discover the condition of the furnace) is defensible because it is quite common to make the sale of a home contingent on a successful house inspection.

Without more, the writer's ultimate conclusion might appear justified: the Wyndhams will not succeed in a fraud claim because they cannot prove justifiable reliance. In the absence of thorough research, the writer's analysis might stop there. Had it stopped there, however, the analysis would suffer from myopic vision because it would fail to take an even better argument into account. In Virginia, an exception to the doctrine of caveat emptor provides that where the seller's words or actions divert the buyers' attention from a latent defect, the buyers' reliance may then be justified.

104. Here, the writer anticipates the defendant's affirmative defense of caveat emptor.

Having anticipated the plaintiffs' better argument, though, the writer continued:

> While caveat emptor places the burden on buyers to discover property defects, a buyer's reliance is justified in circumstances where seller's words or actions throw the buyer off his guard or divert him from making the inquiry and examination a prudent man ought to make. See Armentrout v. French, 258 S.E.2d 519, 524 (Va. 1979). In Armentrout, buyer was able to recover damages after relying on seller's statement that the septic system "checked fine," when the system was actually defective. See id. at 521. The court determined that the seller's concealment diverted buyers from making an inquiry about the septic system. Id. In Armentrout as in the present case, sellers knew of a defect in the home, intentionally concealed it from buyers, diverted them from making an inspection, and induced reasonable reliance.

Because the writer anticipated the defendant's responses to the truth of the premises, as well as the defendant's "caveat emptor" defense and the plaintiffs' "diversion" rebuttal, she crafted a well thought-out, defensible analysis.

F. The Editorial

The Editorial occurs when a student analyzes whether a legal rule has been satisfied but fails to cite to law to support her analysis. This often takes the form of setting out a rule of statutory or common law that contains several elements. The writer cites to law in support of the major premise as a whole, but in the application of each element or part of the premise, the writer fails to use law to support her premises and conclusions. Instead, she appears to "editorialize" with regard to the application of that particular rule.

The writer's failure to support her conclusion is obvious in the following example:

Example #11:

> The second element is that a false representation was made of a material fact. See, Id. at 342, 441 S.E.2d at 209. A material fact is one that induces a party into a contract or if omitted the transaction may not have occurred. See, Packard Norfolk v. Miller, 198 Va. 557, 563, 95 S.E.2d 207, 211 (1956). For the Wyndhams, whether or not the furnace worked would certainly be a material fact.

The writer cites to *Packard* in support of the major premise—the rule that a material fact is one that induces a party to enter a contract or, if unknown, would have affected the terms of the transaction once disclosed. So far, so good. However, the writer assumes the minor premise (that the condition of the furnace was material) without explanation or supporting case law. Without reference to case law that guides both writer and reader to the writer's ultimate conclusion, the writer's conclusion is not credible.

In Example #12, the writer analyzes whether the Wyndhams can prove Storey acted with intent to induce their reliance:

Example #12:

> In order to prove fraud, there are several important elements that must be met. The court in Berger v. Security Pacific Information Systems, Inc. discusses five important elements:
>
> > 1) the defendant's concealment of a material existing fact that in equity or good conscience should be disclosed, (2) the defendant's knowledge that the fact is being concealed, (3) the plaintiff's ignorance of the fact, (4) the defendant's intent that the plaintiff act on the concealed fact, and (5) the plaintiff's action on the concealment resulting in damage.
>
> 795 P.2d 1380 (Colo. App. 1990) at 1384. See also Schnell v. Gustafson, 638 P.2d 850 (Colo. 1981).

. . . .

> To prove the fourth element, we would have to prove that Storey, in neglecting to tell the Wyndhams about the furnace, was hoping that they would buy the house. If he had told them that the furnace needed to be replaced, at a cost of several thousand dollars, it would be very unlikely that the Wyndhams would buy the house.

The writer begins by setting out the five elements that must be satisfied in order to prove fraud. In analyzing the fourth element—the defendant's intent to induce reliance—the writer assumes that had the Wyndhams known about the fraud, they would not have bought the house. She also assumes that Storey knew that and his knowledge is evidence that he concealed the condition of the furnace in order to induce the Wyndhams' reliance. Although Storey very well may have failed to disclose the faulty furnace in hopes that the Wyndhams would buy the house, neither the reader nor the writer knows this to be true. Moreover, the writer does not cite to any case indicating that intent can be inferred under circumstances such as these. Even though the analysis seems to make sense, the writer's conclusion has not been proved in any real way.

Again, in this next "Editorial" example the writer fails to cite to law in support of her minor premise:

Example #13:

> One of the exceptions to the requirement of a search warrant is a search made with consent. State v. Boyle, 207 Kan. 833, 836, 486 P.2d 849, 852 (1971). Where two persons jointly occupy living quarters, the consent of one of them may be sufficient to form the basis of valid consent. Id. However, for the consent to be valid, the State has the burden to prove that the facts available to the officers would warrant a person of reasonable caution to believe the consenting party had authority over the premises to be searched. State v. Ratley, 16 Kan. App. 2d 589, 590, 827 P.2d 78, 79 (1992). . . .

> The officers knew that Mr. Bradford had been evicted from the apartment weeks before the search, had surrendered the keys to the apartment, and had not been left alone in the apartment. (G. 13). The police also did not ask Bradford about his status in the apartment. The State has the burden to prove that the facts available to the officers would warrant a person of reasonable caution to believe that Bradford had authority over the premises to be searched. When examining all these facts, the State did not meet its burden of proof.

In this example—an appellate brief—the writer acknowledges that officers may enter to search if given valid consent, and consent can be valid if officers have good reason to believe the consenting party has authority. The writer sets out some of the relevant facts and then concludes that the officers' belief that consent was valid was unreasonable under the circumstances. Again, although it may be true that the officers' belief was unreasonable, the mistrusting reader—the opposing party in this example—has no reason to believe the writer without some sort of proof.

In the absence of proof to support their conclusions, writers lose credibility and character in the reader's mind. As Aristotle recognized, in addition to logic and emotion, the rhetor appeals by way of credibility and character.[105] Since readers do not have an opportunity to assess a writer's credibility and character the way a live audience does, they must rely on the written argument alone. As Corbett states, "The *whole* discourse must maintain the 'image' that the speaker or writer seeks to establish."[106] Thus, when the writer fails to cite to law, the reader will assume none exists, and the writer risks losing credibility with respect to the entire argument. When there is no law to support an argument, a writer can maintain credibility and character only by explaining that she relies on common sense due to an absence of controlling or helpful law.

By failing to cite to supporting law, the writers of these three Editorials implicitly reject stare decisis and fail to demonstrate how their conclusions are consistent with binding precedent. The reader—likely to be a supervising attorney, client, opposing counsel, or judge—is not going to be

105. "The ethical appeal is exerted . . . when the speech itself impresses the audience that the speaker is a person of sound sense (*phronēsis*), high moral character (*aretē*), and benevolence (*eunoia*)." CORBETT, *supra* note 1, at 80.

106. *Id.* at 82.

satisfied until the writer explains how this case fits into the pattern of existing case law. The conclusion is simply not credible until placed in the context of existing common law. Given the way the common law develops, the syllogism alone cannot support the conclusion.

Imagine that different letters of the alphabet represent the relevant case law in each of the three examples. Consonants represent those cases where the plaintiff/prosecution tends to win, and vowels represent those cases where the defendant tends to win:

B C D F... = P wins

A E I O... = D wins

The writer in Example #11 is struggling to determine whether her case is a consonant or a vowel. She sets out the rule that must be satisfied in order for the plaintiffs to prove "materiality" and argues that the misrepresentation was indeed material. She does not describe, however, what the consonants and the vowels relating to materiality look like in her jurisdiction. Nor does she attempt to characterize her case as either a consonant or a vowel. Without reference to any case law, the analysis fails to inform the reader where the writer's case fits within existing law. Similarly, the writer of Example #12 fails to describe what "inducement" looks like in other cases, making it impossible to know if her case is a consonant or a vowel. The same is true in Example #13. The writer claims the officers' belief was unreasonable, but she does not explain why her case is more like a consonant than a vowel. Given this analysis in a vacuum, the reader has no way to evaluate the writer's conclusion, and therefore it is ineffective and unpersuasive.

G. The Negative Proof

The negative proof occurs when the writer attempts to prove the existence of a necessary condition by arguing that the case at hand differs from cases where the court found the condition did *not* exist. In Example #14, the writer argues that a search incident to arrest was valid because it was different from other searches incident to arrest where the court found the searches *invalid*:

Example #14:

> The search of Pruitt's bag, ten to fifteen minutes after the arrest, is reasonable under Chimel. See United States v. Vasey, 834 F.2d 782, 785 (9th Cir. 1987). See also State v. Adams, 585 N.W.2d 96 (1998). In Vasey, the officers searched the defendant's vehicle thirty to forty-five minutes after the arrest. The court held that such an extensive time lapse invalidated a search under Chimel because the length in time indicated that the officers no longer feared the defendant would grab a weapon or evidence. See id. at 787. The time between Pruitt's arrest and the search of her bag can be distinguished from that in Vasey. While the officers in Vasey knew at the time of the arrest that the defendant's vehicle was present, neither Berens nor Coleman noticed the presence of the nylon bag until approximately ten minutes after the arrest, a considerably shorter period of time than in Vasey. The fear of the officers that Pruitt would reach for a weapon or evidence did not arise until Coleman saw Pruitt's bag. Coleman searched the bag immediately after he noticed it lying on the sidewalk. Therefore, Coleman's search qualifies as a contemporaneous search, and the search is valid.

In this case, the writer needs to prove that the search incident to arrest was contemporaneous with the arrest. The overall syllogism can be diagrammed as follows:

Syllogism #1:

> Major premise: If contemporaneous with arrest **(Term #1)**, the warrantless search is valid **(Term #2)**.

> Minor premise: (Compared to *Vasey*) Pruitt's search **(Term #3)** was contemporaneous with the arrest **(Term #1)**.
>
> Conclusion: Pruitt's search **(Term #3)** was valid **(Term # 2)**.

So far, so good, right? Wrong. The problem here lies in the minor premise. Its truth is not probable. The writer argues that Pruitt's search is contemporaneous because the time between the arrest and search (ten to fifteen minutes) is significantly shorter than that in *Vasey* (thirty to forty-five minutes). Does it necessarily follow that if thirty to forty-five minutes is too long, ten to fifteen minutes is just right? Let's diagram the syllogism that led to the minor premise:

Syllogism #2:

> Major premise: If it occurs thirty to forty-five minutes after arrest **(Term #1)**, a search is not contemporaneous **(Term #2)**.
>
> Minor premise: Pruitt's search **(Term #3)** was not thirty to forty-five minutes after arrest **(Term #3)**.
>
> Conclusion: Pruitt's search **(Term #3)** was contemporaneous **(Term #2)**.

One of Corbett's rules for testing the validity of a syllogism is that no conclusion may be drawn from two negative premises, and both premises here are negative.[107] The second syllogism thus fails, and so does the writer's argument.

Here is another way to think about the flawed reasoning in Example #14. Searches incident to arrest are either valid or invalid; they cannot be both. A search incident to arrest is valid if it is contemporaneous with arrest;[108] the letter "A" in the major premise can represent contemporaneousness:

> Major premise: If *A*, then the Pruitt search is valid.

In *Vasey*, the court invalidated the search because it was not contemporaneous; in other words, it was *not* A. Reasoning by analogy, the writer

107. *See supra* note 65 and accompanying text.

108. The search must also be contemporaneous in terms of space, but the time requirement alone is sufficient to illustrate the fallacy of the negative proof.

argues in the minor premise that the Pruitt search was not like the *Vasey* search. In effect, she argues that Pruitt is not *not* A and therefore valid:

> Major premise: If *A*, then the Pruitt search is valid.
>
> Minor premise: The Pruitt search is not *not A*.
>
> Conclusion: The Pruitt search is *A*.

The problem here is that the writer assumes that the double negative is equivalent to a positive: that not being "not contemporaneous" is equal to being contemporaneous. The two are not equivalent because when it comes to classifying the Pruitt search as either valid or invalid, the knowledge that it differs from *Vasey* does not provide adequate help. It is like saying in the world of shapes that an unidentified object must be a circle because it is definitely not a square. Of course the object could be a rectangle, a triangle, or any other shape imaginable. To say that Pruitt is not *not* A is essentially to give it another name; let's call it "B."

> Major premise: If A **(Term #1)**, then the search incident to arrest is valid **(Term #2)**.
>
> Minor premise: The Pruitt search **(Term #3)** is B (not *not* A) **(Term #4)**.
>
> Conclusion: The Pruitt search **(Term #3)** is valid **(Term #2)**.

This is an invalid argument because the first rule of syllogisms is that they must contain three and only three terms.[109] By arguing that Pruitt is different from *Vasey* is to inject another, fourth term that makes it impossible to draw any conclusion about the relationship between the Pruitt search and its validity. Not being *not* A does not make it A; it might be that in order to be contemporaneous, a search must take place within five minutes of the arrest. In other words, being different from *Vasey* does not make the Pruitt search lawful; it could still be invalid but for different reasons (i.e., it still took too long for the officers to conduct the search).

In Example #15, the writer argues that police had reasonable, articulable suspicion to perform a *Terry* stop on the defendant, Ms. Pruitt:

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109. *See supra* note 61 and accompanying text.

Example #15:

> In State v. Fleming, the court held that the suspect being in a high crime area late at night and walking away from the police was not enough to form a reasonable, articulable suspicion. 415 S.E.2d at 785. In Fleming, however, the suspect made no overt suspicious acts. Ms. Pruitt, on the other hand, made a cellular phone call as those involved in drug trafficking often do.

The reasoning here is as follows:

> Major premise: If police had reasonable, articulable suspicion (RAS), the *Terry* stop in Pruitt is valid.
>
> Minor premise: (Compared to *Fleming*) there was RAS in Pruitt.
>
> Conclusion: The Pruitt stop was valid.

If the minor premise were true or even probably true, the reasoning here would be sound. As in the prior example, where the antecedent of a hypothetical proposition is affirmed, the conclusion must be valid. However, to affirm the antecedent here is fallacious. To say that the Pruitt stop is unlike the *Fleming* stop is not to prove that the police had RAS in Pruitt (it is not necessarily a circle because it is not like *Fleming*, a square). The Pruitt stop could still be invalid.

Consider the implicit legal syllogism, where A equals "reasonable articulable suspicion":

> Major premise: If A **(Term #1)**, then the stop is valid **(Term #2)**.
>
> Minor premise: The Pruitt stop **(Term #3)** is B (not *not* A) **(Term #4)**.
>
> Conclusion: The Pruitt stop **(Term #3)** is valid **(Term #2)**.

By arguing that Pruitt is different from *Fleming* is to inject another, fourth term that makes it impossible to draw any conclusion about the relationship between the Pruitt stop and its validity. Not being *not* A does

not make it A (i.e., it is likely that without more, cell phone activity is not in and of itself suspicious enough to warrant a *Terry* stop). In other words, being different from the search in *Fleming* does not make the Pruitt search lawful; it could still be invalid, but for different reasons (i.e., the defendant did not act suspiciously by using her cell phone). Therefore, it is not possible to draw a conclusion about the Pruitt stop and its validity under the *Terry* doctrine.

The foregoing examples of errors in deductive reasoning common to legal writers can now be summarized as follows:

> *The Book Report*—where the writer fails to articulate a major premise and "reports" instead on the case cited in support of the major premise, hoping the reader will extract the legal rule for herself;
>
> *The Fear of Commitment*—where the writer articulates a major premise and a minor premise but fails to reach a conclusion, making the syllogism incomplete and unsatisfying;
>
> *The Packed Paragraph*—where the writer combines more than one legal syllogism into one long paragraph, failing to develop fully any or all of the syllogisms;
>
> *The Deceptive Hypothetical*—where the writer creates a hypothetical (if, then) syllogism, denies the antecedent (the if clause), and then fallaciously denies the consequent (the then clause);
>
> *Myopic Vision*—where the writer fails to test the truth of her premises by not anticipating either her opponent's response or a different, better argument;
>
> *The Editorial*—where the writer fails to cite case law in support of the minor premise and thus appears to "editorialize" with respect to its probable truth; and
>
> *The Negative Proof*—where the writer creates an invalid syllogism by arguing that an element of proof is met because the cited case in which the element was *not* found is *not* analogous to the writer's case.

III. ANALOGICAL REASONING

In the process of reasoning deductively with rules of statutory and/or common law, an advocate is often compelled to make comparisons to similar or distinguishable case law in order to demonstrate the proper appli-

cation of a given rule.[110] Analogical reasoning comes into play when the advocate applies the rule she has already articulated either explicitly or implicitly in the major premise. Because the ultimate conclusion must be consistent with binding precedent, the writer must demonstrate that the case at hand is either similar to or different from the cited case and thus justify similar or different treatment in applying the stated rule of law. As such, the analogy fits within a larger syllogistic framework.[111] This traditional paradigm for legal analysis is often referred to as "analogy within deduction."[112]

Analogies derive their force from comparing two different but arguably similar situations. Due to significant factual similarities or dissimilarities between these two situations, the advocate argues that the case at hand should be treated in the same or opposite manner.[113] Burton describes the first step in analogical reasoning as "the selection of a proper base point with which to compare and contrast" the case at hand.[114] The advocate then selects the facts she believes are most pertinent to the cited case and compares them to her case. The idea behind the analogy is that "two things which resemble each other in a number of respects resemble one another in a further, unconfirmable respect."[115] Like legal syllogisms, analogies cannot *prove* anything. They can only persuade, but persuade they do.[116]

The success of the analogy depends on how significant the reader perceives the factual similarities between the two cases and whether any differences strike the reader as even more significant. An analogy can fail as much because an advocate ignores significant differences between two cases as because of a dearth of similarities.[117] Consider the following example:

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110. The rule—as articulated by the advocate—may be subject to dispute. But if the rule is reasonable, if it is applied in a way that does not violate the principle of distributed terms, and if it does not produce grossly unfair or unwieldy results, the application of that rule will nonetheless be effective.

111. BURTON, *supra* note 10, at 25–40; GARDNER, *supra* note 10, at 10–13; RAMSFIELD, *supra* note 12, at 299–304.

112. *See, e.g.*, RAMSFIELD, *supra* note 12, at 299. For a more complete discussion of how deductive and analogical reasoning are combined in legal argument, see BURTON, *supra* note 10, at 59–82.

113. ALDISERT, *supra* note 10, at 51; BURTON, *supra* note 10, at 26; CORBETT, *supra* note 1, at 105.

114. BURTON, *supra* note 10, at 28. Of course, an advocate may analogize several cases at once that are arguably similar to her case and dispense with a full textual comparison to an individual case. For purposes of understanding the analogy, however, it is best to begin by learning what makes a case-to-case comparison effective and build outward from there. A combination of these approaches gives the advocate the versatility she needs on a case-by-case basis to respond to the relevant law and write creatively and efficiently.

115. CORBETT, *supra* note 1, at 104.

116. *See id.* ("[T]here is a leap from the known to the unknown. It is because of this inductive leap that analogy achieves probability rather than certainty.").

117. *Id.* at 105 ("Most of the time when we say, 'Your analogy doesn't hold,' we are exposing an analogy that has avoided consideration of important differences.").

> *A prosecutor in a murder trial attempts to admit a hammer—the alleged murder weapon—into evidence under the plain view exception to the Fourth Amendment to the United States Constitution. In support of this effort, she cites Case A, in which the officers saw a knife on a kitchen table approximately fifteen feet from the doorway of the apartment. In ruling to admit the knife, the Case A court relied on the facts that the defendant voluntarily opened the door; it was 3:00 p.m. on a partially sunny day; the officers at the door knew the defendant's employer had been stabbed to death; and the knife was obviously bloody.*
>
> *The prosecutor then compares her case to Case A: the defendant voluntarily opened the door; it was noon on a bright, cloudless day; the officers at the door knew the defendant's wife died as a result of blunt force trauma; the hammer was seen lying on the floor only ten feet from the doorway; and the hammer was "obviously bloody."*[118] *Like in Case A, the weapon was seized in plain view and thus should be admitted into evidence.*

At this juncture, the analogy seems quite good; one might even argue that the circumstances are better for admitting the evidence in the prosecutor's case than in Case A because it was a sunnier day, the hammer was closer to the door than the knife was, and the link between the defendant and the victim was even stronger than the link in Case A.

However, as opposing counsel points out, there is a problem:

> *Even if the court were to conclude that the defendant voluntarily opened the door—a fact the defense disputes, the defendant had all the window shades drawn that day, and the officers asked the defendant to turn on the hall light so they could see. Moreover, the officer who saw the hammer did so only after the defendant turned on the light, and the officer leaned up against the door and peered around it. Case A is thus distinguishable, and the hammer should be excluded from evidence.*

Given these additional facts, the court in the prosecutor's case decides that the two cases are not alike and grants the defendant's motion to suppress the hammer as evidence.

The prosecutor's analogy ultimately failed because the court perceived the factual differences between the two cases to be more important than the similarities. The degrees of importance between similarities and differences

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118. The analogy is made stronger by using the same language the court uses in the cited case to describe the case at hand.

are rarely as obvious as in this exaggerated example. In fact, it is often difficult to know which facts really matter and which do not.[119] The answer seems to lie in figuring out why the court ruled the way it did in the cited case(s).[120] That is why an advocate must focus on more than just the facts of the cases; she must discern why the facts led the court to rule the way it did. In the example above, the facts suggest that what mattered to the court was that in Case A, the officers were legitimately on the scene, they did nothing to coerce the defendant, the object was visible without any effort on the officers' part, and the officers had reason to link the bloody knife to a recent crime.

In the prosecutor's case, several of these justifications are absent: the officers were not legitimately on the scene in the sense that one of them peered around the door and arguably "searched" without a warrant, and they could be said to have "coerced" the defendant into turning on the light so they could look inside. Not only are there significant factual differences between Case A and the prosecutor's case, the justifications for admitting evidence obtained without a warrant in this manner are missing.

The rule of Case A might reasonably be articulated as "where police officers are legitimately on the scene and observe incriminating evidence they know to be related to a crime, they are entitled to seize it without a warrant." That rule would justify the seizure of the hammer in the prosecutor's case, but admitting the hammer seems unfair. In the process of applying the rule of Case A to the prosecutor's case, a new rule is formed and applied in the same case in order to grant the defendant's motion to suppress the evidence: "where police officers are legitimately on the scene and observe incriminating evidence they know to be related to a crime, they are entitled to seize it without a warrant, *as long as they do nothing to coerce the defendant's cooperation and can see the object without assistance*."

As several scholars have pointed out, there is a certain fiction involved in the process of applying *existing* legal rules to new circumstances to yield

119. Burton calls this the "problem of importance." BURTON, *supra* note 10, at 31. Aldisert explains the complexity of treating two cases as alike in terms of value judgments the court must make. ALDISERT, *supra* note 10, at 17. Judges are often called upon to decide which facts matter, how new facts are to be interpreted, and what competing rule or principle of law should apply to the situation. *Id.*

120. Burton devotes several chapters to developing an interpretive method for determining the "important" or relevant facts in a given case. *See* BURTON, *supra* note 10, at 85–163. Because cases may be very different in terms of their facts but still require similar treatment, he stresses the need to see cases as related to each other in the sense that they belong to the same family of cases. *Id.* at 85–99. What makes the cases related is due in large part to the judge's sense of what the law is and what it is or should be trying to do. *Id.* at 101–23.

predictable results.[121] In our sample case, the court amends the rule of Case A and applies it to exclude the hammer. The rule of Case A serves only as a starting point for the court to incorporate the prosecutor's case into the family of cases dealing with the admissibility of evidence under the plain view exception. This is precisely the way in which the common law builds upon itself, and the process of articulating rules and applying them in a flexible and responsive manner allows judges to make decisions that are fair and just.

IV. RECURRING PROBLEMS IN ANALOGICAL REASONING

Weak and/or incomplete analogies are most common among novice legal writers who struggle, without adequate foundation, to mimic analogy within deduction. The writer has a basic understanding of the need to present a rule and then apply it to the case at hand with some reference to a supporting or similar case. However, that is essentially as far as it goes for many young legal writers. Due to no fault of their own, they are not aware of the complicated process in which they are engaging. They do not realize that they first must create a syllogistic framework. That process alone involves extracting a rule from a case or set of cases that will function as the major premise, characterizing the case at hand to function as the minor premise, and applying the major premise to the minor premise to yield a "valid" conclusion. If the student intentionally creates or intuits a valid syllogism (and this is no small task), the student's ability to imitate good legal writing often breaks down when she attempts to use case law to demonstrate—as she must do because of stare decisis—how a rule is applied in a given jurisdiction.

The following types of weak or incomplete analogies are typical of novice legal writers who have made ineffective attempts to reason by analogy. Each of these examples is given a simple, descriptive name for easy identification and reference.

A. The Missing Link

The Missing Link occurs where the writer cites to a case that is arguably analogous without explaining or inferring the court's reasoning. To leave out the reasoning is to omit a critical link between the cited case and the case at hand. If the court's reasoning does not apply well to the writer's case, the analogy is weak.

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121. *E.g.*, ALDISERT, *supra* note 10, at 17; BURTON, *supra* note 10, at 36.

In this example, the writer cites to a case in support of the Wyndhams' argument that Storey intended to induce their reliance:

Example #16:

> Intent to mislead is the fourth element. See Gibbs at 207, 647 A.2d at 889. Intent can be shown by suppression of the truth or a suggestion of what is false. See Smith at 300, 564 A.2d at 189. In Smith, the seller told the buyer "not to worry about" termite damage, and that statement qualified as a suggestion of what was false and evidenced seller's intent to deceive. Storey's intent to deceive was shown when he suppressed the fact that the furnace was broken and suggested it would only need annual inspection. He intended that the Wyndhams believe him and buy the house without checking the furnace, and they did.

As stated earlier, the logic is valid,[122] but that is not the end of the inquiry. The writer's credibility is at stake unless she can convince the reader that the conclusion is consistent with binding precedent.[123] She must demonstrate that her case is more like cases where the court found intent than cases where the court did not. The success of the analogy to existing case law—in this example, *Smith*—depends on how significant the reader perceives the similarities and differences between the two situations, and the writer's complex task is to supply just the right amount of information about both.

At first, the analogy appears to be fairly good. A fact was suppressed in both cases in a way that might justify similar treatment. Although the analogy seems to work, it is incomplete in a number of respects. First, it is not at all clear *why* the *Smith* court concluded that the seller's statement suggested a falsity because the writer does not elaborate on the facts of *Smith*. Second, it is not clear why the falsity of that statement led the court to infer intent to mislead. Third, it would be helpful if the writer explicitly demonstrated *how* the statements in both cases are similar, which would lead the reader more inexorably to the conclusion that Storey's statement evinces an intent to mislead the Wyndhams.

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122. *See supra* Part I.

123. *See supra* Part II.F (The Editorial).

The first two infirmities can be characterized as a failure to include the *Smith* court's *reasoning*. Without understanding why the court reached its conclusion, the reader finds it difficult to use the case as a predictor of outcome in the case at hand. The writer needs to provide or infer the court's reasoning in order for the reader to find *Smith* helpful. An exercise conducted by Elisabeth Keller and Jane Kent Gionfriddo at Boston College Law School demonstrates well the necessity for this information.[124] Students are asked to assume the following: A red Macintosh apple represents the first case on a given issue in a particular jurisdiction. In that case, the court holds for the plaintiff, and thus the apple "belongs in the basket."[125] The second case comes along and is represented by a green Bartlett pear. The court holds for the defendant, and thus the pear "does not belong in the basket."[126] A third case comes along which is represented by a green Granny Smith apple. The question is thus posed: "[T]his object is now before the court. Predict: Will the court find that it 'belongs in the basket,' or not?"[127]

The answer, of course, is that without knowing why the court found for the plaintiff in Case #1 and for the defendant in Case #2—was it because of the color or the shape of the fruit?—it is impossible to predict the outcome in Case #3.[128] If shape was determinative, one could predict (but not be certain) that the plaintiff will win in Case #3; if color was determinative, one could predict (but not be certain) that the plaintiff will lose in Case #3.[129] In order to predict outcome, it is necessary to explain *why* the court ruled the way it did, even if the writer must infer those reasons.

A revised version of Example #16 attempts to articulate adequate similarities between the two cases by incorporating the court's reasoning *and* providing explicit examples of factual similarity:

Revised Example #16:

> Intent to mislead is the fourth element. See Gibbs at 207, 647 A.2d at 889. **Where a seller intentionally conceals a known material fact, a jury may find intent to mislead. [reformulated major premise]** See

124. *See* Jane Kent Gionfriddo, *Using Fruit to Teach Analogy*, 12 SECOND DRAFT 4–5 (1997), *available at* http://www.lwionline.org/publications/seconddraft/nov97.pdf.

125. *Id.* at 5.

126. *Id.*

127. *Id.*

128. *See id.*

129. *Id.*

> Smith at 306-7, 564 A.2d at 192. In Smith, **a real estate salesman** told the **plaintiff** buyer "not to worry about" **minor** termite damage **that had been repaired, when in fact, the damage was quite extensive and had not been repaired. The court thus held that the jury was justified in finding the salesman had "acted intentionally to dissuade the purchaser from making a more careful inspection." Id. at 307, 564 A.2d at 192.** Storey's intent to **mislead** was shown when he **told the Wyndhams to "continue having the furnace inspected" as he had. [minor premise] Like the salesman in Smith, Storey acted intentionally to conceal the nature of the damage to the furnace and to dissuade the Wyndhams from inspecting the furnace more carefully. [analogy to Smith] Because Storey intentionally concealed a known material fact, a court is likely to find the intent to mislead element satisfied. [conclusion]**

In the revised version, the major premise has been reformulated in a way that is slightly more specific and precise. The reformulated rule allows the writer to describe the case at hand in the same terms as the rule (i.e., Storey concealed a known material fact). Modifying "suppression of the truth or a suggestion of what is false" homes in on the concealment at issue in both cases: an affirmative statement that misleads the buyer regarding the condition of an important aspect of the house. More detail regarding the facts of *Smith* provides the reader with a better context in which to appreciate the comparison to the Wyndhams' case and supplies the reasoning for the court's conclusion: Because the salesman told the buyer that there was only minor termite damage, and the salesman knew that the damage was both major and unrepaired, the court inferred the salesman's intent to mislead.

When shown a thorough and persuasive analogy, legal writers often object to the amount of space it takes to write one. Struggling with word or page limits,[130] a writer feels justified cutting corners to get in as much

130. At Georgetown, we impose these limits for several reasons, not the least of which is because courts do. We also impose them for practical reasons: it is more manageable and fairer to compare and grade papers that are equal in length. These limits tend to be rough estimates, however, and admittedly put the students in a sometimes difficult position.

information as possible. Understandably, writers are frustrated by comments indicating they need to accomplish more in less space. Although not recommended as an automatic substitute for full-blown analogies, parentheticals can be used to conserve writing space. The versatile legal writer should be familiar with and use a variety of techniques that convey information quickly and emphasize analyses or analogies that deserve fuller treatment. Understanding the principles behind analogies and how they function within legal analysis gives writers a way to evaluate the efficacy of their own analysis. Writers should learn to consider these techniques before they begin writing in order to help them make intentional choices about how much space to devote to each issue in their analysis.

Assume the writer of Example #16 had several cases to choose from that supported the stated rule that intent to mislead can be inferred from intentional concealment and many of them concerned sales of property. The writer might choose to make a full, textual comparison to the best supporting case and cite another for additional support using a parenthetical, for example: *See also* Smith v. Renault, 564 A.2d 188 (1989) (holding that intent to mislead could be inferred when the seller knew about major termite damage to the house but told the buyer it was only minor and "not to worry about it"). The key to an effective parenthetical is including enough information to make clear the reason for the court's ruling and the significant similarities between the cited case and the case at hand. Here, the choice is made to inform the reader that *Smith* involved the sale of a house, the seller misrepresented the condition of the house, and the seller had knowledge of the actual condition of the house at the time the statement was made.

In Example #17, the student argues that police officers could not reasonably have concluded that a man who answered the defendant's apartment door had authority to consent to a search:

Example #17:

> The facts available to Officers Moll and Stone at the time should have led them to conclude that Bradford did not have common authority over the apartment. In State v. Savage, the court held that a roommate may consent to a police search of a residence if the facts support a reasonable belief by the officer that the roommate had authority to consent. 27 Kan. App. 2d 1022, 1028, 10 P.3d 765, 770 (2000). See also United

> States v. Dozal, 173 F.3d 787 (10th Cir. 1999); United States v. Lee, 972 F. Supp. 1330 (D. Kansas 1997). In Savage, the defendant's roommate contacted an officer, told the officer that he lived in the house with the defendant, and arranged to show the officer marijuana plants growing in the house. 27 Kan. App. 2d 1022, 1023-24, 10 P.3d 765, 767-777.
>
> However, in the present case, Officers Moll and Stone had no previous contact with Bradford and he never told them that he lived in the apartment. To the contrary, the superintendent explicitly told the officers that Bradford had moved out. . . .

At this point in the analysis, it becomes clear to the reader that something is missing.[131] The student has formulated a major premise (i.e., that police may search if they reasonably believe one has authority to consent). The minor premise—that there was no reasonable belief that Bradford had authority to consent—is easily inferred. The writer provides a brief description of *Savage*, distinguishes *Savage* from the case at hand, and goes on to conclude that Officers Moll and Stone were not justified in searching. The logic of the syllogism works,[132] but the jump from *Savage* to the writer's case is too abrupt.

Again, the writer has failed to include the reason for the court's decision in the cited case. As in Example #16, the court failed to state explicitly its reasons for ruling the way it did. However, the facts noted and relied on by the court can be used to infer the court's reasoning. The caller identified himself on the telephone, told the police he had lived at the apartment for two months and had access to the kitchen, was present at the apartment when the officers arrived, and admitted them into the apartment

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131. Notice at the outset that the writer uses *Savage* differently from the way *Smith* was used in the first example. The rule of *Savage* is being used to support the writer's argument, but the writer distinguishes *Savage* in order to persuade the court to hold the opposite. This is still reasoning by analogy, but the writer is saying that the differences between the cases are greater than the similarities, and therefore, they should be treated *differently*. CORBETT, *supra* note 1, at 106–07.

132. The syllogism is as follows:

> Major premise: Unreasonable belief in authority to consent [Term #1] prohibits a warrantless search. [Term #2]
>
> Minor premise: The officers [Term #3] had an unreasonable belief in Bradford's authority. [Term #1]
>
> Conclusion: The officers' [Term #3] warrantless search was prohibited. [Term #2]

and showed them the marijuana plants.[133] When I read the case, I found that the writer had not cited the facts as itemized by the court in its discussion of the authority issue, but as summarized by the court throughout the opinion. More factual and procedural background about the case made it clear *why* the court ruled that the officers' belief was reasonable. Often the court's reasoning can be taken directly from the case or, as in these two examples, inferred from the facts the court relied on. By adding additional facts and explaining that the court relied on these facts in making its decision, the analogy is smoother and more effective:[134]

Revised Example #17:

> The facts available to Officers Moll and Stone at the time should have led them to conclude that Bradford did not have common authority over the apartment. In State v. Savage, the court held that a **third party** may consent to a police search of a residence if the facts support a reasonable belief by the officer that the **third party** has authority to consent. 27 Kan. App. 2d 1022, 1028, 10 P.3d 765, 770 (2000). See also United States v. Dozal, 173 F.3d 787 (10th Cir. 1999); United States v. Lee, 972 F. Supp. 1330 (D. Kansas 1997). In Savage, **the court ruled that Officer Axman reasonably believed a young man had authority to consent to the search of defendant's residence. The court cited the following facts in support of its ruling: the young man called the police to inform them that the defendant was growing marijuana, he explained that he lived at the apartment and that he had access to the kitchen, he was present when Officer Axman arrived, and he readily showed the officer**

133. State v. Savage, 10 P.3d 765, 769–70 (Kan. Ct. App. 2000).

134. Having read the case more carefully and thinking more specifically about why the court ruled the way it did, I revised the major premise a bit. The court did not restrict its ruling to roommates. In fact, it stated that any third party with authority over the premises can consent to a warrantless search, and officers may enter if they reasonably believe such authority exists. *Id.* at 769. The question in *Savage* was essentially whether the young man was the defendant's roommate, a fact that could reasonably lead the officers to believe he had authority to consent to a warrantless search of the kitchen to which he had access. *Id.*

> **the marijuana plants growing in the window-sill of the kitchen. 27 Kan. App. 2d at 1027-28, 10 P.3d at 770.**
>
> However, in the present case, Officers Moll and Stone had no previous contact with Bradford and he never told them that he lived in the apartment. To the contrary, the superintendent explicitly told the officers that Bradford had moved out. . . .

B. The House of Cards

The House of Cards is related to the Missing Link because it involves the *consequence* of the court's reasoning, its *holding*. Although a writer is often tempted to cite a case because the facts are somewhat similar to the case at hand and the rule of law is favorable, the actual outcome of the case is critical to the success of the analogy. For example, a writer's credibility is seriously compromised when she cites a case in support of Proposition A (e.g., the defendant had authority to consent to a warrantless search) when the court in the cited case actually ruled that Proposition A did not exist (e.g., the defendant did not have authority to consent). In that case, the writer's comparison to the cited case collapses like a house of cards.

The comparison is both incomplete and weak because the writer forgot to tell the reader the outcome of the cited case; the reader cannot be persuaded without knowing what the court actually *did*. Burton explains the significance of the court's holding to analogical reasoning:

> The holding is a statement that captures in a sentence or two the probable significance of a single precedent as a base point for reasoning by analogy in future cases. It summarizes the important facts in the precedent case—the facts that are likely to become a point of important similarity or difference between the precedent and a problem case, largely as perceived by the court in the precedent case. It also states the legal consequence that followed from those facts in that case.[135]

Since the "holding is used as a base point in analogical legal reasoning,"[136] it is critical that the reader include it in her analogy.

In Example #18, the writer omits the holding in both *Savage* and *Rodriguez*. This omission threatens to collapse the analogy:

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135. BURTON, *supra* note 10, at 37.
136. *Id.*

Example #18:

> Nor does the "apparent authority" rule apply to this case. The state attempts to rely on the rule from Illinois v. Rodriguez that the consent of a third party who does not have common authority may be relied on if the police reasonably believe that he does have such authority. 497 U.S. 177. In Kansas, this rule excuses the warrant requirement on the basis of consent "where the facts available to an officer would warrant a person of reasonable caution to believe the consenting party had authority" to do so. State v. Savage, 10 P.3d 765, 769 (Kan. Ct. App. 2000) (quoting Ratley). In Savage, the consenting third party told the police that he lived on the premises for about two months. Id. at 770. Similarly in Rodriguez, Fischer referred to the apartment as "ours" and claimed she had clothes and furniture there, giving no hint that she had moved out. 497 U.S. at 179. By contrast, Bradford did not tell the police anything about his authority over the premises. They inferred, wrongly and unreasonably, that he had authority from the statements of the super and from hearing his voice over the intercom, and the state cannot demonstrate that they reasonably could have believed he had such authority.

Because "reasonable belief" is a common law construct, it cannot be applied in a vacuum. The writer must look to existing case law where the meaning of that critical phrase is explored. Notice that in this example, the writer does not appear to have cases in her jurisdiction where the factual scenario is similar *and* the outcome of the case is favorable to her client. Therefore, she has chosen to distinguish those cases where the scenario was similar but the outcome favored her opponent. If she demonstrates that the differences between the cases are more significant than the similarities, she may be able to convince the reader that the cases should be treated *differently*. This comparative technique is the counterpart to similarity

(reasoning by analogy) and is simply termed "difference" (reasoning by distinction).[137]

In both *Savage* and *Rodriguez*, the consenting parties appear to have done something to warrant a reasonable officer to believe they had authority to consent to the search. In *Savage*, the third party told the officers he lived on the premises; in *Rodriguez*, the third party behaved like a resident and gave no hint that she did *not* live there. Here, though, the writer would have us believe that the third party did nothing to warrant an officer's reasonable belief in his authority, and the statements from the superintendent and those heard over the intercom presumably make matters worse. Assuming the differences between the cited cases and the case at hand are accurately described, the distinction is ineffective because the reader does not know what the court held in either *Savage* or *Rodriguez*.

If the courts in *Savage* and *Rodriguez* ruled that the third party did *not* have apparent authority to consent, the reader would be presented with a distinction without a difference. In actuality, the courts held both in *Savage* and *Rodriguez* that the third party had apparent authority. Without being told, however, the reader cannot be sure of that. The only way to find out what the courts did would be to read the cases. On its face, the writer's argument is incomplete; it simply collapses in on itself. The problem is easily fixed and the argument greatly strengthened in the following revision:

Revised Example #18:

> Nor does the "apparent authority" rule apply to this case. The state attempts to rely on the rule from Illinois v. Rodriguez that the consent of a third party who does not have common authority may be relied on if the police reasonably believe that he does have such authority. 497 U.S. 177. In Kansas, this rule excuses the warrant requirement on the basis of consent "where the facts available to an officer would warrant a person of reasonable caution to believe the consenting party had authority" to do so. State v. Savage, 10 P.3d 765, 769 (Kan. Ct. App. 2000) (quoting Ratley).

137. CORBETT, *supra* note 1, at 106–07. Both similarity and difference are forms of comparison, one of the "topics" used to invent or develop one's arguments. *Id.* at 102–07.

> **Where consenting third parties behave as though they live on the premises and do nothing to dispute that impression, officers may have a reasonable belief in their authority to consent. See Rodriguez, 497 U.S. at 179 (holding that a third party who referred to the apartment as "ours" and claimed she had clothes and furniture there, giving no hint that she had moved out had apparent authority); Savage 10 P.3d at 770 (holding that a third party who told the police that he lived on the premises for about two months had apparent authority).** By contrast, Bradford did not tell the police anything about his authority over the premises. They inferred, wrongly and unreasonably, that he had authority from the statements of the super and from hearing his voice over the intercom, and the state cannot demonstrate that they reasonably could have believed he had such authority.

In Example #19, the writer relies on analogy to prove that officers who conducted a warrantless sweep of the defendant's home were justified by a reasonable belief of the presence of a dangerous third party:

Example #19:

> The presence of a third party posing a danger to the officers' safety was merely speculative, and, thus, did not support a reasonable inference of the presence of a third party posing danger. The officers' inference of the presence of a third party must be reasonable given the series of events prior to and during arrest. Nova, 740 N.E.2d at 1023. In Nova, the court noted that footsteps were heard prior to defendant's answering the door, that during the defendant's arrest the police did not see another person in the apartment, and that no one tried to intercede on the defendant's behalf, all suggesting the

> defendant was alone at the time of arrest. Similarly, here, there was nothing, during the time of arrest, to suggest the presence of a third party.

The writer's argument is that the officers had no reason to believe a third party was present who posed a danger to them. The writer compares her case to *Nova*, where the situation was arguably similar: the officers heard footsteps as the defendant approached and opened the door, saw no one other than the defendant, and arrested the defendant without interruption. However, without stating the actual outcome in *Nova*, the writer leaps to the conclusion that the officers' belief in the case at hand was similarly unreasonable. Without knowing the holding of *Nova*, the reader is not in a good position to determine if the similarities between the cases are more significant than the differences. The revision simply adds this critical fact and elaborates on the court's reasoning:

<u>Revised Example #19</u>:

> The presence of a third party posing a danger to the officers' safety was merely speculative, and, thus, did not support a reasonable inference of the presence of a third party posing danger. The officers' inference of the presence of a third party must be reasonable given the series of events prior to and during arrest. <u>Nova</u>, 740 N.E.2d at 1023. In <u>Nova</u>, the court noted that footsteps were heard prior to defendant's answering the door, that during the defendant's arrest the police did not see another person in the apartment, and that no one tried to intercede on the defendant's behalf. **Because these facts did not suggest the presence of a third and dangerous party, the court concluded that these facts did not reasonably suggest the presence of a third and dangerous party and held that the officers' sweep of the home was unlawful. <u>Id.</u> at ___. Similarly, there were no facts in this case suggesting the presence of a third party: the officers heard footsteps only as the defendant**

> **approached the door, the police saw no one during the time it took to arrest the defendant, and no one attempted to interfere with the arrest. Therefore, the officers' sweep of the residence was unlawful.**

C. *Insufficient Facts*

The Insufficient Facts analogy is very common. It occurs when the writer fails to include enough facts for the reader to decide whether the cases are sufficiently similar or different to justify similar or different treatment. In Example #20, the writer relies on *Kopeiken* in determining that Storey intended to induce the Wyndhams' reliance:

Example #20:

> In determining whether Storey's intent was to cause the Wyndhams to act upon the concealed fact, **inferences from circumstantial evidence can be used. [major premise]** See Kopeikin v. Merchants Mortgage and Trust Corp., 679 P.2d at 602. In Kopeikin, the court inferred from circumstantial evidence that the defendant's intent in concealing facts was to influence plaintiff's decision to purchase the land. See id. at 601.
>
> **Inferences can similarly be made in determining that Storey intended to influence the Wyndhams' decision to purchase the house. [minor premise/analogy to Kopeikin and implicit conclusion]** Had the Wyndhams known about the defective furnace, that emitted noxious fumes, they almost certainly would not have bought the house in the condition it existed at the time of sale. The Wyndhams would certainly have decided differently in either not purchasing the house, or replacing the defective furnace and factoring it into the overall cost of the purchase.

In this example, the writer identifies the element at issue as intent to induce reliance. The writer proceeds to extract a common law rule from *Kopeikin*—which may or may not be a credible premise—that circumstantial evidence can be used to infer intent to induce reliance. The writer provides some background information about *Kopeikin*: land was being sold, some fact was allegedly concealed while negotiating the sale, and the court used circumstantial evidence to conclude that the seller concealed that fact in hopes of completing the sale. The writer then shifts to the case at hand, and says, "similarly," inferences can be made that Storey concealed the defective condition of the furnace.[138]

The problem here is that the reader does not have enough information to know if the case at hand is truly similar to the cited case. The minor premise, the comparison to *Kopeikin*, and the conclusion drawn from that comparison are all rolled into one sentence. Recall that analogies are the comparisons of two different but arguably similar situations. If there are significant similarities without significant differences, stare decisis requires that they be treated in the same manner.[139] Because there are no clear guidelines for judges on what makes a similarity or difference truly significant, the writer must take advantage of every opportunity to demonstrate and explain what she considers a meaningful similarity or difference.

The writer here depends solely on the suggestion of similarity to accomplish the complicated task of analogy-making. Since the legal rule relied on by the writer is that circumstantial evidence can be used to infer intent, it would be helpful to know what circumstantial evidence was used in *Kopeikin*. It would also be helpful to know what kind of fact was concealed and how it was concealed. Without this information, the reader cannot determine if the Wyndhams' case is similar to *Kopeikin* and whether a court should treat the cases similarly.

As it turns out, *Kopeikin* holds that circumstantial evidence may be used to establish fraudulent concealment, and fraudulent concealment requires proof of intent to induce reliance.[140] In *Kopeikin*, buyers of undeveloped lots in Colorado sued to invalidate promissory notes they had signed, on the ground that the seller had fraudulently concealed its financial troubles.[141] The trial court directed verdicts against those plaintiffs who had

138. The last two sentences of this paragraph about whether the buyers would have purchased the house had they known about the defect more properly belong in the portion of the analysis regarding the "materiality" of the defect. *See supra* Part II.C (The Packed Paragraph).

139. *See supra* Part III.

140. Kopeikin v. Merchants Mortgage & Trust Corp., 679 P.2d 599, 601–02 (Colo. 1984).

141. *Id.* at 600.

failed to testify, and the court of appeals affirmed.[142] The Supreme Court of Colorado reversed the court of appeals and remanded the case to the trial court for further proceedings on the fraud claims, stating that "fraud may be inferred from circumstantial evidence."[143] Since thirty-six co-plaintiffs had testified about what the seller had told them in negotiating their sales, "a jury reasonably could infer that a party who fraudulently concealed material facts from 36 potential buyers likewise concealed those facts from four other similarly situated buyers."[144]

When *Kopeikin* is compared to the Wyndhams' case, it appears that the nature of the inferences being made in these two cases is different. In *Kopeikin*, the court used evidence of concealment in related transactions to infer the same type of concealment in another.[145] In the Wyndhams' case, the writer argues, evidence of the seller's knowledge about the defective furnace can be used to infer the defendant's intent to induce reliance.

In *Kopeikin*, the rule is evidentiary in nature: evidence of intent in one case is admissible to prove intent in another. In the Wyndhams' case, however, the writer seems to apply a different rule of law: evidence of one fact (knowledge of the defect) can be probative in finding the likely existence of another fact (intent to induce reliance).

Assuming for the moment that *Kopeikin* is the best case in support of the writer's argument, a more effective analogy would try to make explicit the relevant similarities between the two cases and account for any arguably irrelevant dissimilarities:

Revised Example #20:

> In determining whether Storey's intent was to cause the Wyndhams to act upon the concealed fact, inferences from circumstantial evidence can be used. See Kopeikin v. Merchants Mortgage and Trust Corp., 679 P.2d at 602. **In Kopeikin, the seller of land lots in Colorado failed to inform the plaintiffs that it had serious financial troubles. When the seller went bankrupt, the plaintiffs sued to invalidate the promissory notes they signed in payment for the lots. The trial court directed**

142. *Id.*
143. *Id.* at 602.
144. *Id.* at 601.
145. *Id.* at 601–02.

> verdicts against the buyers who did not testify about the conversations they had with the seller. The Supreme Court of Colorado reversed, stating that "fraud may be inferred from circumstantial evidence." Id. The court reasoned that evidence of fraud in related transactions could be used to infer fraud in another. Id. at 601.
>
> In this case, Storey failed to inform the Wyndhams that the furnace was defective. When he showed them the house, he told the Wyndhams to have the furnace inspected each year as he had. However, the inspector hired by the Wyndhams indicated that the heat exchanger had probably been cracked for at least a year or two. Either Storey omitted material information about the condition of the furnace, or he lied about having it inspected every year. As in Kopeikin, these pre-existing facts can be used to infer fraud in the absence of direct evidence that Storey knew that the furnace was defective and intended to induce the Wyndhams' reliance.

This analogy may work on some level, but the factual similarities between the cases and the use of circumstantial evidence in both do not seem to justify like treatment. Even if the result proposed by the writer seems justified, *Kopeikin* is not particularly helpful in reaching that conclusion. The writer could have made the analogy more effective by trying to figure out *why* the court ruled the way it did in *Kopeikin* and applying that same reasoning to her case. In *Kopeikin*, the court determined that because thirty-six plaintiffs testified that the defendant failed to disclose a material fact in their transactions, it was fair to take that evidence into account and assume the defendant had made the same omission in the cases of the four plaintiffs who did *not* testify.[146] In the writer's case, the court would need to be convinced that it was fair to assume the seller knew about the defective furnace based on the cumulative effect of observed indicators of his prior knowledge.[147]

However, the nature of these assumptions is quite different. Stated

146. *Id.*

147. Notice that in this example the writer failed to identify any of those indicators.

broadly, the *Kopeikin* rule that circumstantial evidence can be used to prove fraud is certainly helpful in supporting the writer's ultimate conclusion, but it has little to do with *Kopeikin* itself. When examined more closely, *Kopeikin* is not really helpful in advancing the writer's argument. Although *Kopeikin* and the writer's case are factually similar, the similarities are superficial and insignificant. In fact, the legal rule applied by the court in *Kopeikin* is so different from the rule the writer would have the court apply in her case that she would have been better off citing to a different case altogether. At best, the writer uses *Kopeikin* ineffectively because the analogy is so incomplete as to be unhelpful. At worst, the writer's use of *Kopeikin* is misleading, because it leads the reader to think that *Kopeikin* simply stands for the rule that circumstantial evidence can be used to infer the existence of a critical fact.

Here is another example of insufficient facts dealing with a different element of the same fraud problem:

Example #21:

> The first element is that a false representation was made. See Van Deusen at 324, 441 S.E.2d at 209. Storey would argue that no misrepresentation about the condition of the furnace was given.[148] However, concealment of a material fact, either by word or conduct, can satisfy the false representation requirement. See id. The inspector told the Wyndhams the furnace had been broken at least since October 10, 1995 and probably prior to that time. Storey may have had the furnace inspected prior to October 10, but the furnace was inoperative all winter and it is highly unlikely he would have been able to go all winter without discovering the furnace was broken.[149]

148. In this example, the writer begins discussing the satisfaction of the first required element by raising the defense's perceived counter-argument (i.e., that he is not liable because he never affirmatively represented that the furnace was in working order). Although it is less common to begin this type of analysis with the defense's argument, it is certainly not *wrong*. Notice, though, that there are certain pitfalls to this approach. By leading with the defense's argument, the writer fails to consider the argument that the statements Storey made about having the furnace inspected every year were affirmative misrepresentations. Had the writer led with the plaintiff's potential theories, she might have developed two alternative arguments for the first element: affirmative misrepresentation and/or concealment amounting to misrepresentation.

149. The last sentence of this paragraph is more relevant to the seller's knowledge of falsity and

This example runs dangerously close to being an Editorial[150] because the writer states the rule from *Van Deusen* and makes no real comparison to it in concluding that Storey made a false representation. The hint of a comparison is contained in the statement of the rule that concealment of material facts can constitute fraud and the accompanying cite to *Van Deusen*. The reader is subtly led to believe that concealment occurred in *Van Deusen* that is sufficiently similar to the concealment in the Wyndham case to justify the conclusion that the first element of fraud can be satisfied. The problem, of course, is that the writer does not supply the reader with facts about *Van Deusen* that might convince the reader that the Wyndhams' case is sufficiently similar to justify the same treatment.

As it turns out, *Van Deusen* is very similar to the Wyndhams' case in terms of the nature of the false representations made by the sellers. In *Van Deusen*, the Sneads contracted first to sell their home to a Mr. and Mrs. Osmann, who had the house inspected for defects.[151] The inspector's report revealed structural defects, and the Sneads released the Osmanns from their contract.[152] Subsequently, the Sneads entered into a contract to sell their home to the Van Deusens.[153] The Van Deusens claimed that the sellers took affirmative steps, such as covering and filling in cracks, to hide the damage and divert the Van Deusens' attention from the defects.[154] The Supreme Court of Virginia held that contrary to the lower court's ruling, the Van Deusens had indeed stated a claim for fraud, because concealment of a material fact may constitute false representation.[155]

In the revised example, the writer takes full advantage of the factual similarities between the two cases and the favorable result in *Van Deusen*:

Revised Example #21:

> The first element is that a false representation was made. See Van Deusen at 324, 441 S.E.2d at 209. Storey may argue that no misrepresentation about the condition of the furnace was given. **However, Storey did tell the Wyndhams to**

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should probably be moved to the analysis of that element of fraud. *See supra* Part II.C (The Packed Paragraph).

150. *See supra* Part II.F (The Editorial).

151. Van Deusen v. Snead, 441 S.E.2d 207 (Va. 1994).

152. *Id.* at 208.

153. *Id.* at 208–09.

154. *Id.* at 209.

155. *Id.* at 211–12.

keep inspecting the furnace every year as he had. That statement led the Wyndhams to believe that the furnace was in working order, and that statement was arguably false. [cite to case where a statement implied a falsity, make comparison to that case, and conclude that the first element is potentially satisfied]

In the alternative, the Wyndhams could argue that Storey fraudulently concealed from them the true nature of the furnace. **Concealment of a material fact, either by word or conduct, can satisfy the false representation requirement. See id. In Van Deusen, the sellers had entered into a contract to sell their home to a Mr. and Mrs. Osmann but released them from the contract when an inspector found structural defects. The sellers then agreed to sell the home to the Van Deusens but said nothing to them about the defects. The Van Deusens claimed that the sellers covered up and filled in the basement cracks in order to hide the defects and divert their attention. Because concealment of a material fact may constitute false representation, the court ruled that the buyers had stated a cause of action for fraud. Id. at 329, 441 S.E.2d at 210.**

Similarly, Storey agreed to sell the Wyndhams his home but said nothing to them about the condition of the furnace. According to the Wyndhams, Storey told them to continue having the furnace inspected each year as he had. The inspector told the Wyndhams that the furnace had been broken at least since October 10, 1995 and probably prior to that time. **If Storey did have the furnace inspected, then he deliberately concealed the fact that the furnace was inoperative, and the Wyndhams should have no trouble establishing the first element of misrepresentation under Van Deusen. If, on the other hand, Storey**

> lied about having the furnace inspected, he made a false representation that similarly diverted the Wyndhams' attention from a material defect, and the first element is likely to be satisfied.

Without comparison to *Van Deusen*, the argument that Storey fraudulently concealed looks like this:

> Major premise: Concealment of a material fact is equivalent to false representation.
>
> Minor premise: Storey concealed a material fact.
>
> Conclusion: Storey made a false representation.

As a matter of logic, it makes sense. However, without comparing Storey's alleged concealment to prior cases of concealment (i.e., which forms of concealment are vowels and which ones are consonants), the analysis is an editorial, ungrounded in precedent.[156]

By making an explicit comparison to *Van Deusen* using sufficient facts to suggest that the Wyndhams' case should be treated similarly, the writer creates a more effective argument:

> Major premise: A seller's failure to disclose a known but hidden house defect is equivalent to false representation.
>
> Minor premise: Like the sellers in *Van Deusen*, Storey knew that there was a defect but failed to disclose it to the Wyndhams.
>
> Conclusion: Storey made a false representation.

The major premise is better because it is framed to apply directly to the case at hand. In addition, the Editorial problem is resolved because the nature of "concealment" is accounted for by reliance on binding precedent. Where the case at hand and the cited case are truly similar in terms of the facts, the similarity alone will often suggest to the reader that the case at hand should be treated the same way for the same reasons the court ruled in the cited case. Finding truly similar cases in terms of facts, however, is rare. More often, the writer must convince the reader that the facts are similar enough

156. *See supra* Part II.F (The Editorial).

to justify like treatment and that the reasons for the decision in the cited case pertain equally well to the case at hand despite any differences between them.

D. The Problem with Totalities

A fourth type of incomplete analogy demonstrates the difficulty posed when advocates must make arguments based on a totality of circumstances. Legal writers often treat the factors courts use to define a relevant "totality" like an à la carte menu, selecting those factors they like and ignoring those they do not. Consider the following hypothetical:

> *Assume the issue before a state trial court is whether police officers lawfully seized evidence incident to arrest under the Chimel exception to the Fourth Amendment.*[157] *The officers arrested the defendant just inside the door to his apartment and handcuffed him behind his back. Immediately thereafter, they seized the murder weapon—a gun—that they found at the bottom of an umbrella stand approximately ten feet away and from which three umbrellas had to be removed before the gun was visible. The officers testified that they were "not really" afraid at the time they seized the gun.*
>
> *Cases from that state's jurisdiction indicate that courts look to the following factors in determining whether the item seized was within the defendant's immediate control: 1) whether the area searched was accessible to the defendant, 2) whether the officers' control of the arrestee would have prevented him from reaching that area, 3) whether the officers were in fact concerned about their safety or the destruction of evidence, and 4) whether the search was conducted soon after the arrest occurred.*
>
> *In her brief to the court, counsel for the state relies on Case A to support her argument that the gun was seized lawfully. In Case A, officers seized a knife in the entryway of the defendant's apartment, which they found in an open box approximately twelve feet from the defendant. In her argument, she writes:*
>
> > *The gun should be admitted into evidence because it was seized lawfully under the Chimel exception to the Fourth*

157. *See* Chimel v. California, 395 U.S. 752, 763 (1968) (stating that incident to arrest, officers may search the defendant and the area within defendant's immediate control for weapons or evidence).

> *Amendment. The supreme court of this state has held that factors to be taken into consideration in determining whether an object was within the defendant's immediate control include whether the area searched was accessible to the defendant, and whether the search was conducted soon after the arrest occurred. See Cases A, B, and C. In Case A, officers searched the defendant two minutes after he was arrested in his doorway; they found a knife in an open box approximately twelve feet from the defendant. Denying the defendant's motion to suppress the evidence, the court held that the seizure of the knife was lawful under Chimel. Case A. In this case, the murder weapon seized by police officers was only ten feet away. As such, it was two feet closer to the defendant than it was in Case A. Moreover, as in Case A, the evidence was seized immediately upon the defendant's arrest.*

As with the earlier example illustrating how critical factual dissimilarities are to the success of case analogies,[158] the argument is potentially strong at this point. However, the writer ignores that portion of the analysis that factors in the amount of control exercised by the police over the arrestee and the degree to which the officers feared for their safety or the destruction of evidence. At best, the writer gives the reader only a partial, and therefore inaccurate, picture of the totality present in both the case at hand and the cited case. At worst, the missing information is vital to the ultimate outcome of the case. For example, if the reader were to learn that the defendant in Case A was not handcuffed, the reader would feel differently about the need for the *Chimel* search. The reader might also feel that the weapon being two feet closer to the defendant would weaken the state's ultimate argument. Moreover, if the court held in Case C that the evidence had to be suppressed because the officers involved were not actually afraid for their safety, the reader would feel even less confident that the search at issue was justified.

As this example illustrates, relying only on favorable factors in a totality of the circumstances analysis is as misleading as ignoring damaging facts in a typical case comparison. The writer here is not being purposely deceptive; something happened, though, when she tried to fit her case in and among prior cases where several factors were at play. It is as if the writer strung cases together based on the similarity of one or two factors but ignored the other factors that vary widely among them. The differences among the cases may actually be more significant than the similarities,

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158. *See supra* Part III.

making reliance on the chosen factors ultimately unpersuasive. Because the reader implicitly understands that each individual factor cannot be considered in a vacuum, the selectivity of the writer's approach detracts from her credibility. As with all case analogies, the writer's thinking in this context needs to be less linear and more holistic in order to be more effective.

In the following sample, the writer argues on behalf of the prosecution that a third party who consented to a warrantless search had authority to consent based on his relationship to the premises:

Example #22:

> The question of whether Bradford was living in the apartment with the Defendant at the time of the search is one of fact and is for the jury to decide. We contend that whether or not [Bradford] was currently residing there, Bradford retained common authority with which he consented to the officers' search. Matlock defined common authority as having mutual use and control over the apartment at the time of the search.
>
> In Ratley, the court held that evidence found in a search could not be suppressed because the defendant's wife retained common authority or had sufficient relationship to her husband's home to give valid consent to the search even though at the time of the search she did not live at the house. Some of the factors the court considered in "determining if common authority or sufficient relationship exists," were possession of a key, general access to the premises, and the length of time the party was away from the premises. Id. at 81.
>
> Bradford answered the intercom when the woman dialed up to the apartment, and told her that she could not come up. Bradford opened the door to the officers and allowed them to enter. The superintendent of the building told the officers Bradford had

> been living there, and that while there may have been some disagreement between Bradford and the actual tenants from whom he was renting, Bradford was at the apartment frequently, had friends and visitors at the apartment, got mail delivered there, and was acting like he lived at the apartment. These actions are consistent with the factors set in Ratley and combine to show both common authority and a sufficient relationship between Bradford, the Defendant, and the apartment.

Having come this far, we can evaluate Example #22 fairly quickly and then focus on the "totality" problem. Consider first the writer's syllogistic framework. Her ultimate conclusion is that Bradford had authority to consent:

Overall Syllogism:

> Major premise: A person with common authority over premises may consent to its warrantless search.
>
> Minor premise: Bradford had common authority over the premises searched.
>
> Conclusion: Bradford could consent to the search.

In order for the argument to work, however, the writer needs to establish Bradford's common authority over the premises:

Syllogism Supporting the Minor Premise:

> Major premise: A person with mutual use and control over premises has common authority.
>
> Minor premise: Bradford had mutual use and control over the apartment.
>
> Conclusion: Bradford had common authority.

Both syllogisms contain only three terms, and they pass the validity test.[159] However, the syllogisms alone are not enough. Authority is a common law construct, and the writer must do more than cite to rules; she must look to existing case law in order to determine what "mutual use and control of the premises" means in her jurisdiction. The writer turns to *Ratley* for that purpose.[160]

According to the writer, *Ratley* held that a non-resident wife could consent to a search of the defendant's apartment based on the following factors: possession of a key, general access to the premises, and the length of time the party was away from the premises. In Example #22, the writer jumps immediately to an application of these factors to the case at hand. As a result, the analogy is incomplete due to insufficient facts.[161] The reader can assume but does not know whether the wife in *Ratley* had a key or general access. In addition, the writer provides no information about the wife's length of time away from the premises. Because the writer provides no concrete facts or reasoning from *Ratley*, it is impossible for the reader to know how, if at all, the cases are similar.

Without knowing more, the reader might think *Ratley* is distinguishable because the woman who gave consent was married to the defendant. In addition, without knowing if the wife had a key (which she did), *Ratley* is not rock-solid support for the writer's conclusion. Finally, some of the facts cited in support of Bradford's common authority are more relevant to apparent than actual authority.[162]

Finally, we come to the totality problem. There is something unsettling about the writer's sole reliance on *Ratley*. Even if *Bradford* were similar enough to *Ratley* to justify similar treatment, *Ratley* is not enough to justify the ultimate conclusion that Bradford had authority to consent. A legal writer is not justified in cherry-picking a good or even "the best" case and relying on that case alone without some reference to the rest of the case law. This is especially true in a totality of the circumstances analysis, where varying combinations of factors yield different and sometimes unpredictable outcomes in the precedent cases. Here, the writer relies on just a few factors from just one case.

Assume again that the letters of the alphabet represent the relevant body of case law[163] and that winning cases are vowels and losing cases are

159. *See supra* Part I.A.

160. *See* Kansas v. Ratley, 827 P.2d 78 (Kan. Ct. App. 1992).

161. *See supra* Part IV.C (Insufficient Facts).

162. The fact that Bradford answered the intercom when the woman dialed up to the apartment, told her that she could not come up, and opened the door to the officers and allowed them to enter is evidence of his *apparent* authority to the outside observer.

163. *See supra* Part II.F (The Editorial).

consonants. Because of stare decisis, the writer must describe what the consonants and the vowels look like in her jurisdiction and then characterize her case as either a consonant or a vowel. In a totality of the circumstances situation, the difference between the vowels and the consonants is subtler and less defined. A positive factor may be present in two cases whose outcome is different, and the only way to reliably predict an outcome is to make the reader familiar with enough vowels and consonants to feel comfortable that all things considered, the Bradford case really is a vowel. Here, though, the writer cites and describes only one vowel. Because *Bradford* looks only somewhat similar to that one vowel, the reader is left wondering what the other vowels look like and whether the case at hand might look more like a consonant.

A close reading of *Ratley* reveals that all the cases relied on by that court were non-occupying spouse cases.[164] The court explicitly listed the factors Kansas courts should thenceforth use to determine authority to consent in such cases, and *Ratley* cites to some of these.[165] The court also listed these factors: whether the locks had been changed by the occupying spouse, "whether the non-occupying spouse left personal property on the premises" and intended to return to get it, and "the reason for the non-occupying spouse's departure."[166] Although a Kansas court might very well use the same or similar factors for non-married, joint occupants, the writer does not establish that fact.[167] Assuming these are the relevant factors, the failure to assess them in their entirety weakens the writer's analysis. Although the defendant in the *Bradford* case did not change the locks, Bradford did not retain a key to the apartment. Moreover, as far as the reader knows, Bradford had not left property at the apartment that he intended to claim. At most, he received some mail there. Finally, there is no indication that he left out of fear, a major factor in spousal abuse cases.[168] These other factors would need to be dealt with in order for the analysis to be persuasive:

Revised Example #22:

> The question of whether Bradford was living in the apartment with the Defendant at the time of the search is one of fact

164. *Ratley*, 827 P.2d at 79–82.

165. *Id.*

166. *Id.* at 81.

167. In fact, the court stated that marital status, not joint occupancy, was the "overwhelming factor" in favor of "common authority." *Id.* at 80.

168. *Id.* at 81.

and is for the jury to decide. Whether or not [Bradford] was currently residing there, Bradford retained common authority with which he **lawfully** consented to the officers' search. Matlock defined common authority as having mutual use and control over the apartment at the time of the search. **[Cite]**

Kansas courts have interpreted Matlock to mean that a non-occupying resident must have at least a sufficient relationship to the premises to justify his consent to search. See, e.g., State v. Ratley, 827 P.2d 78, 81 (Kan. Ct. App. 19920 (holding that an abused wife who had left the premises for a safe house but returned several times within a few days to claim her property retained authority to consent to its search). In Ratley, the Kansas Court of Appeals reviewed cases from the United States Supreme Court and neighboring jurisdictions to compile a list of factors helpful in determining whether a consenting party has a sufficient relationship to the searched premises. These include 1) whether the locks have been changed; 2) the length of time the party has been absent; 3) the reason for the non-resident's departure; and 4) whether the non-resident continued to use the property, 5) left personal property on the premises, and 6) intended to return to get it. See id. at 80-81 (citations omitted).

As in Ratley, Bradford's relationship to the premises was sufficient to give him authority to consent to the search: The locks had not been changed, Bradford had not been away from the apartment for any significant period of time, he continued to use the property for socializing with his friends and receiving mail, and he left property there such as his counterfeiting equipment. In addition, Bradford did not leave because of a dispute with his

> roommate, he left because of a disagreement between Bradford and the actual tenants from whom he was renting. These factors combine to make his authority to consent even stronger than the wife's authority in Ratley even though she was married to the co-occupant. Although the Ratley court recognized that the marital relationship is unique and might be enough to establish common authority, nothing in its opinion suggests that given a sufficient relationship to the premises, a non-occupying, non-spousal resident cannot retain common authority to give consent to search. Indeed, the court recognized that joint occupancy is a factor to be considered in assessing authority. See id. at 80.

Although improved, Example #22 would be much stronger if the writer cited to more than one case for comparison. *Ratley* alone is not enough to give the reader confidence that the body of Kansas law on authority to consent has been synthesized and factored into the writer's analysis.[169]

As described above, the common weaknesses associated with analogical reasoning can be summarized as follows:

> *The Missing Link*—where the writer compares the facts of her case to the facts of a cited case but fails to include the court's reasoning, making it difficult to know if the same rule of law should apply to the writer's case;
>
> *The House of Cards*—where the writer analogizes to an arguably similar case in terms of facts and/or reasoning but fails to include the court's holding, threatening to make the argument collapse like a house of cards;
>
> *Insufficient Facts*—where the writer fails to include enough facts for the reader to decide whether two cases are sufficiently similar to warrant similar treatment or sufficiently dissimilar to warrant different treatment; and
>
> *The Problem with Totalities*—where the writer analyzes a totality of circumstances by cherry-picking those

169. "It is important to understand that a single court decision cannot give birth to an all-inclusive principle." ALDISERT, *supra* note 10, at 12. Aldisert calls this "the material fallacy of hasty generalization." *Id.*

factors that are favorable to her case and ignoring those that are not, giving the reader a skewed vision of the case law.

CONCLUSION AND RECOMMENDATIONS

The bulk of legal writing may be doomed to mediocrity because most lawyers strive to imitate that which they have never been taught. Without formal training, most lawyers cannot hope to intuit or understand the complexities of the legal syllogism and reasoning by analogy or distinction. Because legal reasoning springs from these pillars of classical rhetoric, lawyers need to teach and learn about these basic principles of persuasive discourse.

This article exposes many of the problems that lawyers face when they try to imitate syllogistic or analogical reasoning without adequate theoretical foundation. These problems are both predictable and identifiable. Once identified, they can be analyzed and solved. However, judges, practitioners, scholars, and students of the law need a working knowledge of deductive and analogical reasoning in order to understand and correct these errors in reasoning. The place to begin educating lawyers about the rhetorical tradition of law is in the law school classroom, where students *expect* to learn about it. Doctrinal, clinical, and writing courses provide ample opportunity to recapture classical rhetoric and infuse students' learning with its rich heritage.