



Presentation to the faculty
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CASE-BASED REASONING: Theory, pedagogy, and practice

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DEPARTMENT OF
WRITING STUDIES



UNIVERSITY OF MINNESOTA
Driven to DiscoverSM

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There are two norms of legal argumentation in tension

- (Domain) rationalism
- Effectiveness/persuasion

- Living in tension since Plato (or earlier)



We teach legal writing to be explicit (e.g., office memo)

- Question presented: Is Socrates mortal?
- Short answer: Yes, Socrates is mortal.
- Facts: Socrates is a man.
- Analysis
 - Issue: Is Socrates mortal?
 - Rule: All men are mortal.
 - Application: We know from the facts that Socrates is a man. Consequently, we know from the rule he is mortal.
 - Conclusion: Socrates is mortal because he is a man.
- Conclusion: Socrates is mortal.



(Dis)analogizing is “case-based reasoning”

- Law professors often refer to “analogical reasoning” or “(dis)analogizing cases.”
- Usual practice might best be characterized as “reasoning by example or verbal classification.”
- “Case-based reasoning” avoids terminological disconnect (for now).



A factor-based rule is a basic example of CBR

- Copyright fair use
 - Four statutory factors
 - 17 U.S.C. 107
- Case 1
 - Decided two years ago
 - Facts: A, B, C, D
 - Outcome: No fair use
- Case 2
 - Decided one year ago
 - Facts: A¹, B¹, C¹, D¹
 - Outcome: No fair use
- Case 3
 - Before the bench today
 - Facts: A², B², E, F
 - Outcome?



CBR is essential for deductive rules, too

- A corporation’s director is reckless if she acts “in conscious disregard of a risk . . . [k]nown, or so obvious that it should have been known.”
- Application of the rule is deductive.
- But classification of “conscious,” or “so obvious that it should have been known”?
- --likely by comparison to previous cases.



Theory suggests how to make CBR explicit

- To satisfy the norm of rationality, describe a process for CBR that is subject to rational examination.
 - Macagno and Walton’s CBR model
 - The problem of critical questions
 - Posner’s policy-based theory for explicit CBR



Macagno & Walton (2009)

- Step 1
 - Identification of a “common (pragmatic) genus”
 - Generalization “brought out”
- Step 2
 - Generalization applied deductively to the “target subject” (the case at bar)



Case-based reasoning model

Case at bar

Precedent 1
(Plaintiff)

Precedent 3
(Plaintiff)

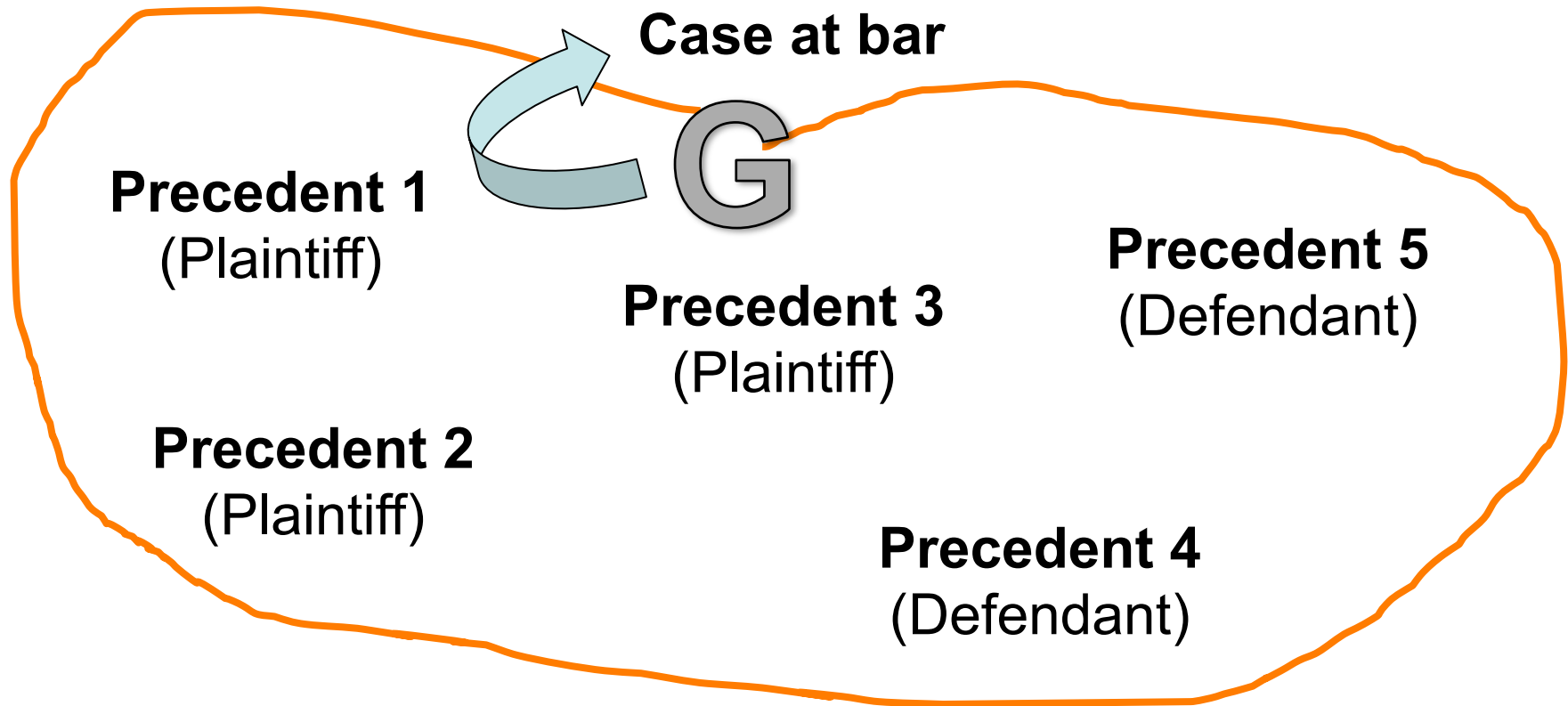
Precedent 5
(Defendant)

Precedent 2
(Plaintiff)

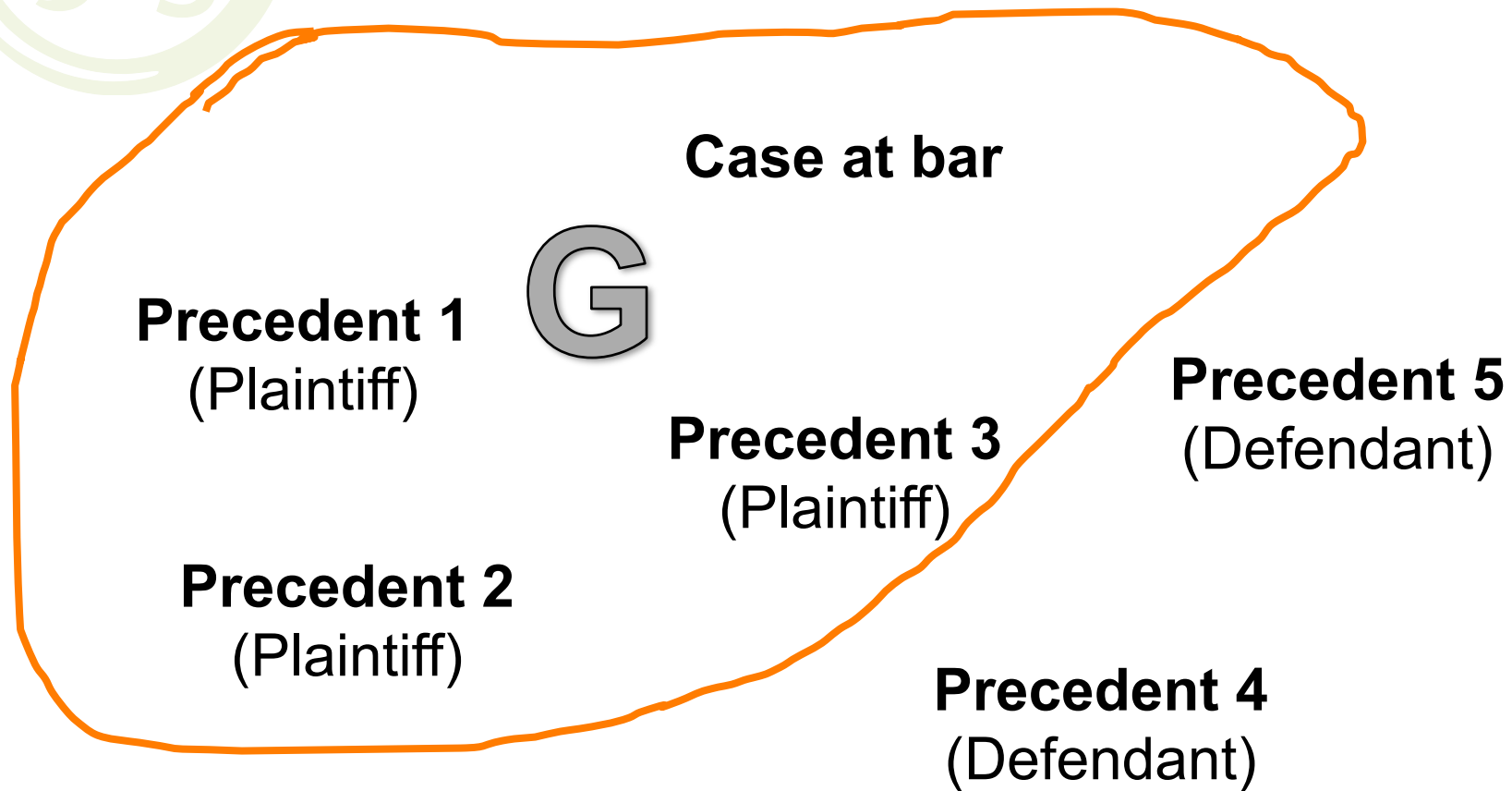
Precedent 4
(Defendant)



Case-based reasoning model



Case-based reasoning model





Case-based reasoning model

Precedent 1
(Plaintiff)

Precedent 2
(Plaintiff)

Case at bar

Precedent 3
(Plaintiff)

Precedent 4
(Defendant)

Precedent 5
(Defendant)

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M&W offer critical questions for “bringing out” the rule

- Are there relevant differences between case-at-bar and precedents in the genus?
- Are the similarities between them irrelevant?
- Are there other precedents more relevantly similar to case-at-bar with different outcomes?



Policy-based CBR finds relevant facts

- **Facts from the precedent are relevant insofar as they relate to the policy of the rule.** (Posner, 2006)
 - Identify the motivating policy supporting the precedent's discussion of particular facts.
 - Connect the facts discussed to the policy posited.
 - Connect facts from case at bar implicating the same policy.



Policy-based CBR is rhetorical/dialectical not logical

- The results are classifications in a genus/ identifications of rules.
- But the classifications are always the result of the plausible or the probable . . .
- Not the logically inevitable.
- CBR may not have *rational force (logical validity)*, but it can still be *(domain) rational*



Policy-based CBR should be explicit

- Norm of rationality calls for explicit CBR.
- The advocate should draw lines.
 - Between the precedent and case facts on one hand and the policy on the other
 - Then between the precedent facts and the case facts
- This is essential in student writing . . .
- Perhaps not in professional writing.



My pilot studies led to two hypotheses


- **PEDAGOGY:** A review of legal writing texts suggests some instructors teach explicit CBR, but most do not.
- **PRACTICE:** Lawyers do not employ explicit CBR in persuasive memoranda.





Some legal writing texts teach explicit CBR, but most do not

- Examination of a selection of current legal writing textbooks
 - Do the textbooks expressly explain how to determine whether precedents are relevantly similar to case at bar?
 - Do they provide samples/examples of explicit CBR?
- Generally, no and no (some exceptions)



Systematic study may confirm pedagogy hypothesis (or not)

- Review of large selection of current legal writing texts
- Identification of
 - Explicit instructions for identifying *relevant, policy-related* similarities
 - Examples (sample briefs, etc.) that illustrate it
- Further study could include qualitative work with instructors

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Lawyers do not employ explicit CBR in court briefs

- Example case: *Drakes Bay Oyster Co. v. Salazar*
- Plaintiff objected to failure of government to issue a permit and sued.
- Before trial of issues, plaintiff moved for preliminary injunction.



Drakes Bay Example: Five textual artifacts

- Plaintiff's memorandum supporting motion
- Defendants' memorandum opposing
- Intervenors' memorandum opposing
- Plaintiff's reply memorandum
- Court's opinion



Plaintiff's memo (continued)

[See handout.]

This destruction of Plaintiffs' business constitutes irreparable harm. *Am. Passage Media Corp. v. Cass Commc'ns, Inc.*, 750 F.2d 1470, 1474 (9th Cir. 1985) (“The threat of being driven out of business is sufficient to establish irreparable harm.”).



Intervenors' and defendants' opposition

- They do not cite or discuss *APM*.
- They focus instead on arguing that the harm plaintiff predicts has resulted from plaintiff's own conduct.





Court's opinion

[See handout.]

Evidence of such a threat must be adequate and must be causally connected to the alleged wrongdoing. For example, in *American Passage Media*, the court held that evidence of past losses and forecasts of future losses, standing alone, were insufficient to show that the company was “threatened with extinction.”



Practice example recap

- Common practice
 - Cases mentioned in string cites
 - Scant effort in explanatory parentheticals to draw the relevant (dis)similarities
- Pilot review of cases suggests this practice is more common than not.
 - In winning and losing briefs
 - Briefs filed by all types of firms



Systematic study may confirm practice hypothesis (or not)

- I'm collecting a corpus of briefs and opinions in 100 cases where district courts issued opinions:
 - Copyright cases
 - Summary judgment motions
- Analysis of each case reference
 - Describing author's practice
 - Inferring author's purpose
- Future study might include discourse-based interviews with attorneys.



Systematic study of CBR is important

- Students would benefit from a description and better models of explicit CBR.
- We should understand how lawyers are using CBR so we can prepare our students to execute it professionally.





THANK YOU!

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Bonus slides

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We teach legal writing to be “non-enthymematic”

- An enthymeme is an incomplete syllogism, one with a missing term.
 - Major premise
 - “All men are mortal” (if A then B)
 - Minor premise
 - “Socrates is a man” (A)
 - Conclusion
 - “Socrates is mortal” (B)



Enthymemes are easy to understand

- “Socrates is a man, so he’s mortal.”
 - Missing term?
- “All men are mortal, so Socrates is mortal.”
 - Missing term?
- “All men are mortal, and Socrates is a man.”
 - Missing term?



Speaker's use of enthymemes is strategic

- Aristotle: Audience does not like a tedious pedant spelling everything out.
- Persuasion theory: Getting the audience to supply the missing term increases her adherence to it.
- Rationalism: Avoiding stating the missing term allows speaker to disclaim responsibility for it.
 - “That’s not what I said!”