CHAPTER TWO

Analogical Legal Reasoning

LEGAL REASONING TAKES two principal forms: One is analogical; the other is deductive. These forms perform important practical functions; some means of organizing the mass of legal materials is essential. They can help you to identify the proper starting points for reasoning, locate the relevant materials, and formulate issues to focus deliberation. You will find that poorly formed legal arguments are easily dismissed because they are hard to understand. Chapters 2 and 3 will introduce these forms, beginning with analogies.

The forms of legal reasoning, however, cannot guarantee the soundness of a legal argument. Many well-formed arguments are wrong, while others are less persuasive than competing well-formed arguments. A form is like an empty vessel: Its usefulness resides in the space where there is nothing. As a vessel can carry wine or water, a form can carry sense or nonsense. The soundness of a legal argument depends on how the forms of legal reasoning are filled in—on the content of the statements in an *argument*.

A. The Analogical Form

Most legal problems in the United States are governed by either the common law or the law enacted by a legislature or an administrative agency. The common law is the law made by judges through their decisions in cases within their authority. Common law making is on a case-by-case basis. The law of contracts, torts, and property is largely common law.

The central tenet of the common law is the principle of *stare decisis*: Points of law once decided in an appropriate case should not be reopened in other cases involving the same point in the same jurisdiction (unless something has changed that justifies changing the law). Accordingly, decided points of law are normally *binding* or *authoritative* and are referred to as *legal*

authority. The principle of stare decisis supports the common law doctrine of precedent, which treats previously decided cases as authorities for the decision of later cases. Reasoning under the doctrine of precedent is mainly by analogy, which requires basically that like cases be decided alike.[1] This is a requirement of formal justice.

Analogical reasoning is familiar in everyday nonlegal situations. For example, Mother may allow Older Brother to stay up until 9:00 P.M., and Younger Brother may demand the same treatment. Younger Brother may make an argument for his view by claiming he is like Older Brother because both are children. Therefore, he thinks, they should be treated alike. When Mother rejects his claim, explaining that older children need less sleep than younger children, she is arguing that there is an important difference between her two children. Therefore, she thinks, they should not be treated alike. On reflection, you can imagine any number of familiar situations in which people argue by analogy.

To make any analogical argument, you should take three steps. First, you identify a *base point* situation from which to reason (e.g., Older Brother's bedtime). The base point consists of the relevant facts together with a decision about what someone should do. Second, you describe those factual respects in which the base point situation and the problem situation (Younger Brother's bedtime) are *similar* or analogous (childhood status) and *different* or disanalogous (age). Third, you judge whether the factual similarities or the differences are more *important* under the circumstances. Thus, if childhood status is more important than age in the example, the analogy suggests that Younger Brother's bedtime should also be 9:00 P.M. If age is more important, however, the disanalogy suggests that an earlier time would be justified.

The second and third steps are made necessary by the simple logic of analogies. No two people, acts, or things are alike in all respects. The claim that two people, acts, or things are *alike* is not a claim that they are *identical*. If identical, they would not be two and could not be compared and contrasted at all. Nor will any two people, acts, or things ever be different in all factual respects. If different in all respects, they could not both be people, acts, or

[1] On common law rules, see Chapter 4 §A.

things; comparing or contrasting them would be pointless. Therefore, analogical reasoning requires careful consideration of both the similarities and the differences between two situations. The crucial point is judging whether the similarities or differences are more important.

Analogical reasoning is highly dependent on context. It is silly to ask whether Older Brother and Younger Brother are alike or unalike in the abstract: They are both. Significant likeness or unlikeness makes sense only in a concrete setting, as when bedtime is disputed. Even then, likeness or unlikeness may change with the circumstances. Given the fact of a three-year difference in age, for example, the two brothers may be unalike for purposes of bedtime at ages 3 and 6 but alike for the same purposes some years later. And they may be different for purposes of bedtime while similar for purposes of distributing Christmas presents fairly. (This dependence on context is one reason why it is hard to formulate rules that can be applied formalistically without producing some absurd results.)

In most familiar nonlegal settings, analogical reasoning is highly informal. The individuals involved decide what will count as a base point, or an important similarity or difference, for whatever reasons they find appealing. Rarely are they quite aware that they are reasoning "by analogy" or are analyzing (1) the propriety of a base point, (2) the factual similarities and differences between two situations, and (3) the relative importance of the similarities and differences under the circumstances.

B. Analogical Legal Reasoning

Analogical legal reasoning is not fundamentally different from analogical reasoning in familiar situations. It is, however, more formal, rigorous, and uniform in expression. What can count as a base point or an important factual similarity or difference is constrained by the law, in principle if not always in practice. Underlying good legal reasoning of this kind are well-accepted rules identifying the authoritative base points, a vocabulary and method encouraging rigorous consideration of both similarities and differences, and a form of expression for framing the issue to be decided. Strict analogies, however, leave the crucial judgment of

importance—determining whether the factual similarities or differences should control the outcome—unconstrained by the law and open to abuse.

1. *Precedents*

The first step in analogical reasoning is identifying a proper base point. In law, the *doctrine of precedent* gives a special status as base points to law cases decided in the past by the highest court in the relevant jurisdiction.[2] The U.S. legal system includes a federal jurisdiction in which federal courts are primarily responsible for matters of national interest. The U.S. Supreme Court is the highest court for these matters. It also includes fifty state jurisdictions in which state courts carry primary responsibility for most other matters. Each state has a highest court, usually called the supreme court of the state.[3] The cases decided in the past by these courts are the most authoritative precedents for deciding future cases within the respective jurisdictions.

Other cases, though of less significance, can serve as persuasive base points. You can use the precedents of any court (including foreign courts) as base points for analogical argument before any other court. If the case is not a binding precedent, it nonetheless may be a well-reasoned decision that a court will find convincing. You also can use hypothetical cases found in the scholarly literature or the American Law Institute's Restatements of the Law, and hypotheticals of your own construction when the result is obvious to reasonable people.

This explanation of the base points in common law adjudication simplifies the rules of the game. For example, it is open to the highest court in a problem case to *overrule* its own precedents. The case that overrules then supplants the case that was overruled as the authoritative base point for future cases of that kind, making a change in the law. Overruling is not a common occurrence,

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[2] *Jurisdiction* refers to the scope of a court's authority to decide cases lawfully. It may be described in territorial, citizenship, functional, or other terms. Jurisdiction is normally established by the statute creating the relevant court.

[3] In New York, the highest court is called the Court of Appeals, while the trial and intermediate appellate courts are called the supreme courts.

though the possibility is ever-present. Moreover, the complex relationships among courts are treated in specialized law school courses in far greater detail than would be appropriate in this introduction. Here, you only need understand that legal reasoning proceeds on the basis of formal rules that identify authoritative base points for analogical legal reasoning.

2. *Factual Similarities and Differences*

The second step in analogical reasoning is identifying factual similarities and differences between the base point situation and a problem situation. Legal reasoning by analogy uses a vocabulary and rhetoric that emphasize the need for rigorous attention to both relationships. In controversial cases, which are the problem cases that require lawyerly skill, there will be many precedents that are somewhat similar to the problem case but seem to cut both ways. You should, by rigorous analysis of the facts of the cases, proceed to identify the many plausible points of factual similarity and difference. You can make a good judgment whether the similarities or differences are more important only after you have identified all plausible points of comparison and contrast.

We say that a judge or decision *follows precedent* when the facts of a precedent are so similar to those of a problem case that the same outcome is required (unless the earlier case is overruled). A judge or case *distinguishes precedent* when the facts of a precedent are so different that a different outcome is required. There is no reason to presume in advance of rigorous analysis that a superficially similar precedent should be followed or distinguished. The idea that like cases should be decided alike implies that unalike cases should be decided unalike if the differences are more important under the circumstances. Stare decisis requires judges to distinguish dissimilar precedents as much as it requires them to follow similar precedents.

In principle, then, the doctrine of precedent requires a judge to treat each relevant authoritative precedent in one of three ways: A judge may follow a precedent, distinguish it, or (if on a high enough court) overrule it. A judge may not in good conscience ignore a relevant authoritative precedent, though this sometimes happens and becomes a reason for criticizing the judge. In their

arguments, lawyers similarly should advocate that each relevant authoritative precedent be followed, distinguished, or overruled. Legal arguments are seriously vulnerable if they ignore a relevant and unwelcome authoritative precedent. A lawyer who knowingly fails to disclose such a precedent can be subject to discipline by the bar.[4]

Whether a precedent should be followed or distinguished depends in part on a careful analysis of the facts of the precedent in relation to the facts of a problem case. The *facts* of a case consist of a description of the events in the world that set the stage for the dispute, how the parties came to find themselves in dispute, and sometimes what the parties did to try to resolve the dispute on their own. These are all events that normally occur before a court is asked to settle the dispute and mostly can be described in ordinary, nontechnical language. The facts of a case also include a description of the legal proceedings in the lower courts, if any, as necessary to identify the legal point that was or may be appealed to the higher court. Most important, the *legal issue* on appeal always involves the question whether the trial judge erred in making some particular decision under the factual circumstances in the case. The facts and legal issue establish the context in which we make the judgment of importance at the third step.

When working by analogy, you should compile the facts of the problem case as they have been or may be proved in court. Analyze them until you understand them in great detail. Mastery of the legally provable facts is crucial. The presence or absence of a particular fact may become the point on which a precedent is determined to be alike or unalike in an important respect. At the early stages of legal analysis, you never know which facts will matter. Good lawyers err on the side of compiling more facts in greater detail than they are likely to need in the course of legal proceedings.

Then you should locate (by legal research) the facially similar precedents and analyze their facts. Here again, a masterful understanding of the facts is needed, though the facts as summarized in judicial opinions normally are sufficient for this purpose.

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[4] Model Rules of Professional Conduct Rule 3.3(a)(3) (1992).

You do not yet know which facts will or should matter when a court decides to follow or distinguish each precedent. A good judge will want to hear about all plausible similarities and differences before deciding which are more important under the circumstances.

Only then can you list the factual similarities and differences between each precedent and your problem case. Doing so, of course, is not a mechanical matter of finding identical statements in the descriptions of the cases. You may summarize the facts in your own language. This allows room for insight into relationships among the facts that overly technical or thoughtless descriptions sometimes mask. It also allows room for distorting the facts, though opposing counsel and the judges can be expected to expose such distortions.[5]

3. *The Judgment of Importance*

The third step for analogical reasoning is determining whether the factual similarities or the differences between the two situations are more important under the circumstances. In law, the analogical form requires a judgment whether precedents should be followed or distinguished (assuming away any question of overruling). Unlike a layperson, however, a judge in a law case is not free to assign importance for any reason whatever. A judge's duty is to decide that question *according to the law*. But it is most difficult to give a satisfactory account of what this might mean in common law adjudication.

You might think that judging according to the law means following the common law rules at this third step and, therefore, departing from the analogical form of legal reasoning. Common law rules are rules announced by judges in their opinions in cases governed by the common law. These rules, you might think, should perform two functions: They should identify the legally important facts in advance of a case and the required legal consequences when the important facts are presented. For example, a common law rule might provide, "Whenever a man dies without

[5] An advocate has an ethical duty of candor when before a court. Id. Rule 3.3.

a will, his property shall become the property of his eldest son." A man's death without a will would be a possible fact. The legal consequence of its occurrence would be the transfer of his property to the eldest son. The law would make the judgment of importance in advance of a case materializing; the only important fact would be that of a man's death without a will. The judge in such a case would not be free to decide that any other fact is important enough to justify a different legal consequence.

To elaborate, such a common law rule would take the form (or be translatable into the form) of a "when . . . , then . . . " statement. For example:

> When facts *a*, *b*, and *c* are present but fact *d* is not, then the defendant shall compensate the plaintiff for harms caused.

Such a legal rule would tell us that the presence of generic facts *a*, *b*, and *c* together with the absence of *d* shall result in the defendant's liability. The "when . . . " clause would state the factual conditions that require a court to order the legal consequence stated in the "then . . . " clause. Common law rules often are stated in a form approximating this simple scheme.

This rigid deductive form of expression can be illustrated, and its serious deficiencies in common law adjudication exposed, by an extended example.[6] Five hypothetical cases will be described as they might come up in one common law jurisdiction. The statements of fact and reasoning are simplified representations of what a court might state in a published opinion. Each story starts with Costello, the original owner of five horses and a somewhat naive and too-trusting friend of Abbott. Each horse came by theft or fraud into Abbott's hands. Costello sought a court's aid to recover possession of each horse from Abbott or someone who came into possession of the horse after Abbott sold it in turn. To help the reader keep the facts straight, a diagram of the factual relationships in each case appears as Figure 2-1.

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[6] The illustrations are adapted from Lon L. Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353, 375-376 (1978). See also Chapter 3.

FIGURE 2-1

Case 1: Costello → Abbott by theft
↓
Holliday by innocent purchase

Case 2: Costello → Abbott by fraud

Case 3: Costello → Abbott by fraud
↓
Holliday by innocent purchase

Case 4: Costello → Abbott by fraud
↓
Holliday by purchase;
Holliday a party to the fraud

Case 5: Costello → Abbott by fraud
↓
Holliday by innocent purchase
↓
Ball by purchase;
Ball had heard of the fraud

CASE 1

Abbott stole Costello's horse and sold it to Holliday, who did not know and had no reason to know it had been stolen from Costello. Costello sued Holliday to recover the horse. Costello won.

The court in Case 1 might state a general rule in its opinion: A person who purchases property from a seller who did not own the property does not acquire ownership and must return the property to the rightful owner. The court then might apply the rule to the facts of the case: Holliday purchased the horse from Abbott, a thief who did not own it. Logically, this yields as a conclusion: Holliday did not acquire ownership of the horse from Abbott and must return it to Costello.

CASE 2

Abbott bought Costello's horse, giving as payment a forged check on another person's account. Abbott knew the check was forged. After delivering the horse to Abbott, Costello discovered the fraud and sued Abbott to recover the horse. Costello won.

The court in Case 2 might state another general rule: A person who acquires possession of property by fraudulent purchase does not acquire ownership and must return the property to the rightful owner. Application of the rule: Abbott acquired possession of the horse by purchase with a fraudulent check. Conclusion: Abbott did not acquire ownership of the horse and must return it to Costello. So far, so good.

CASE 3

> The facts are similar to Case 2, except that Abbott sold the horse to Holliday. Holliday knew that Abbott had bought the horse from Costello, but she did not know or have any reason to know that Abbott paid with a forged check. Costello sued Holliday to recover the horse. Holliday won.

Now, if the rules stated in the precedents were "the law" that determines the results in future cases, Case 3 would have to go the other way. The combination of the rules from Cases 1 and 2 would seem to require that Costello win. Case 2 states that a person who fraudulently acquires possession of property does not acquire ownership; Case 1 states that a person without ownership of property cannot transfer ownership to another. In Case 3, Abbott did not acquire ownership of the horse, under the rule in Case 2. By finding for Holliday, the court seems to ignore the rule stated in Case 1. It finds that Holliday owns the horse when Abbott did not. (There are many cases on the books that decide Case 3 for Holliday in jurisdictions that decide Cases 1 and 2 for Costello.)

The court in Case 3 could create and state a new rule that requires the results in all three cases. It could announce, for example, that an owner of property is entitled to possession when he loses possession by another's wrongful act and seeks to recover the property from the perpetrator or from a third party purchaser when the wrongful act was theft. But surely this is quite a change from the rule given in Case 1. Moreover, this new rule would not justify the result in Case 3 based on the law stated in the precedents. Clearly, the judgment of importance—that Holliday's innocence in Case 3 is an important fact requiring a different result from the first two cases—would be made by the court in Case 3, not by the rule stated in previous cases.

R3

How reliable, then, would be the rule stated in Case 3 for Cases 4 and 5?

CASE 4

The facts are similar to Case 3, except that Holliday had helped Abbott perpetrate the fraud on Costello. Costello sued Holliday to recover the horse.

CASE 5

The facts are similar to Case 3, except that, after buying the horse from Abbott, Holliday sold and delivered it to Ball. Ball had heard rumors of the fraud worked on Costello by Abbott. Costello sued Ball to recover the horse.

The court in Case 3 modified the rule of Case 1 to decide Case 3. The court in Case 4 similarly can modify the rule of Case 3 to decide Case 4. And the same is true in Cases 5 and so on.

Consequently, the common law process is not one of simply tracing the logical consequences of preexisting rules stated in the precedents. As Edward H. Levi put it, "[t]he rules change as the rules are applied. More important, the rules arise from a process which, while comparing fact situations, creates the rules and then applies them."[7] Judges may write as if the common law has always been what it has come to be. Some legal thinkers, such as Blackstone, thought of the common law like this. Others, such as the great Oliver Wendell Holmes, Jr., belittled views of law as a "brooding omnipresence in the sky."[8] Most of us today would reject Blackstone's view.[9]

It is misleading in another way to regard the judgment of importance as a logical function of common law rules. Reasoning by analogy would be analytically superfluous if there were previously stated rules that dictated the judgment of importance. Such a rule could simply be applied to the facts of a new case. There would be no need to search out the precedents or analyze

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[7] Edward H. Levi, An Introduction to Legal Reasoning 3-4 (1948).
[8] Southern Pac. Co. v. Jensen, 244 U.S. 205, 218 (1917) (Holmes, J., dissenting).
[9] See, e.g., Melvin A. Eisenberg, The Nature of the Common Law (1988).

the facts of the precedents to identify similarities and differences between the precedents and the problem case. Studying cases would not be so important. Instead, we would study rules and collect them in textbooks that contained little other than the rules.

A basic principle of common law adjudication is that a judge is empowered to decide the case before the court and *only* the case before the court. A judge has no authority at common law to enact an authoritative general rule to govern parties and situations that were not before the court. Thus, the judge in Case 1 could not decide the outcome in Case 3, however broadly she may craft a rule to explain the decision in Case 1. In all likelihood, the judge in Case 1 did not consider the facts of Cases 3 et seq. when crafting the general rule. Its mechanical application in later cases may yield a thoughtless and arbitrary result. More important, the parties in the later cases are entitled to their days in court. They should not have their rights adjudicated on the basis of the facts and arguments put before the court by others in Case 1, due to the happenstance that the language employed by the court in Case 1 was sufficiently general to be so used.

These characteristics of common law adjudication are reinforced by the practice of distinguishing between the *holding* of a precedent and its *dicta*. "Holding" is commonly used in either of two senses. A broad holding is much like a common law rule, which states its factual part in general terms.[10] To minimize confusion, let us call this a "ruling." A narrow holding is more case-specific and difficult to get a handle on. For our purposes, a *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.

A holding summarizes the important case-specific facts in the precedent case and states the legal consequences then attached to those facts. The important facts are those that are likely to become a point of important similarity or difference between the precedent and a problem case. For example, the holding of Case 1 above is that an owner of property who is the victim of a theft can recover possession of the property from a third party who bought it from the thief, even if the third party did not know or have any reason

[10] See Chapter 4 §A.

to know that it was buying stolen property. Consider variations on the facts in Case 1. Should the result be the same if Costello is the victim of a fraud? Case 3 suggests not, so the law in Case 1 should be confined to cases involving a theft. That is all the judge had authority to decide.

Accordingly, without casting doubt on the holding in Case 1, the court in Case 3 can properly hold that an owner of property who is the victim of a fraud cannot recover possession of the property from a third party who, not knowing or having reason to know of the fraud, bought it from the perpetrator of the fraud. It thus decides that the difference between fraud and theft is an important difference that requires a different outcome. Similarly, the court in Case 4 can hold that a purchaser who helped perpetrate a fraud on the original owner is not like the buyer in Case 3, which decided only that the owner cannot recover possession of the property from a third party who did not know and had no reason to know of the fraud. It thus decides that Case 4 is more like Case 2, in which the owner sued the perpetrator of the fraud himself, than it is like Case 3, in which the owner sued a subsequent purchaser who was not complicit in the fraud.

A holding will be used as a base point in reasoning by analogy. It summarizes what was decided in a single case in which the judge did not and could not decide a class of cases. A holding does not determine the result in other cases involving different parties under different circumstances. Those cases will be decided when they come up. They will be treated according to the holding of a precedent if they *then* are determined to be like the precedent in the more important respects. A holding may have implications for a class of future cases. But whether a problem case is within that class will be decided when the case is brought before a court.

Common law rules stated in precedents are dicta to the extent they are broader than a case-specific statement of the important facts and the legal outcome. (Statements on points of law that need not be decided in the case are called "obiter dicta.") Dicta lack the status of legal authority because they purport to exceed the powers of a common law judge. Dicta can be useful when lawyers predict what the court will do in future cases because they often express the court's inclinations on matters expected to come before it. But the holding of a case has the privileged status of "the law." Dicta

forecast, in a vague and less reliable way, what the law is likely to become.

In each case as the law unfolds, then, the general rule announced in a prior case need be given effect only to the extent that the (narrow) holding of the precedent requires. The general rule announced in Case 1 ("A person who purchases property from a seller who did not own the property does not acquire ownership and must return the property to the rightful owner") can be disregarded properly in Case 3. It is dictum to the extent it is more general than the holding ("An owner of property who is the victim of a theft can recover possession of the property from a third party who bought it from the thief, even if the third party did not know or have reason to know that it was buying stolen property"). Therefore, the best statement of a holding will change as subsequent cases are decided.

The analogical form captures significant aspects of legal reasoning at common law (and, we will see, in other settings). The Abbott and Costello sequence illustrates how the analogical form in law provides a vocabulary and frames an issue for decision, contributing to the rationality of legal thought. In Case 5, for example, a judge should decide whether one who, having heard rumors of the fraud, buys a horse from an innocent purchaser who bought it from one who took possession by fraud, is *more like* one who bought a horse fraudulently (Case 2) or from a thief (Case 1), or *more like* one who, not knowing or having reason to know of the fraud, bought a horse from one who took possession by fraud (Case 3). We would expect legal arguments in Case 5 to address that legal issue, posed in the analogical form, by parsing the analogies and disanalogies among the cases.

But what leads a court to decide, for example, that the difference between fraud and theft in Cases 1 and 3 is an important difference requiring different results? Fraud and theft are alike in some respects; both are wrongful in the eyes of the law. They are unalike in other respects: Fraud at common law is a civil wrong, not punishable by imprisonment, but theft is a criminal wrong, punishable by imprisonment. The courts often consider the difference here to be more important than the similarity, at least when the subsequent purchaser is an innocent one. Similarly, Costello is the victim of wrongful behavior in all of these cases.

The precedents are unlike Case 5 in other respects, however, because none involved a purchaser who had heard of the wrongful behavior and bought the horse from a purchaser who was wholly innocent and herself would win in a suit by the original owner. The resolution of the key issues remains a mystery, so far as the form of analogical legal reasoning suggests.[11]

Analytically, analogies leave the crucial third step—the judgment of importance—wholly unconstrained. As Professor H.L.A. Hart put it:

> [T]hough "Treat like cases alike and different cases differently" is a central element in the idea of justice, it is by itself incomplete and, until supplemented, cannot afford any determinate guide to conduct. . . . [U]ntil it is established what resemblances and differences are relevant, "Treat like cases alike" must remain an empty form. To fill it we must know when, for the purposes in hand, cases are to be regarded as alike and what differences are relevant.[12]

To be sure, in practice, some cases are so obvious that an analogy seems to suffice without supplementation. But the interesting cases will not be those.

To summarize, analogical legal reasoning—reasoning from (narrow) case holdings—is but a formal version of the analogical reasoning used in everyday life. It is governed by the principle that like cases should be decided alike and unalike cases decided unalike if the differences are important. This form of reasoning requires three steps: (1) identifying an authoritative base point, or precedent; (2) identifying factual similarities and differences between the precedent and a problem case; and (3) judging whether the factual similarities or the differences are more important and, therefore, whether to follow or distinguish the precedent. The analogical form contributes significantly to the rationality of legal thought by providing a framework for analysis, identifying starting points for reasoning, and framing a legal issue.

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[11] For further discussion of these examples, see Chapters 4 §A and 6 §C.

[12] H.L.A. Hart, The Concept of Law 155 (1961).

However, judging which facts are more important remains a mysterious activity.

I will take up this key problem—the judgment of importance—in later chapters. Let us first consider deductive legal reasoning in an enacted law context. Deductive legal reasoning also requires a judgment of importance. We can better confront that difficult problem after you consider whether it is avoidable.