

“Because I said so” is a reason – but not a reasoning technique.

The following materials

- (1) summarize the nine reasoning techniques used by the United States Supreme Court,
- (2) show how to identify those reasoning techniques in cases, and
- (3) demonstrate the incorporation of the reasoning techniques into doctrinal classes.

The workshop will use hot-off-the-presses Supreme Court opinions to identify reasoning techniques and to apply them in writing.

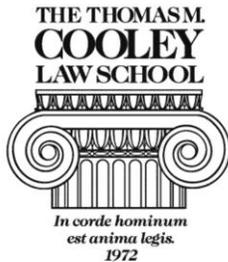
Good times. Good reasoning.

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Summary of Nine Reasoning Techniques

Applying Law, Bradley Charles (Carolina Academic Press 2011), describes nine reasoning techniques that the U.S. Supreme Court regularly uses. This document summarizes those techniques for participants of the Institute for Law Teaching and Learning's Summer 2013 Conference. The techniques, ordered from most to least used, are apply the rule's plain language, imply, clarify, analogize, infer, evaluate the opposing party's argument, hypothesize, characterize law, and quantify facts.

Apply the rule's plain language

The U.S. Supreme Court applies the rule's plain language by (a) repeating a word or phrase from the rule, (b) using a synonym or antonym of the rule, or (c) comparing a characterization of the facts to the rule. Graphically, the rule of law is the bull's-eye. Graphically, the rule of law is the bull's-eye. When the Court repeats the rule within the same sentence as relevant facts, the law and facts are a perfect match, a bull's-eye. If the Court uses a synonym of the rule, it is saying that the facts are close enough, like the arrow landing within one or two rings of the bull's-eye. And an antonym of the rule used with relevant facts is saying that the arrow completely misses the target. A characterization of the facts could be anywhere on the target. If that characterization is equal to or close to the rule, then it is a bull's-eye, and we would say that the rule has been satisfied.

(a) Repeating a word or phrase from the rule. In *Fox Television Stations, Inc.*, the issue was whether the FCC's decision to find Fox liable was "arbitrary or capricious." This was an issue because the FCC finds liability based on the circumstances of each case; there are no absolute rules. The Court said that "the agency's decision to consider the patent offensiveness of isolated expletives on a case-by-case basis is not arbitrary or capricious." So one reasoning point was to merely repeat the rule in the same sentence as relevant facts.

(b) Using a synonym or antonym of the rule. In one case, the Court applied the rule of stare decisis, "Stare decisis 'promotes the evenhanded, predictable, and consistent development of legal principles.'"^{vi} As a synonym for *predictable*, the Court reasoned that varying from precedent "would not upset expectations."^{vii}

Antonyms signal that the element or rule is not satisfied. In *Fox Television Stations, Inc.*, the Court used antonyms of "arbitrary or capricious" to reason that the FCC's case-by-case decisions were not arbitrary or capricious:

[T]he Commission's new enforcement policy and its order finding the broadcasts actionably indecent were neither arbitrary nor capricious. . . . [T]he agency's reasons for expanding the scope of its enforcement activity were entirely rational. It was certainly reasonable to determine that it made no sense to distinguish between literal and nonliteral uses of offensive wordsⁱⁱⁱ

Antonym: *rational* and *reasonable* for *arbitrary or capricious*. By using these antonyms, the Court explained that the facts completely miss the target.

(c) Comparing a characterization of the facts to the rule. When applying the rule's plain language, the Court will often characterize facts and then compare that characterization to the rule. If the characterization is equal to or close to the rule, then we would say that the rule has been satisfied.

In *Caperton*,^{iv} a judge was elected in part by a single \$3 million campaign contribution. The problem? The contribution came from a corporation with a \$50 million verdict against it, and the elected judge would eventually rule on it. The law the Court applied states, "Due process requires an objective inquiry into whether the contributor's influence on the election . . . 'would offer a possible **temptation** to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.'"^v The Court applied that law to these facts: "A coal corporation contributed **\$3 million** to an election for the highest court in West Virginia, more than the total of all other contributors. After being elected, the justice helped overturn a \$50 million guilty verdict against the corporation."

And here's the Court's reasoning: "[The] campaign contributions—in comparison to the total amount contributed to the campaign, as well as the total amount spent in the election—had a **significant and disproportionate influence** on the electoral outcome."^{vi}

Not only did the Court repeat a word from the rule, *influence*, it characterized the influence of a \$3 million contribution as *significant and disproportionate*. That characterization proved the Court's point here because it justified the conclusion that it did *offer a possible temptation*.^{vii}

Imply

Cause-and-effect relationships are the essence of reasoning by implying. The cause, effect, or both, depending on the situation, must be consistent with the rule for the rule to be satisfied. In *Winter v. Natural Resources Defense Council, Inc.*,^{viii} a group wanted the Navy to stop using submarine sonar in training exercises because it allegedly harmed marine wildlife. Such an injunction may be granted if balancing "equities" favors it.^{ix} The Court eventually sided with the Navy. To get there, it balanced the pros and cons of both parties' arguments.

The Court reasoned, "[T]he preliminary injunction would clearly increase the number of disruptive sonar shutdowns the Navy is forced to perform during its . . . training exercises."^x And the Court said that this "can result in the loss of several days' worth of training," which would reduce war readiness.^{xi} On the other hand, the Court said that using sonar could cause "harm to an unknown number of marine mammals."^{xii} In the Court's view, that effect was not consistent with the rule—what equity required. Equity, it reasoned, favored using sonar because of its factual effects: the Navy would be more war ready.

Here's another quick example. In one case, the Court held that a religious group couldn't force a city to accept its monument because a city has the right to speak for itself. One point of reasoning was the large-scale implication of forcing cities to accept all monuments: "Indeed, it is not easy to imagine how government could function if it lacked this freedom."^{xiii} Cause: governments must display all donated monuments. Effect: governments probably could not function.

Clarify

Clarifying is putting a finer point on the law, facts, and issue by stating what they are or are not. This defines them. Clarifying can also be reasoning when it is used to explain how the facts satisfy the rule. Here's an example of clarifying law from *Fox Television Stations, Inc.* Fox argued that the FCC went too far by finding it liable for a few "fleeting expletives" said on live TV. The Court clarified the law to define its boundaries. In the following excerpt, see how the Court clarified *Pacifica*, a controlling case:

[Fox Television Stations] also make much of the fact that the [FCC] has gone beyond the scope of authority approved in *Pacifica*, which it once regarded as the farthest extent of its power. But we have never held that *Pacifica* represented the outer limits of permissible regulation, so that fleeting expletives may not be forbidden. To the contrary, we explicitly left for another day whether "an occasional expletive" in "a telecast of an Elizabethan comedy" could be prohibited.^{xiv}

Clarifying facts is another reasoning technique. In *Summers*, an environmental group tried to stop the sale of 238 acres of National Forest. The issue before the U.S. Supreme Court was whether that group had standing, which requires showing that it "is under threat of suffering 'injury in fact' that is concrete and particularized."^{xv} One group member, Bensman, argued that his recreational activities in the National Forest would be negatively affected by the sale.

In reasoning that Bensman did not suffer an injury, the Court reasoned, "The Bensman affidavit does refer specifically to a series of projects in the Allegheny National Forest that are subject to the challenged regulations. It does not assert, however, any firm intention to visit their locations, saying only that Bensman 'want[s] to' go

there.”^{xvi} By clarifying the facts, stating what the facts are not, the Court explained that the rule (injury in fact) was not met.

Analogize

Attorneys compare and contrast a case at hand to precedent. If the precedent is similar to the case at hand, then the precedent will control the case’s outcome. Here’s an example:

In *Franks*, we held that police negligence in obtaining a warrant did not even rise to the level of a Fourth Amendment violation, let alone meet the more stringent test for triggering the exclusionary rule. We held that the Constitution allowed defendants, in some circumstances, “to challenge the truthfulness of factual statements made in an affidavit supporting the warrant,” even after the warrant had issued. If those false statements were necessary to the Magistrate Judge’s probable-cause determination, the warrant would be “voided.” But we did not find all false statements relevant: “There must be allegations of deliberate falsehood or of reckless disregard for the truth,” and “[a]llegations of negligence or innocent mistake are insufficient.”

Both this case and *Franks* concern false information provided by police. Under *Franks*, negligent police miscommunications in the course of acquiring a warrant do not provide a basis to rescind a warrant and render a search or arrest invalid. Here, the miscommunications occurred in a different context—after the warrant had been issued and recalled—but that fact should not require excluding the evidence obtained.^{xvii}

- (1) The Court stated the precise and facts concept in common.
- (2) The Court indicated the significance of the similarity between the precedent and the case at hand.

Infer

This is the classic “wet umbrella in a windowless room” reasoning technique. If you were in a windowless room and saw a wet umbrella, the reasonable conclusion would be that it must be raining. There is no direct empirical evidence that it is raining, but the facts *suggest* the conclusion.

Some time ago, I walked into the master suite to my two-year-old daughter racing from the bathroom (the kind of racing that suggests criminal activity). I then saw her doll sitting soaked on the bathroom counter. I looked on the floor and saw water drops; they spanned from the toilet to the counter. What was I to gather? In other words, what do these facts infer? Well, I’ll tell you one thing: they infer guilt!

To infer is to reach a new conclusion based on known facts. “The key to a logical inference,” one veteran jurist wrote, “is the reasonable probability that the conclusion flows from the [evidence] because of past experiences in human affairs.” I knew that my daughter dunked her doll in the toilet because she is curious—a fact learned from my experience with her—and because I know that a trail of water drops from the toilet to the counter signals that something wet had to pass one way or the other. Because the wet doll was on the counter, I knew the action started in the toilet and ended on the counter. The inference that my daughter was dunking her doll in the toilet was a reasonable probability because it directly flowed from all of the evidence.

In *Caperton*,^{xviii} a corporation was accused of buying a high-court justice through a \$3 million campaign contribution. A contribution is improper if it would “tempt” the justice to be biased. How was the Court to support its conclusion that such a contribution did tempt the justice to be biased? One argument was an inference from these facts:

The temporal relationship between the campaign contributions, the justice’s election, and the pendency of the case is also critical. It was reasonably foreseeable, when the campaign contributions were made, that the pending case would be before the newly elected justice. The \$50 million adverse jury verdict had been entered before the election, and the Supreme Court of Appeals was the next step once the state trial court

dealt with post-trial motions. So it became at once apparent that, absent recusal, [the elected justice] would review a judgment that cost his biggest donor's company \$50 million. Although there is no allegation of a quid pro quo agreement, the fact remains that [the corporation's] extraordinary contributions were made at a time when [it] had a vested stake in the outcome.^{xix}

A quid pro quo agreement would be direct evidence. But there was no such evidence—no undercover audio recording or e-mail trail. So the Court relied on the next best thing: inference. Facts: temporal relationship between company's appeal and the election. Inference: it is "foreseeable" that a justice would be tempted to favor the overly generous contributor. These many circumstances make this inference permissible.

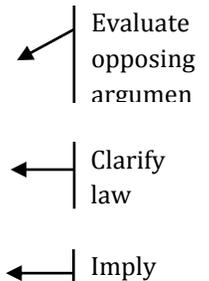
Evaluate the opposing party's argument

Exploit factual and legal weaknesses in opposing arguments by using the other eight reasoning techniques, and downplaying and neutralizing arguments.

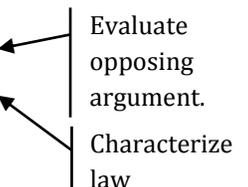
In *Gant*, the Court held that police officers may not search an arrested person's car in every stop. But officers may search a car incident to an arrest to protect officer safety or prevent the destruction of evidence. The State of Arizona argued that *Belton*, the precedent for searching stopped cars, should be read to allow its officers to always search cars stopped incident to an arrest. The Court made a point to evaluate Arizona's argument.

The State argues that *Belton* searches are reasonable regardless of the possibility of access in a given case because that expansive rule correctly balances law enforcement interests, including the interest in a bright-line rule, with an arrestee's limited privacy interest in his vehicle.

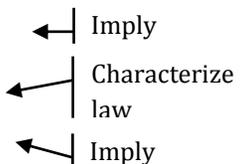
For several reasons, we reject the State's argument. First, the State seriously **undervalues** the privacy interests at stake. Although we have recognized that a motorist's privacy interest in his vehicle is less substantial than in his home, the former interest is **nevertheless** important and deserving of constitutional protection. It is particularly **significant** that *Belton* searches authorize police officers to search not just the passenger compartment but every purse, briefcase, or other container within that space. A rule that gives police the power to conduct such a search whenever an individual is caught committing a traffic offense . . . **creates** a serious and recurring threat to the privacy of countless individuals. . . .



At the same time as it undervalues these privacy concerns, the State **exaggerates the clarity** that its reading of *Belton* provides. Courts that have read *Belton* **expansively** are at odds regarding how close in time to the arrest and how proximate to the arrestee's vehicle an officer's first contact with the arrestee must be to bring the encounter within *Belton*'s purview



These exceptions together **ensure** that officers may search a vehicle when genuine safety or evidentiary concerns encountered during the arrest of a vehicle's recent occupant justify a search. Construing *Belton* **broadly** to allow vehicle searches incident to any arrest **would serve no purpose** except to provide a police entitlement For these reasons, we are unpersuaded by the State's arguments^{xx}



Hypothesize

Hypothesize a fictional situation where the issue and conclusion are clear. Reason by comparing the fictional situation to the case at hand.

We hypothesize in everyday speech. In my teenage years, the curfew was normally 10:30 p.m., but it was midnight when I was playing basketball with the boys. When I was caught at 11 p.m. bowling with the boys and some girls, my dad was mad because I disobeyed the curfew rule. I said, “Dad, you’re cool with me playing basketball with boys until midnight, right? Well, what if a few girls showed up once. Could I still play basketball until midnight?” Dad answered that I could. Why? The risk of hanky-panky was low. “Fine,” I said. “Well then,” I asked, “what’s the difference between playing basketball at 11:30 with guys and girls and bowling at 11:30 with guys and girls? In either case, the risk of hanky-panky is low.”

You can probably remember such negotiating with your parents. My hypothetical, basketball with guys and girls being okay after 10:30, was a fictional situation that we both agreed on. I then compared that fictional situation to my situation—me being caught at the bowling alley after curfew with girls. Because the justification in the hypothetical (no chance of hanky-panky) could be applied to my current situation (caught after curfew) the argument, a hypothetical, had a chance of success.^{xxi}

Hypothesizing is similarly used to reason in the law. The reasoner creates a hypothetical where all parties agree that the rule is or is not satisfied. That hypothetical, or fictional situation, is then compared to the case at hand to decide whether the rule is satisfied. So hypothesizing is largely imagining what would satisfy or what would not satisfy the law.

Characterize law

Characterize law to explain whether a rule is easy or difficult to satisfy. Courts may characterize rules explicitly like it did in this first example. The issue before the Court was whether a federal statute pre-empted state failure-to-warn claims. In explaining that federal law does not pre-empt state failure-to-warn claims, it said, “[P]re-emption is a **demanding** defense. On the record before us, [the defendant] has failed to demonstrate that it was impossible for it to comply with both federal and state requirements.”^{xxii} The court induced from the history of the pre-emption doctrine that proving it is a high bar, or “demanding.”

In this next example, the Court explained how difficult it is to prove that an attorney gave ineffective assistance to a criminal defendant, “Counsel’s [conduct] does not rise to the **high bar** for deficient performance set by *Strickland*.”^{xxiii} The precedent, *Strickland*, set a “high bar.” Thus, on a spectrum of deficiency, to prove ineffective assistance of counsel, a defendant has to prove it to the extreme.

Quantify facts

Reason by stating the chance of success. When the U.S. Supreme Court quantifies an argument’s chance of success, it sounds like this: “The Government’s position is just too unlikely.”^{xxiv} You may be called on in class to do the same—quantify the chance of success of a certain argument. “Is this argument likely to fly with a judge or jury?” a professor may ask. You would likely reply with quantifiers such as yes, no, likely, or unlikely.

And quantify facts to prove the rule with adjectives, adverbs, and numbers. A group tried to stop the federal government from selling 238 acres of National Forest.^{xxv} The issue on appeal was whether the group had standing to sue, which required showing that it was threatened by an injury in fact. The injury cannot be merely speculative or hypothetical; it must be concrete. Quantifying was one point of reasoning to support the Court’s conclusion that the group did not have an injury in fact: “The National Forests occupy **more than 190 million** acres, an area **larger** than Texas. There may be a chance, but is **hardly a likelihood**, that [the Petitioner’s] wanderings will bring him to a parcel about to be affected by a project unlawfully subject to the regulations.”^{xxvi}

Compared to 190 million acres, 238 acres pales. Comparing it to Texas punctuates even more the small likelihood that Bensman’s outdoor activities would ever occur in the measly 238-acre parcel. By juxtaposing those two numbers and Texas, the Court proved the rule: Bensman’s injury was speculative at best.

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- ⁱ *Pearson v. Callahan*, 129 S. Ct. 808, 816 (2009) (citation omitted).
- ⁱⁱ *Id.*
- ⁱⁱⁱ *Fox Television Stations, Inc.*, 129 S. Ct. at 1812.
- ^{iv} *Caperton v. A. T. Massey Coal Company, Inc.*, 129 S. Ct. 2252 (2009) (citation omitted).
- ^v *Id.* at 2264.
- ^{vi} *Id.*
- ^{vii} *Id.* at 2265.
- ^{viii} *Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365 (2008).
- ^{ix} *Id.* at 374.
- ^x *Id.* at 379.
- ^{xi} *Id.*
- ^{xii} *Id.* at 377.
- ^{xiii} *Summum*, 129 S. Ct. at 1131.
- ^{xiv} *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1815 (2009) (citation omitted).
- ^{xv} *Summers v. Earth Island Institute*, 129 S. Ct. 1142, 1149 (2009).
- ^{xvi} *Id.* at 1150 (citation omitted).
- ^{xvii} *Herring v. U.S.*, 129 S. Ct. 695, 703 (2009).
- ^{xviii} *Caperton v. A. T. Massey Coal Company, Inc.*, 129 S. Ct. 2252, 2257 (2009) (citation omitted).
- ^{xix} *Id.*
- ^{xx} *Arizona v. Gant*, 129 S. Ct. 1710, 1720–21 (2009) (citations omitted).
- ^{xxi} I never won.
- ^{xxii} *Wyeth v. Levine*, 129 S. Ct. 1187, 1199 (2009).
- ^{xxiii} *Knowles v. Mirzayance*, 129 S. Ct. 1411, 1421 (2009).
- ^{xxiv} *Abuelhawa v. U.S.*, 129 S. Ct. 2102, 2104 (2009).
- ^{xxv} *Summers v. Earth Island Institute*, 129 S. Ct. 1142, 1147 (2009).
- ^{xxvi} *Id.* at 1150.

Chart to Practice Reasoning

Step 1 Identify Law and Facts at Issue		
Law		
Facts		
Step 2 Capture Arguments that Naturally Come		
Step 3 Create Reasoning Statements		
Reasoning	Element Met	Element Not Met
R Apply the Rule's Plain Language	Repeat: Synonym: Antonym: Characterize facts:	Repeat: Synonym: Antonym: Characterize facts:
I Imply		
I Infer		

<p>C Clarify</p>	<p>Law: Facts: Issue:</p>	<p>Law: Facts: Issue:</p>
<p>H Hypothesize</p>		
<p>C Characterize Law</p>		
<p>A Analogize</p>		
<p>Q Quantify</p>		
<p>E Evaluate Opposing Arguments</p>		
Step 4 Choose Best Arguments		
Step 5 Organize Arguments		
Step 6 Write the Application		

SYLLABUS

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CLASS	SUBJECT	PAGES
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Contract Formation – Offer and Acceptance

Week 1	The Offer	xxix-xxxiii; 1-32
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Week 2	The Acceptance	32-42; 49-76
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*Week 1's Writing Assignment is due

*Reasoning Technique Exercise: In *Kortum-Managhan*, identify where the court applies a rule's plain language

Week 3	Termination of the Power of Acceptance (Omit Problem 24)	77-89; 92-99; 102-03
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*Week 2's Writing Assignment is due

*Reasoning Technique Exercises: In *Loring v. City of Boston*, identify where the court reasons by implying. In *Dickinson v. Dodds*, identify where the court reasons by inferring.

Week 4	Termination and the Battle of the Forms Indefiniteness	112-132 132-140
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*Week 3's Writing Assignment is due

Consideration

Week 5	Introduction; the Basic Concept; Forbearance	147-168
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* Week 4's Writing Assignment is due

*Reasoning Technique Exercise: In *Schnell v. Nell*, identify where the court clarifies law

Week 6	<u>MIDTERM EXAM.</u> (one hour) Failure of Consideration Illusory Promises Pre-Existing Duty/Past Due Debts	169-182 198-202 203-210
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*Reasoning Technique Exercises: In *Lingenfleder v. Wainwright*, identify where the court characterizes the law. In *Hayes v. Plantations Steel*, identify where the court analogizes.

Statute of Frauds

Week 7 Statute of Frauds 407-458

(Do not prepare cases. Instead, prepare answers to the problems within the assigned page range – Problems 92-105)

Promissory Estoppel & Moral Obligation

Week 8 Promissory Estoppel Introduction 182-187
Promissory Estoppel 210-226

*Week 7's Writing Assignment (grading) is due

Week 9 Promissory Estoppel 235-249
Moral Obligation 188-199

*Week 8's Writing Assignment (grading) is due

Remedies for Breach of Contract

Week 10 Introduction to Remedies and Damages 251-253
Measuring Expectation Damages 253-264
Reliance Interest 272-281

*Week 9's Writing Assignment is due

*Reasoning Technique Exercise: In *Peevyhouse v. Garland Coal*, identify where the court quantifies *and* where the court evaluates the opposing argument

Week 11 Limitations on Recovery 281-297
Certainty, Foreseeability, Avoidability 307-320

*Week 9's Writing Assignment is reviewed

Week 12 Avoidability; Damages by Agreement 322-331
(Omit Problems 76, 78, 79)

*Voluntary Damages Writing Assignment

Week 13 Restitution, Equitable remedies 355-372
Restitution for the Breaching Plaintiff 380-383
(Omit Problem 89, p. 383)
Economic Analysis 391-394
Specific Performance

Week 14 Wrap-up & Review (any material not already covered may be covered this day)

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