DISTINGUISHING DISTINGUISHING

WE NEED TO DISTINGUISH THE DIFFERENT TYPES OF DISTINGUISHING

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INTRODUCTION

"DISTINGUISHING" CASES IS ONE OF A common-law lawyer's core skills. Law school focuses heavily on it. But when lawyers talk about "distinguishing" a case, they don't always mean the same thing. Instead, "distinguishing" a case can mean one of three mental exercises: deductive distinguishing, analogy stopping, or policy distinguishing. We should delineate (or distinguish between) them clearly. Below, I define them, give examples, and discuss them.

Before I begin: a brief note about animals. "Generally, the law divides animals into classes: (1) domitae or mansuetae naturae – tame animals; and (2) ferae naturae – wild animals."[1] These two categories are in service of tort law doctrine. Owners of wild animals are strictly liable for injuries caused by those animals.[2] But owners of tame – or domestic – animals are held to an ordinary negligence standard when it comes to injuries by those

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[1] 3B C.J.S. Animals § 2 (September 2022 Update).

[2] *Id.* § 319 (November 2022 Update).

animals.[3] Some of the examples I give in this article involve cases that classify an animal as one of the two. These cases are good vehicles for examining distinguishing's mechanics.

DEDUCTIVE DISTINGUISHING

A deductive argument is one in which, if the premises of the argument are true, the conclusion must also be true.[4] Consequently, to distinguish deductively means to argue that a past case's holding doesn't deductively apply here because, even if the premises of the past case are true, the premises do not apply to this case and therefore do not control it. For example, a lawyer represents someone whose donkey harmed the plaintiff. The plaintiff's lawyer leans heavily on a case about an injury caused by an animal. But with careful reading and consideration, the defense lawyer discerns that this case's holding is about horses. It doesn't apply deductively to his client's case because it is not about a horse, so even if the past case is a correct statement of the law, the facts of the present case are different in a way that prevents that case from controlling this case. Because the past case was about a horse, but this one is about a donkey, the defense lawyer will argue to the judge that the precedent doesn't bind the court as to his client.

A 1956 New Hampshire case supplies an example. In *King v. Blue Mountain Forest Ass'n*, a plaintiff sued a defendant for allegedly letting its wild boar trespass on and harm the plaintiff's property.[5] In part, the Supreme Court of New Hampshire wrote:

> The second count in the plaintiffs' declaration is in trespass predicated on the theory that the wild boar are 'reclaimed' wild animals for whose acts the defendant is responsible. Reliance is placed on the Irish case of Brady v. Warren, [1909] 2 Ir.Rep. 632, where the defendant was held liable for damage to adjoining property caused by a herd of deer which the defendant kept in an enclosure which had fallen in disrepair, so that the deer passed in and out of the en-

[3] *Id.* § 334 (November 2022 Update).

[4] Timothy Shanahan, Deductive and Inductive Arguments, Internet Encyclopedia of Philosophy, https://iep.utm.edu/deductive-inductive-arguments (last visited Mar. 14, 2023).

[5] King v. Blue Mountain Forest Ass'n, 123 A.2d 151, 153 (N.H. 1956).

> closure. However, in that case the deer were tame and it is not authority for holding that boar which are both wild and dangerous, Kelly v. Wade (1848) 12 Ir.L.R. 424, 430, and to which title is not lost by their escape, are in the class of reclaimed animals. Cf. Ulery v. Jones, 81 Ill. 403. The demurrer to the second count of the declaration should be sustained.[6]

That court told the plaintiff: 'no, plaintiff, that case was about deer; it doesn't apply here because this case is about wild boar.'

The Supreme Court of New Hampshire did an excellent job deductively distinguishing. Let's look at an example of a poor attempt to deductively distinguish. In 2022, former President Trump sued Twitter, alleging that Twitter's banning him from its platform violated his First Amendment rights.[7] Among the arguments the former President made, one supplies a paradigmatic example of deductive distinguishing done wrong. The former President's legal team argued that the pleading standard announced in *Bell Atlantic Corp. v. Twombly*, applied only to antitrust cases because *Twombly* was an antitrust case.[8] Judge Donato of the Northern District of California did a fantastic job dispelling this notion. He wrote:

> Plaintiffs make the odd assertion that these pleading standards apply only in antitrust conspiracy actions. Dkt. No. 145 at 6 n.7. *Twombly* and *Iqbal* expressed no such limitation, and their standards have been applied to a myriad of Rule 12(b)(6) motions in non-antitrust actions in every federal district and circuit court. A scant minute of online research makes this abundantly clear. *See*, *e.g.*, *Mendoza v. Amalgamated Transit Union Int'l*, 30 F.4th 879, 886 n.1 (9th Cir. 2022) (labor and employment case); *Hoffman v. Preston*, 26 F.4th 1059, 1063 (9th Cir. 2022) (*Bivens* claims).[9]

President Trump's lawyers tried to distinguish *Twombly* by saying, 'its holding, as far as pleading standards, only applies to antitrust cases.' I'll translate Judge Donato's response: 'that's baloney!'

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[6] *Id.* at 156.

[7] *Trump v. Twitter Inc.*, No. 21-cv-08378-JD, 2022 WL 1443233 at *1 (N.D. Cal. May 6, 2022).

[8] *Id.* at *2 n.1.

[9] *Id.*

During the second impeachment trial of former president Trump, Congressman Jamie Raskin, a constitutional law scholar, got in on the act. He supplied another excellent example of deductive distinguishing. The former President's counsel, Michael Van Der Veen, tried to invoke *Bond v. Floyd*,[10] to defend the former President's January 6, 2021, speech stirring up the capital rioters. Congressman Raskin took that argument apart:

> In his case, [Julian Bond] got elected to the Georgia State Legislature and was a member of SNCC, the Student Nonviolent Coordinating Committee, the great committee headed up by the great Bob Moses for a long time. He got elected to the Georgia Legislature, and they didn't want to allow him to be sworn in. They wouldn't allow him to take his oath of office because SNCC had taken a position against the Vietnam war. So the Supreme Court said that was a violation of his First Amendment rights not to allow him to be sworn in.
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> That is the complete opposite of Donald Trump. Not only was he sworn in on January 20, 2017, he was President for almost four years before he incited this violent insurrection against us, and he violated his oath of office. That is what this impeachment trial is about – his violation of his oath of office and his refusal to uphold the law and take care that the laws are faithfully executed.[11]

Congressman Raskin explained that *Bond* did not apply deductively to the former President's actions. Instead, *Bond* applies deductively to cases in which a State has imposed an oath requirement on elected officials, limiting their ability to publicly express policy views. That was simply not the former President's case.

Analogy Stopping

Analogy stopping means explaining why a past case doesn't serve as a good analogy to this case. We know that cases can be persuasive, by analogy, even if they do not apply deductively to the matter at hand. Imagine a plaintiff's lawyer arguing that a horse case is a persuasive analogy

[10] 385 U.S. 116 (1966).

[11] The House Impeachment Managers and the House Defense, Prosecution of an Insurrection 309 (2022).

to a case about donkeys. She argues that the court should follow it, even though it's not technically binding, because horses and donkeys are similar. The defense lawyer may say, 'no, your honor, they are distinguishable because horses are big, strong, and fast, while donkeys usually are none of those things.'

An 1896 decision – *Adams v. New Jersey Steamboat Co.* – by New York's high court supplies a classic example of analogy stopping. The plaintiff had been a passenger on the defendant's steamboat.[12] Someone stole $196 from his room.[13] That's like a plaintiff today suffering a theft of several thousand dollars in cash. Defendant had not been negligent.[14] But the plaintiff argued it should be held strictly liable.[15] The high court did not apply a past case deductively.[16] Instead, it considered an analogy to train operators, which it had held – in *Carpenter v. Railroad Co.* – not strictly liable for theft of customer valuables.[17] The court distinguished *Carpenter*. It explained why it found passenger trains an unpersuasive analogy to passenger steamers, writing:

> That case does not, we think, control the question now under consideration. Sleeping-car companies are neither innkeepers nor carriers. A berth in a sleeping car is a convenience of modern origin, and the rules of the common law in regard to carriers or innkeepers have not been extended to this new relation. This class of conveyances are attached to the regular trains upon railroads for the purpose of furnishing extra accommodations, not to the public at large, nor to all the passengers, but to that limited number who wish to pay for them. The contract for transportation, and liability for loss of baggage, is with the railroad, the real carrier. All the relations of passenger and carrier are established by the contract implied in the purchase of the regular railroad ticket, and the sleeping car is but an adjunct to it only for such of the passengers as wish to pay an

[12] Adams v. New Jersey Steamboat Co., 45 N.E. 369 (N.Y. 1896).

[13] *Id.*

[14] *Id.*

[15] *See id.*

[16] *See generally id.*

[17] *Id.* at 370 (citing Carpenter v. Railroad Co., 26 N.E. 277 (N.Y., 2d Div. 1891)).

> additional charge for the comfort and luxury of a special apartment in a special car. The relations of the carrier to a passenger occupying one of these berths are quite different, with respect to his personal effects, from those which exist at common law between the innkeeper and his guest, or a steamboat company that has taken entire charge of the traveler by assigning to him a stateroom. While the company running sleeping cars is held to a high degree of care in such cases, it is not liable for a loss of this character, without some proof of negligence.[18]

I note two other vital takeaways from *Adams*.

First, as one can see, the court's distinguishing of *Carpenter* differed from the Supreme Court of New Hampshire's distinguishing of *Brady*. That court contented itself in pointing out that *Brady*'s holding didn't apply deductively to the case before it. It wrote a short paragraph. Had that been all the *Adams* court did, it would have simply said, '*Carpenter* was about trains. This case is about a steamer.' Instead, it wrote a long and detailed paragraph analyzing, and rejecting, the potential analogy.

Second, the *Adams* court mainly found trains an unpersuasive analogy to steamers because it landed on a better analogy: inns. This is one fundamental way to stop an analogy: argue that a better analogy exists.

As the *King* court showed us, technically, a court can get around a precedent only by deductively distinguishing it. The *King* court got around *Brady* by pointing out that *Brady* applied to deer and the case before it concerned wild boar.[19] It didn't consider deer an analogy to wild boar and then reject that analogy. But that may be because that would be an easy analogy to knock down. That the *King* court didn't do it doesn't mean analogy stopping isn't vital. A common-law lawyer must supplement deductive reasoning with analogical reasoning. So, a common-law lawyer must supplement deductive distinguishing with analogy stopping.

Let's look at an example that illustrates that importance by showing us what happens when you can't stop the analogy. In 1829, in *Commonwealth v.*

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[18] *Adams*, 45 N.E. at 370.

[19] King v. Blue Mountain Forest Ass'n, 123 A.2d 151, 156 (N.H. 1956) (citing Brady v. Warren, 2 Ir.Rep. 632 (1909)).

Chace, Massachusetts's high court held doves to be *ferae naturae,*[20] putting them in the same category as lions, tigers, and bears.[21] Why? Because:

> it is difficult to distinguish them from other fowl of the same species. They often take a flight and mix in large flocks with the doves of other persons, and are free tenants of the air, except when, impelled by hunger or habit, or the production or preservation of their young, they seek the shelter prepared for them by the owner.[22]

Basically: 'we can't stop the analogy so we will treat them as the same.' With all due respect to the former Justices of the Supreme Judicial Court of Massachusetts, I can think of a few ways to stop that analogy. Doves are traditionally associated with peace. They are small. They're not known for aggressiveness or defensiveness. Other fowl do not share these characteristics.

The *Chace* court couldn't stop the analogy. Could it have said, 'we can't stop the analogy of doves to 'fowl of the same species,' but we will treat them differently just because'? I guess. But that's not convincing legal reasoning. This exemplifies the importance of stopping the analogy, a vital part of the common-law lawyer's toolkit. You may be stuck with a result if you can't do it.

People stop analogies all the time. Law doesn't own this method of reasoning. Any parent who has ever explained, or tried to explain, to a younger child why they can't do something an older sibling can do has stopped an analogy. We need analogy stopping to save us from politicians' bad analogies. For example, in the wake of the tragic Uvalde shooting, Representative Lauren Boebert tried to argue against firearm restrictions with the following lousy analogy: "When 9/11 happened, we didn't ban planes. We secured the cockpits."[23] Bush administration official Bryan Del Monte and *Forbes* writer Suzanne Rowan Kelleher did an excellent job stopping that analogy: "In the aftermath of 9/11, the government, quickly and in bi-partisan fashion, made enormous, sweeping changes to air travel –

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[20] Commonwealth v. Chace, 1829 WL 1953 at **2 (Mass. Oct. 1, 1829).

[21] 21 A.L.R.3d 603 § 1[a].

[22] *Chace*, 1829 WL 1953 at **2 (Mass. Oct. 1, 1829).

[23] Suzanne Rowan Kelleher, *What Lauren Boebert Gets Dead Wrong About Air Travel After 9/11*, Forbes (May 27, 2022, 1:06 PM EDT), https://www.forbes.com/sites/suzannerowankelleher/2022/05/27/what-lauren-boebert-gets-dead-wrong-about-air-travel-after-911/?sh=4268f0f34f75.

including putting in place a raft of rules and restrictions for travelers that still remain today."[24]

In other words: not restricting gun ownership is not analogous to Congress's post-9/11 response.

POLICY DISTINGUISHING

Policy distinguishing means arguing that, although a past case's holding applies deductively to this case, the court should narrow it to continue to apply to cases like the preceding case but exclude cases like this case. This process begins with pointing out a meaningful factual difference between the prior and current cases. If one can't do that, then excluding this case from the preceding case's holding becomes logically inconsistent. Another word for that: unfair. Then, the lawyer must explain why, because of that factual difference, applying the prior holding here would result in bad policy going forward.

Here's a real-life example that also uses animals. Cases typically hold that dogs, as a category, are tame animals. But, in 2012, Maryland's high court created an exception to that rule for pit bulls.[25] It distinguished previous cases about dogs.[26] To do so, it pointed to substantial evidence that pit bulls are hazardous and vicious dogs.[27]

This mode of distinguishing, although the rarest because it changes existing law, rather than building on it, is what many law students have learned is distinguishing. This is because many law students read Edward Levi's famous 1948 article, *An Introduction to Legal Reasoning*.

In his article, Levi discusses a line of products liability cases, ending in *MacPherson v. Buick Motor Co.*[28] In them, New York's high court demolished the privity limitation to recovery in product liability cases.[29] Levi explains

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[24] *Id.*

[25] Tracey v. Solesky, 427 Md. 627, 652 (Md. 2012).

[26] *Id.* at 636-52.

[27] *Id.* at 644-52. It bears noting that many pit bull owners disagreed with this characterization. They disagreed so strongly that they lobbied the Maryland legislature. SB 247 Fiscal and Policy Note (MD 2014). Two years later, legislature abrogated the case. MD CTS & JUD PRO § 3-1901.

[28] 111 N.E. 1050 (N.Y. 1916).

[29] Edward Hirsch Levi, *An Introduction to Legal Reasoning*, 15 U. Chi. L. Rev. 501 (1948).

this not as a sudden change but as a culmination of a decades-long process of chipping away at that common-law rule through what I call policy distinguishing. For example, Levi discusses how, in 1816, New York's high court had confronted a case in which a plaintiff had been injured by a defendant's negligence with a loaded gun.[30] The pure privity wall would have prevented recovery.[31]

But, as Levi explains, that court distinguished its past cases, which had broadly held that a plaintiff could not recover against a defendant with whom he was not in privity. The court noted that a gun is, unlike the product in those cases, an article "by this want of care …, left in a state capable of doing mischief."[32] The court reasoned that applying a hard privity wall to such products would be bad policy. So, it limited the privity wall. In doing so, Levi explained, that court changed New York common law to have an exception to the privity wall: for "commodities mischievous through want of care."[33] *MacPherson*, Levi concluded, was a culmination of decades of chipping away in this same manner.[34]

I've discussed two examples of successful policy distinguishing. Now, let's look at an unsuccessful attempt. In 1998, in *Austin v. HealthTrust, Inc.*, a plaintiff urged the Supreme Court of Texas to create a common-law whistleblower cause of action. Eight years before, the court held that such a cause of action did not exist.[35] The *Austin* plaintiff argued: "The facts in the case at bar provide this Court with an unique opportunity to create a private sector whistleblower cause of action distinguishable from the facts in *Winters* that implicates compelling public interest concerns."[36] The Supreme Court of Texas did not take the plaintiff up on that invitation. Instead, it affirmed the non-existence of a common-law whistleblower cause of action.[37]

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[30] *Id.* (citing Dixon v. Bell, Maule & Selwyn 198 (N.Y. 1816)).

[31] Levi, *supra* note 29, at 501.

[32] *Id.* (citing Dixon v. Bell, Maule & Selwyn 198 (N.Y. 1816)).

[33] Levi, *supra* note 29, at 501.

[34] *Id.*

[35] Austin v. HealthTrust, Inc., 967 S.W.2d 400, 401 (Tex. 1998) (citing Winters v. Houston Chronicle Publishing Co., 795 S.W.2d 723, 723 (Tex. 1990)).

[36] Pet.'s App. for Writ of Error, 1997 WL 33635326 at *10.

[37] *Austin*, 967 S.W.2d at 403

Lawyers rarely ask courts to engage in policy distinguishing. It changes the law. So only a court with the power to change the law that one case has laid down may policy-distinguish that case. Only a few lawyers regularly, or ever, have the opportunity to argue such a case. But even when lawyers counsel a client based on caselaw, they give incomplete advice when they only advise on current law. They must also give advice on how the law, particularly judge-made law, may change.[38]

Let's take a hypothetical example. In *Alice Corp. v. CLS Bank International*, the Supreme Court held unpatentable the mere automation of an otherwise unpatentable process.[39] Consider self-driving cars. One could not patent driving. Self-driving cars automate driving. So, because of *Alice*'s holding, current law technically prohibits patents on self-driving vehicles. Does this mean the Supreme Court would hold a self-driving car unpatentable? No. That's absurd. If such a case came before the Supreme Court, it would distinguish *Alice*. A patent lawyer who advised a client 'no, you can't patent a self-driving car,' would be giving *bad* legal counsel. This last point bears highlighting. Policy distinguishing finds its roots in the canon *reductio ad absurdum*.

CONCLUSION

When lawyers say "distinguishing," they mean one of three exercises: deductive distinguishing, analogy stopping, or policy distinguishing. Our legal culture needs to move towards one where we clearly delineate, speak, and write about the different kinds of distinguishing. The first type

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[38] Grant Lamond, *Precedent and Analogy in Legal Reasoning*, The Stanford Encyclopedia of Philosophy (Spring 2016 Edition), Edward N. Zalta (ed.), plato.stanford.edu/archives/spr2016/entries/legal-reas-prec/:

> But when a case is distinguished it is not often thought that the law was one thing until the later decision of a court, and now another thing. The law will be regarded prior to the later decision as already subject to various distinctions not mentioned by the earlier court. Indeed part of the skill of a good common lawyer is grasping the law as not stated by the earlier court: learning that cases are 'distinguishable' is a staple part of common law education, and no common lawyer would be competent who did not appreciate that the law was not to be identified simply with the ratio of an earlier decision. Common lawyers do not, then, conceptualize distinguishing along lines analogous to overruling.

[39] Alice Corp. v. CLS Bank Int'l, 573 U.S. 208, 222 (2014).

of distinguishing is an exercise in deductive reasoning under current law. The second type of distinguishing is an exercise in analogical reasoning under current law. Finally, the third type argues for changes to the law.

Being clear about which of these is going on will help lawyers make on-point arguments, help lawyers jettison bad ideas, and help courts save time by getting quickly to the heart of the disputes before them.