

Analogy Through Vagueness

Mark Cooney*

[E]very term goes cloudy at its edges

—H.G. Wells¹

I. Introduction

A funny thing, this vagueness. To laypersons and lawyers alike, the word *vague* has a negative connotation. Something vague is uncertain, unclear, wishy-washy. Courts declare laws void for vagueness—laws with language too indefinite to give fair notice and, thus, to withstand constitutional scrutiny.² Scholars call the term “pejorative.”³

And yet lawyers need vagueness, and the best lawyers master it. Experts have long recognized the need for flexible language—vague language—in legislation.⁴ And the leading drafting texts acknowledge the

* Professor and Research & Writing Department Chair, Western Michigan University Cooley Law School. I want to thank my research assistant, Alison Brajdich, for her enthusiasm and excellent work. I also offer heartfelt thanks to Professors Lucy Jewel, Barbara Kalinowski, and Joseph Kimble for reading drafts and sharing their time, expertise, and insight. I’m grateful to Professors Shailini Jandial George and Louis Sirico for their encouragement and advice during a Legal Writing Institute scholarship breakout session in Portland. Finally, I want to thank my editor, Jeffrey Jackson, for his support and astute suggestions.

¹ H. G. WELLS, *The Classificatory Assumption*, in FIRST AND LAST THINGS § 1.5 (Project Gutenberg ed. 2016) (e-book), <http://www.gutenberg.org/files/4225/4225-h/4225-h.htm>; see also ROY SORENSEN, *Vagueness*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY § 3 (Edward N. Zalta ed. 2018) (e-book), <https://plato.stanford.edu/archives/win2016/entries/vagueness/>.

² *Johnson v. United States*, 135 S. Ct. 2551, 2556–57 (2015).

³ See, e.g., SORENSEN, *supra* note 1, § 2; MICHAEL P. LYNCH, TRUTH IN CONTEXT: AN ESSAY ON PLURALISM AND OBJECTIVITY 61 (1998).

⁴ See, e.g., George C. Christie, *Vagueness and Legal Language*, 48 MINN. L. REV. 885, 890 (1964) (stating that “[t]he importance of the flexibility that vagueness gives to all normative methods of social control can scarcely be overestimated and is recognized by all”); Albert Choi & George Triantis, *Strategic Vagueness in Contract Design: The Case of Corporate Acquisitions*, 119 YALE L.J. 848, 856 (2010) (noting that “vague terms may do a better job than precise terms in promoting the goals of contract design”).

⁵ See, e.g., MARGARET TEMPLE-SMITH & DEBORAH E. CUPPLES, LEGAL DRAFTING: LITIGATION DOCUMENTS, CONTRACTS, LEGISLATION, AND WILLS 316 (2013) (noting that “a drafter needs to use vague language” when unable to predict or specify every circumstance that might fit a category).

art of shaping vagueness in legislation, codes, and contracts.⁵ For drafters, vagueness is “both unavoidable and a potential benefit.”⁶ In the “highly stipulative enterprise” of legal rulemaking, the indecision accompanying vague terms is “functional,” a prudent safeguard against premature commitment and a safeguard that allows us to “fill in meanings as we go along in light of new information and interests.”⁷ In other words, vagueness “allows flexibility and spares the drafter from the impossible task of having to identify, and include or exclude, every conceivable particular.”⁸

For instance, imagine—as Professor Tina Stark does in a leading text—an employment contract promising a low-interest loan toward a new executive’s Manhattan “house.”⁹ The term *house* “is problematic,” Stark notes, because it’s “too specific.”¹⁰ Manhattan has far more “cooperatives, condominiums, townhouses, and lofts” than traditional houses.¹¹ For a Manhattan executive’s contract, “a more vague, more inclusive term such as *residence* or *home* is more appropriate.”¹²

The best legal drafters use careful, calculated vagueness to produce forward-thinking language like that found in the Federal Rules of Criminal Procedure.¹³ Rule 41(d)(3), for example, allows a magistrate judge to issue a warrant based on information communicated by telephone “or other reliable electronic means.” Somewhat vague? You bet. And effective. As the technology juggernaut screams forward, having already gone from PC to laptop to iPad to smartphone, and from e-mail to text to Skype to Google Hangouts—and who knows what next?—an appropriately broad, fuzzy category like *other reliable electronic means* is ingenious. It allows the rule to remain viable into the indefinite future, accounting for all sorts of electronic communication devices that we haven’t yet conceived. In short, for lawyers, vagueness is a strategic, creative tool¹⁴—a lens we zoom in or out to capture the right semantic shot.

6 Joseph Kimble, *How to Mangle Court Rules and Jury Instructions*, 8 SCRIBES J. LEGAL WRITING 39, 54 (2001–2002).

7 SORENSEN, *supra* note 1, § 8; see also Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93, 93 (2002) (arguing that “the vagueness in takings doctrine is quite functional and entirely appropriate”).

8 Kimble, *supra* note 6, at 54–55; see also Choi & Triantis, *supra* note 4, at 883 (noting that a vague term can “reduce the risk of errors of over- and under-inclusiveness stemming from precise terms,” serving as a helpful “catch-all for contingencies, particularly unforeseen contingencies, that are not encompassed by the precise terms”).

9 TINA L. STARK, *DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO* 296 (2d ed. 2014).

10 *Id.*

11 *Id.*

12 *Id.* (italics in original).

13 See Kimble, *supra* note 6, at 55 (listing sixteen examples of vague language within the first six rules).

14 See SORENSEN, *supra* note 1, § 8 (noting that vague terms allow judges to exercise discretion through a “creative” gap-filling process).

Careful vagueness won't achieve a utopian bliss free from disputes about intent or meaning. Indeed, Professor Scott Brewer defines *vagueness* as a term that “occasions doubt in a language user about whether a particular object falls within the scope of the term.”¹⁵ Others call it a proposition that is “intrinsically uncertain.”¹⁶ Yet careful, appropriate vagueness can move our texts closer to something resembling linguistic immortality. Just ask the Framers: “unreasonable searches and seizures” . . . “due process of law.”¹⁷

But legislative and contract drafters don't have a monopoly on these language-shaping techniques. While language-shaping may be more visible in the drafting context, litigators and judges shape language in similar ways, at both the micro and macro level. Litigators use vague language to draw analogies—and use precise language to counter that strategy and draw distinctions.¹⁸ After all, a litigator's life is not a steady stream of perfectly on-point cases with ready application. Instead, the litigator often lives on the analytical fringes, trying to argue plausibly that—for a simple example—a pen is like a stapler. And some lawyers might try to buttress that argument by pointing out that both items indisputably fall within the same vague category: office supplies.

My focus here is on this advocacy technique: the lawyer's use of what I call vague analogical categories. And while any number of fine articles flesh out analogical reasoning (and other forms of legal reasoning) with an eye toward exposing fallacies and assessing the validity of resulting conclusions,¹⁹ my interest is solely in the lawyering process—in how advocates shape ideas and language, sometimes in subtle ways, to make analogical *assertions*.²⁰ It's a type of semantic advocacy that some commentators, including Judge Richard Posner, might call mere rhetoric—perhaps even “self-serving” rhetoric—as opposed to policy-based legal

15 Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 937 n.35 (1996); see also Kimble, *supra* note 6, at 54 (noting that we could, for example, “apply the term *good health* to most persons without much disagreement,” but “we would still have the in-between cases, say someone with high (itself vague!) cholesterol”).

16 See, e.g., SORESEN, *supra* note 1, § 1 (quoting CHARLES SANDER PEIRCE, DICTIONARY OF PHILOSOPHY AND PSYCHOLOGY 748 (1902)).

17 See Christie, *supra* note 4, at 890.

18 Brewer, *supra* note 15, at 937 n.35 (noting that *precision* is the “logical antonym” of *vagueness*).

19 See, e.g., PAUL BARTHA, *Analogy and Analogical Reasoning*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed. 2013) (e-book), <https://plato.stanford.edu/archives/win2016/entries/reasoning-analogy/>.

20 See Brewer, *supra* note 15, at 963. Readers might also explore the growing body of literature on how stock cognitive structures affect advocacy and statutory interpretation. See, e.g., Michael R. Smith, *Linguistic Hooks: Overcoming Adverse Cognitive Stock Structures in Statutory Interpretation*, 8 LEGAL COMM. & RHETORIC: JALWD 1 *passim* (2011) (exploring, among other things, how ambiguity can arise when a nonprototypical item technically fits within a statutory category yet clashes with that category's standard stock structure—as with an ostrich's falling into the bird category—and also exploring how advocates might evoke more favorable stock structures when their facts technically fall outside a statutory category).

reasoning.²¹ (Judge Posner has remarked that “[a]nalogies are not reasons.”²²) Nevertheless, vagueness, that oft-maligned linguistic bugaboo, is a sharp piece of rhetorical weaponry.

II. Vagueness in Argument

Building on the definitions mentioned above, in referring to *vagueness* I mean a degree of breadth and imprecision high enough to encompass multiple, distinct items and show their commonality, with the ultimate aim of drawing useful legal analogies. As Professor Jeremy Waldron put it, this type of vagueness “attends complex predicates whose meaning is understood in terms of the application of other predicates.”²³ This concept gets clearer with a look at philosopher-logician Ludwig Wittgenstein’s lively explanation, later put to good effect by Professor Waldron:

Consider for example the proceedings that we call “games.” I mean board-games, card-games, ball-games, Olympic games, and so on. What is common to them all?—Don’t say: “There *must* be something common, or they would not be called ‘games’”—but *look and see* whether there is anything common to all.—For if you look at them you will not see something that is common to *all*, but similarities, relationships, and a whole series of them at that. To repeat: don’t think, but look!—Look, for example, at board-games, with their multifarious relationships. Now pass to card-games; here you may find many correspondences with the first group, but many common features drop out, and others appear. When we pass next to ball-games, much that is common is retained, but much is lost.—Are they all “amusing”? Compare chess with tic-tac-toe. Or is there always winning and losing, or competition between players? Think of patience. In ball games there is winning and losing; but when a child throws his ball at the wall and catches it again, this feature has disappeared. Look at the parts played by skill and luck; and at the difference between skill in chess and skill in tennis. Think now of games like ring-around-the-rosy; here is the element of amusement, but how many other characteristic features have disappeared!²⁴

21 Richard A. Posner, *Reasoning by Analogy*, 91 CORNELL L. REV. 761, 762, 764 (2006) (book review) (describing analysis that “never dips below the semantic level,” in contrast to policy-based analysis).

22 *Id.* at 768.

23 Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CAL. L. REV. 509, 517 (1994). Waldron also notes that vagueness can also be found in “classificatory terms” that create a continuum, such as the term *community*, which encompasses locations arranged on a population continuum ranging from *villages* to *towns* to *cities*. *Id.* at 516–17.

24 *Id.* at 517–18 (quoting LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* ¶ 66, at 31e–32e (G.E.M. Anscombe trans., 1974)).

Thus, *game* is a vague category into which we might fit any number of activities that are similar—and dissimilar—in some or many ways. An Olympian pole-vaulting 18 feet into the air and over a bar is, as Professor Wittgenstein suggests, arguably doing the same thing as two children playing “Go Fish” at a card table: participating in a *game*. With a vague category such as this, “a competent speaker can faultlessly classify the borderline case as a positive instance while another competent speaker can faultlessly classify the case as a negative instance.”²⁵

Keeping these notions of vagueness in mind, we begin to see how lawyers might try to change perceptions and advance arguments by asking readers or listeners to step back from the differences—from the precise details—and appreciate anew how facially different items are alike. Returning to my fanciful hypothetical, picture yourself staring down a skeptical judge and declaring that “a pen is like a stapler.” When pressed, how might you justify the comparison? After all, a pen is for writing, and staplers don’t write. On the flip side, a stapler fastens together sheets of paper, and pens can’t do that (in any lasting way). By being precise, we see that these are two very different things.

Yet by getting vague and calling them *office supplies*, we make them the same. We’ve broadened our language and softened the conceptual edges just enough to accurately fit into a common category one device used for writing and one device that cannot be used for writing. And this calculated vagueness serves our purpose: it creates an encompassing category that, we hope, connects the two items we’ve placed within it. As philosophy professor Roy Sorensen has noted, “[g]enerality is obviously useful” in projecting the characteristics of one item in a category to other items in that category.²⁶

We might reinforce our vague *office supplies* category by offering up more specific qualities that the contained items share or scenarios in which the items are logically linked. For instance, pens and staplers both help office workers accomplish clerical tasks in the workplace. They’re found together—or near each other—on desks, in supply closets, and on store shelves. Can they really be so different? Materially different?

Scholars often define *analogizing* as “reasoning from the particular to the particular”²⁷ rather than reasoning from the particular to the general. Yet as you saw above, an attorney who reasons from the particular to the

25 SORENSEN, *supra* note 1, § 2 (attributing view to Crispin Wright and Stewart Shapiro).

26 *Id.*

27 RUGGERO J. ALDISERT, *LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING* 90 (3d ed. 1997).

general can suggest a closer similarity—a parallel—between two or more particulars.

Opposing counsel would draw distinctions by doing just the opposite: by narrowing the language and ideas. In other words, she would counter vagueness with precision.²⁸ When we focus on the precise qualities and functions of each item, the items become less sibling and more distant cousin. Returning to our *office supplies* example, an opponent getting precise might point out that a pen is a thin, streamlined, cylindrical vessel that dispenses ink, and a stapler doesn't look or act like that. Staplers fasten sheets of paper together by applying metal fasteners. A pen does not affix metal fasteners and cannot fasten together sheets of paper. More important, a pen is an instrument used to communicate. One cannot write—communicate—with a stapler.

When we delve into this realm of precision and hammer away at a pen's distinguishing characteristics with supporting examples, the stapler is tossed to the wayside as a clumsy (distinguishable) interloper—the distinction emerges, and the vague analogical category is undermined and possibly defeated.

However, creating vague analogical categories still requires focus: the proponent must select a focal attribute that the two items—the source item and the target item—share.²⁹ Since items or ideas often share many attributes, the advocate's focus is crucial. Pens and staplers may both contain metal, but depending on context, this shared attribute may be too far removed from their functions to make for a plausible or meaningful comparison.³⁰ If so, we'd be careful to create a vague category (like *office supplies*) that accentuates the objects' workplace utility rather than their size (things you can hold in your hand) or what they're made of (things with metal). After all, to analogize effectively is to focus on the "relevant similarity."³¹ The controlling law's underlying policies are apt to enter the frame at this point, no matter how facially semantic the argument.³²

As we'll see below, an advocate's careful focus can, oddly enough, be harmonious with a broadening of the lens and a calculated blurriness at the edges.

28 Brewer, *supra* note 15, at 937 n.35 (noting that *precision* is the "logical antonym" of *vagueness*).

29 See generally *id.* at 966–68 (discussing roles of sources and targets and selection of relevant attributes).

30 Christy H. DeSanctis, *Narrative Reasoning and Analogy: The Untold Story*, 9 LEGAL COMM. & RHETORIC: JALWD 149, 165 (2012).

31 Brewer, *supra* note 15, at 950; see also Posner, *supra* note 21, at 772 (noting that cases are analogous when they "share a relevant similarity").

32 See Posner, *supra* note 21, at 772 ("[R]easoning by analogy has no traction unless considerations of policy are brought into play to determine whether a pair of cases shall be deemed analogous . . .").

III. Climbing the Abstraction Ladder

The process described above—that of consciously stepping back from precision to reveal a commonality between items—resembles what Professor S.I. Hayakawa famously called “abstracting.”³³ When we refer to an object, even a *cow*, we are abstracting. The process begins when we perceive an object composed of atoms and attach a label to it. We might begin by using the word *Bessie* to refer to this object. This—the object’s personal name—is the lowest level of verbal abstraction, meaning the most specific way to refer to the object. Note that it still omits some specific information about the object, like the differences between Bessie yesterday and Bessie today.³⁴

If we now declare that “Bessie is a cow,” we are creating a broader classification based on Bessie’s resemblances to other things we call *cow*, and we are “ignoring the differences” between Bessie and those other *cow* objects (like differences in breed, color, spot pattern, size, or temperament).³⁵

By continuing to choose slightly broader and less precise classifications—categories—we are, in essence, ascending the rungs of a ladder that takes us, in incremental steps, from the lowest level of abstraction to the highest. And with each step up, we increase the number of seemingly distinct items that we can present as common, related items. For instance, as we work our way up Hayakawa’s abstraction ladder, we could broaden the object’s classification to *livestock*, which now focuses on the characteristics that Bessie has in common with other animals commonly found on farms, such as chickens, pigs, sheep, and goats.³⁶ With this category, a mammal with no feathers or wings becomes the same as a nonmammalian creature with feathers and wings.

Climbing one more rung up the abstraction ladder, we could classify Bessie as a *farm asset*, grouping her with “all other salable items on the farm,” such as livestock, grain, tractors, and furniture.³⁷ Again, this category focuses on the attributes that Bessie shares with these other items and ignores the many significant differences.³⁸ More abstract still would be to classify Bessie as an *asset*, and, on the next (and perhaps most abstract) rung of the ladder, *wealth*.³⁹

33 S.I. HAYAKAWA & ALAN R. HAYAKAWA, *LANGUAGE IN THOUGHT AND ACTION* 98 (5th ed. 1990).

34 *Id.*

35 *Id.*

36 *Id.* at 97–98.

37 *Id.*

38 *Id.*

39 *Id.*

On the other hand, descending the ladder from *wealth* to *Bessie* involves a “rung-by-rung narrowing: each descending rung becomes more concrete and less abstract; more specific, less vague; more focused, less broad.”⁴⁰

Given how prominently they feature in our ability to classify and reimagine information, scholars have painted abstraction and vagueness in a far more positive shade than that seen by casual skeptics. In a remark that could apply equally to the word *vagueness*, Professor Hayakawa lamented our tendency “to speak with contempt of ‘mere abstractions.’”⁴¹ He reminded us that “[t]he ability to climb to higher and higher levels of

40 JEFF ANDERSON, 10 THINGS EVERY WRITER NEEDS TO KNOW 46 (2011). This statement reflects that a “vague analogical category,” as I’ve put it, may be a confluence of vagueness, abstraction, and generality interacting simultaneously and, the advocate hopes, with a persuasive synergy. Yet experts distinguish between vagueness, abstraction, and generality—and sometimes vary their definitions depending on the field.

As commonly understood, an *abstract* term refers to something that exists in thought but not in a physical or concrete state—something that we can’t touch, like a *mindset* or a *philosophy*. *Abstract*, OXFORD DICTIONARIES, <https://en.oxforddictionaries.com/definition/abstract> (last visited Mar. 29, 2019) (defining *abstract* as “[e]xisting in thought or as an idea but not having a physical or concrete existence”); *Abstraction*, NEW WORLD ENCYCLOPEDIA, <http://newworldencyclopedia.org/entry/Abstraction> (last visited May 27, 2019) (noting that “[a]bstract things are sometimes defined as those things that do not exist in reality or exist only as sensory experience”). A *vague* term might do that as well, but can also refer to something concrete and physical—like a *car*—while leaving uncertainty at the margins about whether certain items fit within its meaning. See Brewer, *supra* note 15, at 937 n.35. Is a PT Cruiser a *car*? Is a Matchbox toy a *car*? See Kimble, *supra* note 6, at 54.

Yet some experts use the term *abstraction* to encompass both these concepts—along with a third concept: *generality*. See, e.g., *Abstraction*, NEW WORLD ENCYCLOPEDIA, <http://www.newworldencyclopedia.org/entry/Abstraction> (referring to *abstraction* as a “process of generalization” and the “reduction of a complex idea to a simpler concept or a general domain”). In their eyes, an abstraction is “an idea created by the mind to refer to all the objects [that], possessing certain characteristics in common, are thought of in the same class”—and that can be “created at various levels of generalization.” JAMES L. CHRISTIAN, PHILOSOPHY: AN INTRODUCTION TO THE ART OF WONDERING 193 n.3 (11th ed. 2012). This definition tracks Hayakawa’s abstraction ladder. In fact, some have described Hayakawa’s abstraction ladder as “sort of a sliding scale of vagueness.” Ken O’Quinn, *Writing with Clarity: Stay Low on the Abstraction Ladder*, WRITING WITH CLARITY (May 3, 2013), <https://www.writingwithclarity.com/writing-with-clarity-stay-low-on-the-abstraction-ladder/>. Others have noted the “vague terms” that appear on the higher rungs. Victoria Hay & Tina Minchella, *Word Choice: The Abstraction Ladder*, WRITING 101 CLUES (Sept. 12, 2009), <https://cceng101.wordpress.com/2009/09/12/word-choice-the-abstraction-ladder/>. Still others have noted that with high-level abstracting, a writer’s or speaker’s meaning “does not lend itself to easy identification because of the vague and indeterminate semantics.” Richard Fiordo, *Midlevel Abstracting: An Underserved Zone of General Semantics*, 70 ETC: A REV. OF GEN. SEMANTICS 82, 86 (Apr. 2013). Thus, while *vagueness* and *abstraction* may not be true synonyms, they are kindred—and are often described as interrelating or acting in concert.

Likewise, *generality* and *vagueness* are not synonymous. Brewer, *supra* note 15, at 937 n.35; see also Marcus G. Singer, *Universality and the Generalization Principle*, in MORALITY AND UNIVERSALITY: ESSAYS ON ETHICAL UNIVERSALIZABILITY 50–51 (Nelson T. Potter & Mark Timmons eds., 1985). Yet the two can coincide. Professor Sorensen has noted that “[v]ague’ has a sense which is synonymous with abnormal generality.” SORENSEN, *supra* note 1, § 2. And as Professor Brewer put it (while addressing the *ejusdem generis* canon), “either generality or vagueness, or both, can generate . . . interpretive questions.” Brewer, *supra* note 15, at 937 n.35 (emphasis added). Other commentators have also acknowledged this potential interrelationship: “The more you rely on general terms, the more your writing is likely to be vague . . .” John Friedlander, *Abstract, Concrete, General, and Specific Terms*, GUIDE TO GRAMMAR AND WRITING, <http://grammar.ccc.commnet.edu/grammar/composition/abstract.htm>.

To complete this conceptual sketch, some might add that a term’s relative generality or specificity depends on which abstraction-ladder rung we’re watching from. As Professor Brewer notes, terms are “neither general nor specific in isolation,” but rather become “one or the other only in relation to another term that can be measured within a common category.” Brewer, *supra* note 15, at 937 n.35. Thus, the word *animal* is general if compared to *cat*, yet *animal* is specific when compared to *living thing*. *Id.* And returning to Hayakawa’s ladder, the term *livestock* is general if compared to *cow*, yet specific when compared to *farm assets*. Again, for this article I embrace the intersection—the potential simultaneity and synergy—of these concepts.

41 HAYAKAWA & HAYAKAWA, *supra* note 33, at 108.

abstraction is a distinctively human trait without which none of our philosophical or scientific insights would be possible.”⁴² Professor Sorensen has similarly observed that vague categories facilitate communication and classification: “[M]any commentators say that vagueness exists because broad categories ease the task of classification. If I can describe your sweater as red, then I do not need to figure out whether it is scarlet. This freedom to use wide intervals obviously helps us to learn, teach, communicate, and remember.”⁴³

Professor Linda Berger’s research on cognitive processes confirms our routine use of novel comparisons or metaphors to produce “analogy-like” comparisons that don’t change what we see but how we see it.⁴⁴ This technique aims to change a reader’s or listener’s perspective.⁴⁵ And it conforms to our mind’s habit of using abstract frameworks to process new information:

We create abstract structures or frameworks for seemingly related items, and by analogy, we try to fit new information into the discrete and recognizable slots we have created. When we are successful, we know how to think and feel about the information without examining it in detail. This lifelong process of “chunking” is an efficient way to acquire, organize, and use information.⁴⁶

And malleable categories, she explains, are critical to human thinking and analogizing:

Again by comparison, we channel the new data and information we perceive into these frameworks. The “triggering of prior mental categories by some kind of input . . . is . . . an act of analogy-making.” This channeling is considered analogical rather than mechanical because there is usually some degree of mismatch or “slippage” between the new instance and the prior category. Sometimes, the channeling works the way we usually think about categorization: we have a prototype in mind, and we fit new items into that slot depending on how similar they are to the prototype.⁴⁷

⁴² *Id.*

⁴³ SORENSEN, *supra* note 1, § 2.

⁴⁴ Linda L. Berger, *Metaphor and Analogy: The Sun and Moon of Legal Persuasion*, 22 J.L. & POL’Y 147, 149 (2013).

⁴⁵ *Id.* at 152–53.

⁴⁶ *Id.* at 155–56.

⁴⁷ *Id.* at 156–57 (quoting Douglas R. Hofstadter, Epilogue: Analogy as the Core of Cognition, in *THE ANALOGICAL MIND: PERSPECTIVES FROM COGNITIVE SCIENCE* 499, 503 (Dedre Gentner et al. eds., 2001)).

Tapping into this innate ability to channel information, lawyers can emphasize common attributes between a source object and a target object by placing both within an appropriately vague category—a category that’s just far enough up Hayakawa’s ladder to encompass both items. (Your Honor, a cow is materially the same as a pig: both are *livestock*.) The further we go up the ladder, the broader and more potentially vague the category—and the more we potentially strain the comparison, depending on context. (Your Honor, a cow is materially the same as a tractor: both are *farm assets*.) One real case hinged on whether a burrito fell within the “sandwich” category,⁴ prompting colorful commentaries by Justice Antonin Scalia and Judge Posner.⁴ For a burrito to be a sandwich, one scholar noted, “one must define a sandwich more broadly as an item of food with filling (meat, vegetables, etc.), served within or on top of a grain-based product.”⁵

Shrewd advocates climb and descend the ladder, as needed, to shape analogical categories that align their cases with precedent cases—and smooth over nagging distinctions. As Professor Mary Beth Beazley observed, climbing the abstraction ladder can help advocates develop argument themes.⁵ Likewise, advocates who devise abstract fact categories can better recognize how facially dissimilar facts in precedent cases parallel the facts in their own cases.⁵² And while categories can undoubtedly “produce a fallacious sense of certainty for legal conclusions,” they are nevertheless “useful for [their] powerful ability to persuade legal audiences.”⁵³ As Professor Lucy Jewel put it: “Becoming facile with categories pushes the lawyer toward the level of a virtuoso”⁵⁴

III. A Closer Look: Analogies Through Vagueness—and the Precision Counterpunch

A. Natural gas is like a rabbit.

In an essay on analogical reasoning, Judge Posner taps into a legal debate on whether the property-law rule of capture, usually associated

⁴⁸ *White City Shopping Ctr., LP v. PR Rests.*, No. 2006196313, 2006 WL 3292641 (Mass. Super. Ct. Oct. 31, 2006).

⁴⁹ See discussion in Lucille A. Jewel, *Old-School Rhetoric and New-School Cognitive Science: The Enduring Power of Logocentric Categories*, 13 *LEGAL COMM. & RHETORIC: JALWD* 39, 53 (2016) (citing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 55 (2012); Richard A. Posner, *The Incoherence of Antonin Scalia*, *THE NEW REPUBLIC* (Sept. 13, 2014), <http://www.newrepublic.com/article/magazine/books-and-arts/106441/scalia-garner-reading-the-law-textual-originalism>).

⁵⁰ *Id.* at 54.

⁵¹ MARY BETH BEAZLEY, *A PRACTICAL GUIDE TO APPELLATE ADVOCACY* 45–46 (4th ed. 2014).

⁵² *Id.* at 47.

⁵³ Jewel, *supra* note 49, at 77.

⁵⁴ *Id.* at 72.

with wild game (like Pierson’s famous fox), should control whether a person has acquired rights in oil or gas. In presenting the opposing views on this issue, Judge Posner doesn’t speak explicitly of vague categorization versus precision. Yet a careful reading of his analysis reveals both—and reveals that after using precision to poke holes in the prevailing vague analogical category (with which he finds fault), he creates his own vague analogical category to replace it.

Judge Posner first describes the analogy that has long prevailed in American law: oil and gas fall within the same vague category as wild rabbits. Each is potentially valuable property whose value is unlocked, as a practical matter, only through capture. The category that contains both is, in essence, property that moves freely.⁵⁵ Though one (an animal) moves under its own power and the other (oil or gas) moves from gravitational or external force, they both *move*.⁵⁶ And as courts and commentators have observed, from the outset this similarity practically begged for an analogy between wild game and mobile minerals: “Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *ferae naturae*. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner.”⁵⁷ The capture rationale is that whether dealing with natural gas or a rabbit, the putative property owner must somehow curtail that property’s free movement to derive its value and assert rights superior to the rights of other claimants. Thus, natural gas is the same as a rabbit.

As Judge Posner points out (to his mild chagrin), courts have adopted this vague category and have, by virtue of the analogy it supports, long applied the capture rule to settle rights in oil and gas.⁵⁸ In fact, as one court put it: “The rule of capture is a cornerstone of the oil and gas industry and is fundamental both to property rights and to state regulation.”⁵⁹

Not satisfied with this analogy, Judge Posner offers an opposing view that rests not on the vague but on the precise, pushing against the validity of a category encompassing both wild animals and gas. Posner posits that the moving-property analogy—category—rests on the irrelevant similarity of free mobility, or wildness.⁶⁰ After declaring that courts should shine the

55 Posner, *supra* note 21, at 765–66.

56 *Id.* at 766.

57 Bruce M. Kramer & Owen L. Anderson, *The Rule of Capture—An Oil and Gas Perspective*, 35 ENVTL. L. 899, 906 (2005) (quoting *Westmoreland & Cambria Nat. Gas Co. v. De Witt*, 18 A. 724, 725 (Pa. 1889)).

58 Posner, *supra* note 21, at 766.

59 *Coastal Oil & Gas Corp. v. Garza Energy Tr.*, 268 S.W.3d 1, 13 (Tex. 2008).

60 Posner, *supra* note 21, at 766.

light of sound policy onto any proposed analogy, Judge Posner carves up the vague moving-property category by invoking precision—facts concerning the economic investments, incentives, and rewards associated with gas and oil exploration. Those things, he notes, do not exist for wild game:

By definition these are wild rabbits, not a product of investment, and so you're not deprived of the fruits of an investment when your neighbor shoots a rabbit that, having wandered onto your land, later wanders onto his. In contrast, oil and gas are extracted from the earth by expensive drilling equipment after costly exploratory efforts often involving the digging of many dry holes, the expense of which has to be recouped in the occasional lucky strike.⁶¹

Judge Posner's analytical crescendo reaffirms his belief that policy should dictate whether an analogy is valid: "We need rules that will optimize these investments—a consideration that has no counterpart in the wild-animal case."⁶²

Finally, Judge Posner presents what he sees as the proper analogy, offering his own appropriately vague category: "extractable natural resources."⁶³ This category is just as broad and soft-edged as it needs to be, encompassing, for example, coal, oil, and gas. It reinforces the likeness of these items even though coal, unlike oil or gas, does *not* move freely and cannot escape a pursuer. Once the facts of the case—a dispute over gas rights, for example—are framed within this category, the proponent can assert that the same legal rule should apply to all items within the category. Thus, Judge Posner advocates that because oil, gas, and coal are in the same category of extractable natural resources, the property-law regime that applies to coal rights should apply to disputes over oil or gas.

In short, Judge Posner first defeated his fictional adversary's vague category—the *freely moving property* category—by getting precise. Then, once finished, he offered what he believes to be a sounder, broader policy-based category to replace it: *extractable natural resources*. Classic legal advocacy. And if Judge Posner's dismantling of the *freely moving property* category has persuaded you to look skeptically on vague analogical categories, remember that his is not the prevailing view. In courtrooms across America, natural gas is a rabbit.

61 *Id.*

62 *Id.*

63 *Id.*

B. A Nazi war criminal is like a pirate.

Vague analogical categories have even shaped international legal history. For instance, Israeli courts got vague when confirming Israel's jurisdiction over Nazi war criminal Adolf Eichmann. While some commentators have observed that traditional criminal jurisdiction existed based on Israel's "unique connection to the offense,"⁶⁴ the Israeli courts instead invoked so-called universal jurisdiction. This doctrine empowers a nation to "prosecute offenses to which it has no connection at all."⁶⁵ And while now commonly associated with prosecutions arising from human-rights abuses and war crimes, before World War II the doctrine was associated with piracy on the high seas.⁶ The prevailing historical view was that piracy justified an exception to traditional notions of jurisdiction—an exception that allowed any nation to try (and execute) pirates "regardless of the pirates' nationality or where on the high seas they were apprehended."⁶⁷

In his examination of Eichmann's case, Professor Eugene Kontorovich noted that the Israeli trial court "found support for its jurisdiction in the universal principle," which it "traced back to piracy."⁶⁸ On appeal, the Israeli Supreme Court "placed even greater reliance on the universal principle."⁶⁹ According to Professor Kontorovich, "the Court justified its exercise of universal jurisdiction almost exclusively on the basis of the piracy analogy."⁷⁰ To do so, the Court needed to extract "a general principle . . . from the piracy precedent" that could withstand the inevitable counterargument that "nothing but piracy could be regarded as a universal offense."⁷¹ Thus, the Court "maintained that piracy is merely an example of a broader principle of universal jurisdiction."⁷² This broader principle "extends to heinous acts that 'damage vital international interests . . . [and] violate the universal moral values and humanitarian principles' embraced by all civilized nations."⁷³

64 Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L.J. 183, 197 (2004).

65 *Id.* at 183, 190.

66 *Id.* at 184, 190, 194–95; *see also* United States v. Layton, 509 F. Supp. 212, 223 (N.D. Cal. 1981) (noting that historically, the doctrine was tethered to "the special problems and characteristics of piracy").

67 Kontorovich, *supra* note 64, at 188, 190.

68 *Id.* at 196 (citing *Eichmann v. Attorney-General*, 36 I.L.R. 277, 287–92, 298–304 (Isr. 1962)).

69 *Id.*

70 *Id.*

71 *Id.*

72 *Id.*

73 *Id.* at 196–97 (quoting *Eichmann*, 36 I.L.R. at 291).

In other words, the Court described a broad, vague category for which universal jurisdiction applies: morally heinous acts against humanity.⁷⁴ Piracy was a “classic” example of conduct falling within this category, but not the only one.⁷⁵ Nazi atrocities likewise fit the category, prompting the Court to apply the same universal-jurisdiction rule used in piracy cases to Eichmann’s war-crimes case.

Since then, more courts have relied on the piracy analogy in exercising jurisdiction over nonpiracy cases—and have supported that analogy with vagueness. The International Criminal Tribunal for the Former Yugoslavia, for example, drew on the piracy analogy “to justify universal jurisdiction over heinous crimes, citing it as an example of jurisdiction over offenses that ‘shock the conscience of mankind.’”⁷⁶ Likewise, in finding that a New York federal court had jurisdiction in a civil suit arising from a politically motivated torture and murder in Paraguay, the Second Circuit said that “for purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind.”⁷⁷

In synthesizing these and other holdings, Professor Kontorovich acknowledged “the centrality of heinousness in analogizing piracy to modern offenses,” but pointed out that “[t]he precise degree of evil necessary to create universal jurisdiction remains unclear.”⁷⁸ The test, he observed, “can only be qualitative and *vague*.”⁷⁹

When the dust settles, we see a line of modern cases in which courts have based universal jurisdiction on a vague category: offenses universally recognized as being extraordinarily heinous (or some variant).⁸⁰ We see the courts fitting piracy into that category and then fitting alongside piracy various war crimes or other human-rights abuses. And thus the universal-jurisdiction rule historically relegated to piracy now applies to war crimes and politically motivated torture. In other words, we see vagueness supporting the piracy analogy.⁸¹ Under international law, a war criminal is like a pirate.

74 *Id.*

75 *Id.* at 197.

76 *Id.* at 199 (quoting *Prosecutor v. Tadic*, No. IT-94-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 57 (The Hague Oct. 2, 1995), <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>).

77 *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

78 Kontorovich, *supra* note 64, at 206.

79 *Id.* (emphasis added).

80 *Id.* at 185.

81 *Id.* at 184–85.

Like any other analogy supported by vagueness, the piracy analogy is potentially vulnerable to a precision counterpunch. In fact, Professor Kontorovich himself questions the piracy analogy's validity and criticizes courts, lawyers, and scholars for failing to meaningfully question its underpinnings.⁸² After all, precision reveals that to most minds, piracy is "nothing more than robbery at sea"—a mere "subspecies of robbery."⁸³ And while robbery victims surely view robbery as a heinous act, courts do not treat robbery on par with genocide; and robbery would strike most minds as a lesser evil than murder or rape.⁸⁴

Professor Kontorovich ultimately concludes that the vague *heinousness* category underlying modern universal jurisdiction rests on loose historical readings and faulty assumptions.⁸⁵ In his opinion, the "fallacy of the piracy analogy" unravels court decisions that have used it to justify the modern brand of universal jurisdiction.⁸⁶ Still, underlying Professor Kontorovich's criticism is a truth that he readily acknowledges: modern courts and advocates perpetuate this vague *heinousness* rationale—a vague category encompassing especially heinous offenses—to prop up the piracy analogy and, in turn, justify universal jurisdiction over heinous *nonpiracy* crimes.⁸⁷

C. A hairbrush is like a toothbrush.

Turning to the comparatively mundane, patent disputes, with their frequent wrangling over the presence of "analogous art" in a field, can also pit vagueness against precision. For instance, in a case involving a hairbrush invention, the Federal Circuit considered whether a patent had been properly denied because the applicant's invention (boasting a unique hairbrush shape) was analogous to a preexisting *toothbrush* invention and thus "obvious" to reasonable minds in the field.⁸⁸ The rub was articulating exactly what the relevant field *was*.

In affirming denial of the patent, the majority adopted the patent board's broad, vague category: "the 'field of hand-held brushes having a handle segment and a bristle substrate segment.'"⁸⁹ (Might this category include a brush used to clean pipes? To dust snow off a car windshield? To

⁸² *Id.* at 223, 230.

⁸³ *Id.* at 191, 223.

⁸⁴ *Id.* at 223.

⁸⁵ *Id.* at 223, 233.

⁸⁶ *Id.* at 237.

⁸⁷ Kontorovich, *supra* note 64, at 205–07, 236–37.

⁸⁸ *In re Bigio*, 381 F.3d 1320 (Fed. Cir. 2004).

⁸⁹ *Id.* at 1325 (quoting *In re Bigio*, No. 2002–0967 (B.P.A.I. Jan. 24, 2003)).

clean toilets?) And having reaffirmed this category, the majority agreed that a brush for hair is the same as a brush for teeth, making preexisting toothbrush innovations obvious to inventors working with hairbrushes.⁹⁰

But the dissenting judge bristled at this broad category, countering with precision: “A brush for hair has no more relation to a brush for teeth than does hair resemble teeth. . . . [T]eeth are not bodily hair.”⁹¹ Her argument on why a hairbrush is not the same as a toothbrush bears a striking resemblance to our mock argument on why a stapler is not the same as a pen:

The mode and mechanics of brushing teeth cannot reasonably be viewed as analogous to the mode and mechanics of brushing hair. To state the obvious: teeth require a brush that penetrates around the edges of relatively large and hard substrates, a brush that administers a soapy abrasive, a brush that works in the up-and-down and circular motion needed to scrub teeth; a brush for hair must serve entirely different shapes and textures and purposes.⁹²

Points well made. And yet for the majority, the broader, vaguer category held more sway than this precise view.

IV. Practical Application

And so we see that analogy through calculated vagueness—with a broad, soft-edged category driving the analogy—can serve the thoughtful advocate (or judge). Thus, “lawyers should master the skill of category manipulation and shaping.”⁹³ This ability to “choose language that will affect the shape of legal categories” allows advocates to, among other things, “influence the way that rules interact with the facts on the ground.”⁹⁴

With this in mind, let’s consider some hypothetical cases to see how lawyers can devise and apply vague analogical categories to their advantage, especially in written advocacy.

As mentioned, advocates can use vagueness at both the micro and macro level. For a glimpse at the macro level, picture a lawyer defending a blogger in a defamation case. The blogger has publicly maligned a

90 *Id.* at 1326.

91 *Id.* at 1327 (Newman, J., dissenting).

92 *Id.*

93 Jewel, *supra* note 49, at 73.

94 *Id.*

politician for opposing police-budget increases—branding the politician “pro-crime” and “pro-terrorist.” The blogger’s lawyer plans to argue that even if those statements were literally false, they were merely hyperbole used to express the blogger’s subjective political opinion. Thus, they cannot, in a legal sense, satisfy the falsity element. For support, the lawyer will rely on a case that used this reasoning to absolve a custody-seeking father who, in a fit of obvious exaggeration, publicly claimed that his child’s mother “never spends any time” with the child. In analogizing this precedent to his blogger–client’s case, the lawyer might assert, vaguely, that both cases arose from “obviously exaggerated language questioning a person’s fitness for a position of responsibility.”

At the same time, advocates use vagueness at the micro level—sometimes more than once in the same sentence—to wash away small factual differences that might stick out if expressed with precision. Consider an advocate arguing that an injured boat passenger was heavily to blame for accepting a ride from a drunk boater. The advocate might use vague language to smooth over the fact that the leading cases involved *car* passengers. Throughout her brief, the advocate might stress that courts have affirmed findings of fault against passengers who accepted rides in “vehicles” driven by known drunks. Or the advocate might use the ultimate form of vagueness by omitting any vehicle reference at all: passengers are at fault when they “accept rides from drunk drivers.” Either way, a boat is now the same as a car because they both fit within a broad, vague *vehicle* category—or within the even vaguer implicit category of any nameless thing that a drunk person might drive.

Likewise, an advocate whose client suffered a broken clavicle might wish to rely on precedent holding that a broken elbow meets a statutory serious-impairment threshold. If so, the advocate might introduce that broken-elbow case (think topic sentence) as a case finding that a *broken bone* satisfies the threshold. Thus, the reader’s first impression is that the injury in that broken-elbow case must be like the immediate plaintiff’s broken clavicle. The advocate would, of course, follow with precise details about the broken-elbow case, hoping that the topic sentence’s broad *broken bone* category has firmly planted the parallel between a broken elbow and a broken clavicle, and, by doing so, smoothed over the difference.

The typical court brief presents any number of opportunities for planting and supporting analogies through vague categorization. A brief supporting or opposing a motion for summary judgment, for example, might benefit from vague categories in:

- *point headings:*

2. The Act applies to office supplies.

- *thesis paragraphs:*

YZ incorrectly asserts that the statute did not govern this transaction. Binding precedent confirms that the statute applies to transactions involving office supplies. The stapler here is an office supply common to every workplace and, like pens and other office supplies, is used to fulfill everyday clerical functions. Thus, the statute controls, and the Court should deny XYZ's motion.

- *rule exposition/synthesis:*

The statute's definition encompasses office supplies, such as pens. *Jones v. . . .*

- *topic sentences:*

The court of appeals has applied this rule to office supplies. For instance, in *Jones v. . . . a pen . . .*

- *case synthesis:*

Read together, *Jones* and *Smith* confirm that the statute applies to office supplies. . . .

- *application of law to facts:*

Like the pen in *Jones*, the stapler here is an office supply that serves a common clerical function, and the policies underlying the *Jones* rule apply with equal force. . . .

Let's work through some more realistic examples.

A. Example 1—An assisted suicide is like a heat-of-the-moment shooting.

Factual/procedural context: As an act of mercy, and at the patient's urging, a hospital orderly suffocates a terminally ill patient while she sleeps. The two had carefully planned the killing. The patient's estate later sues the hospital on a *respondeat superior* theory, trying to hold the hospital vicariously liable for the orderly's workplace act. You represent the hospital.

Leading case: In your research, you find a case holding that the owner of an apartment complex was not vicariously liable for its manager's shooting of a tenant during a heated argument. The court reasoned that

this intentional, criminal act was outside the scope of the manager’s employment. The crime was wholly unauthorized and unexpected, and did not further the apartment complex’s business interests.

Notable differences: How might you heighten the analogy between your carefully planned mercy killing and the leading case’s heat-of-the-moment shooting? Besides the commission of a fatal crime, there’s not much in common:

Your case	→	Leading precedent
vulnerable patient		confrontational tenant
hospital orderly		apartment manager
hospital		apartment complex
suffocation as an act of mercy, at terminally ill patient’s request		shooting during a a heated argument

Shaping the analogy: The advocate would point out that the differences are superficial given the underlying policies and legal rules at play. Yet a careful attorney would still look for language-shaping opportunities to emphasize the factual parallels and neutralize the many differences. A number of vague analogical categories could, in opportune places, help smooth over the distinctions—and a few are self-evident.

For instance, a hospital orderly is the same as an apartment manager when we broaden our language to the vague *employee*. The same is true for the *victims*, despite the notable differences between a terminally ill patient begging for a merciful end and a tenant whose unruly behavior stirs an ugly confrontation. *Employer* is the natural category for the hospital and the apartment complex.⁹⁵

A bit less obvious is how to describe the employees’ acts. Recall that you’re representing the hospital here, and the more egregious the act—the more obvious its departure from a legitimate work activity—the better your client’s odds of avoiding vicarious liability. Both acts were *intentional killings*. Both were *crimes*. Both were *unauthorized acts*, though committed in the workplace. After sorting through the possible word choices, you might settle on a phrase like *criminal workplace killing*, which is sufficiently broad and vague to encompass both acts. Some lawyers

95 For a case acknowledging the potential vagueness of terms like *employee* and *employer*, see *Ferreira v. Network Express, Inc.*, No. 6:05-cv-893-Orl-22DAB, 2007 WL 8097539, at *3–4, *4 n.3 (M.D. Fla. Mar. 9, 2007) (noting that because the Fair Labor Standards Act’s definitions of *employee* and *employer* are “vague” or “not helpful,” courts are left to “define” the contours of the employer-employee relationship,” a process that involves a multifactor economic-reality test).

might choose *an unforeseeable homicide*, and the like. There's certainly room for debate on the best words, tone, and shape. (And while these categories may not seem vague at first, some scenarios could well test their margins, especially in the vicarious-liability context. Consider, for example, whether a fatal car accident or industrial accident caused by a reckless or drunk employee might fall within *criminal workplace killing*.⁹⁶)

Now armed with vague categories (italicized in the example below), we could construct a topic sentence designed to help our reader transition into our discussion of the leading (apartment-shooting) case, while also planting the seed of analogy to our hospital mercy killing:

It is settled that a Michigan *employer* is not vicariously liable for an *employee's criminal workplace killing*. For instance, in *Bryant v. Brannen . . .*, an apartment manager got into a heated argument with a tenant who had been disturbing neighbors with loud music. During the argument, the manager pulled out a gun and . . .

Again, the topic sentence's vague categories show the reader that it's all the same, even though it's different.

Policy support: After shaping and presenting a vague analogical category, an advocate may want to tie it back to the policy underlying the controlling legal rule. A pure exercise in semantics may not conquer skeptical minds. So for our fictional hospital case, the advocate might remind the court that the proposed *criminal workplace killing* category embodies the policy underlying the rule: it is unfair to hold an employer vicariously liable—legally responsible without fault—for a criminal act that is wholly unauthorized and unexpected, and that does not further the employer's interests. A criminal act reflects not the employee's service to or for the employer but, instead, the employee's personal animus.

A caveat: My approval of strategic vagueness is not meant to endorse a generally vague or abstract writing style. On the contrary, the best legal writers adopt the concrete style that Judge Gerald Lebovits describes so effectively in his writings. "The more concrete the writing, the better," he urges, having read thousands of court briefs in his years on the bench.⁹⁷ So an advocate's use of vague categories for analogical assertions is, again, *strategic*. We pick our spots. Thus, while our hypothetical topic sentence above uses vagueness, note that the case analysis that follows it is, and

⁹⁶ See, e.g., *Weinstein v. Siemens*, 673 F. Supp. 2d 533, 534, 542–43 (E.D. Mich. 2009) (denying employer's motion for summary judgment on respondeat superior claim arising from drunk employee's fatal car accident; employee had pleaded no contest to second-degree murder and received a lengthy prison sentence).

⁹⁷ Gerald Lebovits, *Free at Last from Obscurity: Achieving Clarity*, 16 SCRIBES J. LEGAL WRITING 127, 130 (2014–2015).

should be, concrete and precise. The very purpose of the strategically vague topic sentence is to ensure that readers immediately appreciate the analogy and thus aren't put off when they learn, in the coming moments, that the cases aren't truly identical.

Shaping and reshaping: Recall also that the analogy-shaping process can be a matter of degrees. Thinking back to Hayakawa's abstraction ladder, we climb to the lowest rung (i.e., use the lowest degree of abstraction possible) necessary to support our proposed analogy. So in the example above, imagine that the leading precedent arose not from an apartment shooting but instead from a hospital orderly's sexual assault of a patient who'd been restrained during a manic episode. Suddenly, our advocate wouldn't need to rely on the highly vague *victim*, which was necessary to encompass a hospital patient and an apartment tenant. Instead, the advocate would choose a less vague term: *vulnerable patient*. This lower rung on the ladder is still vague enough to encompass both victims, yet it's precise enough to emphasize helpful similarities: both victims were hospital patients, and both were susceptible to wrongdoing. Likewise, the vague *employer* would become the more precise *hospital*, further emphasizing the cases' similarities.

Now suppose that your research had yielded even better results: the leading case instead arose from a registered nurse's intentional overdosing of a terminally ill patient. Suddenly, the vague *vulnerable patient* would become less vague still: *terminally ill patient*. And the precise *mercy killing* would replace our vague references to the employees' criminal acts.

In short, when the facts in supporting precedent match the facts in our own case, precision wins the day. We descend Hayakawa's ladder to the lowest rung possible—or hop off altogether—to emphasize the likenesses. We use vagueness, and higher degrees of vagueness, when our facts are a mismatch.

B. Example 2—A pothole is like an icy staircase.

Factual/procedural context: A slip-and-fall victim has sued your client, a local college, for failing to remove a patch of ice from an exterior staircase. You intend to argue that the college owed no duty to warn of the danger because it was open and obvious—meaning a danger that (the cases tell you) an average person would have readily appreciated.

Leading case: Your research reveals no open-and-obvious-danger cases involving ice. The only modern case you've located applied the rule to a summertime pothole in a supermarket parking lot.

Shaping the analogy: You might analogize the pothole case to your ice-patch case by creating vague categories to describe where the falls took

place and what caused them. A college's exterior staircase isn't the same as a flat supermarket parking lot. And yet both are *pedestrian walking surfaces*. Likewise, a patch of ice isn't a pothole. One is frozen water atop pavement, while the other is an irregular hole in pavement. Yet both are *common, visible hazards* found on *pedestrian walking surfaces*.

Armed with these vague categories, you might plant the analogy to your case in a point heading:

1. The open-and-obvious rule applies to common, visible hazards on pedestrian walking surfaces.

The same vague categories (italicized below) might appear in a thesis paragraph:

XYZ College is entitled to summary judgment because it owed Smith no duty. Our supreme court has held that *common, visible hazards* on *pedestrian walking surfaces* pose open and obvious dangers, for which there is no duty to warn. Here, Smith admits that he saw ice on XYZ's staircase before climbing the steps—and that any person in his position would have seen the ice and appreciated the risk of slipping. Therefore, the risk was obvious, and XYZ had no duty to warn Smith of it.

The same vagueness might show up in the argument section's application of law to facts:

Like the pothole in *Jackson*, the icy patch that Smith confronted was the type of *common, visible hazard* that pedestrians encounter and avoid every day. . . .

Policy support: The advocate might support this vague category—*common, visible hazard on a pedestrian walking surface*—by arguing that it reflects the open-and-obvious doctrine's recognition that invitees are expected to remain reasonably vigilant. Our tort jurisprudence has not absolutely negated personal responsibility or embraced absolute liability (in this context). Thus, the law does not require a warning about (or, in some jurisdictions, protection from) what is known or what is so apparent on a casual inspection that it should be known—like a *common, visible hazard on a pedestrian walking surface*.

Now that we've eased into this technique a bit, let's tackle a more challenging set of facts.

C. Example 3—An aquifer is like drained farmland.

Factual/procedural context: You’re a Department of Justice attorney prosecuting an oil company whose well leaked oil into the ground. The oil seeped into groundwater that collected in an aquifer. From there, oil-tainted groundwater flowed through a spring and into a navigable river. Federal jurisdiction under the Clean Water Act depends on whether the oil company discharged oil into a *navigable* water.⁹⁸ But it’s impossible to navigate groundwater or an aquifer or a spring, isn’t it? And that’s where the oil company leaked—“discharged,” to use the statutory term⁹⁹—its oil.

Leading case: A published case in your federal circuit is helpful because it applied the Act even without a direct discharge into a navigable water. The court held that a farmer fell under federal jurisdiction—and violated the Act—by “sidecasting.” With this sidecasting process, the farmer created additional farmable land by digging ditches that drained polluted wetlands into a small, nonnavigable creek. After pollutants reached the creek, they flowed downstream and eventually into a navigable river.

Notable differences: How could you use this farmland-sidecasting precedent for support in your groundwater case? The differences are daunting:

Your case	→	Leading precedent
<p><i>Initial water body receiving pollutant:</i> Aquifer (i.e. areas of underground rock or sediment containing enough ground water to sustain a well or spring).</p> <p><i>Nature of polluter’s conduct:</i> Allowing defective oil rig to leak oil into the ground.</p> <p><i>Mode of pollutant’s movement to navigable river:</i> Oil seeped into groundwater and aquifer, was carried through natural spring into river.</p>		<p>Wetlands (i.e. areas where water covers the soil or is at/near the soil’s surface all parts of the year).</p> <p>Dredging, draining wetlands and refilling wetlands with dredged soil.</p> <p>Farmer dredged, drained wetlands so that pollutants flowed into small creek that carried pollutants to river.</p>

Again, at first glance an oil leak into the ground doesn’t look like polluted water flowing through a dredged wetland into a small creek. Those farm wetlands also don’t look anything like an aquifer (i.e., underground rocks and sediment holding groundwater). And a creek flowing through farmland and into a river looks little like an aquifer spilling

⁹⁸ 33 U.S.C. § 1362(7), (12) (Westlaw through Pub. L. No. 116-5); *see also* Rapanos v. United States, 547 U.S. 715 *passim* (2006).

⁹⁹ 33 U.S.C. §§ 1311(a), 1362(12) (Westlaw through Pub. L. No. 116-5).

groundwater out through a spring. Yet, by using an analogy, they're the same.

Shaping the analogy: The cases are the same because both polluters engaged in a *surface activity* that caused a pollutant to enter *hydrologically connected nonnavigable water*—water, in other words, that eventually flowed into a navigable waterway over which the federal government has Clean Water Act jurisdiction.

These vague categories—*surface activity* and *hydrologically connected nonnavigable water*—might show up in your appellate brief's issue statement. Let's try Bryan Garner's deep-issue style, which imitates a deductive syllogism but turns the conclusion into the core legal question:

The Clean Water Act governs *surface activities* that cause pollutants to reach navigable waters through *hydrologically connected nonnavigable waters*. Big Mitten Oil Company's well spilled oil into groundwater that flowed through a natural spring into the navigable Black River, polluting the river. Does the Act govern this spill?

Once again, we see how an advocate can use vagueness to shape language multiple times in a single sentence to build a sense of similarity between their case and controlling precedent.

Policy support: Later in the brief, this advocate might buttress the *hydrologically connected nonnavigable waters* argument by reminding the court that Congress's stated purpose in enacting the Clean Water Act was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."¹⁰⁰ When pollutants despoil what is undisputedly one of the nation's waters (i.e., a navigable water), it would thwart the Act's purpose to reject federal jurisdiction merely because the pollutant began its journey in a nonnavigable water.

In each of these examples, the hypothetical advocate faced the type of factual distinction that routinely tests lawyers. The advocate's case involved a patch of ice, but the leading case involved a pothole; the advocate had a pollutant-moving aquifer, but the leading case a dredged wetland; and so on. In each instance, vagueness offered a subtle yet potentially potent strategy for making seemingly disparate items seem kindred. The vague category—shaped just broadly and imprecisely enough to capture the items being analogized—signaled a commonality that had perhaps been latent and supported a comparison that, the advocate hoped, felt natural and logical.

100 33 U.S.C. § 1251(a) (Westlaw through Pub. L. No. 116-5).

V. Conclusion

Scholars often tie analogy to precision, speaking of particulars and “minuteness.”¹⁰¹ But advocates can also analogize through breadth and imprecision. Stepping back from the minutiae and taking a vague macro look at a case can yield potentially persuasive comparisons to precedent cases. And on a micro scale, lawyers can suggest and reinforce analogies by planting vague categories that logically encompass otherwise distinct facts. Lawyers can use these categories to make connections and smooth over superficial or troubling factual differences, sometimes multiple times in the same sentence. Yes, lawyers aspiring to virtuosity should embrace strategic, appropriate vagueness (and recognize an opponent’s use of it), despite the word *vague*’s dubious reputation.

¹⁰¹ ALDISERT, *supra* note 27, at 95.