

**Presentation title:** “Using cases: An Empirical Study of Judge and Lawyer Practices”

**Abstract:**

The ways that judges and lawyers justify their arguments and decisions have profound impacts on all our lives. Understanding those practices in light of theories of reasoning and argumentation is thus critical for understanding this country’s laws and its society. There is nevertheless no extant empirical study of how lawyers and judges use citations to court opinions to construct their legal arguments, and until now, there has been no set of empirical research methods suited to answering those questions. The questions are not amenable to the citation-counting or bibliometric studies common in the law, which tend merely to count whether a given opinion cites or does not cite a given authority. Questions about how arguments’ proponents use cases call for a finer level of detail. For example, the long-standing debate over the rational force of analogical reasoning takes place principally without empirical support—or with support coming from cherry-picked opinions selected by adherents to one theoretical position or another. Some leading thinkers claim that a precedent case is useful as precedent in a legal argument only if the argument’s proponent can derive—via induction or abduction—a universally applicable rule from the precedent and apply that rule to the instant case. Others claim that lawyers routinely, and rationally, use analogical reasoning from precedent case to instant case without the need for a deductive rule. Merely noting whether an argument cites or does not cite a court opinion sheds no light on this problem.

This article develops and justifies a first-of-its-kind set of research methods and an empirical study to establish a baseline for how lawyers and judges in a randomly selected set of opinions, and the briefs that led to them, actually used cited cases in the construction of their arguments. It introduces the research construct of the “case use,” consisting of a citation to and discussion of a court opinion in a section of a legal argument to support the assertion of the author’s claim in that section of argument. It reports results from a study of arguments from nearly 200 randomly selected briefs and opinions filed between 2012 and 2018. All were filed in federal copyright cases, and the arguments related to copyright fair use. This paper reports the high-level findings of the study, suggesting their implications for legal theory, practice, and pedagogy. It also points the way to future work to enhance and exploit the methods developed here.