Context: Comparative Legal Analysis

- **Legal Analysis**: Civil Law and Common Law

- Differing views of precedent – binding power of case law, *Stare Decisis, jurisprudencia* (or *jurisprudence constante*), *opinio juris*
Comparative Legal Analysis

- **Civil Law**: (traditional view) there should be no judge-made law; thus, cases (judicial opinions) are not a source of law, not binding

- **Common Law**: judges make law through cases; cases create precedent; cases are binding; *Stare Decisis* applies
Comparative Legal Analysis of Facts

- **Civil Law** (traditional view): the code makes the law; the code *is* the law; cases and their facts are merely supplemental aids

- **Common Law:** Facts make the law

- **Facts** play a role in determining the law through the ways we use precedent and apply *Stare Decisis*

- Law is built thought synthesis of rules from cases (*rule synthesis*) and synthesis of facts from cases and the applications of law to facts (*explanatory synthesis*)
<table>
<thead>
<tr>
<th>NARRATIVE IN LAW</th>
<th>EXPLANATORY SYNTHESIS</th>
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<tr>
<td>-Facts are essential to an understanding of how the law will be interpreted and applied</td>
<td>-Synthesis of authorities using the facts and how the law applied to those facts to produce the outcome in the case</td>
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<td>-There is a narrative of how the law developed</td>
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Bridging Civilian-Common Law concepts of Facts in Legal Writing

**Facts** (throughout the memo or brief) play a role in framing (priming), and the communication of the narrative of the client’s situation.

**Explanatory Synthesis** (E Section) communicates the lessons from the facts of the precedent authorities.

The **Application** section brings together the narrative of the case with the lessons of explanatory synthesis.
FACTS THROUGHOUT THE WRITING

Label (and soundbite)
Questions Presented

Soundbite, Theme
Introduction

Story
Statement of Facts

Label, Soundbite, Theme
Explanation Section

Label, Soundbite, Theme
Thesis Headings and Table of Contents

Label, Soundbite, Theme
Application Section
Statement of Facts is the Story—the whole narrative of the client’s situation

**Target:** Emotions by targeting values, public policies

**Level of detail** communicates level of importance

**Consider:** Archetypical story-types and character types

**Work on:** Conflict, plot, point of decision (unstated resolution – leaving it for the decision maker)
• Get visual with the facts
• The best writers always are visual
• Consider the two stories reflected in these two depictions

Each tells a very different story. Each frames the issue differently.
Explanatory synthesis can combine common *storylines* of favorable or unfavorable authorities through a process called *narrative synthesis*.

**Basic function:** Analogize to the favorable storylines, distinguish the unfavorable storylines.

**Advanced function:** Target the values, emotions, and policies underlying and connecting precedents.
Explanatory Synthesis

- **Explanation** of how rules work that relies on synthesis of factual scenarios from cases

- **In legal analysis** – responds to precedent as source of law and source of reasoning

- But you have got to **ILLUSTRATE** – not just write the law from the cases, but illustrate how the law applied to the facts with specific factual detail
APPLICATION SECTIONS should:

- Retell the story in the context of the law

  *The law is met, the policy is upheld when ...*

- Draw on the synthesized illustrations from the explanation section

- Especially highlight how the client’s story furthers and matches values, emotions, & policies underlying and connecting precedents

  — all requiring attention to the client’s narrative in the context of the synthesized narratives of the precedents