Analogical Legal Reasoning and Legal Policy Argumentation: A Response to Darwinist Defenders of Judge Jones' Copying from the ACLU

By Casey Luskin
Version 1.0. January 22, 2007

> *I suggest to you strongly that you avoid as far as you possibly can simply signing what some lawyer puts under your nose. These lawyers, and properly so, in their zeal and advocacy and their enthusiasm are going to state the case for their side in these findings as strongly as they possibly can. When these findings get to the courts of appeals they won't be worth the paper they are written on as far as assisting the court of appeals in determining why the judge decided the case.*
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> --*Judge James Skelly Wright quoted in* United States v. El Paso Natural Gas Company*, 376 U.S. 651, 657, fn4 (1964) (internal citations and quotations omitted).*

Introduction:
In December, 2006, Discovery Institute issued a study which found that 90.9% of the *Kitzmiller* ruling's section on whether ID is science was copied essentially verbatim from the ACLU's Proposed Findings of Fact and Conclusions of Law.[1] Predictably, this study caused a stir among Darwinists, who tried their best to defend Judge Jones through legally deficient arguments. Several Darwinists also engaged in their typical name-calling and *ad hominem* attacks.[2] Just as I previously replied kindly to Ed Brayton,[3] I will presently respond to Tim Sandefur, Ed Brayton, and Wesley Elsberry with respect and without any name-calling. But this response will explain that my arguments regarding the inappropriateness of judicial copying legitimately cited cases in order to elucidate a *policy* that large-scale judicial copying is disapproved of by courts. I will show that the standard legal practice of analogical reasoning can rely upon that policy to justifiably argue that Judge Jones' copying of the ACLU's Findings of Fact and Conclusions of Law was inappropriate. In short, my legal arguments were completely appropriate, and Darwinist rebuttals have been insufficient.

From the beginning, I have **not** argued that the *Kitzmiller* ruling should be overturned because it fits perfectly the facts of cases like *Bright v. Westmoreland* or *In re: Community Bank of Northern Virginia*. Nor have I argued that judicial copying is always prohibited or that Judge Jones did anything prohibited under current law. And of course I am not arguing that Judge Jones engaged in "plagiarism" or violated some cannon of judicial ethics. Yet Sandefur claims that I "watered down"[4] my original argument when it is clear my arguments were consistent in both posts, stating that judicial copying is not always prohibited, but it is also not favored by courts:

> My first post: "Thus, it is clear that while the "verbatim or near verbatim" adoption of a party's findings of facts practice is not prohibited, it is also highly disapproved of by many

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[1] John G. West and David K. DeWolf, "A Comparison of Judge Jones' Opinion in Kitzmiller v. Dover with Plaintiffs' Proposed "Findings of Fact and Conclusions of Law," at http://www.discovery.org/scripts/viewDB/filesDB-download.php?command=download&id=1186
[2] For example, Tim Sandefur's response to me was titled: "Casey Luskin—Not Too *Bright*." Ed Brayton has called me "dishonest" at least 5 times when discussing judicial copying. Wesley Elsberry even uses violent analogies, writing: "Casey Luskin is getting beaten like a drum," and eagerly asks, "Can I Get a Piece of That?"
[3] http://www.evolutionnews.org/2006/12/defending_the_judge_jones_stud.html
[4] http://www.pandasthumb.org/archives/2006/12/dis_plagiarism.html

courts, including the U.S. Supreme Court and the Third Circuit Court of Appeals, which governs Judge Jones' own court."[5]

My second post: "[B]lanket copying a party's brief—while not always prohibited—is clearly disapproved of by courts. That's my point, and I think it's legitimate"[6]

Our point is therefore that the verbatim or near verbatim adoption of a party's findings of facts is disapproved by courts, especially the Third Circuit, even when there are not grounds for reversal. Judge Jones engaged in near-verbatim copying when writing his section on whether ID is science. While the *Kitzmiller* facts do not necessarily fit the facts from other cases, a strong argument can be made that what Judge Jones did is disfavored by using the standard practice of analogical legal reasoning and assessing the relevant policy considerations.

Response to Wesley Elsberry

Wesley Elsberry attacks me as if I implied the study applies to the **entire** *Kitzmiller* ruling. (And Wesley asserts that only 38% of the whole ruling was taken from the plaintiffs' findings of fact.) But in fact, I stated upfront in my first post on this topic that "[t]he report covers only the section of the *Kitzmiller* opinion which purported to address the question of whether ID is science."[7] I have always been clear that our report did not apply to the entire *Kitzmiller* decision. Wesley accuses me of "equivocating," but there is a very good reason why special scrutiny should be given to Judge Jones' section on whether ID is science: As I explained in the first sentence of my media backgrounder, "The section on whether ID is science is the most celebrated and expansive portion of the *Kitzmiller* opinion, which Judge Jones hoped would have an impact on future courts. As constitutional law scholar Stephen Gey said, 'the critique of ID and science is the most important part of the *Kitzmiller* opinion . . .'"[8] Our report is interested in the important section on whether ID is science, not the other sections. Wesley's accusation falls flat.

Moreover, I never denied that the case law I cite deals with entire rulings, but as I will argue, the policies underlying judicial disapproval of large-scale copying of entire rulings can be extracted and applied here. This seems appropriate since the section on whether ID is science is the most important section of the ruling, which would presumably be considered for citation by future courts. As the study showed, 90.9% of the section on whether ID is science was taken in a verbatim or near-verbatim fashion from the ACLU. As will be discussed below, analogical legal reasoning and application of the policies underlying disapproval of judicial copying should make that statistic a cause for concern.

Response to Tim Sandefur:

Tim Sandefur has 2 posts defending Judge Jones and critiquing my arguments. The first post tried to distinguish *Bright v. Westmoreland* from *Kitzmiller* on the basis of facts. As I acknowledged,[9] the *Bright* does have some differences from *Kitzmiller*. But I'm not claiming that *Kitzmiller* fits the facts of *Bright* identically because I'm not arguing that *Kitzmiller* should be overruled, as was the judge in *Bright*. In fact, it is pointless for Sandefur to imply that two cases must have identical facts for the policy reasoning in one case to bear upon another case. No two cases are exactly alike, and case law progresses by applying rules adopted under prior fact patterns to new ones. Thus I cited *Bright* because it contains important statements of dicta which announce a **policy that judicial copying is disapproved even when there are not grounds for reversal:**

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[5] http://www.evolutionnews.org/2006/12/media_backgrounder_on_kitzmill.html
[6] http://www.evolutionnews.org/2006/12/defending_the_judge_jones_stud.html
[7] http://www.evolutionnews.org/2006/12/media_backgrounder_on_kitzmill.html
[8] http://www.evolutionnews.org/2006/12/media_backgrounder_on_kitzmill.html
[9] http://www.evolutionnews.org/2006/12/defending_the_judge_jones_stud.html

> We have held that the adoption of proposed findings of fact and conclusions of law supplied by prevailing parties after a bench trial, although disapproved of, is not in and of itself reason for reversal.[10]

This statement is critical because it shows that a practice can be disapproved even if it doesn't necessarily warrant reversal. Thus judicial copying can be disapproved even when the ruling should not be reversed. Though the *Bright* case found egregious actions on the part of a lower court judge which warranted striking down his decision, *Bright* also showed that, even when reversal is not an option, the practice of judicial copying can still be frowned upon by courts. Sandefur leaves this quote out of his discussion, preferring instead to engage in a meaningless exercise of distinguishing the fact pattern of *Bright* from *Kitzmiller* and ridicule.

Sandefur's second post claims I backtrack (a charge I've already refuted) and then tries to defend Judge Jones' "heavy" reliance upon the proposed findings of fact by saying that "even these he reworded." Sandefur apparently thinks that Judge Jones' slight rewording removes cause for concern. Yet *In re: Community Bank of Northern Virginia* said that even "near verbatim" usage is inappropriate, meaning that trivial rewording is also disapproved. Discovery Institute's report shows that many of the differences between the ruling and the plaintiffs' findings of fact and conclusions of law are unquestionably trivial: For example, "Indeed" becomes "It is notable"; "Intelligent Design" becomes "ID"; "an intelligent-design movement leader" becomes "Prominent IDM leaders"; "Intelligent design is premised on a false dichotomy" becomes "ID is at bottom premised upon a false dichotomy". Do these examples of "rewording" represent meaningfully, independent thinking?

In addition, there are many policy arguments underlying why judicial copying is inappropriate. When noting that courts disapprove of judicial copying, the *Bright* case relies upon the U.S. Supreme Court case *Anderson v. Bessemer City,* 470 U.S. 564 (1985). When discussing judicial copying, *Anderson* cites to *United States v. El Paso Natural Gas,* 376 U.S. 651 (1964), which is an early case dealing with judicial copying. *El Paso Natural Gas* provides some clearly policy arguments for why judicial copying is disapproved:

> I suggest to you strongly that you avoid as far as you possibly can simply signing what some lawyer puts under your nose. These lawyers, and properly so, in their zeal and advocacy and their enthusiasm are going to state the case for their side in these findings as strongly as they possibly can. When these findings get to the courts of appeals they won't be worth the paper they are written on as far as assisting the court of appeals in determining why the judge decided the case.[11]

The policy arguments are clear: large-scale judicial copying is disapproved because it can lead to errors, promulgated by overzealous lawyers, becoming incorporated directly into a ruling because the judge did not adequately scrutinize the lawyers' claims. In fact, this seems to be precisely what happened with the *Kitzmiller* ruling, as seen in these examples:

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[10] *Bright v. Westmoreland County*, 380 F.3d 729, 731 (3rd Cir. 2004).

[11] Judge James Skelly Wright quoted in *United States v. El Paso Natural Gas Company*, 376 U.S. 65, 657, fn4 (1964) (internal citations and quotations omitted).

Plaintiffs' Findings of Fact and Conclusions of Law	Judge Jones in the *Kitzmiller* ruling
Pandas makes clear that there are two kinds of causes, natural and intelligent, clearly indicating that intelligent causes are beyond nature. (page 9; paragraph 16)	Pandas indicates that there are two kinds of causes, natural and intelligent, which demonstrate that intelligent causes are beyond nature. (page 30 of online version)
The religious nature of intelligent design is made explicit in *Pandas*, when it asks rhetorically, "what kind of intelligent agent was it [the designer], and answers: "On its own science cannot answer this question. It must leave it to *religion* and philosophy." Pll at 7 (emphasis added); 9:13-14 (Haught). (page 4; paragraph 5)	In fact, an explicit concession that the intelligent designer works outside the laws of nature and science and a direct reference to religion is Pandas' rhetorical statement, "what kind of intelligent agent was it [the designer]" and answer: "On its own science cannot answer this question. It must leave it to religion and philosophy." (P-11 at 7; 9:13-14 (Haught)). (pages 25-26 of online version)
Professor Behe has also written that by intelligent design he means "not designed by the laws of nature" (page 9; paragraph 15)	Professor Behe has written that by ID he means "not designed by the laws of nature" (page 29-30 of online version)
On cross-examination Professor Behe was questioned about his 1996 claim that science would never find an evolutionary explanation for the immune system. He was confronted with the fifty-eight peer-reviewed publications, nine books and several immunology text-book chapters about the evolution of the immune system, P256, 280, 281, 283, 747, 748, 755 and 743, and he insisted that this was still not sufficient evidence of evolution - it was "not good enough." 23:19. (page 35; paragraph 77)	In fact, on cross-examination, Professor Behe was questioned concerning his 1996 claim that science would never find an evolutionary explanation for the immune system. He was presented with fiftyeight peer-reviewed publications, nine books, and several immunology textbook chapters about the evolution of the immune system; however, he simply insisted that this was still not sufficient evidence of evolution, and that it was not "good enough." (23:19 (Behe)). (page 78 of online version)

Each of these example statements is patently false (and the rewording by Judge Jones is trivial). The reasons why these statements are false are given in *Traipsing Into Evolution* or Table C of Discovery Institute's report.[12] Yet in each example, Judge Jones made trivial changes but still copied **errors** from the plaintiffs' findings of fact directly into his section on whether ID is science. While Judge Jones' actions are not grounds for overruling the decision under current law, remember that judicial copying can be disapproved even when there are not grounds for reversal.

Judge James Skelly Wright essentially warned judges not to copy, but to exercise independent judgment, so that the overzealous advocacy of lawyers would be tempered and corrected. Yet when we look at Judge Jones' most celebrated and expansive section on whether ID is science, it's clear that Judge Jones directly copied false claims due to the "zeal and advocacy" of the ACLU. This squarely fits the reasons why courts disapprove of judicial copying. When future courts look at the *Kitzmiller* ruling, this will diminish the value of that section.

[12] *See* David K. DeWolf, John G. West, Casey Luskin, and Jonathan Witt, *Traipsing Into Evolution: Intelligent Design and the Kitzmiller v. Dover Decision* 31-32, (Discovery Institute Press, 2006); John G. West and David K. DeWolf, "A Comparison of Judge Jones' Opinion in Kitzmiller v. Dover with Plaintiffs' Proposed "Findings of Fact and Conclusions of Law," at http://www.discovery.org/scripts/viewDB/filesDB-download.php?command=download&id=1186

Response to Ed Brayton

Ed Brayton also wastes time distinguishing the facts of *Kitzmiller* from other cases, even though I'm simply using those cases to establish the *policy* that large-scale judicial copying is disapproved. Brayton seems to operate under the ludicrous assumption that two cases must be identical in order for the principles involved to apply. As already noted, no two cases have identical fact patterns, so trying to demand as such indicates ignorance of how the legal process works. Brayton apparently does not realize that one can look at cases with different fact patterns and extract principles which can be extended to apply to new, different fact patterns. This happens all the time in the law, and such legal reasoning is called *reasoning by example*, or *reasoning by analogy*, and it is often used to apply the underlying *policies* which guide courts in their rulemaking to new fact patterns.

For example, a review[13] of Edward H. Levi's famous book, *An Introduction to Legal Reasoning*, by Garret Wilson explains that Levi "sees case law as progressing in three stages: 'similarity is seen between cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case'. This amounts to 'reasoning by example'". Thus no two cases are exactly alike, and Levi explains how "reasoning by example" allows the underlying principles behind prior decisions to be extended to deal with new fact patterns:

> As the comparison of cases proceeds, new categories will be stressed. Perhaps, for example, there will be a category for trade-marked, patented, advertised, or monopolized articles. The basis for such a category exists. The process of reasoning by example will decide. [14]

Wilson's review of Levi's book continues on, explaining that legal reasoning commonly extracts "encompassing principles" from pre-existing cases and then applies them to new fact patterns:

> [I]n early cases a decision is made without regard to all-encompassing principles—or, if such principles are implied, they are inevitably short-sighted. It is through future cases that such principles are discovered and refined and eventually applied to even later cases. Through this processes, most recent cases may be decided using completely separate rules than those used in the early cases. Such a process seems similar to the evolution of scientific theories: early theories such as that of omnipresent "ether" attempted to explain the propogation [sic] of light, until later discoveries and situations called for new theories to encompass new findings. Newer theories are therefore more far-reaching, making older ones redundant in most cases or even contradict them.[15]

Such "encompassing principles" are often called *policy* considerations. Kenneth J. Vandevelde, in his "Thinking Like a Lawyer" (Westview Press, 1996), writes:

> In other cases, the court may decide that the language of the rule is too general to dictate a single result and that the policy behind the rule must be examined. The court would then be attempting to decide which result would best further the policies underlying the particular rule. For example, if the rule to be applied prohibits the use of a "motor vehicle" in a park, the court may have to decide whether remote-controlled toy operated by a child falls within

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[13] Garret Wilson, Review of *An Introduction to Legal Reasoning*, at http://www.garretwilson.com/books/introductionlegalreasoning.html

[14] Edward H. Levi, *An Introduction to Legal Reasoning*, pg. 27 (University of Chicago Press, 1949).

[15] Garret Wilson, Review of *An Introduction to Legal Reasoning*, at http://www.garretwilson.com/books/introductionlegalreasoning.html

> the definition of a motor vehicle. The court may decide that the purposes underlying the rule are to promote recreational use of the park and to ensure the safety of pedestrians.[16]

Vandevelde goes on to explain that "discussions of policy are of considerable importance" and that "despite its importance, the policy discussion may be the portion of the opinion that is the least structured or methodical."[17] (Thus policies are often discussed in the dicta of a ruling.) Policies compete with one another, as "a judicial decision, rather than being based on a single policy, reflects a balance between at least two competing policies, one of which supported creation of the right or duty and the other of which opposed it." When lawyers argue before a court, they commonly "characterize the prior case, not in terms of its facts but in terms of the underlying policy judgments, which the lawyer argues should be followed."[18] Roy L. Brooks concurs that "[w]hether avowed or unconscious, a policy is the stuff of which a rule (a standard of behavior) is made. It gives purpose, meaning, structure, coherence, and direction to a rule…"[19] Vandevelde further explains the importance of looking at policies when engaging in analogical legal reasoning:

> The second form of reasoning which lawyers apply law to facts is reasoning by analogy. An analogy is a form of logic by which one reasons that because two items are alike in at least one respect they are alike in at least one other respect. … [T]he advocate argues that the inevitable dissimilarities are irrelevant, the basic contention being that none of the facts that make the cases different is relevant to furthering or impeding any of the underlying policies.[20]

In conclusion, the policy we can elucidate from the U.S. Supreme Court's quotation of Judge James Skelly Wright is that large-scale judicial copying is disapproved because it shows that a judge did not exercise independent judgment, leading to the incorporation of errors promoted by overzealous lawyers into the ruling, which diminishes the value of those rulings when examined by other courts or the public. I am simply using this exact "reasoning by example" or "reasoning by analogy" methodology to apply this policy to *Kitzmiller*.

The logical application of this policy is that Judge Jones' section on whether ID is science should be subject to similar disapproval because the policy reasons behind the disapproval of largescale copying are satisfied. Regardless of whether the *Kitzmiller* case perfectly fits a present rule for overturning a copied legal decision, it definitely fits the policy reasons for why extensive judicial copying is undesirable. That fact alone should diminish the value of *Kitzmiller's* section on whether ID is science in the eyes of future courts. This conclusion is based upon standard and bona fide legal reasoning, contrary to the claims of certain Darwinists. In the final analysis, these Darwinists have completely failed to refute my arguments.

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[16] Kenneth J. Vandevelde in his "Thinking Like a Lawyer" (Westview Press, 1996), pg. 30
[17] *Id.*
[18] *Id.* at 92.
[19] Roy L. Brooks, *Structures of Judicial Decision-Making from Legal Formalism to Critical Theory* 14-15 (Carolina Academic Press, 2002).
[20] Kenneth J. Vandevelde, "Thinking Like a Lawyer," pg. 86, 91 (Westview Press, 1996).