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# Introduction

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Why at all deviate from literal meaning in the law by appealing to analogy, to precedent instead of clear legal rules, to paradigm instead of principle, and to paradoxes of metaphor instead of literal meaning and truth?

However we understand absurdity, the textual approach gives priority to the language used in the text in its ordinary sense over other evidence of the author's intention. The textual approach is sometimes attacked by critics, who call it 'literalism', going by the letter. But what is the point of putting a statute, contract, treaty, or will into words unless those words are to be treated as binding?

Thus Honoré (1995, p. 90). So go for clear rules in the first place one would think, avoiding absurdity in their applications. Though this is still good advice at times, no legal system exclusively consisting of literally applicable rules has yet been devised. Reasons why this won't change any time soon have been widely publicized of course, at least in the philosophy of law.

So analogy, precedent, paradigm, metaphor and related concepts unquestionably play a major role in legal and non-legal reasoning. It is even contended (for example by Weinreb, in 2005) that all legal reasoning is analogical, in the absence of literal identity of legally relevant facts – and thus of clear rules applicable to standard situations.

What was and is the issue of *analogy* about? Travelling by rail with a non-standard pet may lead to the following ticket collector's reaction (according to Freeman Dyson in 2006, p. 4, reciting an old story):

Cats is dogs and rabbits is dogs but tortoises is insects and travel free according.

Thus the 'analogical' core issue is: how to make cats out of dogs? Or tortoises out of insects? Standard analysis proceeds in terms of relevant similarities.

But what are relevant and what are irrelevant similarities and differences? Everything resembles everything in an infinite number of respects (see Hampshire, 1959, among others).

This may be no major issue concerning pet train travellers. Many more analogies in civil law and in administrative law may be relatively harmless or even quite useful as well, however unanalysed in adjudication and in other applications. Some analogies, though, may have far-reaching symbolic and material consequences, like legally treating pregnancy as an illness, however well-meant from gender-neutral points of view. In criminal law the appeal to misconceived analogy can lead to really wrongful and serious harm in the name of the law, by unjustly widening the scope of codified crimes.

Less formal analogical argumentation, legal or otherwise, is much more widespread and can be just as risky, or even lethal. Think here of former United States Supreme Court member Antonin Scalia, who suggested (in *Herrera v. Collins*, [506 U.S. 390] 1993):

Mere factual innocence is no reason not to carry out a death sentence properly reached.

Are such convicts analogous to soldiers who lose their life in defence of their country, like: they did not deserve it, but legal procedure is a thing to die for, just like the country itself is? The rhetoric of such analogical argument may be quite effective, without any clear guarantee concerning argumentative content.

The same holds good for appeal to *precedent*, logically related to analogy as it is, at least in terms of relevant and irrelevant similarities. In fact, in adjudication, precedent is explicitly invoked much more often than analogy. Thus a court can order punitive damages to be paid to a victim of verbal offence without explicit motivation. Later victims of verbal offence may appeal to this decision. But then the cases brought by such plaintiffs could be different in relevant respects. Thus, there may have been nothing like public offence with any third-party effect against such plaintiffs, and/or such plaintiffs may have wrongly elicited verbal offence against them. So again: what may be relevant similarities and relevant differences?

It may also be contended that the original decision appealed to by way of precedent is wrong and ought not to be repeated, according to the adage: 'two wrongs don't make one right'. But isn't this at odds with deep-seated notions of equality and legal security? Imagine one twin objecting to supposedly receiving less pocket money 'because the other twin previously

got more'. Surely such a precedent must be decisive in treating both twins equally? Or ought the overpaid twin to be restored to a rightful position, by paying less next time or otherwise?

*Paradigmatic reasoning* is another issue of relevant similarities and differences: what is it that a paradigm stands for? Capital punishment against the innocent may be a paradigm of official injustice, but then the paradigm does not by itself exhaustively explain what it is a paradigm of. The same holds good for paradigmatic court decisions or even of paradigmatic judges or role models for their colleagues to imitate – in what respects?

Lastly a few words on *metaphor* and its paradoxes, not just for the sake of completeness. 'They leapt to conclusions' may be said of courts, other official bodies, and even of some scholarly authors (not represented in this collection of essays of course). Results of this may not always be just and fair:

Written laws are like spider's webs; they will catch, it is true, the weak and the poor, but would be torn in pieces by the rich and powerful. (Ascribed to Anacharsis, sixth century BC).

Metaphors galore here of course, not just analogies. But what about their logic, however imaginative and rhetorically persuasive such lack of literacy may be?

So on goes the nearly universal appeal to or at least use of analogy, precedent, paradigm and metaphor, not just in the law and in legal reasoning. Discussion of their status and logic goes on as well, aiming at better understanding of such less than completely transparent forms of reasoning, with possibly important consequences. This collection of essays is intended to be a scholarly but still shining example of the "chain novel" of legal theory and law in general – an idea developed by Dworkin since 1986.

This book originated in a workshop on analogy at the 2011 International Association for Philosophy of Law and Social Philosophy (IVR) conference in Frankfurt am Main. Happily most of its participants are represented here. Some other distinguished scholars joined this enterprise later on, adding to the discussion and thus to the state of the art, as follows:

*Amalia Amaya* aims to show the relevance of exemplary judges, alongside exemplary cases, for legal theory and legal practice. She develops a virtue-based account of such exempla, according to which paradigmatically good judges are those who possess and exhibit judicial virtues to a high degree. Next, she subjects to criticism the conception of imitation of exempla as analogical reasoning, and puts forward a view of imitation as character development. Thus at least one kind of exemplary reasoning – namely,

imitative reasoning – is not coextensive with analogical reasoning, she argues. She then examines the main roles that exempla may play in legal theory and practice: they have educational value, help in theorizing about excellence in adjudication, and are pivotal in the evolution of legal culture.

*Scott Brewer* criticizes the ‘all too’ common view of analogical arguments in law and in other domains as necessarily lacking the force of valid deductive argument and thus, by definition, as defeasible forms of argument. Instead he argues that, properly understood, some analogical arguments, including analogical arguments in law, do have the force of valid deductive arguments, and that those arguments are indefeasible. Paradigms of such supposedly indefeasible arguments are an important part of his discussion. For comparison and contrast he focuses on conceptions of analogy as belonging to contexts of discovery instead of to contexts of justification.

*Bartosz Brożek* defends three claims. First, he argues – *contra* Robert Alexy – that there are no distinct basic operations in the process of the application of law. In particular, he posits that balancing and analogy are no such operations. Second, he argues that analogy has two stages: the purely heuristic stage (which may be reconstructed formally in many ways), and the justification-transmitting stage, which can be identified with the process of balancing legal principles. Thus he contends that analogy is partly reducible to balancing, and that the reduction embraces the rational aspect of analogical reasoning. Finally, he defends partial reducibility by rejecting two competing views of analogy: the rule-based and the factual.

*Damiano Canale and Giovanni Tuzet* focus on the tension between analogical reasoning and extensive interpretation in law. They note that, in most legal systems, reasoning by analogy is prohibited in criminal law (unless it is in favour of the accused) whereas extensive interpretation is not. Hence they argue that it is a crucial point in criminal adjudication to distinguish the two arguments, although they seem to serve the same purpose. The problem however seems to them to be that it is very unclear whether there is a real difference between the two and where it might lie. Against such confusion they propose an original account of the distinction between analogical reasoning and interpretive extension, based upon the principle of semantic tolerance and its inferential structure in legal argumentation, with hopefully constructive implications for criminal justice adjudication.

*David Duarte* focuses on structure and sequence of analogy, criticizing the ‘partial reducibility thesis’ sustaining that analogy, apart from a strictly analogical step, is reducible to balancing of legal principles. Thus he points out some problems raised by the partial reducibility thesis, such as the contingency of reducibility or the fact that analogical reasoning proper is

done under the cover of balancing. His main point however is that analogy and balancing have opposite normative conditions, which explains the unacceptability of the reducibility enterprise.

Against this Bartosz Brożek offers an interesting defence of the partial reducibility thesis, appealing to Robert Alexy's theory of legal reasoning. According to Brożek, one issue with Duarte's criticism of the partial reducibility thesis is its relative neglect of Alexy's insights. Brożek also highlights aspects of his theory of analogy which may be of importance for any viable theory of analogy in the law.

In his reply David Duarte states that analogy and balancing have, or presuppose, totally opposite normative conditions. According to him this makes the whole idea of reduction inconsistent. Or: if an analogy depends on a gap and balancing presupposes more than one applicable norm, then analogy and balancing are incompatible.

*Martin Golding* contends that reasoning by analogy is a non-deductive but still strong variety of legal argument that can establish its conclusion not just as plausible but as true (or correct). Still he argues that such argument may be supplemented to become deductively valid. But then such extra premises add nothing to the plausibility of the original non-deductive argument, so he contends. Also he explains the importance of possibly countervailing circumstances in establishing or rejecting analogy in the law. According to him, such countervailing considerations may be backed by analogy in their turn. Thus he offers a most elegant version of one or even the classic conception of analogy.

*Hendrik Kaptein* notes that intellectual – and probably also some real – harm has been done by wrong-headed conceptions of argumentation by analogy, precedent, paradigm, and metaphor, not just in legal argumentation. The most common error consists in taking them too seriously, as if they had autonomous argumentative force. Accordingly, argumentation by analogy is of heuristic value at best. Underlying and oftentimes enthymematic argument from principle is decisive, reducing argumentation by analogy and like semblances of reasoning to (*pia*) *fraus*. Still he does not deny the importance of analogy, precedent, paradigm, metaphor and the like, related as they all are to 'outward difference and underlying identity'. In his analysis, issues of wrongful harm and even matters of rightful or wrongful life and death can be greatly clarified by an appeal to analogy and related notions.

*Bastiaan van der Velden* explains how the 1992 Civil Code of the Netherlands prescribes analogy and related legal techniques in order to fill gaps and repair other inadequacies in the Code. This is further explained in

terms of the strict liability of the 'possessor' for her animals, as codified in Dutch tort law in Book 6 of the Civil Code. Courts are expected to apply contrary-to-fact reasoning, in rewriting the facts of a case into an analogous scenario, in which the possessor controls the behaviour of (e.g.) the animal that caused the damage. This discussion is extended to other issues, showing the importance of such analogy's autonomous argumentative force in the context of effective civil law adjudication. Thus he convincingly shows that analogical reasoning is not, as so often assumed, a stopgap measure to repair deficiencies in legal rules, but is in fact an essential part of a paradigmatic civil code.

Actually there is a certain logic or at least a sequence of thought in this collection of essays as well. Kaptein starts from the negative contention that there is no real argumentation by analogy and the like at all. Against this, Brožek, Canale and Tuzet, and Duarte forcefully argue for varieties of analogy's argumentative powers. Brewer goes still further, in his explanation of indefeasible analogical argument. Van der Velden demonstrates analogy's indispensable role in a highly developed and in fact paradigmatic variety of civil law adjudication. Lastly, Amaya convincingly demonstrates the importance of exemplary adjudication created by role models of man, or in fact of humanity.