Edited by Hendrik Kaptein and Bastiaan van der Velden

Analogy and Exemplary Reasoning in Legal Discourse

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Introduction

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Keywords: analogy, precedent, paradigm, metaphor, legal reasoning

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, Brożek, 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.

1. Imitation and analogy

Amalia Amaya

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Abstract
Exemplary judges are important for legal theory and legal practice. Still the conception of imitation of exempla as analogical reasoning is criticized here. Imitation as character development may well be more important. Thus, there is, at least, it is argued, one kind of exemplary reasoning – namely, imitative reasoning – that is not coextensive with analogical reasoning. Exempla have educational value, help in theorizing about excellence in adjudication, and are pivotal in the evolution of legal culture.

Keywords: exemplars, imitation, virtue, character

1 Introduction

Exemplary reasoning plays a prominent role in both legal theory and legal practice. 'Exemplary reasoning' is understood as 'reasoning by analogy' or 'reasoning by example', but regardless of whether one uses 'exemplary reasoning' as logically equivalent to analogical reasoning, or to refer to reasoning 'case-by-case', this form of reasoning is mostly viewed as involving reasoning with exemplary cases.[1] There is, I would argue, another kind of exemplars that are highly relevant to law, namely, exemplary judges, that is to say, paradigmatically good judges. In this essay, my aim is to provide an account of what those exempla are and which roles they might play within a theory of legal reasoning. This analysis may also clarify the issue of how exemplary reasoning and analogical reasoning relate to each other.

The structure of this chapter is as follows.[2] Section 2 distinguishes between two kinds of exemplarism, case-based exemplarism and

1 On the use of these terms, see Brewer, 1996, nn. 6, 50, and 51 and accompanying text.

2 Some parts of this chapter build on previous work on exemplarity that appeared in Amaya, 2013.

subject-based exemplarism, which is the focus of the rest of the chapter. Section 3 provides a virtue account of (subject-) exempla, according to which exemplary judges are, first and foremost, exemplars of virtue. Section 4 discusses several models of judicial exemplarity and shows the variety and broadness of the repertoire of models that may potentially contribute to legal argument. Such contribution is always made via 'imitation', that is to say, exemplary judges provide models that we may emulate. The nature of imitation is discussed in section 5: the view according to which imitation is a matter of analogy is criticized and an alternative model of imitation as character development is put forward. Section 6 explores the different ways in which imitation of exempla is relevant to law; more specifically, it argues that exempla play a critical role in legal education, legal reasoning, and the evolution of legal culture. The conclusion suggests a few avenues for further research (section 7).

2 Two versions of exemplarism

An important distinction needs to be drawn between two kinds of legal exempla, namely, exemplary decisions or cases and exemplary judges. It has been the former, rather than the latter, that have been the focus of most work on exemplary reasoning.[3] However, exemplary judges, alongside exemplary cases, are highly relevant to both legal theory and legal practice. Thus, we may distinguish between two types of exemplarism: case-based exemplarism, which examines the role of leading cases in legal reasoning, and agent-based exemplarism, which focuses on the study of exemplary judges.[4] These two versions of exemplarism are not in opposition to each other, but they are rather complementary. Each of them contributes in its own distinctive way to improving legal practice and theorizing about that practice.

Agent-based exemplarism can be either foundational or non-foundational. According to the foundational version, the identification of paradigmatically

3 Some discussion may be found in Pound, 1938; Currie, 1964; Schwartz, 1979; and Hambleton, 1983. Some biographical sketches of the careers and contributions of renowned judges include: Andenas and Fairgrieve, 2009; Ball and Cooper, 1992; Ball, 1996; Gunther, 2010; White, 2007; Vile, 2003; and Yarbrough, 2008. See also the series 'Exemplary Judges' published by the Mexican Supreme Court of Justice (in Spanish).

4 See Zagzebski's related distinction between exemplarist ethical theories that make persons the primary exemplars, exemplarist act-based theories, and exemplarist outcome-based theories: Zagzebski, 2004, p. 48.

good judges provides the foundation of a theory of adjudication. In this view, judgments about how judges should decide are derivative from particular judgments about the identity of exemplary judges. That is to say, the latter enjoys a conceptual priority over theoretical judgments so that the evaluative properties of decisions are defined in terms of paradigmatically good judges. We do not have, on this approach, any criteria for good legal decision-making in advance of identifying exemplary judges. Rather, judgments about the identity of paradigmatically good judges provide the basis for constructing a theory of adjudication. Such a theory would be the result of investigation into how exemplary judges actually decide cases.[5]

This ambitious form of agent-based exemplarism is rather problematic. Most importantly, it rests on a highly untenable view of theory construction. It is not as if one could merely collect 'data' on exemplars and then build up a theory about exemplary legal decision-making. The idea that there is some raw data against which theories may be tested has long ago fallen into disrepute. And its credentials when it comes to data concerning exempla are no better. A more plausible view about how theory and data relate to each other appeals to coherence-oriented methods such as reflective equilibrium. When developing a theory, we work from 'both ends', as Rawls (1999, p. 18) put it, so that we revise theoretical judgments about how cases should be decided in light of particular judgments about the identity of exemplars, which are also revisable in light of our more theoretical judgments about good legal decision-making. There is no conceptual priority of particular judgments about the identity of exemplars over theoretical judgments about how cases ought to be decided, but rather there is a relation of interdependence between both sets of judgments. Assigning exempla a foundational role within a theory of adjudication assumes a deeply unsatisfactory view about how data and theory relate to each other.[6]

A non-foundational version of agent-based exemplarism looks more promising. On this view, exempla have an important place in a theory of legal reasoning, even if they cannot be said to provide the foundation for

5 A foundational agent-based version of exemplarism is defended by Linda Zagzebski for both ethics and epistemology. See Zagzebski, 2004, 2006, 2010, 2017.

6 Ultimately, the problem is not that of giving exemplars a foundational role but that of assuming that a theory needs to have a foundational structure (whether the foundations be exempla or any other foundation) for it to be able to explain and justify the practice. Surely we want theories that have the resources to do that, but the structure of such theories need not be foundational. Coherentist structures are, for a number of reasons, preferable to the traditional foundationalist ones. For a discussion of the coherentist-foundationalist debate as it applies to law, see Amaya, 2015.

such a theory. There are three main roles for exempla in a theory of adjudication: the notion of a paradigmatic good judge is critical to inculcating the traits of character that are necessary for good legal decision-making, developing a theory about excellence in judging, and giving an account of the evolution of legal culture.

3 Exemplarity and virtue

How can we go about identifying exempla? What is it that makes a particular judge an exemplary one? According to an influential approach, developed by Linda Zagzebski, exemplars may be identified through the emotion of admiration. On Zagzebski's account, exemplars are persons who are most admirable, and we identify the admirable by the emotion of admiration. This reliance on the emotion of admiration to identify exemplarity seems to me, however, problematic. To start with, the proposal to identify exemplars by the emotion of admiration assumes that most observers will find the exemplar naturally admirable, but this assumption seems to be over-optimistic: only the humane person can like or dislike persons properly, as Confucius says.[7] In addition, it does not seem to be the case that most people converge in their feelings of admiration, partly because judgments about who is admirable are not theory-free judgments but depend on some previous, even if inarticulate, conception of virtue. The appeal to the emotion of admiration does not provide us with a pre-theoretical and straightforward way to identify exemplarity: there are no raw emotions – just as there are no raw data – but judgments about who to admire are also informed by some pre-existent theoretical ideas about the good. What an admirable judge is is not something we find out merely by empirical investigation, but we do have some previous conception of correct judging 'before' identifying who the good judges are.

Instead of using the emotion of admiration as the basis for a theory of exemplarity, my suggestion is that we use the resources of virtue theory to describe exempla. On this virtue approach to exemplarism, exemplary judges are those who possess the judicial virtues, i.e. the traits of character that are necessary to excel at the functions institutionally assigned to judges. The judicial virtues include moral virtues as well as epistemic or intellectual virtues. Honesty, magnanimity, courage, and prudence are among the moral virtues we expect good judges to possess. The good

7 In *Analects*, 4.3, as quoted in Kim, 2012.

judge also has a number of intellectual virtues, such as open-mindedness, perseverance, intellectual autonomy, or intellectual humility. Among the intellectual virtues, the virtue of practical wisdom or *phronesis* stands out as a particularly important virtue for successful judicial decision-making. This virtue is necessary to arbitrate between the demands imposed by the specific virtues, in cases in which these demands overlap or come into conflict, to determine the right mean in which virtue consists, and to specify what virtue requires in the particular case (Zagzebski 1996, pp. 211–231).

To be sure, the virtue of justice is paramount in judicial legal decision-making as well. This virtue cannot find an easy place within a theory of virtue: the virtue of justice, unlike other virtues, cannot be understood as a mean between two vices, neither can it be associated with a characteristic motive (see B. Williams, 2006, pp. 205–217). Despite these difficulties, the good judge can hardly be described without appeal to the virtue of justice: this virtue is, as Hart says, the more juridical of the virtues and a virtue especially appropriate to law (see Hart, 1994). In addition to the general moral and intellectual virtues, the judicial virtues also include the virtue of fidelity to law or judicial integrity, which is a virtue specific to the role of the judge. Finally, it is a mark of exemplarity in the context of judicial decision-making to exhibit a set of institutional virtues, i.e. the traits of character that are necessary to ensure the proper functioning of institutional bodies.[8]

Judges who have all – or some – of these virtues compel admiration. That is to say, exemplary judges are also admirable judges. Zagzebski (2017, p. 113) defines the concept of virtue in terms of admiration. In her view, a virtue is 'a deep and enduring acquired trait that we admire upon reflection'. But this is the relationship between virtue and admiration wrongly reversed. We admire a person because of her virtue, it is not that a person is virtuous because we admire her. A virtue account of exemplarity recognizes the importance of admiration in an exemplarist theory, without defining, in a problematic way, exemplarity (and virtue) in terms of admiration.

An objection may, however, be raised against a virtue approach to exemplarity. It might be argued that there is an inherent tension in combining exemplarism with virtue theory: exemplarity is more context-dependent than virtue and, thus, an exemplarist theory of legal decision-making

8 For instance, one might list the virtues of the communicator and the virtues involved in reaching consensus among those necessary to ensure the proper functioning of institutional bodies. The issue of which virtues are conducive to effective institutional bodies is different from the question of whether institutions, as opposed to individuals, may possess virtues. On the latter question, see Lahroodi, 2007, and Fricker, 2010.

advocates a looser, more flexible normative standard than a virtue-based one, which aims to be valid across contexts.[9] One could respond to this objection by denying that a virtue approach to normativity aims to provide any transcultural standards. A normative approach based on the virtues may be relativistic in that different cultures embody different virtues. Then there is no tension between virtue theory and exemplarism, as what counts as virtuous shifts with the context as much as what counts as exemplary. While there are certainly important relativist versions of virtue theory,[10] a non-relative account of the virtues is a more promising way to develop a virtue-based account of normativity (see Nussbaum, 1988). A response to the objection that says that virtue theory and exemplarism are in tension because the former defends a less context-dependent conception of normativity than the latter does not consist in claiming that virtue is a relative concept, but rather in denying that exemplarity should be understood along relativist lines. Unlike other approaches to exemplarity, for example, those that ground exemplars on the emotion of admiration – which put in place normative standards that importantly vary with context – a virtue approach to exemplarity has the advantage of providing exemplarism with the resources needed to put worries about relativism to rest.

Another important advantage of the virtue model of exemplarity is that it allows us to capture some of the qualities we typically associate with the good judge. Some of the traits of character mentioned above are among those that laypeople, as much as jurists, would identify with exemplarity. It would be most surprising if someone were to say that justice is not a virtue we expect good judges to possess. This is, nonetheless, compatible with having different conceptions of exemplarity in judging, as the virtues might be further specified in different ways. Surely, not everyone has the same idea of justice or agrees on what a just judge is. Consequently, people might differ in their identification of good judges as well.[11] Furthermore, there might also be different ways in which a judge may be an exemplary one. That is to say, there may be different models of exemplarity. Thus describing exemplary judges by appeal to the judicial virtues provides a way of identifying exemplars that allows for variation, but without depriving exemplars of their normative content, for, to be sure, it is not as if any trait

9 Thanks to Maksymilian Del Mar for raising this objection.

10 See most prominently MacIntyre, 2007.

11 Although it is, I think, an advantage of exemplarism that it helps to bring about agreement, as agreement is more likely on who are good judges than on what good judging requires. I touch on this issue in the last section of Amaya, 2013.

could count as a judicial virtue or any specification could count – on the non-relativist approach I am advocating – as a specification of the virtue of justice. The next section discusses different types of exempla all of which have the potential to contribute in various ways to improving both legal theory and legal practice.

4 Models of exemplarity

So exempla are virtuous persons who provide models that are worthy of admiration and imitation. There are, however, several classes of exemplars and different ways in which one may be exemplary. Each of these categories contributes in distinctive ways to performing the roles which exemplars may be claimed to play in the legal context.

4.1 Real and fictional exempla

There are both real and fictional exempla. Sometimes, we learn about exempla and the way in which they virtuously face the situations confronting them by first-hand experience. The teachers we study with, our parents or grandparents, friends, and co-workers sometimes provide us with models we want to imitate – or hope to avoid. But, fortunately, the circle of persons we can learn from is much larger than the group of persons we have a direct relationship with. We also learn about virtue from historical characters, from persons who are very distant from our acquaintance, and from exemplary individuals who have existed only in fiction. We learn from all these exemplary persons only through narrative. Thus, narratives are critical to broadening the horizon of exempla we admire and hope to emulate. This function of narratives is as important in law as in any other context: while we can certainly learn about judicial virtue from our law professors and peers, a great deal is learnt through the stories told about great judges or legal thinkers we have never personally interacted with.[12]

Two kinds of narrative make an extended set of models available to us: historical narratives and literary narratives. We learn about virtue – judicial or otherwise – through the stories circulating about outstanding individuals

12 On the relation between virtues and narrative, the *locus classicus* is MacIntyre, 2007. MacIntyre's account connects a virtue approach to normativity with a relativist position that is markedly different from the kind of objectivity that a virtue approach to exemplarity may bring about.

we have never met, from historical writings of exemplary characters as well as from depictions of admirable persons in literary texts. While there are obvious differences between historical and literary narratives, they might also be closer than it might appear. Until the end of the eighteenth century, history was a branch of literature in the West, and historical texts of Imperial China extensively relied on literary sources (Tan 2005, p. 416). Stories circulating about real persons from the past – of those who make it into historical texts and those who are known only to a smaller circle of persons – and even stories about contemporary persons might be in important respects like literary narratives. Regardless of their connections, both kinds of narratives are central to exemplarism insofar as they provide us with models to emulate beyond those that we encounter on the basis of first-hand experience. The relevant repertoire of exempla thus includes not only real exempla that we have first-hand experience of, but also those that we get to know through historical narratives – as well as fictional exempla, as described in literary texts and film.

4.2 Negative and positive exempla

Exempla may also be positive or negative. 'Anti-exemplars' raise a host of interesting issues. Do they work equally well as models through which one may regulate one's behaviour? Against the relevance of negative exemplars, it has been argued that good and bad models are not equally strong (anti-) mimetic objects (see Fossheim, as reported in Zagzebski, 2017, p. 135). Zagzebski also claims that 'it is easier to model ourselves on what we want to be than on what we want to avoid' and has raised doubts about the educational value of negative exemplars (Zagzebski, 2017, p. 31). However, there is some empirical evidence to support the view that negative exemplars have motivational force, and that teaching methods that provide exposure to both positive and negative exemplars are more effective – at least in the domains under study – than exclusive exposure to positive exempla (see P. Haack, 1972; and Lockwood et al., 2005). Thus, exemplars of judicial vice, alongside with exempla of judicial virtue, should also be given a role within a theory of judicial exemplarity (see G. Williams, 2013).

The potential value of negative examples reinforces the view that literature importantly contributes to enlarging the repository of exempla, since fictional judges are often models of judicial vice, rather than models of virtue. Judges are frequently portrayed in literary texts as corrupt (as in Shakespeare's *Measure for Measure*, Euripides' *Hecuba*, and Quevedo's *The Dream of the Skulls*), indifferent (as in Victor Hugo's *The Last Days of a*

Condemned Man, Rabelais's *Gargantua and Pantagruel*, and Tolstoy's *Resurrection*), overly formalistic (as in Shakespeare's *The Merchant of Venice*), or simply as fools (as in Grisham's *The Appeal* or García Márquez's *One Hundred Years of Solitude*). But, given the benefits of using both positive and negative examples, this does not detract from the value of literature as an important source for exemplarity. Models of vice can help judges develop the judicial virtues insofar as reflection upon them allows judges to appreciate the serious consequences of judicial vice and, thus, may lead them to see the importance of cultivating the judicial virtues as well as understand (by contrast) what judicial virtue requires.

4.3 Heroes, saints, sages, and the ordinary exempla

Three main categories are usually discussed under the notion of exemplar: the saint, the hero, and the sage.[13] These figures represent different, irreducible forms of exemplarity, identified with the caring, the brave, and the just.[14] They are also associated with predominant virtues, namely, charity, courage, and wisdom (Zagzebski, 2017, p. 96). These categories are undoubtedly important as exempla that one may aspire to emulate. However, it is critical to note that the kind of exempla that provide us with good models do not only include the great heroes, sages, and saints, but also ordinary persons. Ordinary heroes – that is to say, persons who have not done extraordinary things in an extraordinary way but that, nevertheless, have excelled at facing our most common problems and troubles and have an admirable understanding of the meaning of life and what matters to us – are critical to learning about basic features of ordinary moral experience. Similarly, in the context of law, we may learn not only from those judges who have faced important cases involving moral dilemmas, or who have worked in regimes – such as the Nazi regime or the apartheid in South Africa – which required them to face danger and fight great evils, but also from those judges that have to address far more routine cases and work under less exceptional circumstances.[15]

13 For discussion see Zagzebski, 2017, ch. 3; see also Markovits, 2012.

14 For a defence of the claim that there are irreducibly different kinds of moral exemplarity, see Blum, 1988. For a discussion of studies indicating that moral excellence may be exemplified in different ways, see Walker and Hennig, 2004.

15 The relevance of 'ordinary' exempla for the cultivation of judicial virtue is highlighted by Wigmore (1936). After describing the career of Ervoan Heloury Kermartin of Tréguier, in Brittany, later to be hailed as Saint Yves, patron saint of the judicial profession, he writes: 'he [Saint Yves] had pursued this career as an ordinary man, amidst the very same conditions that

Ordinary exempla are also of the utmost importance to theory development. Moral theory oftentimes focuses on the raw tensions involved in moral dilemmas just as legal theory is mostly preoccupied with the problems posed by hard cases that involve deep conflicts of values. However, our moral life – as much as the life of the law – is often conducted in the absence of severe conflicts, which is not to say that it does not pose, nevertheless, great moral challenges. Narratives and first-hand experience of ordinary heroes help us develop a theory of virtue, and, more specifically, of judicial virtue, that, instead of focusing on extremely difficult cases, has the resources to account for the whole of our experience, and provides guidance in the ordinary circumstances that characterize most of our daily life (Olberding, 2012, p. 10).

4.4 Partial and complete exempla

Exemplarity does not require the possession of all the virtues. Similarly, on an admiration account of exemplarity, exemplars need not be admirable to the highest degree in every trait (Zagzebski 2017, p. 65). Most exempla provide partial, rather than complete, models. Some exempla, nonetheless, possess an unusually large share of virtues; others are, however, exemplars of a certain virtue, but not exemplary all things considered. There is yet a further, related distinction, between 'moral paragons', who exemplify how to be a good person, and 'role models', who are domain-specific. But even if most legal exemplars (or exemplars, for that matter) fall short of completeness, they are still useful as models that are worthy of imitation, aids to legal theorizing, and vehicles for the development of the law. Furthermore, there seems to be evidence indicating that in order to be truly inspirational, a model should reflect behaviour that the apprentice considers attainable (see

surround any lawyer and any judge at any time in any country. Well may he be enshrined in our aspirations as an example of the ideal of Justice attainable in real life by a member of our profession!' Similarly, Burnett writes:

> No part of history is more instructive and delighting than the lives of great and worthy men [...] But the lives of heroes and princes are commonly filled with the account of the great things done by them, which do rather belong to a general rather than a particular history and do rather amuse the readers' fancy with a splendid shew of greatness, than offer him what is really useful to himself [...] But the lives of private men, though they seldom entertain the reader with such a variety of passages as the others do; yet certainly they offer him things that are more imitable, and do present wisdom and virtue to him not only in a fair idea, which is often looked on as a piece of the invention or fancy of the writer, but in such plain and familiar instances, as do both direct him better, and persuade him more.

See Burnett, 1805, pp. iii–v.

Moberg, 2000). This makes partial exempla (and ordinary folk, in contrast to the categories of the sage, the hero, and the saint) extremely valuable for modelling one's conduct.

4.5 Exempla and other normative ideals

As argued, exemplary judges possess the traits of character conducive to good legal decision-making to a higher degree than most judges; but they do not need to possess all the virtues, nor need they perfectly embody them. This sets exempla apart from other kinds of normative ideals that are farther removed from what is humanly attainable. Judge Hercules is a case in point. According to the version of exemplarism proposed here, Dworkin's Hercules would not be an exemplary judge. Unlike Hercules, exempla do not have any superhuman skill, ability, or trait of character. Hercules idealizes away from human conditions and capacities and this sheds serious doubts on whether it posits a normative standard that is relevant for us, i.e. a standard that is capable of guiding and improving judicial practice. In contrast, exemplars provide judges with a normative ideal that they may approximate. Exemplars are also to be distinguished from other normative ideals that, while attainable by flesh-and-blood judges, are nonetheless disembodied. The ideals of 'the virtuous person', the *spoudaios* ('the great'), or the *phronimos* ('the wise') are examples of normative ideals that arguably do not abstract away from human capabilities but lack the embodiment and concreteness of exemplars.[16] Exemplars, as I will argue below, are not merely instances of some abstract conception of virtue, but their power as tools for professional and personal development, theory development, and the evolution of culture is inextricably linked to their particularity. In all their richness, imperfection, and specificity, exempla provide us with models that are worthy of imitation. The next section examines what is involved in imitation and subjects the kind of exemplary reasoning that is at work in imitative reasoning to close scrutiny.

5 Imitation as character development

Imitation is a topic that has recently been the object of intense study in various disciplines, including neuroscience, psychology, animal behaviour,

16 For discussion of these ideals see Duke, 2013, and Russell, 2009, ch. 4.

computer science, education, anthropology, media studies, and philosophy.[17] We are thus witnessing a renewed interest in what was once a fundamental pillar of the study of rhetoric, music, and the arts, fading away as the modern urge for innovativeness took hold.[18] However, recent research has shown that imitation, far from being an undemanding cognitive task or an outmoded form of engaging in literary or artistic activities, is a rare ability, linked to characteristically human capacities like mindreading and understanding of language, and plays a critical role in cultural accumulation and evolution (Hurley and Chater, 2005 p. 14; see also Gerrans, 2013). It is also of fundamental importance in moral development and an essential aspect of mature empathy (Decety, 2011). What does imitation consist in? Two pathways to imitation may be distinguished: a 'low road' to the imitation of specific observed behaviour, which is wired into our cognitive equipment and has a neurological basis, and a 'high road', mediated by the activation of personality traits and social stereotypes and leading observers to assimilate their behaviour to general patterns of observed behaviour (Dijksterhuis, 2005, pp. 207–221). This imitative influence may be automatic as well as deliberate, in that it results from the conscious selection of models of behaviour. I will be concerned here with deliberate imitation only, as a kind of imitation that is most directly relevant to legal theory and legal practice.

Now, how does such imitation proceed? Imitation can hardly be viewed as an automatic process whereby one mimics the exemplar's behaviour; rather, it is a reason-guided activity. A common approach to imitation views 'analogy' as the method of imitation and, thus, imitative reasoning as a form of analogical reasoning. In this view, paradigmatic characters provide the basis for the following kind of argument:

> One should emulate *P*.
> *P* did *x* in situation *y*.
> A situation similar to *y* obtains.
> Therefore, one should do *x*.[19]

Understanding imitation as a form of analogical reasoning brings to light the extent to which the process of emulation involves the exercise of reason.

17 For a useful introduction see Hurley and Chater, 2005.

18 See Frow, 2009, discussing the transition from a 'classical regime', valuing imitation, to a 'modern regime', built on the model of proprietary authorship.

19 See Tan, 2005, p. 414; see also Keith McGreggor, 'Imitation as Analogy' (unpublished manuscript).

However, there are several problems with this account of what is involved in imitation. First, according to this account, the identification of one's situation as similar to the situation faced by the exemplar functions as a premise from which to derive the conclusion that one ought to do as the exemplar did. However, the identification of relevant similarities between situations already presupposes a kind of moral sensitivity that is distinctive of those who are worthy of imitation. Thus, it is not as if one draws an analogy and then imitates, but one needs to possess already some degree of virtue in order to be able to draw the relevant analogies between the situation faced by the exemplar and one's own situation.

Second, this account establishes that imitation results in a person doing just as the model did. But this is a poor conception of what is involved in the process of emulation. Imitation, when successful, leads to developing the kind of moral and intellectual autonomy that is characteristic of exemplary persons. Imitation does not amount to a mindless repetition of the exemplar's behaviour.[20] The point of emulation is not to get the young or the student to do as the master does, but rather to develop in them the features of character, such as the capacity to form one's own views and act accordingly, we find admirable. It is not petty fidelity to the master's ways that one seeks in emulation, but rather, the acquisition of those traits of character that make the master worthy of imitation.

Finally, there is an additional reason why it may not be the case that one should do as *P* did: the space of possibility available to the exemplar might be very different from the possibilities we have. Maybe *P* did *x* because that was, back then, the best possibility available, but had he faced such situation now, he would have acted differently. Not only may the possibilities differ, but also the historical circumstances might differ dramatically. Exempla are particular individuals living in concrete situations and, like any other human being, they cannot escape having specific shortcomings and limitations. Thus, imitation cannot merely be a matter of doing now what the exemplar did before, for virtue might require that we act otherwise under current circumstances. This, however, rather than detracting from the value of exempla, shows their normative power. We might disagree about what exemplary persons did in the past, or the decisions they took, but we still admire the way they faced the situations they faced and we learn about how to act and decide in our current circumstances by looking at the way they behaved and decided in the past.

20 Just as habituation – the other major way of inculcating virtue – is not a mindless process either: see Sorabji, 1980 and Sherman, 1989, pp. 157–201.

Hence, a more complicated picture of the process of imitation than the description provided by the foregoing argument is required. Several dimensions to successful emulation need to be taken into account. First, the emulation of paradigmatic characters has an important emotional aspect: for such emulation to be more than a superficial imitation of external behaviour, it is necessary to emulate the emotional reaction of others as well.[21] One needs to be able to learn not only about what others did, but also about the way they felt about the situations. Virtue, as Aristotle already said, is a matter of both action and feeling. Thus, successful imitation requires that one understands how the exemplar acted and felt in a situation in order to be able to virtuously respond to a different set of circumstances.

Second, imitation critically involves the exercise of imagination.[22] The imaginative participation in the exemplar's ethical experience is necessary for successful emulation. One needs to be able to put oneself in the situation of the paradigmatic character in order to understand how the exemplar acted the way she did, what purposes she had in mind, what her attitudes and feelings were, and what she was responding to. Only after has one gained an adequate understanding of the exemplar's behaviour is one able to grasp what virtue requires in new circumstances. Thus, imagination is central to fully comprehending paradigmatic characters and extending that understanding into practice.

Third, imitation, when successful, results in a transformation of oneself (Tan, 2005, p. 419). One imitates with a view to becoming a sort of person like the model. Through the process of emulation one learns to see things the way the virtuous person sees them. That is to say, one acquires the kind of sensibility that is characteristic of the exemplars. When one succeeds at emulating the exemplar, one makes the exemplar's way of seeing things one's own.

In short, successful imitation results in developing a kind of character that is worthy of admiration. This transformation of the self, it might be argued, is not open to all. Most people cannot become anything like the exemplars they admire (Blum, 1988, pp. 215–216). To start with, virtue is dependent on various sorts of circumstances, as debates over 'moral luck' have shown. In addition, it just does not seem to be within our power to bring about in ourselves the psychological structure constituting moral

21 For a discussion of the emotional aspects of emulating paradigmatic characters see Tan, 2005, pp. 420–423.

22 For an argument to the effect that imagination is central for successful imitation see Tan, 2005, pp. 417–419.

excellence (Zagzebski, 2006, p. 136, and Blum, 1988, p. 216). I will not take a stand on these issues, although I do find Mencius' claim that 'the sage and ordinary mortals are of a similar kind' (Tan, 2005, p. 414) much more persuasive than views that make excellence the province of a few, thereby making morality inaccessible and thus cutting it off from the will of ordinary persons. But the important point is that – debates over whether excellence can be accomplished by all human beings notwithstanding – we can all surely be better than we are. Even if it turns out that not every judge can become an exemplary one, they can all come to possess some virtues in a greater degree than they now do, regardless of the circumstances they are in. Exemplars help judges improve by providing ideals which – unlike other normative ideals – they can, at least, approximate.[23]

6 The role of exemplary judges in law

Imitation of exemplars, as a venue for character formation, may play an important role in legal theory and has also important practical consequences. Exemplars of judicial virtue perform three main roles in legal education, legal reasoning, and the development of the law.

6.1 Education and imitation

The imitation of exempla is widely regarded as a means to education in the history of Western education indeed (Warnick, 2008, p. 2). Interestingly, it also has a prominent place in non-Western thought. In the Confucian tradition, emulation is not merely one way of moral education, but is considered to be by far the most efficient way (Olberding, 2012, p. 10). The imitation of exempla has been, and still is, regarded as a main educational tool in a variety of domains. Similarly, in law, exempla are critical to the professional development of judges. Exemplary judges are instrumental to instilling virtues in the judiciary by serving as models that they may imitate. As argued, the array of models that can be put at the service of education is quite broad and includes not only positive exempla but also negative, real

23 An interesting objection to this line of thought – which I cannot consider here – sheds doubts over whether it would be a good thing that ordinary judges emulate exemplary ones. In this view, while exemplary persons might well be able to do extraordinary things, non-exemplary persons may better stick to the rules, as the consequences of attempts at exemplary conduct by non-exemplary persons may be disastrous.

and fictional exempla, supererogatory categories such as saints, heroes and sages, but also more down-to-earth, less than perfectly virtuous persons, who are nonetheless role models or exemplars in some specific aspects or that excel in some domain.

The educational potential of exempla imitation has some important implications for legal education and judicial training. If imitation of exempla is an important vehicle for legal education, then it seems necessary to structure legal education and, more specifically, the judicial career, in a way that provides ample opportunities to know about, learn from, and become acquainted with those who in the past and present, in real life or in fiction, have a large share of the virtues that we take to be critical to good legal practice.

6.2 Theorizing about excellence in adjudication

Exemplars play important roles in the development of legal theory, more specifically, they are important tools for theorizing about virtuous adjudication. Exemplary judges thus do not merely illustrate the judicial virtues, but they are also at the root of our conception of judicial virtue. Exempla do not simply 'represent traits of character in our imagination' but are rather 'the vessels through which we construct those traits' (Clark, 2012, p. 88). In other words, exemplars do not just embody a prior, abstract conception of virtue, but also contribute to fleshing out what judicial virtue consists in in the first place and what virtuous judicial practice looks like.

Exemplars aid the task of theorizing about excellence in adjudication in several ways. They help us refine and revise our conception of judicial virtue. We may, in light of what we learn about exemplary judges, come to improve upon our views of what the best judicial practice consists of. Judgments about exemplary judges also provide us with a test against which one may evaluate theories of adjudication (Zagzebski, 2004, p. 41). Theories about how judges should decide should fit judgments about the identity of paradigmatically good judges. Of course, such judgments are, like any other particular judgment, revisable in light of theoretical reasons. But it does tell against a theory about how judges should decide that it has the consequence that exemplary judges are not paradigmatically good judges when assessed by the theory's standards.

In addition, reflection upon exemplary judges raises a number of questions that importantly broaden the aims of inquiry (Olberding, 2012, p. 188). For example, what distinguishes the exemplars' responses from the responses of others? What conditions are necessary for being a good

judge? Which are sufficient? What is it that we admire in great judges? A careful examination of exemplars may yield insight into larger theoretical questions about how judges should decide. Another way in which the study of exemplars may advance a theory of judicial virtue or excellence in judging is by revealing connections between the virtues, especially between the moral and epistemic virtues, as well as by providing a test for the 'unity of the virtues' thesis (Zagzebski, 2017, p. 119).

Finally, exemplars help us enrich our conception of the virtues (Clark, 2012; see also Olberding, 2008, pp. 631 and 635). Virtues are often illustrated by a limited set of traditional exemplars and this leads to a more impoverished and less sophisticated picture of what excellence in judging amounts to. For instance, the virtue of practical wisdom is traditionally associated with Solomon. As a result, we come to see this virtue as endowing its possessor with the kind of imaginativeness and resolution we expect in good judges, but also as tied up with a view of adjudication that is in severe tension with the demands of the rule of law. The analysis of an enlarged canon of relevant models may lead to constructing more refined versions of the virtues.[24] In sum, while we can certainly engage in an abstract description of the virtues of judging, reflection upon exemplars contributes in a number of ways to developing a more subtle and complex account of excellence in adjudication.

6.3 The evolution of legal culture

Imitation, through the so-called 'ratchet effect', has been claimed to be the mechanism that drives cultural and technological transmission, accumulation, and evolution (Tomasello, 1999, and Tennie et al., 2009). Imitation helps transmit with a very high degree of fidelity through generations insights about how to achieve goals that could hardly be rediscovered through trial-and-error learning. Imitation not only helps preserve cultural artefacts that would otherwise be lost but also spreads these discoveries, which form a platform for future developments. The unique evolution of human culture is thus characterized by a 'ratchet effect' in which 'modifications and improvements stay in the population fairly readily (with little loss or backward slippage) until further changes ratchet things up' (Tennie et al., 2009, p. 245). This process relies both on inventiveness and faithful transmission, but while inventiveness is quite widespread among primates,

24 Another role – only available to foundational exemplarism – is to avoid circularity in theory by providing a foundation for the theory: see Zagzebski, 2004, pp. 45–46.

humans transmit cultural items with a much higher degree of fidelity. Thus, it is the faithful transmission (the ratchet) that explains why human culture is cumulative in a way in which (other) animal cultures are not. This difference is explained by the fact that imitation in humans, unlike imitation in other, non-human animals is process-oriented, rather than outcome-oriented. Such imitation is, in this view, the key to a unique form of social learning and accounts – alongside distinctive forms of cooperation that lead to active teaching, social motivations for conformity and normative sanctions against non-conformity – for humanity's unique form of cumulative cultural evolution.

These theses about the importance of imitation, as a distinctively human form of social learning, for the evolution of human culture hint at the relevance of imitation for the development of legal culture as well. Imitation of experts has been claimed to be 'a reliable way to learn how to use tools, make fishing nets, hunt, play music, pronounce words, or reproduce stories' (Gerrans, 2013, p. 21). Similarly, the imitation of exemplary judges, of experts at judging, seems a safe way to go about learning how to behave, think, reason, and act in an adjudicative setting. Legal culture, as much as human culture in general, may rightly depend to a large extent on the degree to which patterns of reasoning, thought, and action are transmitted across generations through processes of imitation. Imitation in law, as much as in art, music, or culture, is coupled with creation and inventiveness. It is the medium through which legal culture is inherited and by which the law cumulatively evolves and is improved.

7 Conclusions

In this chapter, I have defended the value of (agent-)exemplars for legal theory and legal practice. Exemplars provide us with models that are worthy of imitation. Such emulation, however, cannot be adequately explained as involving a kind of analogical argument. Imitative reasoning is a subclass of exemplary reasoning that cannot be reduced to analogical reasoning. Successful emulation involves a transformation of the self and, is, at bottom, a critical avenue for character development. Exemplary judges are virtuous judges, i.e. judges who possess and display the judicial virtues. This virtue account of exemplarity is, as argued, comprehensive enough to encompass diverse models of exemplarity and is responsive to the different kinds of exemplars that inspire us to thrive and help us to improve.

Exemplars of judicial virtue play three main roles: they contribute to legal education by helping to instil the virtues in the judiciary, they are important tools for theorizing about excellence in adjudication, and they are critical to the evolution of legal culture. These roles, however, do not exhaust the potential contributions of exemplarity to legal theory. The study of exemplarity might arguably shed light on some core debates in current legal theory, such as the problem of disagreement, the nature of authority, and discussions over generalism vs. particularism in law.[25] Thus it is necessary to recognize the imitation of exempla as a major topic in legal theory and legal practice, important as it is in other disciplines as well.

About the author

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25 Thanks to Damiano Canale for pointing out that there is an important connection between exemplarity and authority.

2. Indefeasible analogical argument

Scott Brewer

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Abstract
A too common view of analogical arguments in law and in other domains holds that they necessarily lack the force of valid deductive argument and thus, by definition, that they are defeasible forms of argument. Against this it is argued here that, properly understood, some analogical arguments, including analogical arguments in law, do have the force of valid deductive arguments, and that these arguments are indefeasible. Paradigms of such supposedly indefeasible arguments are an important part of this discussion.

Keywords: indefeasible analogical argument, deductivism, heuristics

1 The issue: are all analogical arguments defeasible?

1.1 Deductivist and anti-deductivist accounts of analogical argument

Among philosophers, legal theorists, cognitive psychologists, and AI theorists, a very common, almost universally accepted view of analogical arguments is that such arguments cannot have the epistemic force of valid deductive arguments.[1] I shall refer to this as the 'anti-deductivist' explanation of analogical argument. And I shall refer to explanations according to which is it *possible* for an analogical argument to have the

1 My view of the relation between the *form* of an argument (deductive, non-deductive, analogical, etc.) and its epistemic force arises from my understanding of the nature of the enterprise of logic, on which see more extensively the next footnote. See also Skyrms, 1966, p. 4: 'Logic is the study of the strength of the evidential link between the premises and conclusions of arguments.'

force of deductive argument as 'deductivist'.[2] Since only valid deductive arguments are *in*defeasible, according to the anti-deductivist explanation, all analogical arguments are defeasible.

I defend a deductivist explanation in this chapter, as I have done elsewhere.[3] It is important to be clear about the precise scope of the claim advanced regarding argument by analogy. It is not the claim that all instances (tokens) of argument by analogy have the epistemic force of deduction. Instead, it is the claim that some instances of analogical argument have the epistemic force of deduction, and thus are indefeasible. Considerations of pragmatics determine whether a particular enthymeme is best interpreted as an analogical argument (or as one of the other four modes of logical inference), and if so, whether it is best interpreted as having the epistemic force of deduction. I shall illustrate and further articulate this point later in this chapter. My *abductive*, explanatory task is to show how it is possible for analogical arguments to have the force of deductive arguments.[4]

2 It is important to recognize that competing explanations of analogical argument, such as the deductivist and anti-deductivist explanations, are indeed *explanations*, for this characterization reminds us that the account we give of the structure and properties of analogical argument is the product of *abduction*, of *inference to the best explanation* (as is common, I regard these terms as synonyms). At this point I should define a few terms in order to make an observation about what we do when we offer explanations of analogical argument. I take 'logic' to be study of the different modes of logical inference that different kinds of arguments display: see also Skyrms, 1966. An argument's *mode of logical inference* (or, synonymously, its *logical form*) is *the evidential relation between the argument's premises and its conclusion*. In accord with this conception of logic, I maintain that an argument's logical form is the evidential relation between the argument's premises and its conclusion(s). For discussion, see Brewer, 2011. For reasons I shall not offer here, I believe that there are exactly four irreducible modes of logical inference: deduction, induction, analogy, and abduction. An *explanation* of the structure of any of these four modes of inference, including analogy, can be achieved only by means of *abduction*. (When one uses abduction to explain abduction, one engages in meta-abduction.) For this reason and in this way, abduction is *prima inter pares* among the four modes of logical inference.

3 See Brewer, 1996. What I consider an importantly mistaken view of analogy largely persists and I here renew the effort on this particular point.

4 On this very common form of *philosophical abduction*, there is no better discussion than that offered by Nozick (1981, pp. 8–10):

> Many philosophical problems are ones of understanding how something is or can be possible. [...] How is it possible that we know anything, given the facts the skeptic enumerates [...] The form of these questions is, how is one thing possible, given certain other things? Some statements $r_1, \ldots, r_n$ are assumed or accepted or taken for granted, and there is a tension between them and some other statement *p*; they appear to exclude *p*'s holding true. Let us term the r_i apparent excluders (of *p*). Since the statement *p* is also accepted as true, we face the question of how *p* is possible, given its apparent excluders. [...] The strongest mode of apparent exclusion would be logical incompatibility: the apparent excluders, in conjunction, logically (appear to) imply that *p* is false. [...] To rebut an argument for not-*p* from specific

A small sample of conceptions may suffice to identify the 'anti-deductivist' view of analogical argument that I shall challenge in this chapter. Hospers (1967, p. 476) asserts that '[i]t will be apparent at once that an argument from analogy is never conclusive.' Regarding reasoning from precedent, which, as he recognizes, (often) involves reasoning by analogy, Golding (2001 [1984], p. 103) asserts that no reasoning from precedent is deductive, and that if there were such a thing as deductive reasoning from precedent, it would be 'strictly speaking, no argument by analogy at all'. Rissland and Ashley state that, unlike reasoning in mathematics, which does not rely on cases, analogical reasoning is based on cases and thus is not deductive.[5] Holyoak and Thagard (1995, p. 30) argue that:

> The basic device for generating inferences by analogy is called 'copying with substitution', because it essentially consists of simply copying over propositions known to be true of the source to become inferences about the target [...] Inferences made by analogy using copying with substitution are never guaranteed to be true. The point to remember is that analogy is a source of plausible conjectures, not guaranteed conclusions.

And Fried maintains that

> [a]nalogy and precedent are the stuff of the law because they are the only form of reasoning left to the law when general philosophical structures and deductive reasoning give out, overwhelmed by the mass of particular details. Analogy is the application of a trained, disciplined intuition where the manifold of particulars is too extensive to allow our minds to work on it deductively.[6]

1.2 Prakken's version of anti-deductivism: anti-inferentialism

Prakken offers an anti-deductivist view of analogy, but one that is quite different from most others. Because there is so much overlap between his explanation of analogy (his abduction of the structure of analogy)[7] and

apparent excluders removes a reason for thinking *p* cannot hold, and so counts as a kind of explanation of how *p* is possible.

5 Rissland and Ashley, 1989, p. 67 ('in mathematics one does not justify a conclusion by citing cases but rather through the methods of logical inference').

6 Fried, 1981, p. 57 (footnote omitted).

7 See note 4 on the relation between abduction and explanations of the structure of analogy.

my own, a close comparison and contrast of his and my theories will help me explain the deductivist position I endorse.

Central to Prakken's explanation of analogy is the familiar distinction between a 'context of discovery' and a 'context of justification'. Cleaving to that distinction, he characterizes logic as 'essentially a matter of *justifying* a solution to a problem given a set of premises, in whatever way the solution has been obtained and the premises have been selected'.[8] On this view of logic, 'a mode of reasoning has (given the premises) a justifying force only if the conclusion is somehow based on the way it has been derived – that is, if it is based on the *form* of the mode of reasoning'.[9] Next, Prakken argues that analogies have whatever value they do, not by virtue of their form but only by virtue of their content. Since – on his view, as noted – justification in an argument must be a matter of form, analogies cannot do the work of justification. Instead, their value lies in the contribution they make to discovery:

> [A]nalogical reasoning is a formal way of *suggesting* additional premises if in a particular case the rules 'run out', without providing any conclusive reason to accept the suggested premise. Analogical reasoning is not an inference mode but a heuristic principle for trying to find additional information and as such it is an aspect of the context of discovery of problem solving [...][10]

Prakken offers an example to illuminate and illustrate his view of analogical reasoning, one in which the comparison (the search for relevant similarity that is characteristic of analogical reasoning) is between a case and a prior statutory rule from Dutch civil law. According to the statutory provision, the selling of a house does not terminate an existing lease. The question presented to the legal reasoner was whether donating instead of selling the house would also preserve (not terminate) an existing lease. Informally, we might say (Prakken does not put it exactly this way) that the question for the reasoner is whether donating a house is *relevantly similar* to selling a house for the purpose of the statutory provision whose explicit terms preserve a lease in the case of sale. As Prakken (1997, p. 27) presents it, donating was indeed found to be relevantly similar to selling for

8 Prakken, 1997, p. 28 (emphasis original).
9 Prakken, 1997, p. 28 (emphasis original).
10 Prakken, 1997, pp. 28-29 (emphasis original).

the purpose of this provision, because both donating and selling involved *transferring property*:

> [T]he way in which in Dutch law the analogy was justified was first observing that selling and donating are both instances of the more general legal concept 'transferring property' and then by arguing that [the statutory provision] is based on the principle that transferring property does not terminate an existing lease contract [...]

Prakken observes that this analogy requires a rule to determine whether the two analogized items (selling a house and donating a house) are relevantly similar. Indeed, he maintains that all analogies require such rules:

> This example shows that what is important in an analogy is that the two cases which are matched are both instances of a more general *rule* or principle from which the desired conclusion in both cases can be derived [...][11]

He notes that if the rule had been known before the reasoning task was to be performed, it could simply have been applied deductively,[12] and that what makes the case of analogy interesting is that the knowledge system 'has to construct such a rule in a non-deductive but formally defined way from certain knowledge-based items' (Prakken, 1997, pp. 27–28). He regards this construction as a matter of the 'logic of discovery', not the logic of justification (which is the domain of 'logical inference' such as deduction), and thus on his view analogical reasoning is not 'logical inference' at all but is rather 'a formal way of *suggesting* additional premises if in a particular case the rules "run out", *without providing any conclusive reason to accept the suggested premise*' (Prakken, 1997, pp. 28–29).

There is much to commend in this explanation of analogy, especially what is in my view its correct emphasis on the role that rules play in the process of analogical reasoning. My account of analogy also emphasizes the importance of the role of rules in analogical reasoning. I also regard as importantly correct his emphasis on the role of discovery in the process

11 Prakken, 1997, p. 27.

12 Prakken does not use the term 'deductively', but that clearly seems to be what he refers to by the phrase 'logical inference'. See Prakken, 1997, p. 27 ('If such a rule is already present in the knowledge base, then, of course, the system can apply this rule, which is simply *logical inference*'; emphasis added).

of analogical reasoning. Unlike Prakken, however, I regard analogical reasoning as a type of *logical inference*, along with induction, deduction, and abduction.[13] Moreover, although Prakken's view is unusual among what I've called 'anti-deductivist' explanations of analogy, like other anti-deductivists (unlike Prakken, his fellow anti-deductivists regard analogical reasoning as a type of *justification*), he clearly believes that analogical reasoning can never have the force of deduction (see Prakken, 1997, p. 27). By contrast, on my deductivist explanation of analogy, it is possible for analogical arguments – one of four modes of logical inference – to have the force of deduction. Before explaining why I believe this is so, I shall briefly summarize my own account of analogy.[14] Because I have offered this account in detail elsewhere, I will present my summary in schematic form.

2 The logic of exemplary reasoning

2.1 Summary of features of analogical argument

1 Analogical arguments always involve a comparison of two or more selected items – it can be many more than two – 'target' items, on the one hand, and 'source' items, on the other.
2 In every analogical argument there is also an *inferred characteristic* – a characteristic known to be possessed by the source of the analogical argument, but not, at the outset of the analogy, known to be possessed by the target. Analogical argument serves the purpose of enabling the reasoner to discern whether the possession of some characteristics known to be shared by the source and the target *rationally warrant the inference* that the target also possesses the inferred characteristic that the source is known to have.
3 Reconstructing any enthymematic argument, including analogical arguments, requires a *fair interpretation* of the text in which the argument is presented (judicial decision, lawyer's brief, etc.).
4 Analogical arguments always involve picking *shared characteristics* in the source(s) and the target that are judged to be rationally relevant to possession of the inferred characteristic.

13 I've reported this view above, see note 2, with a brief explanation of what I understand the discipline of *logic* to be.

14 My view – still my view – is presented in detail in Brewer, 1996.

5 Discerning the pattern of shared characteristics between source(s) and targets that are rationally relevant to the possession of the inferred characteristic involves abduction within the multi-step process of analogical argument.
6 The basic pattern is always this: on the basis of some shared relevant characteristics, one infers that the 'target' item has an additional characteristic that the source item is known to have.
7 There is always an implicit rule guiding the inference to inferred characteristics from relevant shared characteristics – this is the 'analogy-warranting rule'.
8 There must always be a justification of this rule (an 'analogy-warranting rationale') if the analogy is to be successful. The importance of the analogy-warranting rationale cannot be overemphasized, for the following reasons:
   (a) Any two items (source and target of an analogical argument, and indeed any two pairs of items in the universe) are alike in an infinite number of ways.
   (b) Any two items (source and target of an analogical argument) are also unalike in an infinite number of ways.
   (c) Analogical arguments (and disanalogical arguments – on which more below) cannot be rationally compelling unless there is some explanation that justifies the analogy-warranting rule – that is, that provides a rational justification for the rule's assertion that possession of the shared characteristics in an item rationally warrants the inference to the conclusion that the item also possesses the inferred characteristic.

Note that in the argument template offered below, two possible patterns are offered for the analogy-warranting rule; what the actual rule (and thus what the logical structure of the rule) is in a given analogical argument depends, of course, on how the interpreter of an analogical argument interprets the *enthymematic* analogy (see Summary Point 3, above).

2.2 Structure of analogical argument

(1) x_1, x_2, x_3, ... have *F, G, H,* ... [sources have specific characteristics]
(2) *y* has *F, G, H,* ... [target has those same specific characteristics – thus, they are 'shared' characteristics]
(3) x_1, x_2, x_3 also have *N* [sources also have the inferred characteristic]
(4) Analogy-warranting rule:

[One option:] anything that has *F, G, H* also has *N* [anything that has the specified shared characteristics also has the inferred characteristic]
[Another option:] some things that have *F, G, H* also have *N* [some things that have the specified shared characteristics also have the inferred characteristic]

(5) Analogy-warranting rationale: states an explanatory justification for the analogy-warranting rule, specifically, for the assertion in the rule that possession of the characteristics shared by source and target rationally license the conclusion that the inferred characteristic is also present (see summary point 8, above).

(6) Therefore, *y* has *N* [conclusion: target has inferred characteristic]

2.3 Simple example of argument by analogy, contract clause

A contract for the sale of a farm includes language that specifies, 'This contract of sale includes all farm buildings, fields, and machinery as well as all cows, chickens, pigs, sheep, and other farm animals.' The farmer's dog is a pet that also sometimes acts as a shepherd. Is the farmer's dog included in this sale?

2.3.1 Analogical argument that the dog is included in the sale

(1) Cows, chickens, and pigs, are all income-producing animals on the farm [premise of the analogical argument stating that sources have specified characteristics]

(2) This dog (in its capacity as shepherd) is an income-producing animal on the farm [premise of the analogical argument stating that the target also has those same characteristics]

(3) Cows, chickens, and pigs are included in the contractual sale of the farm
[premise of the analogical argument stating that sources also have the inferred characteristic – the characteristic whose possession by the target is the problem to be solved, the question to be answered by analogical argument]

(4) Anything that is an income-producing animal on the farm is included in the contractual sale of the farm
[analogy-warranting rule]

(5) Trade usage governs this transaction, and trade usage indicates that the sale of an income-producing farm includes items reasonably related to the income-producing capacity of the farm [This is one possible example of an analogy-warranting rationale; some such rationale must

be supplied or fairly discernible, as a matter of interpretation, in order for this analogical argument to have rational force.]

(6) Therefore, the dog is included in the contractual sale of the farm [conclusion: target has inferred characteristic].

2.4 Argument by disanalogy and 'distinguishing as narrowing': summary of features of disanalogical argument

The pattern of disanalogical reasoning is similar (!) to the pattern for analogical reasoning, except that the basic argument is that, despite what might seem like similarities between source and target that are relevant to possession of the inferred characteristic, the absence of a characteristic in the target that is possessed by the source blocks the inference to the conclusion that the target also possesses the inferred characteristic.

1 Disanalogical arguments always involve a comparison of two or more selected items – it can be many more than two – 'target' items, on the one hand, and 'source' items, on the other.

2 Reconstructing any enthymematic argument, including disanalogical arguments, requires a *fair interpretation* of the text in which the argument is presented (judicial decision, lawyer's brief, etc.).

3 The typical motivation for a disanalogical argument is that certain characteristics of the source(s) and target are in some way salient enough to suggest the conclusion that the target has an additional characteristic (the inferred characteristic) that the source item is known to have.

4 The disanalogical argument asserts that, despite that appearance, the presence of those salient shared characteristics in both source(s) and target is *not* sufficient to warrant the conclusion that the target has the inferred characteristic, because there is an *unshared characteristic*, present in source but not in target, whose presence is necessary to warrant the inference of the presence of the inferred characteristic.

5 The basic pattern is always this: despite the presence of some shared relevant characteristics between source(s) and target, the presence of an unshared characteristic in source(s) but not in target blocks warrant of the inference of the presence of the inferred characteristic in the target.

6 There is always an implicit rule guiding the *blocking* of the inference from the presence of the shared characteristics to the presence of the inferred characteristic; this is the 'disanalogy-warranting rule'.

7 Because every source and every target (and any two pairs of items in the universe) are unalike in an infinite number of ways, if the disanalogical

argument is to have rational force, there must always be a justification of this rule (a 'disanalogy-warranting rationale') that explains the assertion in the disanalogy-warranting rule that possession of an unshared characteristic in the source but not in the target blocks the inference that the target also has the inferred characteristic.

2.5 Structure of disanalogical argument

(1) $x_1, x_2, x_3 \ldots$ have *F, G, H,* ... [source(s) have specified characteristics]
(2) *y* has *F, G, H,* ... [target has those same characteristics, hence they are 'shared' characteristics]
(3) x_1, x_2, x_3 ... also have not-*J* and not-*K* and not-*L* ... [source(s) have additional specified characteristics]
(4) *y* does *not* have not-*J* and not-*K* and not-*L* ... (i.e. *y* has *J* and *K* and *L* ...) [target does *not* have those additional specified characteristics possessed by the source(s), hence they are 'unshared' characteristics]
(5) x_1, x_2, x_3 also have *N* [source(s) have inferred characteristic]
(6) Disanalogy-warranting rule: all things that have *F* and *G* and *H* and not-*J* and not-*K* and not-*L* ... have *N*, but *F* and *G* and *H* ... are not, by themselves, sufficient for *N*
(7) Disanalogy-warranting rationale: provides an explanatory justification for the assertion, in the disanalogy-warranting rule, that possession of characteristics *F, G, H* in an item are *insufficient* rationally to warrant the inference that the item possesses the inferred characteristic
(8) Therefore, the presence of *F* and *G* and *H* ... in x_1, x_2, x_3 ... and in *y*, provides no rational basis for inferring the presence of *N* in *y* [conclusion: unwarranted to conclude that target has inferred characteristic].

2.6 With the contract clause example (see above)

A contract for the sale of a farm includes language that specifies, 'This contract of sale includes all farm buildings, fields, and machinery as well as all cows, chickens, pigs, sheep, and other farm animals.' The farmer's dog is a pet that also sometimes acts as a shepherd. Is the farmer's dog included in this sale?

2.6.1 Disanalogical argument that the dog is not included in the sale

(1) Cows, chickens, and pigs, are all income-producing animals on the farm [premise of the disanalogical argument stating that sources have specified characteristics]

(2) This dog (in its capacity as shepherd), is an income-producing animal on the farm [premise of the disanalogical argument stating that the target also has those same characteristics, hence 'shared' characteristics]
(3) Inclusion of the cows, chickens, and pigs in the sale of the farm was within the intent of the contracting parties [premise of the disanalogical argument stating that the sources have an additional specified characteristic]
(4) Inclusion of the dog in the sale of the farm was *not* within the intent of the contracting parties [premise of the disanalogical argument stating that the target does not possess that additional specified characteristic possessed by the sources, hence this is an 'unshared' characteristic]
(5) Cows, chickens, and pigs are included in the contractual sale of the farm [premise of the disanalogical argument stating that sources also have the inferred characteristic – the characteristic whose possession by the target is the problem to be solved, the question to be answered by disanalogical argument]
(6) Possession by an item of being an income-producing animal on the farm is not sufficient rationally to warrant the conclusion that the item is to be included in the sale of the farm, *unless* the item was intended by the parties to be included in the sale [disanalogy-warranting *rule*]
(7) When there is a reasonable question about the meaning of the term of a contract, the fairly discerned intent of the parties governs the transaction, and here the fairly discernible intent indicates that the dog was not intended to be included in the sale [This is one possible example of a disanalogy-warranting rationale; some such rationale must be supplied or fairly discernible, as a matter of interpretation, in order for this disanalogical argument to have rationale force.]
(8) Therefore, the dog is not included in the contractual sale of the farm [conclusion: target does not have inferred characteristic]

2.7 Prakken's example, explained in my scheme

Recall the example Prakken uses to illustrate his explanation of analogy, above. In my scheme:

Target ('*y*') = event in which a house was donated

Source ('*x*') = statutory rule according to which the sale of a house does not terminate an existing lease

Shared characteristic – F: involves the transfer of property

Inferred characteristic – H: does not terminate an existing lease

Argument:

(1) *x* has *F*
(2) *y* has *F*
(3) *x* also has *H*
(4) Analogy-warranting *rule*: any *F* is also *H*
(5) Analogy-warranting *rationale*: [?]
(6) Therefore, *y* has *H*

Analogy-warranting rationale: In order for this analogy to carry rational force, there must be an explanation that offers a justification for the analogy-warranting rule. In Prakken's report of the case it is not clear whether the court explicitly applied this analogy-warranting rationale. If they did not, that would substantially weaken the rational force of the analogy.

3 Indefeasible analogical arguments

I now turn to the task of presenting a simple but, I believe, compelling example of *indefeasible* analogical arguments. These (and many others are possible, within and outside the context of litigation) exemplify (!) the possibility of analogical arguments that have the rational force of deduction – the core of the 'deductivist' claim I argue in this chapter.

3.1 Validity, deduction, and defeasible argument

A defeasible argument from premises ε_1–ε_n to conclusion *h* is one in which it is possible that the addition of some premise(s), $\varepsilon_{n+1,}$ to ε_1–ε_n, can *undermine the degree of evidential warrant* that premises ε_1–ε_n provide for *h*.[15]

As this definition indicates, the only kind of argument that is *indefeasible* is a valid deductive argument. Even the addition of premises that are inconsistent with or contradictory to one or more of the original premises does not block the validity of the original argument. An argument is valid if and only if *whenever all the premises are true, the conclusion must be true*. By this definition, a set of premises that are inconsistent or contradictory cannot all be true, and thus the conclusion follows validly, almost as if by a trick of the definition of logical validity.

3.2 Indefeasible analogy, example: *Frigaliment Importing Co. v. B.N.S. Intern. Sales Corp.*, 190 F. Supp. 116 (D. N.Y., 1960)

This case involved contracts between plaintiff and defendant for sale of 'chicken'. The dispute arose because the buyer said that the term 'chicken' in the contracts referred to younger, tastier chicken, suitable for broiling and frying, and not to older, less tasty chicken suitable only for stewing. The facts of the case indicated the younger, tastier chicken came in two weights but at a higher price, while the older, less tasty chicken, came only at the heavier weight but at a lower price.

By their terms, the disputed contracts used the term 'chicken' but went on to stipulate what kind of chicken the parties wanted only by reference to weight and price; that is, the poorly drafted contracts did not precisely specify the terms for which the parties actually (or so they later claimed) intended to contract. Rather, they used only the underdeterminative proxies of weight and price. Each of the two contracts called for a certain quantity of heavier 'chicken' at a lower price per pound and a certain quantity of lighter 'chicken' at a higher price per pound. When the seller shipped both younger chicken and older chicken to fill the order the disappointed buyer sued, claiming the contract was for the sale of only the younger chicken.

15 For reasons I will not offer here, I rely on an epistemic conception of defeasibility, which focuses on the rationality of belief formation and revision, rather than a formal logical conception, which focuses on non-monotonic consequence relations. Of course, each conception has important consequences for the other.

In his analysis, Judge Friendly focused on rules of contract interpretation. Among the several interpretive arguments the plaintiff made to show that the term 'chicken' in the contract referred to only younger chicken suitable for broiling and frying was this one:

> Plaintiff says the [lighter] birds necessarily had to be younger chicken since the older birds do not come in that size, hence the [heavier] birds must likewise be young. This is unpersuasive – a contract for 'apples' of two different sizes could be filled with different kinds of apples even though only one species came in both sizes.[16]

This is an *indefeasible enthymematic analogical argument*, which can be fairly reconstructed as follows:

(1) Plaintiff's argument (regarding chicken) has the form: *if* an item of type *X* has characteristics *A* and *B*, but items of type *Y* have only characteristic *A*, *then* any specification of items only by reference to possession of characteristics *A* and *B* must refer to items of type *X* [target has a specified characteristic]

(2) An imagined argument (regarding apples) also has the form: *if* an item of type *X* has characteristics *A* and *B*, but items of type *Y* have only characteristic *A*, *then* any specification of items only by reference to possession of characteristics *A* and *B* must refer to items of type *X* [source also has that specified characteristic]

(3) *Inferred characteristic*: the source argument is invalid [source has an additional characteristic, the inferred characteristic that is the occasion for resorting to argument by analogy]

(4) *Analogy-warranting rule*: any argument that has the form *'if* (an item of type *X* has characteristics *A* and *B*, but items of type *Y* have only characteristic *A*) *then* (any specification of items only by reference to possession of characteristics *A* and *B* must refer to items of type *X*)' is invalid

(5) [The *analogy-warranting rationale*, a principle of deductive logic that says, any argument that has the same logical form as an invalid argument is itself invalid. This rationale is supplied, ultimately, by rules of metalogic, to which Judge Friendly defers, likely intuitively – compare the tacit knowledge of the rules of grammar by competent speakers of a language.]

(6) The plaintiff's argument is invalid [conclusion of the analogical argument]

16 *Frigaliment* 190 F. Supp. at 118.

4 How is indefeasible analogical argument possible?

Recall Prakken's central contention about reasoning by analogy, that it is not a type of inference, but is only a 'formal way of *suggesting* additional premises if in a particular case the rules "run out", without providing any conclusive reason to accept the suggested premise'.[17] My central claim in response to this is that, when one sees the operation of *abduction within* the multi-step process of argument by analogy, one sees that it does have *justificatory form*, even though it does also involve, as Prakken sees, an element of *discovery*. The discovery, by means of abduction, of the pattern expressed by an analogy-warranting rule (or disanalogy-warranting rule), as *justified* (as it must be) by an analogy-warranting *rationale* (or disanalogy-warranting rationale), can have the rational force of deductive inference, if the domain of argument is underwritten by rules of deductive logic.

Compare, for example, the following abduction: *explain* how it is possible for two pawns in chess to appear in the same row. It is possible if and only if one pawn has taken an opposing piece in that row. This is *abduction in a context of indefeasible argument*. On my account, there is always an abduction used to discern a pattern of similarities that are relevant to the presence of inferred characteristics (whether in analogical or disanalogical inference). When that abduction takes place in a context of indefeasible argument – as it did for Judge Friendly, as it does for explaining the genesis of a given chess position – then the analogy that is based on that abduction also has the force of indefeasible argument.

It is the presence of abduction within analogical argument – as one step in the multi-step process of analogical argument – that makes analogical argument a true form of argument, of *logical inference*. Prakken argues that reasoning by analogy is always a matter of only content, not of form, and for this reason such reasoning is not a logical inference at all. That analogy is entirely a matter of content is shown by the fact that if a match between two cases is imperfect, it is always possible to instead construct from exactly the same premises a rule for the opposite conclusion based on the *difference* between the two cases, and if this is indeed done, for example, by the opponent in a law suit, then a choice has to be made between the rules.[18]

This argument overlooks the vital role of analogy- and disanalogy-warranting rationales. Not all of them are believed by reasoners. Not every similarity between items in some respects is sufficient to warrant the

17 Prakken, 1997, pp. 28–29 (emphasis original).

18 Prakken, 1997, p. 28 (emphasis original).

conclusion that they are similar in a further respect. There are simply too many similarities (an infinite number) for this to be how analogical arguments work. And not every dissimilarity between two objects is sufficient to warrant the conclusion that they are dissimilar in some further respect. Again, there are simply too many dissimilarities (an infinite number) for this to be how disanalogical arguments work. The work of accepting and rejecting analogy- or disanalogy-warranting rules is done by the analogy- or disanalogy-warranting rationale, and not every such rationale is credible. And when the analogy- or disanalogy-warranting rationale is underwritten by *abduction in a context of indefeasible argument*, the resulting analogical or disanalogical argument is indefeasible.

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3. Is analogy a form of legal reasoning?

Bartosz Brożek

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Abstract
Three claims are defended here. First, there are no distinct basic operations in the process of the application of law, like balancing and analogy. Second, analogy has two stages: the purely heuristic stage, and the justification-transmitting stage, which can be identified with the process of balancing legal principles. Thus analogy is shown to be partly reducible to balancing. Third, two competing views of analogy – rule-based and factual – are refuted.

Keywords: balancing, partial reducibility, heuristics, transmission of justification

1 Neither two nor three

In a recently published paper Robert Alexy argues that there are three basic operations in the application of law: subsumption, balancing, and analogy; this division corresponds to the distinction between three basic elements of any legal system – rules, principles, and cases (see Alexy, 2010).[1]

Alexy's original formulation of the 'scheme of analogy' is the following (2005, p. 65):

> A1: In every case c_i, each case c_j may be adduced with the argument that c_i shares with c_j the features $F_1, \ldots, F_m$, and that c_i, for that reason and because the rule $F_1, \ldots, F_m \rightarrow Q$ is valid, ought to be treated, as c_j, to the effect that Q.

1 Alexy's analysis originated from a discussion concerning his view of analogy presented in an earlier paper: see Alexy, 2005.

> A2: In every case in which an argument of the form A1 is put forward, it may be claimed that c_i is distinguished by the features F_n, ..., F_z from c_j, and that c_i, for that reason and because the rule F_n, ..., $F_z \rightarrow \neg Q$ is valid, ought not, in contradistinction to c_j, to be treated to the effect that Q.

The main objection against this formulation is that if both cases, c_i and c_j, can be characterized by the features F_1, ..., F_m and there is a valid legal rule F_1, ..., $F_m \rightarrow Q$, then the rule applies directly and explicitly to both cases. In other words, there is no need for analogical reasoning here, as we are not in a situation in which there is a case for which there exists no relevant legal rule. The second objection is that Alexy's formulation of the analogy scheme provides no mechanism with which to handle a situation in which there is more than one case similar to the one at hand.[2]

Alexy recognizes this and reformulates his proposal regarding the 'scheme of analogy', by introducing two novelties; first, he replaces the clauses 'because the rule F_1, ..., $F_m \rightarrow Q$ is valid' with 'because there are reasons for the rule F_1, ..., $F_m \rightarrow Q$'; secondly, he enriches his account of analogy with a 'dialectical' reference to two analogical cases, which give rise to conflicting conclusions for the case at hand:

> A1: In every case c_i, each case c_j may be adduced with the argument that c_i shares with c_j the features F_1, ..., F_f, and that c_i, for that reason and because there are reasons for the rule F_1, ..., $F_f \rightarrow Q$, ought to be treated, as c_j, to the effect that Q.A2: In each case in which an argument of the form A1 is put forward, two counter-claims may be raised:
> A2.1: It may be claimed that c_i is distinguished by the features F_g, ..., F_m from c_j, and that c_i, for that reason and because there are reasons for the rule F_g, ..., $F_m \rightarrow \neg Q$, ought to be treated, in contradistinction to c_j, to the effect that $\neg Q$.
> A2.2: It may be claimed that c_i shares with c_k the features F_n, ..., F_z, and that c_i, for that reason and because there are reasons for the rule F_n, ..., $F_z \rightarrow \neg Q$, ought to be treated, as c_k, to the effect that $\neg Q$.

As I have pointed out, this analysis leads Alexy to the formulation of a more abstract claim, namely that there are three basic operations in the process of the application of law: subsumption, balancing, and analogy. Let us recall that – for Alexy – the difference between rules and principles

2 See my criticism in Brożek, 2007, pp. 154–157.

lies at the level of adjudication. Rules are applied *via* subsumption,[3] which is (in its most basic form):

(1) O$\forall x$ (T$x \rightarrow$ ORx)
(2) Ta
(3) Ora,

where T stands for the circumstances of the case, R stands for legal consequences, while O is the deontic operator 'It ought be the case that …'.

When there is a conflict of two legal rules, one of them has to be deemed invalid, according to such standards as, for instance, *lex superior derogat legi inferiori*. A conflict of principles, on the other hand, is handled through the process of balancing. When we have a case in which two principles lead to incompatible outcomes, we weigh them according to what Alexy calls the Weight Formula:

$$\text{(WF)} \qquad W_{i,j} = \frac{I_i \cdot W_i \cdot R_i}{I_j \cdot W_j \cdot R_j},$$

where $W_{i,j}$ stands for the concrete weight of the principle P_i relative to the principle P_j, i.e. relative to the case at hand; I_i stands for the intensity of interference of P_j with P_i; W_i stands for the abstract weight of the principle P_i, i.e. irrespective of any circumstances; finally, R_i stands for 'the reliability of the empirical assumptions concerning what the measure in question means for the non-realization of P_i and the realization of P_j under the circumstances of the concrete case' (and analogically for I_j, W_j, and R_j) (Alexy, 2003, p. 446). The principle that has a greater weight prevails in the concrete case over the other principle. To complete the picture of the process of balancing principles, the Law of Competing Principles must be added (Alexy, 2002, p. 54):

> (LCP) The circumstances under which one principle takes precedence over another constitute the conditions of a rule which has the same legal consequences as the principle taking precedence.

Now, we can point out where the differences between rules and principles lie. Conflicts of rules can be resolved in an abstract way, irrespective, that

3 The situation is, in fact, more complicated as conflicts may arise between a rule and a principle. See Brożek, 2007, ch. 3.

is, of the given case. Conflicts between principles, on the other hand, are always resolved relative to a particular case, and 'the outweighed principle may itself outweigh the other principle in certain circumstances'. In other words, 'conflicts of rules are played out at the level of validity; since only valid principles can compete, competitions between principles are played out in the dimension of weight instead' (Alexy, 2002, p. 50).

Within the above-described context, Alexy argues that subsumption, balancing, and analogy are the three basic operations in the process of the application of law. His argument runs as follows. He claims that any such basic operation must meet three conditions: it must be formal, necessary, and specific. For instance, in the case of subsumption, he says that it 'has three distinctive characteristics that qualify it as a basic scheme. It is formal, necessary, and specific. Its specific character stems from the fact that it unfolds according to a specific kind of rule, in this case the rules of logic. It is, second, necessary, because it must be employed, in one version or another, in all cases in which legal rules are to be applied, and, third, it is completely formal' (Alexy, 2010, p. 10).

Let us consider, in turn, all three of Alexy's criteria for identifying the basic operations in the application of law. As for specificity, Alexy connects it to working with a 'specific kind of rule' (a rule of logic in the case of subsumption, a rule of arithmetic in the case of balancing). The strangeness of the latter claim notwithstanding (I will return to this issue later), this formulation involves a *petitio principii*: a certain kind of reasoning is specific if it follows a specific kind of rule. In order to break the circle one would need to indicate what is specific about 'the rule of subsumption'. From the logical point of view, it is *modus ponens* or some extension thereof; if it were to be deemed 'specific', any logically valid scheme of inference would also count as 'specific'; add to it that there are infinitely many of them, and so there would be infinitely many 'specific' modes of reasoning. This cannot be the notion of specificity Alexy has in mind.

The only reasonable way of dealing with the specificity criterion is to define it in a different way. A good candidate is the following definition: a rule of reasoning may be deemed specific if it is *dedicated* to solving some particular class of problems only, i.e. it is *not applicable beyond the class* (e.g. it is utilized in the process of applying legal rules only, or exclusively for solving moral dilemmas, etc.).

The obvious problem with this condition is the vagueness of the term 'particular kind or class of problems'; however, even if one assumed that such classes are sharply definable, it is easy to see that subsumption is not specific in the above-defined sense as *modus ponens* is used also beyond

the context of applying legal rules. The same holds for balancing; when we consider the algebraic formula:

$$\text{(WF)} \qquad W_{i,j} = \frac{I_i \cdot W_i \cdot R_i}{I_j \cdot W_j \cdot R_j},$$

which is not 'interpreted' (i.e. the symbols I_i, W_i, etc., are not defined as standing for the intensity of interference of P_j with P_i, the abstract weight of the principle P_i, etc.), this is just an equation which may be true in an infinite number of domains. On the other hand, when one considers the formula as 'interpreted' – i.e. as expressing some relationship between some parameters describing legal principles – it is no longer formal, as the 'interpretation' in question is not interpretation in the logical sense of the word. This fact uncovers a certain *tension* between the specificity criterion and the formal criterion: if a scheme of reasoning is to count as formal it is difficult to see how it can be dedicated to solving one particular kind of problem.

Finally, Alexy claims that the specific character of the analogy scheme 'stems from the dialectic of reference to features of other cases. This dialectic of reference to features of other cases finds its expression in the diametrical opposition of A1 and A2'. It is difficult to see why the 'dialectic of reference to features of other cases' would constitute the specificity of the scheme of analogy. It seems, or so I argue, that it is a constitutive feature of any kind of analogical reasoning (also beyond the realm of legal discourse) that it proceeds in such a dialectical way; in other words, there is usually more than one case similar to the case at hand, and the goal is to decide which of the similar cases is relevantly similar. This thesis holds in legal and moral reasoning, but also possibly in theoretical discourse. Thus, the 'dialectic of reference to features of other cases' does not seem to prove the *dedicated* character of Alexy's scheme of analogy.

Alexy's second condition, definitional of 'basic operations' in the process of applying law, is their formal character. The things he says in connection to this criterion are troublesome. First, he declares that the subsumption scheme is formal (which is not surprising, as it is a scheme of reasoning valid in first-order logic, enriched with the deontic operator 'it ought to be the case that', or O). Secondly, he claims that the Weight Formula is formal 'because it can be connected, in principle, with all arguments of all other forms'. Now, the Weight Formula – when considered without its 'interpretation', i.e. as a mere algebraic equation – is purely formal. However, such an algebraic formula has nothing to do with reasoning, and hence nothing to

do with the operations performed in the process of applying law. The reason for that is very simple: the algebraic formula is not part of a formal system that aims at capturing the relation of the validity of inference. When one considers the subsumption scheme, it is identified as valid on the basis of a system (of first-order classical logic). The system itself has a number of formal properties (e.g. there exist soundness and completeness theorems for first-order logic) that warrant the validity of such inference schemes as *modus ponens*. At the same time, the sole algebraic formula which features in Alexy's Weight Formula is not a part of such a system. Furthermore, when 'interpreted' through the identification of the symbols I_i, W_i, etc., with some parameters of legal principles, the Weight Formula is no longer *formal* in any reasonable sense of 'formal' (see below).

Finally, Alexy says that the scheme of analogy is also formal and he adduces two arguments to support this claim. First, 'the scheme says nothing about which features F_1, ..., F_f, F_g, ..., F_m, and F_n, ..., F_z may figure as *protases* of the rules to which A1 and A2 refer – and, in this connection, says nothing about which features are to be classified as relevant'. The second is that 'the scheme says nothing on the question of whether the argument according to A1 or the argument according to A2 prevails – that is, it says nothing on the question of what features are decisive' (Alexy, 2010, pp. 17–18). In other words, Alexy claims that the formal character of the scheme of analogy hangs together with the fact that the scheme does not discriminate between the features of the analogical cases and posits no criterion for determining the relevant features: the scheme is transparent as to the *types* of features taken into account.

But what then is Alexy's presupposed definition of the 'formal character of a scheme of reasoning'? It is surprisingly difficult to answer this question. Generally speaking, one can distinguish at least three different definitions of what counts as a 'formal mode of reasoning'. In the strictest sense, a formal scheme of reasoning is validity-preserving within some particular formal system (e.g. first-order logic) or a class of systems (e.g. in those for which there exist soundness and completeness theorems, such as the classical logic, intuitionistic logic, some paraconsistent logics).

According to a vaguer definition, a formal mode of reasoning is reasoning in which validity depends solely on the form of the expressions featuring in the arguments. This definition makes use of no particular formal system or class of systems; however, even it delimits the class of formal schemes of reasoning to those only which establish a relation of validity between sets of sentences (formulas). Finally, the vaguest definition of a formal scheme of reasoning is one that connects 'formal' with the use of symbols instead

of ordinary language. Even if it is admissible, this definition is theoretically uninteresting.

Now, from among Alexy's basic operations of the process of applying law, only subsumption is formal in the strictest sense. Balancing and analogy are not formal in the first two senses indicated (they are not valid inference schemes in any recognized formal system; also, they do not represent argument structures in which validity depends on form only – in the case of the Weight Formula validity hangs together with material or substantive features, while the analogy scheme does not address the problem of validity at all). Whether they are formal in the third sense depends on how one defines 'symbol'; however, as I underlined, even if they were 'formal' in this vague sense, this would have no important theoretical consequences (e.g. for the definition of the 'basic operations in the process of applying law').

Finally, Alexy's third condition is the *necessity* of the given operation or its *universal character*. It seems to me that a suitable way to render this criterion is to say that a given operation is necessary when it is the unique way of solving some kind of problem (e.g. applying legal rules or legal principles). This is what Alexy says in connection with subsumption: it is necessary 'because it must be employed, in one version or another, in all cases in which legal rules are to be applied'. I believe (see below) that this characterization is true, although I would say that not only legal rules, but also legal principles are applicable with the *necessary* use of subsumption. Strangely enough, this claim is false within Alexy's (2002) own conceptual scheme: there are cases in which rules are applied *via* the Weight Formula; these are situations in which there is a conflict between a legal rule and a legal principle and it is the rule that prevails.

Alexy also claims that the Weight Formula is necessary as 'it must be employed in all cases in which legal principles are to be applied.' This is not true: one can think of many formal or quasi-formal mechanisms that describe the balancing process. Natural candidates are the tools offered by the economic analysis of law. A more detailed exposition of this option falls outside of the scope of this essay; however, it suffices to observe that the function of many economic models is to find an *optimal solution* to a practical problem (given factual limitations) and to recall that Alexy speaks of principles as optimization criteria, to check the viability of this proposal (see Brożek, 2007, ch. 4).

According to Alexy, 'the necessity of the analogy scheme stems from the fact that it is not possible to refer in a rational way to other cases without using the scheme'. Again, this conclusion is unjustified. Firstly, there are a number of accounts of analogy in law, and Alexy offers no argument for the

superiority of his own account. Secondly, and more importantly, he does not show that there is a *real need* to apply analogical reasoning in the law.

The above discussion shows clearly that Alexy's argument for the existence of the three basic operations in the application of law fails. Subsumption seems to be formal, non-specific, and necessary (but in relation to rules and principles, not rules only); balancing (as depicted by Alexy) is unnecessary, informal, and specific; finally, analogy is informal, unnecessary, and non-specific.

2 A unifying view

I believe that the failure of Alexy's attempt at defining the basic operations in the process of the application of law is strictly connected to his general view of the formal structure of legal reasoning, one that sticks to the utilization of the classical logic. In order to substantiate this thesis, let us have another look at the way he structures the application of legal principles. Schematically, it is as follows:

1 There is a case c_x in which there are two possibly applicable principles, P_1 and P_2.
2 One needs to check whether in case c_x the principles P_1 and P_2 lead to incompatible conclusions. To do so one needs to apply both principles to the facts of case c_x *via* subsumption and establish that the application of P_1 leads to the conclusion p, while the application of P_2 leads to the conclusion $\neg p$. This establishes that there is a conflict between the two *prima facie* applicable principles (if there is no such conflict, no balancing is needed).
3 The competing principles must be balanced according to the Weight Formula (let us assume that it is P_1 that prevails).
4 The prevailing principle (P_1) serves to construct a *case-relative* legal rule R according to the Law of Competing Principles (the circumstances under which one principle takes precedence over another constitute the conditions of a rule which has the same legal consequences as the principle taking precedence).
5 The case-relative legal rule R is applied to the facts of case c_x, again *via* subsumption, to arrive at the final outcome, i.e. p.

In connection with the above-described procedure, a natural question arises as to why one should use the Law of Competing Principles to produce

a case-relative rule if the principles are directly applicable (Step 2 of the procedure and the definition of the LCP). This seems too complicated. The only answer I have is that the Law of Competing Principles is needed because Alexy sticks to classical logic. Observe that the use of classical logic adequately explains the need to formulate the case-relative legal rule; on the other hand, this logic cannot account for the entire process that takes place *before* applying the Law of Competing Principles. If, initially, in order to establish that two principles are in conflict, we construct two arguments in the form of subsumptions that use principles, then we obtain a contradiction. In order to handle it logically one needs a kind of paraconsistent logic. In other words, while insisting on the use of classical logic, one cannot produce two arguments leading to contradictory conclusions. One way out of this trouble is to concede that what happens *before* applying the Law of Competing Principles cannot be accounted for logically. This, however, is rather troublesome. It seems much better to find a way to account for both aspects of the process of applying principles within the same logical system.

I believe that a suitable formal mechanism is offered by the proponents of defeasible logics. One such defeasible logic (DL), developed by Prakken (1997) and Prakken & Sartor (2004) operates on two levels. On the first level *arguments* are built from a given set of premises; on the second level the arguments are compared in order to decide which of them prevails. The conclusion of the 'best' argument becomes the conclusion of the given set of premises.

The language of DL is the language of the first-order predicate logic which is extended by adding a new sentential connective, the so-called defeasible implication. Defeasible implication involves a defeasible *modus ponens*, analogous to that of material implication. The difference between material and defeasible implication is apparent only at the second level of DL, where two concepts play a crucial role: *attack* and *defeat*. We shall say that an argument *A* attacks an argument *B* if the conclusions of the two arguments are logically inconsistent.[4] If two arguments attack one another, one has to know how to decide which of the arguments prevails, i.e. which *defeats* the other. Various ways of comparing attacking arguments have been developed. The easiest and most flexible is the following. One checks what the defeasible implications are that served to build the attacking arguments. It is assumed that these implications are ordered in a certain way. In a comparison the argument prevails which is built with the use of

4 As my presentation is elementary, I apply here a simplified definition of attack: see Prakken, 1997.

a defeasible implication that ranks higher in the order. The conclusion of the argument that prevails in comparison to all attacking arguments built from the given set of premises is the logical conclusion of this set.

Within this framework, the application of legal principles can be represented as follows:

1 There is a case c_x in which there are two possibly applicable principles, P_1 and P_2.
2 Operating at the first level of DL, one develops two arguments based on principles P_1 and P_2.
3 If the two arguments attack one another (say, P_1 leads to the conclusion p, while P_2 gives $\neg p$) the arguments must be *compared* on the basis of the ordering of defeasible implications. The ordering of defeasible implications (in our case: two principles, P_1 and P_2) may be decided according to some accepted criteria, e.g. Alexy's Weight Formula, or economic efficiency.
4 The conclusion of the prevailing argument becomes the conclusion of the entire set of premises.

It is easy to see that the proposed solution steers clear of the two problems of Alexy's original solution: the entire process of applying principles is accounted for logically; moreover, there is no need to apply the Law of Competing Principles, and – consequently – there is no need to formulate a case-relative legal rule. The cost is the abandonment of classical logic in favour of a defeasible one.

Let us now look at Alexy's reconstruction of analogical reasoning. The following steps are required:

1 A given case c_i shares some features, $F_1, \ldots, F_f$, with case c_j. Case c_i differs from case c_j as regards the features $F_g, \ldots, F_m$, as well as it shares the features $F_n, \ldots, F_z$, with case c_k.
2 There are reasons for the rule $F_a, \ldots, F_f \rightarrow Q$, for the rule $F_g, \ldots, F_m \rightarrow \neg Q$, and for the rule $F_n, \ldots, F_z \rightarrow \neg Q$, which shows that the analogical rules possibly applicable to case c_i lead to incompatible conclusions.
3 The rule $F_1, \ldots, F_f \rightarrow Q$ is supported by the principle P_1; the rule $F_g, \ldots, F_m \rightarrow \neg Q$ is supported by the principle P_2, and the rule $F_n, \ldots, F_z \rightarrow \neg Q$ is supported by the principle P_3 (quite possibly, although not necessarily, $P_2 = P_3$). Thus, in order to solve a conflict between the possibly applicable rules, one needs to balance the principles, P_1, P_2, and P_3, which stand behind them.

4 The process of balancing proceeds according to the scheme presented above (including the use of the Law of Competing Principles and the formulation of a case-relative legal rule).

This scheme is a natural extension of Alexy's procedure for applying legal principles. However, one observation needs to be made. In the formulation of the scheme of analogy Alexy speaks of *reasons*, which constitutes a shift in the conceptual scheme he utilizes: one should either speak in terms of rules and principles, or of reasons. For example, legal rules may be understood as a combination of a first-order reason to act in a certain way and a second-order exclusionary reason, while principles may be identified with first-order reasons only (Raz, 1990a). In other words, Alexy's procedure for applying legal principles may be reformulated as follows:

1 Case c_x may be resolved by recourse to two different reasons, R_1 and R_2.
2 One needs to check whether the invoking of R_1 and R_2 leads to incompatible solutions.
3 If so, the competing reasons must be weighted according to some reformulated version of the Weight Formula.
4 The prevailing reason serves as the first-order reason to construct a case-relative legal rule (it is done by adding a second-order exclusionary reason).
5 The case-relative legal rule is applied to the facts of case c_x *via* subsumption, to arrive at the final outcome.

The general structure of analogy I developed in *Rationality and Discourse* within the framework of defeasible logic seems simpler. Before I proceed to present it, two interrelated observations need to be made. Firstly, as I have already alluded to, I believe that analogy is never confined to the comparison of two cases only – the given and the analogical one. More often than not there will be more than one case similar to the case at hand. This aspect of analogical reasoning is captured in Alexy's formulation of the scheme of analogy, when in A2.1 and A2.2 he relates the case at hand c_i to the cases c_j and c_k respectively (this is an important respect in which he changed his original formulation). Secondly, reasoning by analogy may be described by recourse to two different notions of similarity: *prima facie* similarity and *relevant* similarity. A case c_x is *prima facie* similar to the case at hand if it may be contemplated as a possible basis for developing a solution to the latter (so, generally speaking, usually there is more than one case which is *prima facie* similar to the case at hand). A case c_x is

relevantly similar to the case at hand, when it actually serves as the basis for developing a solution to that case. On Alexy's account, the scheme of analogy helps to identify the cases *prima facie* similar to the case at hand (c_j, c_k) and instructs one how to develop arguments based on *prima facie* similar cases. However, relevant similarity is decided by balancing. This is essentially the solution I proposed in *Rationality and Discourse* under the heading 'Partial Reducibility Thesis'. According to my conception, the general structure of analogy looks as follows:

(1) One encounters a problematic case, i.e. a case for which there is no directly applicable legal rule.
(2) One identifies cases *prima facie* similar to the given one, for which there exist definite solutions.
(3) One identifies principles standing behind the legal rules that govern the *prima facie* similar cases and uses them to construct arguments for the case at hand.
(4) One compares the arguments leading to incompatible solutions to the case at hand. (This establishes which of the cases is relevantly similar to the case at hand.)
(5) The conclusion of the prevailing argument is the decision in the case at hand.

It is easy to observe that, from step (4) on, analogical reasoning is reduced to the problem of balancing.

Thus, the unifying view I offer within the framework of defeasible logic is the following. There is one formal structure that embraces subsumption, balancing, and analogy. A simple application of a legal rule is a situation in which only one argument is developed – based on that legal rule. When there is a conflict between two legal principles or a rule and a principle, two (or more) arguments are constructed; the key point is that they are deductively valid, i.e. they are instantiations of the subsumption scheme (even in the case of principles).

More importantly, this logical scheme does not require the use of the Weight Formula. I do not believe that it is *the only* way to decide conflicts between principles – an economic analysis of law or some other mechanism may be used in this context as well. My claim is that the presented defeasible system captures the *logical dimension* of balancing well.

Finally, in my account, analogy leads to the identification of the principles that may serve as the basis for developing arguments in the given case. In this way, the problem of analogical reasoning is for an important part

reduced to the process of balancing principles. In other words, the picture of analogy I sketch is that of a principle-based mechanism which consists of two 'stages'. The first stage, leading to the identification of *prima facie* similar cases, is a heuristic procedure: it is not necessary, as the identification of the principles that may resolve the case at hand may proceed in a different way. The second stage, one in which a relevantly similar case is identified, is in effect identical to balancing principles.

Thus, my answer to the question pertaining to the character of analogical reasoning is that it is Janus-headed; on the one hand, it comprises a *heuristic* procedure (in the sense that it does not serve the *justification* of a legal decision and may be dispensed with); on the other, its justifying force lies in the mechanism of balancing it utilizes.

3 In defence of partial reducibility

The claim that analogy is partly a heuristic device and partly reducible to balancing may be questioned by those who believe analogy to possess full justificatory force. In other words, it seems *prima facie* possible to defend the thesis that analogy may be regarded as the sole means for justifying legal decisions. To assess this stance, I need first to address three issues.

Firstly, I am interested in analogical reasoning only insofar as it may count as a kind of reasoning that serves to justify legal decisions. To put it differently: I am not considering a descriptive model of analogy – it is not my goal to uncover the structure of analogical reasoning as applied in actual legal discourse. Instead, I am interested in analogy as a rational scheme of reasoning, i.e. such that warrants a conclusion on the basis of some previously accepted premises.

Secondly, from the logical point of view, one can speak of two concepts of justification: the deductive and the coherentist. According to the deductive view, a sentence p is justified if it follows logically from some previously accepted set of sentences S. Conversely, the coherentist view of justification posits that a sentence p is justified if, when added to a set S of previously accepted sentences, it makes the set S more coherent. In turn, coherence in the logical sense is defined by recourse to three criteria: a set S is coherent if it is consistent; and the more non-trivial inference connections there are between the sentences of S and the more unified the set S is, the more coherent it is. There are non-trivial inference relations between the sentences belonging to S when these sentences together can be used as premises in deductive arguments. Further, a set of sentences S is unified if it cannot be

divided into two subsets without a serious loss of information (see Bonjour, 1985).

Thirdly, there are three contrasting accounts of analogy in law: principle-based, rule-based, and factual. Loosely speaking, the principle-based model says that when we have two similar cases, c_i for which there is no determinate legal solution, and c_j which has previously been resolved or for which there exists a valid legal rule that governs it, c_i may be decided upon a principle that served to solve c_j or one that justifies the rule which governs c_j. Rule-based analogy, on the other hand, works as follows: when we have two similar cases, c_i for which there is no determinate legal solution, and c_j for which there exists a valid legal rule that governs it, c_i may be decided upon the rule that governs c_j or some extension of that rule. Finally, there is factual analogy, which has the following structure: when we have two similar cases, c_i for which there is no determinate legal solution, and c_j which has previously been resolved, the legal consequences applying to c_j may also be ascribed to c_i.

Principle-based analogy – e.g. as depicted in the previous section – takes advantage of the deductive concept of justification: the analogical conclusion is warranted because the legal consequences of the case at hand follow deductively from the same principle that governs the relevantly similar case.

Also, rule-based analogy is founded on the deductive conception of justification. The idea is that the conclusion in the problematic case at hand follows logically from the same rule that governs the relevantly similar case or from some 'extension' of that rule. The problem is, however, that if there is a valid legal rule applicable to both cases, there is no need for analogy. On the other hand, when the decision in the case at hand is based on some 'extension' or 'reformulation' of the rule governing the analogical case, the question naturally arises as to what warrants such an extension.

Alexy addresses this problem by claiming that there must be reasons for the application of an analogical rule to the case at hand; but, when one shifts from reason-vocabulary to rules-and-principles-vocabulary, this boils down to declaring that an extension of an analogical rule may be applied in the problematic case when there is a legal principle that governs both cases. In other words, the 'extension' of a legal rule applicable to an analogical case is justified only if there is a principle or a set of principles from which both the original rule and its extension follow; were there no such principle(s), the entire process of 'extending' the field of application of the original rule would be groundless.

Thus, the rule-based analogy is either a misunderstanding (as there is no need for analogy when there is a directly applicable legal rule), or its

deep structure utilizes the principle-based mechanism. This conclusion is strengthened by the observation that – from the logical point of view – there is no substantial difference between legal rules and principles. Both rules and principles may prove *inconclusive*, i.e. the arguments based on both rules and principles may be defeated by other arguments. As a consequence, the distinction between rules and principles is didactic rather than substantial.[5]

Finally, the factual conception of analogy seems to dismiss the idea of deductive justification: there is no general and abstract legal rule or principle from which the decision in the relevantly similar case or the case at hand follows. It is, therefore, reasonable to assume that factual analogy takes advantage of the coherentist conception of justification. The problem is that – at least in view of the above characterization of coherentist theory of justification – this claim is plainly false. The ascription of the same legal consequences to the case at hand that were previously ascribed to the relevantly similar case may fulfil the criterion of consistency. However, the remaining two criteria of coherence – of non-trivial inference connections and of unification – are not met.

There would be new non-trivial inferences if one postulated that there exists a legal rule or principle from which the decisions in both cases follow; similarly, our set of beliefs would be more unified if a general rule or principle of conduct were introduced that implies the conclusions for both cases. It seems, therefore, that the idea of factual analogy – as a *rational* operation – is untenable.[6]

In conclusion, I hope to have shown that rule-based and factual accounts of analogy – as a normative mode of applying law – are either untenable or, ultimately, take advantage of principle-based mechanisms. If this conclusion is sound, then the principle-based account of analogical legal reasoning occupies a distinguished place among possible conceptions of analogy in law.

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5 Compare my analyses in Brożek, 2007, pp. 124–129 and 248–252.

6 A natural line of defence for the proponents of factual analogy would be to embrace some kind of particularism, e.g. principled particularism. However, as I tried to show elsewhere, even principled particularism does not offer any acceptable conception of justification. See Brożek, 2007, pp. 59–63.

4. Analogical reasoning and extensive interpretation*

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Abstract
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 it is crucial in criminal adjudication to distinguish the two arguments, although they seem to serve the same purpose. The problem however seems to be that it is very unclear whether there is a real difference between the two and where it might lie. Against such confusion an original account of the distinction between analogical reasoning and interpretive extension is proposed, based upon the principle of semantic tolerance and its inferential structure in legal argumentation, with hopefully constructive implications for criminal justice adjudication.

Keywords: extensive interpretation, criminal law, vagueness, semantic tolerance

> … logic does not prescribe interpretation of terms …
> (Hart, 1983, p. 67)

1 Introduction

The present essay focuses on the tension between analogical reasoning and extensive interpretation in law. These two techniques of judicial decision-making permit ruling on a case that is not explicitly considered by a legal provision and still is worth being regulated on the basis of it.[1] In most legal

* This chapter was published previously in Archiv für Rechts- und Sozialphilosophie, 103, 2017: 117–135.

1 Although 'analogical reasoning' and 'extensive interpretation' are often used in judicial discourse to denote two fungible techniques of decision-making, legal theory clearly differentiates

systems, however, reasoning by analogy is prohibited in criminal law (unless it is in favour of the accused) whereas extensive interpretation is not.[2] Hence, it is a crucial point in criminal adjudication to distinguish the two arguments, although they seem to serve the same purpose.[3] Indeed, if a trial court justifies a criminal decision arguing by analogy, the decision will be reasonably quashed on appeal because it is contrary to the law. The same decision is justified, however, when it can be considered an extensive interpretation of a criminal provision, even when this is the same provision that the court could have used analogically. The problem is that in legal practice one can hardly distinguish analogy from extensive interpretation. It is very unclear whether there is a real difference between the two and where it might lie. On the one hand, some scholars claim that they differ from a theoretical point of view, since they do not have the same argumentative structure. On the other hand, analogical reasoning and extensive interpretation come to the same result starting from the same legal materials: they justify the extension of a regulation to a case that is not explicitly considered by the law.

As a consequence, one might have the suspicion that judges deploy these canons of argumentation strategically. When a judge intends for whatever reasons to punish conduct that is not explicitly regulated by a criminal provision, then he justifies his decision as the compelling upshot of an extensive interpretation of the provision. But, when a judge is not willing to punish the same conduct, then he claims that the extension of criminal liability is not permitted, since this would be a case of analogical reasoning. As a result, these canons of decision-making would be susceptible to random manipulation for purposes of social protection and control: judges would make criminal law up as they go along on the basis of 'what seems to them an ideally just form of society' (MacCormick, 1978, p. 107).

the two classes of entities they refer to. As we shall point out in Section 2, 'extensive interpretation' makes reference either to the interpretive process that extends the standard meaning of an interpreted legal provision, or to the outcome of this process. By contrast, 'analogical reasoning' denotes an argumentative technique inferentially articulated. In this article we shall look at these subjects from the point of view of the theory of legal argumentation: these labels will single out two arguments that are used to justify a judicial decision.

2 This is the case, for instance, in Spain, France, Germany, and Italy: see e.g. Quintero Olivares, 1989, pp. 136–139; Robert, 2001, pp. 191–201; Hassemer, 1992; and Caiani, 1958. Common law countries face the same problem in the interpretation of statutes and precedents: see e.g. McBoyle v. United States (1931) and MacCormick, 1978, ch. 8. It is true that common law rules lack the canonical form of statutory ones: but even if they cannot be 'interpreted extensively' in the same sense of statutory law, they can be construed extensively.

3 See e.g. Ross, 1958, § 29; Silving, 1967; MacCormick, 1978, pp. 155ff.; Wróblewski, 1992, pp. 223–227.

All this being true, it is worth looking at whether there are any constraints on the judicial application of these argumentative canons in legal practice. If it were to turn out that no constraint is put on the judge, and the divide between analogical reasoning and extensive interpretation is *just* a matter of strategic manoeuvring in argumentation, then the conceptual distinction we are considering is not consistent with the principle of legality and the rule of law. When constraints are given and a straightforward line can be drawn between the two canons, then the legality of a criminal decision based upon them is not compromised.

To address these issues, we shall focus first on the theoretical distinction between analogical extension and interpretive extension, as it is traditionally conceived by legal scholars. Then we will concentrate on a recent Italian case (the 'Vatican Radio Case') where the Italian Court of Cassation, in declaring that the accused could have been legally convicted of a criminal offence, claimed to argue from extensive interpretation and not from analogy. We shall assess, in this respect, whether the argumentation of the Court was sound. Finally, we will 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. In doing this, we will highlight the different constraints put on the interpreter who makes use of these arguments to underpin a judicial decision.

2 The traditional standpoint

In legal argumentation and practice, 'restrictive' and 'extensive' interpretations are often described as techniques that are used when the literal meaning of a legal provision (hereafter *standard* meaning) does not correspond to the intended meaning of the legislature. It may be the case that the legislature, by enacting a statute, says one thing but means another.[4] In the legal jargon, it is commonly claimed in these circumstances either that *lex magis dixit quam voluit* (the law said more than it wanted to say) or that *legis minus dixit quam voluit* (the law said less than it wanted to say). Now, when the standard meaning[5] of a legal provision differs from the

4 The distinction between what is said and what is intended has been pointed out by Grice (1989). Here we make abstraction from the ontological and epistemological worries about legislatures, namely whether there are such entities and how it is possible to know their intentions.

5 We shall use the expression 'standard meaning' to refer to the meaning that an expression assumes most times according to the rules governing the use of this expression in a given language.

intended meaning, a court that decides a case according to the former will fail to enforce the law that the legislature intended to make. Restrictive and extensive interpretation address this issue. These interpretive techniques give the judge the opportunity to set aside the standard meaning of the statute in order to bridge the gap between what is said and what is intended. And they do this either narrowing the set of cases that the statute would have ruled if the judge had interpreted it literally, or expanding this set. In the latter circumstance, one or more cases that do not fall under the standard meaning of the statute will be ruled according to it nevertheless.

As a consequence, what does happen when a legal provision is interpreted extensively? A case is not regulated by the law according to the standard interpretation of a legal text, but it becomes such on the basis of a second way of interpreting the same text.

C does not fall under N_1 obtained via I_1 of *P*.
But, *C* falls under N_2 obtained via I_2 of *P*.

I_2 is the extensive interpretation of provision *P*, according to which the content of norm N_1 is extended to N_2. For example, this happens when a provision about 'vehicles' is about motor vehicles according to I_1 and extends to devices that perform the same function even if they lack a motor (e.g. skateboards) according to I_2.

Given this explanation, it is clear that an interpretation is not 'extensive' *per se* but with respect to some standard interpretation.[6] How does this work? N_2 is a justified interpretive extension of N_1 when an interpretive canon permits to extend the standard interpretation of *P*. If I_1 is the standard (literal) interpretation, I_2 might be an extensive interpretation argued from the intention of the legislature, from the purpose of the regulation, from a legal principle, etc.[7] Therefore, strictly speaking, 'extensive interpretation' and 'restrictive interpretation' do not denote argumentative canons. These

6 'Extensive interpretation (interpretation by analogy) is the term used when pragmatic considerations result in the application of the rule to situations which, regarded in the light of "natural linguistic reading", clearly fall outside its field of reference' (Ross 1958, p. 149); note that Ross does not distinguish between analogy and extensive interpretation.

7 Ross (1958, p. 150) claims that extensive interpretation has two presuppositions: (1) that a legal evaluation is in favour of applying a rule not only to sphere (a) but also to sphere (b); (2) that there is no difference between (a) and (b) that could justify a different treatment of the two cases. See also Silving, 1967, p. 313: 'though words have outer limits of social meaning, beyond which their extension might appear absurd, their meaning in a statute is very often sufficiently flexible to include or to exclude certain items, depending on purpose'.

expressions simply qualify the upshot of interpretation: in particular, they mark the fact that the scope of the norm so stated is larger or narrower than it would have been had the provision been interpreted literally. In this sense, such interpretive techniques do not justify a judicial decision, although they are sometimes employed in legal argumentation as if they could. Extensive interpretation is in need of justification: it is not itself an argumentative tool. In fact, it simply brings into operation those argumentative canons that justify giving up literal interpretation, and thus leads the judge to defeat the principle of strict construction in criminal law. By making reference to the intended meaning of the legislature, which can be determined using different argumentative tools, the range of criminal liability may be both expanded and reduced.

What happens instead in analogical reasoning? A gap in the law is filled by arguing analogically from a source case to a target case,[8] thereby creating a new norm. To put it differently, a first norm regulates a source case which is relevantly[9] similar to a target case that lacks a legal regulation. On the basis of this relevant similarity and the lack of relevant dissimilarities, the regulation of the source case is extended to the target one. In this way, the gap is filled by the judge by generating a second norm that goes beyond the first, and hence can be seen as created by the judge:

C_1 falls under N_1.
C_2 does not fall under any actual norm of the system (there is a gap in the law).
There is a relevant similarity between C_1 and C_2.
C_2 falls under N_2 obtained by analogical reasoning (filling in the gap).

In this scheme, C_1 is the source case, whose regulation is extended analogically to the target case C_2. N_2 is a new norm created by analogy from N_1. For example, to use the famous American decision *Adams v. New Jersey Steamboat Co.* (1896), the issue of the liability of steamboat companies for the loss of money or other personal effects of their passengers (target case) is treated by analogy with the liability of innkeepers for such losses suffered by their guests (source case), considering that a steamboat is a 'floating inn'

8 See Holyoak and Thagard, 1995. On analogy in the law: Golding, 1984, pt. 3; Sunstein, 1993; Brewer, 1996; Kloosterhuis, 2005; Kaptein, 2006. It might also happen that the inference is drawn from multiple sources: see Guarini, 2010.

9 Relevance is determined by legal purpose (*ratio legis* in civil law systems), as we tried to show in Canale and Tuzet 2009. See also Cardozo 1921, pp. 28–30, and 1924, pp. 79–80, on analogy and *ratio decidendi* in case law.

in the light of such purpose as the protection of guests or passengers from 'fraud or plunder' from the proprietor.[10]

3 Different traits, and common ones

What are the distinguishing traits of extensive interpretation and analogical reasoning? According to the theoretical demarcation we have just outlined, they have at least four different features.[11] First, analogical reasoning presupposes a given interpretation of the relevant provisions, which is at stake in extensive interpretation. Interpretation comes first. That is, one argues analogically after having interpreted the relevant provisions and having established that the case is not regulated, despite the interpretive method the judge could call on. On the contrary, extensive interpretation is precisely about the way in which such provisions ought to be interpreted, or have been construed as a matter of fact.

Secondly, analogical reasoning presupposes a gap, which is absent in extensive interpretation. This gap actually depends on the interpretive process itself: the case at hand in not regulated by the law in the sense that no available interpretation of a valid legal provision has been able to set up a norm that covers it.

Thirdly, analogical reasoning creates a new norm to fill the gap, whereas extensive interpretation extends the content of the standard reading of the relevant provision. Let's say that N_1 regulates cases of type *A* and *B*: with extensive interpretation N_2 regulates cases *A*, *B*, and *C*. With analogical reasoning, on the contrary, N_1 regulates cases *A* and *B*, while N_2 regulates cases *C*. The scope of N_2 with extensive interpretation is necessarily greater than that of N_1, which is not the case with analogical reasoning.[12]

Fourthly, as is the case in almost every contemporary legal system, analogical reasoning is prohibited in criminal law while, as we already pointed out, extensive interpretation is not. A basic legal principle is

10 Adams v. New Jersey Steamboat Co., 151 N.Y. 163, 45 N.E. 369. As scholars know, a disputed question was whether the relevant similarity of steamboats was with inns or with railroads; in the former case companies were liable for such losses, in the latter they were not. See e.g. Weinreb, 2005, and Posner, 2006. For a similar problem, see Sunstein, 1993, p. 772: is hate speech analogous to physical assault or to political dissent?

11 See e.g. Bobbio, 1994, ch. 1. See also Carcaterra, 1988, pp. 16–18; Gianformaggio, 1997; and Peczenik, 2005, pp. 20–24.

12 But analogical reasoning presupposes a principle or a value related to the *ratio* and applicable to all those cases.

behind this: it is the 'rule of law' principle in common-law countries and the 'legality' principle in civil law ones. It is the shared idea that judges shall not create new law in criminal matters, but just decide on the basis of already established and cognizable norms. As the slogan has it, they have to apply the law. This idea is commonly represented by the maxim *nullum crimen sine lege, nulla poena sine lege.* But this is not meant to exclude all margins of judicial appreciation and discretion; flexibility is a felt need of law in general and also, with more caution, of criminal law. So both laxity of construction and vagueness of criminal statutes may sometimes be useful or even necessary.[13] As a consequence, legal scholars in general think that extensive interpretation is admissible in criminal matters, provided that judges do not create new law but confine themselves to the admissible interpretations of given provisions.[14] This view is reasonable if the two techniques at stake are different indeed. The different traits we outlined above seem to support the view that they are not the same, and rule out as a theoretical confusion the label 'analogical interpretation'.[15]

But extensive interpretation and analogy have common traits too. First, they share the need of settling, one way or another, the case in hand. A decision must be made and an argument must be given in favour of it. In particular, they deal with a case that is not explicitly regulated by a legal provision, i.e. that does not fall under its standard meaning, but needs to be regulated for reasons of social protection and control.

Secondly, and more importantly, extensive interpretation and analogy have the same practical outcome. For N_2 (either obtained by extensive

13 'Overly precise *statutes* invite the criminally inclined to frustrate the intent of legislation by skirting the inflexibly precise language. As a result fairness only requires that a statute put law-abiding non-lawyers on reasonable notice that their intended conduct runs a reasonable risk of violating the statute'; Dressler, 1987, p. 28.

14 In Italy, for instance, the positive law explicitly prohibits analogy in criminal matters (art. 14 of the *Preleggi*), but is silent on extensive interpretation; scholars in general claim that the latter is admissible.

15 But MacCormick (1995, p. 474) argues that analogy can work as an *interpretive* argument, extending the interpretation of one provision to another:

> [I]f a statutory provision is significantly analogous with similar provisions of other statutes, or a code, or another part of the code in which it appears, then even if this involves a significant extension of or departure from ordinary meaning, it may properly be interpreted so as to secure similarity of sense with the analogous provisions *either* considered in themselves *or* considered in the light of prior judicial interpretations of them. (The argument from analogy appears to be stronger on the second hypothesis, where it incorporates a version of the argument from precedent).

Note that this construction is more complex than mere extensive interpretation: it is *analogical extensive interpretation*.

interpretation or by analogy) extends the regulation to the case in hand. The practical outcome for the parties involved is the same, either if you argue from extensive interpretation or from analogy. Let us consider our previous examples. A skateboard might be qualified as a vehicle according to an extensive interpretation of the provision 'No vehicles in the park' whose standard meaning covers motor vehicles, to the effect that skateboards are not allowed in the park (N_2). But one might also argue in the following way: 'vehicles' is to be read as referring to motor vehicles (because of some interpretive argument to be specified, like the argument from literal meaning or from legislative intent); so the norm does not cover the case of skateboards entering the park; so there is a gap in the law; but there is also a relevant similarity between motor vehicles and skateboards (both represent a threat to the safety of pedestrians in the park); therefore the gap is to be filled by analogy extending to skateboards the regulation on motor vehicles, to the effect that skateboards are not allowed in the park (N_2). The same outcome that was arrived at by interpreting extensively the given provision could be reached by arguing analogically after having interpreted non-extensively the same provision. Or, conversely, one could turn an analogical argument into a form of extensive interpretation. The Court of *Adams v. New Jersey Steamboat Co.* (1896) argued there was a gap in the law and, because of the relevant similarity between steamboats and inns (a steamboat is a 'floating inn'), the gap was filled by analogy. Now, assuming there is a provision about 'inns', one might also argue that the word 'inns' is to be interpreted extensively (because a steamboat is a 'floating inn') to the effect that the regulation about inns extends to steamboats and steamboat companies are liable as innkeepers are. It is perhaps for such common traits that some scholars, in the context of systemic interpretation and with reference to the issue of legal gaps, use the labels 'analogy *extra legem*' (analogical reasoning) and 'analogy *intra legem*' (extensive interpretation).[16]

All of this might not be a problem for thinkers who love theoretical distinctions as such. It does, however, pose a problem for pragmatist thinkers who are more interested in outcomes than in the ways they are arrived at. It is a pragmatist principle that, if the application of two concepts has

16 'The problem of the completeness of a legal system is linked with that of extra-statutory analogy ("analogy *extra legem*"), where legal consequences are ascribed to facts, which are not singled out in enacted legal rules. In interpretation, there is a problem of using analogy *intra legem*, where one does not go "outside the valid law" but only tries so to fix the meaning of the legal rules that they constitute the most harmonious whole possible. Thus interpretation by analogy is singled out according to the reasoning it uses'; Wróblewski 1992, p. 103.

the same practical consequences, they are the same concept under different names.[17] Now, if 'extensive interpretation' and 'analogical reasoning' produce the same practical consequences, one could say that they are the same argument and that it does not make sense to allow one and prohibit the other. Same consequences, same arguments.

We shall discuss this core issue by considering the Vatican Radio Case, where our concerns as to the distinction between interpretive and analogical extension come directly into play. Indeed, the proof of the pudding is still in the eating.

4 The Vatican Radio Case

Vatican Radio transmission towers emitted electromagnetic waves that, according to the public prosecution, threatened the population nearby. A first disputed issue was whether the emissions were within the environmental limits fixed by Italian administrative law, and a second was whether the case also had a criminal profile.

Article 674 of the Italian Criminal Code sanctions the dangerous emission of substances (*getto pericoloso di cose*, literally: 'the dangerous throwing of things'), while no article of the Code mentions electromagnetic waves. Was the emission of such waves a 'dangerous emission of substances'? The Court of Cassation (III Criminal Sec., decision no. 36845/2008) decided it was and claimed to argue from extensive interpretation and not from analogy.

Was the decision of the Court really the result of an interpretive extension of the regulation, or rather the hidden upshot of analogical reasoning? This case raised two interpretive problems in particular: (1) the meaning of 'throwing' and (2) the meaning of 'things'. Is an emission an act of 'throwing' according to the law? Are waves 'things' according to the law? And consequently, is the act of emitting such waves a 'dangerous emission of substances'?

Note that these questions, put in this order, imply a semantics that follows the 'principle of composition': first one has to determine the meaning of single words, then one has to put them together to determine the meaning of a whole sentence or complex expression. A semantics following the 'principle of context' would do things the other way round: first you determine the context, that is the meaning of sentences or complex expressions, then you extract from it the meaning of single words.[18] In our case the Court has

17 It was, in particular, Peirce's pragmatic maxim. See e.g. S. Haack, 2005, pp. 75–77.

18 Searle, 1978. For an inferentialist picture of these issues, see Canale and Tuzet, 2007.

chosen to follow a compositional semantics, dividing the expression at stake into parts and determining the meaning of each part in order to establish the meaning of the whole.

4.1 On 'things'

Clearly, according to standard usage, waves are not 'things'. Therefore an argument is needed to support that interpretive conclusion. A significant argument provided by the prosecution and then used by the Court invokes another norm of the system: art. 624 (c. II) of the Criminal Code, on theft, states that electric power, as any other energy with economic value, legally counts as a thing; thus electromagnetic waves are 'things' according to the law. Against this argument the defence contended that, according to the intention of the legislature of 1930, when the Code was enacted, 'things' in art. 674 of the Italian Criminal Code refers to material objects. To that argument the Court added some scientific considerations as to the physical nature of waves.

Now, evidently, both interpretations seem admissible. The first is supported by a form of systemic argumentation (invoking other norms of the same legal system); the second is supported by a psychological argument (the argument from legislative intent). The first claims that defining waves as 'things' is an extensive interpretation justified by systemic considerations; the second claims that treating electromagnetic waves as material objects is an instance of an analogy, since a psychological argument justifies a strict interpretation of art. 674 and the interpretive conclusion that there is a gap: in fact, such waves were not even considered in the 1930 legislature.

Note that if both interpretations are admissible there seems to be room to accept the extensive interpretation thesis as correct: there is no need to argue from analogy, as the case could be settled by selecting one of the admissible interpretations of 'things', namely the extensive one.[19] This is applicable to the object of the conduct in question. But what about the conduct itself?

4.2 On 'throwing'

Again, the argument of the prosecution and the Court about 'throwing' is that art. 674 of the Italian Criminal Code can be interpreted extensively. An emission falls under the notion of 'throwing' because there are linguistic

19 On 'things' in ancient and modern law, see also Silving, 1967, pp. 313–314.

uses of the latter referring to the former; for instance, says the Court, to describe the act of emitting a cry one can use the expression 'throwing out a cry'. You might also think of phrases such as 'throwing light' on something or 'throwing suspicion' on somebody, which share with 'throwing out a cry' the fact of extending the meaning of the expression.

The defence replies that according to standard usage 'throwing' refers to the act of flinging something, for instance out of the window, with some physical effort, and that a 'dangerous emission of substances' refers to the act of dangerously flinging material objects in public space (or in private spaces that are open to the public); metaphorical uses are not at stake here and no interpretive canon permits construing the provision as referring to an emission of waves. So there is a gap in the law, which could be filled only by analogy; but analogy is prohibited in criminal law.

It is worth noting that the interpretive argument of the defence seems to be inspired by a contextualist semantics: the meanings of 'throwing' and 'things' cannot be determined in isolation and should be fixed with reference to the meaning of the whole sentence in that context. As a result, the term 'things' only refers to material things, and the meaning of 'throwing' is restricted to its non-metaphorical acceptations.

Finally, note that if both interpretations are admissible there is also room to think that extensive interpretation is a correct solution. However, one may have legitimate doubts about the admissibility of such an extensive interpretation of 'throwing'. The Court said there are linguistic uses of 'throwing' that refer to the act of emitting something, for instance a cry. The Court used Dante's poetic language as an example of this. But one wonders if the definition of a word in a line of verse by a poet who lived eight centuries ago can be used to determine the admissible interpretations of a provision in a present-day legal controversy.

Nevertheless, the Court contended that the emission of electromagnetic waves can be a dangerous emission of substances and, after settling this interpretive issue, it quashed the appellate decision and ordered a new appeals trial of two Vatican Radio officials in order to settle the relevant factual question, that is, to ascertain if the waves were in fact dangerous for the people living nearby.

5 Vagueness and the location problem

On the basis of the arguments provided by the Italian Court of Cassation, it is actually far from clear whether its decision was the result of an interpretive

extension of an undeclared extension by analogy. Actually, it is the standard account of the distinction between the two that seems to be unsatisfactory or even lacking altogether. In particular, the distinctive features of extensive interpretation in the standard account seem to provide little or no guidance at all for legal interpreters, thereby giving rise to misuses of this interpretive technique.

In the following two sections we shall try to put forward a different explanation of the interpretive practices on which we are focusing in order to shed some light, as it were, on the issues that have been under consideration from the outset.

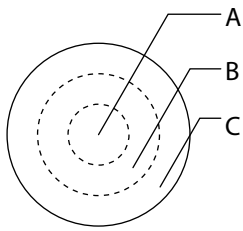
As the Vatican Radio Case clearly demonstrates, the question whether a legal provision is to be interpreted extensively presupposes that such a provision (or its content) is vague.[20] This is true by definition. Extensive interpretation is possible if, and only if, the interpreted legal provision allows for some changes in the cases to which it can be meaningfully applied. In other words, if a legal provision is interpreted extensively, it will yield borderline cases. As Grice puts it, 'To say that an expression is vague (in a broad sense of vague) is presumably, roughly speaking, to say that there are cases (actual or possible) in which one just does not know whether to apply the expression or to withhold it, and one's not knowing is not due to ignorance of the facts' (Grice, 1989, p. 177). The words 'things' and 'throwing' are examples of this phenomenon, at least according to the Italian Court of Cassation. In the Court's view, it is not immediately clear whether the term 'things' applies to electromagnetic waves, nor whether the word 'throwing' applies to their emission. Consequently, art. 674 of the Italian Criminal Code is vague: it is not definitely true that electromagnetic waves are things nor that they are not; similarly, it is not definitely true that the emission of waves is a kind of throwing, nor that it is not.

Now, the word 'definitely' assumes quite different meanings in the philosophical literature on vagueness. As Stewart Shapiro has put it, 'each theorist has his or her own definition of definiteness, and the various concepts have little in common. There seems to be no way to make further progress in defining "borderline case" or "definitely" without begging the question against some view or other.'[21]

20 Some authors claim that vagueness is a property of (some) words, others claim it is a property of (some) contents. See below for some references.

21 Shapiro, 2006, p. 2. As a matter of fact, most theorists claim that vagueness involves a form of ignorance, so that the different accounts of this phenomenon depend on what such ignorance amounts to. For instance, epistemicists claim that with borderline cases we are ignorant of facts that actually we cannot know (Williamson, 1994); a supervaluationist holds that we are

Regardless of the controversial nature of vagueness and related concepts, a thorny issue that we will not take up in this article, one may outline the linguistic problem faced by the Italian Court by means of the following uncontroversial scheme:



This scheme represents the extension and anti-extension of a legal provision such as art. 674 of the Italian Criminal Code.[22] Let *A* be the set of cases that clearly fall under the legal provision according to its standard meaning and which thus belong to its extension. We have no doubts that a bottle or a hammer is a thing that can by thrown and thus falls within the scope of the provision. Similarly, let *C* be the set of cases that clearly do not fall under the standard meaning of the same provision, i.e. that belong to its anti-extension. A trust or a deal is not a thing that can be 'thrown' like a bottle. Similarly, Mount Everest is definitely a thing but it cannot be 'thrown' either. Therefore, the case of the Mount Everest belongs to *C* and not to *A*. Finally, *B* is the set of borderline cases that come between clear 'positive' and 'negative' ones.[23] When *x* is a borderline case, the task for legal interpretation is to determine whether *x* ought to be treated as a 'positive' or 'negative' case from the legal point of view. In the first circumstance, the content of the provision shall be extended so as to include *x*: the boundary between *A* and *B* moves to include *x* within the meaning of the provision as far as the singular case at hand is concerned. In the second circumstance, the content of the provision will be restricted: the boundary between *C*

ignorant because a vague sentence is neither true nor false (Fine, 1975); an incoherentist claims that we do not know whether a vague term apply to a case, because our language sometimes is incoherent (Dummett, 1975); a contextualist assumes that we are (apparently) ignorant of the conditions of application of vague terms because these conditions shift with context (see Raffman, 1994; and Soames, 1999). For a discussion of these accounts of vagueness as to legal language, see Endicott, 2000; Jónsson, 2009; and Poscher, 2012a.

22 The extension and anti-extension of a sentence *S* should not be confused here with the extensive interpretation of *S*. The extension of a sentence is the set of objects, events, or states of affairs *S* refers to, whereas the anti-extension is the complementary set thereof. An extensive interpretation of *S* actually modifies its standard extension and anti-extension.

23 See Endicott, 2000, p. 55. See also (obviously) Hart, 1994 [1961], ch. 7.

and *B* is shaped so as to include *x* in *C*. Obviously, all this requires that the boundaries between *A*, *B*, and *C* are flexible in the sense that they have no sharp cut-off points.[24] By interpreting the legal provision for decisional purposes, however, the judge is called upon to set up these boundaries and to determine where the case at hand is located. As a result, *after* legal interpretation, *x* shall be qualified as belonging to *A* or *C* as a matter of fact. This will not get rid of vagueness; the vagueness of the interpreted provision will simply be reduced to such an extent as to permit legal adjudication in the given case.

Now, the crucial point is to determine whether *x* belongs to *A*, *B*, or *C* according to the standard meaning of the legal provision. If *x* is located in *B*, then extensive interpretation can be worked out from a semantic point of view. Conversely, if *x* is located in *C*, extensive interpretation is not semantically admissible. This does not imply that the regulation provided by the legal provision cannot be extended to *x* by a court, being *x* located in *C*. The case could be so regulated by means of analogical reasoning, when legally permitted. But the starting point of analogical extension is quite different. Indeed, if *x* is located in *C* it is definitely not covered by the interpreted legal provision. Case *x* could still be regulated according to the law on the basis of its relevant similarity to the standard cases of application, although the interpreted legal provision does not rule *x* at all.

We shall label the problem we have just outlined as 'the location problem'. The divide between extensive interpretation and analogical extension basically depends on it. If we had some criteria for locating a given case within *A*, *B*, or *C*, it would be possible to determine under what conditions extensive interpretation is allowed and analogical extension is not. Do such criteria exist?

6 Extension and tolerance

To answer this question, let us return to the features of vague terms or contents. We have seen that a vague term allows for some content changes in the cases to which it can be meaningfully applied. The term 'hammer' applies to the hammer in my toolbox even if I paint it pink. However, the term 'hammer' would no longer apply if I removed the handle, or you would at least hesitate to call it a hammer. If you say 'Pass me the hammer' when

24 This claim is countered, however, by the epistemic theory of vagueness and by supervaluation theory as well: Williamson, 1994. On supervaluationism and its logic see Varzi, 2007.

repairing your house and I hand you something without a handle, you would probably respond with 'This is not what I asked for!' Now in this sense we may say that the term 'hammer' is tolerant to a certain extent as to its application conditions, and that the same holds for 'things' and 'throwing', as claimed by the Italian Cassation Court. The tolerance metaphor is used here to point out that certain terms or expressions are less precise than others in a given context, allowing them to be meaningfully used to denote cases that do not fall under their standard meaning.[25] As a consequence, semantic tolerance is a matter of degree and depends on context. Returning to our example, when a case is slightly different from the standard one in the light of the contextual constraints put on the use of 'things' and 'throwing', these terms nevertheless apply to it. However, if the difference is contextually relevant, these terms do not apply. Given all this, the *Tolerance Principle* can be framed as follows:

> *P* being the set of relevant properties for a term *T* in context *C*, if *x* and *y* do not share all their properties but are indiscernible with respect to every member of *P*, then if *T* applies to *x* it applies to *y* as well.

A pragmatic refinement of this principle could be obtained as follows: when two cases in the field of *P* differ only marginally within the tolerance range of *T*, so that they share the same relevant properties, and if a competent speaker judges the first case to have *P*, then he cannot competently judge the other case in any other manner (see also Shapiro, 2006, ch. 1). Therefore, if having *P* justifies the ascription of the legal consequence *q* to *x*, it justifies the same consequence in the case of *y*. Note that as far as the standard meaning of *T* is concerned, the interpreter might permissibly go either way with respect to a borderline case *y*. The principle of tolerance gives the interpreter a good reason for applying *T* to *y* in context *C*.

The Tolerance Principle reframes the problem of vagueness of legal terms and expressions in a way that is particularly helpful for our purposes in this chapter. This principle sets out the conditions under which the extension of a regulation to a borderline case is justified. These conditions depend on the properties of the subject of regulation that are taken to be relevant within a given context. By pointing out that such conditions are satisfied, therefore, a court sets out the boundaries between the extension and anti-extension of the interpreted provision in a way that is coherent with the semantic content of the provision within the context of adjudication.

25 See Dummett, 1975, and Wright, 1975.

One might ask here: why are those properties relevant? The relevance criterion cannot be determined by the standard meaning of the vague term. Indeed, the standard meaning is not sufficient to determine semantic extension and anti-extension in case of vagueness by definition: the rules governing the use of linguistic expressions will not lead to a definite verdict.

As we have just pointed out, relevance is rather a function of context. More precisely, contextual constraints put on language uses determine what properties of a given case are relevant in adjudication. These constraints are typically made explicit by means of legal arguments. The argument from intention, the argument from purpose, the argument from legal history, and the various sorts of systemic argument used in legal argumentation highlight different contextual constraints that the judge can take into account in interpreting a statute, which in turn make some properties of the case relevant according to the law. When interpreting the term 'things' so as to include in its extension the case of electromagnetic waves, for instance, the judge is committed to give a reason for content extension, which sorts out the properties of the case at hand: some properties will turn out to be relevant according to the argument that the judge resorts to, others will not. If this commitment is satisfied from the point of view of the participants in the argumentative practice according to the accepted argumentative standards, then the word 'things' correctly applies to electromagnetic waves, since the latter are taken to have the same relevant properties as the standard instances of things. In this sense, the sort of tolerance we are focusing on here can be called 'semantic tolerance'. The argumentative process aims at determining the semantic content of a vague term in a borderline case on the basis of the contextual constraints that are made explicit by legal arguments.[26]

As to analogical extension, on the other hand, the starting point of judicial reasoning is that the case is not within the scope of meaning of the legal provision, and thus no interpretation can include it in the extension of the provision. The tolerance principle does not hold in the case at hand, which in fact is not a borderline case. In this sense, the argument from analogy takes for granted that extensive interpretation has failed: analogy is a remedy for the lack of success of any interpretive effort. Despite this, there might be further reasons justifying the extension of the regulation. In this respect, the argumentative process does not seek to determine the

26 In light of this, the semantic content of a legal provision can be conceived of as the set of inferences in which the provision is involved in legal argumentation. We have discussed this idea in Canale and Tuzet, 2007.

semantic content of an interpreted term or expression: the content is taken for granted and the case falls under the anti-extension of the interpreted term or expression. Argumentation aims to flesh out whether the purpose of the interpreted legal provision justifies the analogical extension of the regulation beyond the semantic boundaries of language.

One might oppose to this the claim that analogical reasoning is also based on a relevance criterion. Analogical extension of a given regulation is admitted only if there are relevant similarities between the source and the target, i.e., if the two cases share the same relevant properties. This being true, in what does analogical extension differ from interpretive extension?

The difference rests upon the source of relevance. As far as interpretive extension is concerned, relevance has a *semantic* source: it depends on the rules governing the uses of language and the contextual constraints put on them. In the case of analogical extension, however, relevance has a *pragmatic* source: relevance conditions are fixed by the purpose of the law in its standard circumstances of application. When analogical extension achieves the same goal that the provision was assumed to achieve in standard cases, then the extension is justified. These conditions, therefore, are fixed by the legislature or by the legal system as a matter of policy; they do not merely depend on language and context of use. As a consequence, pragmatic relevance might vary from semantic relevance. And these are precisely the circumstances in which analogical reasoning comes into play.

Accordingly, extensive interpretation and analogical reasoning can be seen as distinct argumentative games, inferentially articulated, in the most interesting cases, by means of a chain of arguments. As we have seen in the previous sections, extensive interpretation is simply an interpretive technique that relies on some argumentative canons: it is normally justified on the basis of the argument from intention, the argument from purpose, or a sort of systemic argument. These standards, in turn, rely on further arguments that justify their premises, often building a complex argumentative framework. It has to be noted, however, that the commitment undertaken by using these argumentative techniques is determining the semantic content of a legal provision, it is not realising any regulatory function in society nor assessing whether the application of the norm so stated is just and fair. Analogical reasoning is connected to interpretive canons and has a complex argumentative structure as well. The argument from analogy does not get off the ground if the interpreter does not show that he is facing a gap in the law. Equally, the similarity relation between source and target case is normally backed by an argument from purpose, a systemic argument, or the assessment of the consequences of regulation. Nevertheless, the

commitments assumed by using analogical reasoning strongly differ from those characterizing extensive interpretation. The arguer from analogy commits himself to determine the aim of a legal provision and to draw a normative conclusion assuming that like cases ought to be treated alike, although their relevant similarity is not captured by language usage in a given context.

To sum up our analysis, the two argumentative games considered in this chapter are similar.[27] First of all, they pursue the same goal: extending a regulation to a case that is not explicitly considered by the law. Moreover, some argumentative constraints are pretty much alike. For instance, relevance is a necessary condition for getting a regulation extended according to the law in both games. Notwithstanding this, they are not the same game: argumentatively they are quite different, both in theory and in practice. In order to justify a judicial decision, it is up to the judge to decide what game to engage in, assuming that extensive interpretation comes first and analogical extension is (normally) not allowed in criminal law.[28]

On the basis of these findings, one may claim that analogical reasoning and interpretive extension actually do not have the same upshot. Their outcome is the same in the sense that they justify the extension of a regulation to a case that is not explicitly considered by it. But this is only one part of the story. With extensive interpretation one claims that the case is within the scope of meaning of a legal provision: there is no gap in the law in the case at hand, and this is so on the basis of a certain reconstruction of legislative intent, the considered legal system, or the goal pursued by the legal provision under interpretation. Engaging in this argumentative game commits the interpreter to a systemic view of the regulation. Conversely, analogical reasoning assumes that the case is beyond the scope of meaning of the interpreted legal provision: the court faces a gap that has to be filled. And this follows from an alternative systemic view of the same regulation, a view in which purposes or principles certainly play a significant but different role.[29] From a pragmatic point of view, this fact has important

27 On interpretive games see Chiassoni, 1999.

28 'Extensive interpretation' may not be distinguishable from 'analogy' in the sphere where the inclusiveness or exclusiveness of a word is uncertain. But where the outer limits of word meaning are exceeded, only 'analogy' can be said to be applicable if the statute is to be extended to conform to its apparent purpose'; Silving, 1967, p. 315; this in turn recalls the Hartian core and penumbra of meaning.

29 'The decision whether to interpret a statute restrictively or extensively, or the decision whether to explain and distinguish or follow by extending a case-law rule is, as a matter of observation, in part at least based on arguments from legal principles, as that we can't tell

consequences for future interpretations of the same provision in similar cases, and on the evolution of relationships between norms within the legal system as well. In a nutshell, the proof of the pudding is still in the eating, but also in the consequences that the latter triggers after dinner.

7 Conclusions

On the basis of the framework just proposed, one can critically assess the justification provided by the Italian Court of Cassation in the Vatican Radio Case.

In our analysis, the Court did not provide sufficient elements in this case to justify its decision. The Court claimed that the emission of electromagnetic waves falls within the extended meaning of the expression 'dangerous emission of substances' but this conclusion could be clearly considered as the upshot of an argument from analogy.

As far as the word 'things' is concerned, the Court satisfied its argumentative commitment to extensive interpretation providing suitable reasons. The Court argued that the case of electromagnetic waves falls under the extension of the predicate 'things' according to a systemic argument that relies, in turn, on scientific considerations as to the physical nature of waves. The counterargument provided by the defence, stating that the legislature intended the term to refer to material things only, is not complete, since the defence provided no evidence for this standpoint. The argument from legislative intention was not properly used, since its premises were lacking: the defence just expressed its own intuition, not unwarranted in itself, about what the 1930 legislature intended to say. As a consequence, the Court was entitled to claim that 'things' applies to the electromagnetic waves released by Vatican Radio according to the interpretive standards accepted in the Italian judicial community. These standards, in particular, single out the relevant properties of the subject of regulation and thus the conditions of application of the term 'things' in the case at hand.

Conversely, the qualification of waves emission as an act of 'throwing' was highly questionable. The Court merely claimed that the standard usage of the term 'throwing' covers a number of different actions, so that the content of this term is not vague but general: it does not yield borderline cases as its extension is highly inclusive. As a consequence, the emission of

whether the case we are faced with is easy or hard until we have reflected on the principles as well as on the *prima facie* applicable rule or rules'; MacCormick, 1978, p. 231.

electromagnetic waves would clearly fall under the meaning of 'throwing', according to the Court, as supported by the poetic use of the term in the thirteenth century.

It has to be noted, however, that the term 'throwing' is not as general as assumed by the Court. The judges simply mentioned an idiomatic or metaphorical use of the term ('throwing out a cry') that is not sufficient to assess its extension in ordinary language. Moreover, the poetic use of this term in the thirteenth century is not relevant in legal interpretation: this is not an accepted canon of argumentation and statutory construction in Italian adjudication, since it does not single out a semantic standard, neither at the time in which the law was enacted (original meaning), nor at the time in which the law is applied (current meaning). Notwithstanding Dante's greatness and his majestic use of thirteenth-century Italian, if even poetic and marginal uses fall within the framework of admissibility (together with ordinary and legally technical uses), one can expect serious violations of the rule of law or of the principle of legality in criminal law. If poetic language were to be induced into the repertoire of linguistic usage that serves to determine admissible legal interpretations, one could always find some marginal or eccentric linguistic uses that would justify an extensive interpretation.[30]

Aside from these considerations, we would like to emphasize that the theoretical framework proposed in this article could be used by courts as a methodological tool to assess whether extensive interpretation is possible, and if not, whether analogical extension could be brought into play.

But is this enough to warrant the claim that the distinction between analogical extension and interpretive extension is not just a matter of strategic

30 The Italian Court of Cassation has provided a second linguistic argument to underpin its decision. In art. 674 of the Italian Criminal Code the term 'throwing' is syntactically related to the term 'things' to form the expression 'emission of substances': given that the complement refers to immaterial entities such as electromagnetic waves, it would follow that the verb can be clearly predicated of the same set of entities. In this respect, it is true that syntactical relations help to reduce vagueness when a vague term is related to a term whose semantic content is not vague in a given context. As far as art. 674 of the Italian Criminal Code is concerned, however, this is not the case. Here, the term 'throwing' is predicatively related to the term 'things', but the fact that the latter applies to electromagnetic waves does not imply that the former applies too. On the contrary, the fact that electromagnetic waves cannot be thrown on the basis of the standard meaning of 'throwing' suggests that the expression 'dangerous emission of substances' does not refer to the emission of electromagnetic waves, at least on the basis of the compositional conception of semantics subscribed to by the Court, according to which if one term does not apply, the whole expression doesn't apply either.

manoeuvring in legal argumentation? Aren't judges actually making up the law as they go along in cases like the one we have been discussing?

We do not believe that the discretionary choice of judges in borderline cases will be associated with judicial arbitrariness. In fact, there is not just one right decision in borderline cases such as the Vatican Radio Case: in such cases, a discretionary court decision cannot be avoided.[31] Is this consistent with the principles of legality and the rule of law? The answer depends on how we conceive of these principles. Some final remarks on this issue can help to clarify some general premises of our analysis.

In contemporary constitutional states, these principles govern legislation, administration, and adjudication. With respect to legislation, in particular, they require 'that new law should be publicly promulgated, reasonably clear, and prospective' (Raz, 1990b, p. 331). Accordingly, with respect to adjudication, they require 'that judicial decisions should be in accordance with law, issued after a fair and public hearing by an independent and impartial court, and that they should be reasoned and available to the public' (Raz, 1990b, p. 331). But what does 'in accordance with law' mean in our context? It does not mean that borderline cases should be dismissed by courts, for in such cases, by definition, there is more than one possible right answer. Rather, these principles require that adjudication should be in accordance with 'the exercise of reason', assuming that 'the exercise of reason' is opposed to 'the mere imposition of will' (Kennedy, 1986, p. 527). Now, in those circumstances in which a court faces a borderline case, the legality requirement is that, among the decisions that are not ruled out by legal texts according to their standard meanings, the court chooses 'reasonably', that is, on the basis of a justification process that is sound and public, and whose premises are open to challenge. This being done, a legal decision

31 One could actually oppose to this the claim that, when there is doubt, the lenity rule or *in dubio pro reo* principle applies: in doubtful criminal cases acquittal is the right answer. It can be pointed out, however, that according to the rule of lenity the court has to resolve the ambiguity in favour of the defendant when interpreting an *ambiguous* legal provision (see among others McNally v. United States, 483 U.S. 350, 1987). Even if one adheres to a strict interpretation of the rule of lenity, assuming that it compels courts to adopt the narrowest plausible interpretation of any criminal statute (Price, 2004, p. 889), this rule of interpretation, it could be argued, cannot be applied to the case at stake. We do not have here two plausible interpretations of the same statute. Actually, the interpreter does not know whether a norm applies to the case, because the content of the norm is lacking. It follows from this that the interpreter is first called upon to determine the content of the legal provision; it is only when this content is not univocal that the lenity rule could apply. In a nutshell, the lenity rule cannot apply in place of a criminal norm. According to this reading, it is a rule of interpretation among others, which helps a court to select the best interpretation of a criminal provision.

is 'in accordance with law' even if the text of the law is indeterminate and it is used to decide a case to which it does not explicitly apply. The legality requirement is satisfied, first of all, when the argumentative process is sound, i.e. when the interpreter satisfies the commitments she assumes by arguing a certain legal conclusion within a given argumentative context.[32] As Kennedy once observed when describing the situation of a judge assigned to a borderline case, 'I see myself as having promised some diffuse public that I will "decide according to law", and it is clear to me that a minimum of meaning of this pledge is that I won't do things for which I don't have a good legal argument' (Kennedy, 1986, p. 527).

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32 Even if legal systems and judicial outcomes are largely indeterminate 'argumentation frameworks provide a measure of at least short-term systemic stability to the extent that they condition how litigants and judges pursue their self-interest, social justice, or other values through adjudication' (Stone Sweet, 2002, p. 125).

5. Analogy and balancing*

The partial reducibility thesis and its problems

David Duarte

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Abstract
The structure and sequences of analogous reasoning serve to show the implausibility of the 'partial reducibility thesis' stating as it does that analogy is reducible to balancing of legal principles. Problems raised by the partial reducibility thesis include the contingency of reducibility and the fact that analogous reasoning proper is done under the cover of balancing. Analogy and balancing have opposite normative conditions, explaining the unacceptability of the reducibility enterprise.

Keywords: balancing, analogy, partial reducibility, contingency of reducibility, normative conditions

1 Three as the starting point for analogy and balancing

The idea that the application of law includes three basic operations, subsumption, balancing, and analogy, has recently become a central issue in legal theory, yielding new insights into the analysis of their connections: (i) subsumption and analogy, (ii) subsumption and balancing, and (iii) analogy and balancing.[1] However, taking into account that a subsumption is performed in every instance of the application of law and that analogy and balancing are only used under their specific normative conditions, it follows that the third connection is the only one that links basic operations

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1 On the three basic operations, Alexy, 2010, pp. 9ff.; Brożek, 2008, pp. 188ff.; and Bustamante, 2012, pp. 59ff.

that are, from this point of view, normatively contingent.[2] This feature of analogy and balancing poses some particular problems: (i) what are the specific normative conditions of each one of them, (ii) if there is any intersection between those conditions, and (iii) to what extent can analogy and balancing be combined or interfere with each other. It is precisely here that the partial reducibility thesis comes into play (Brożek, 2008, pp. 188ff.). Formulated as an explanation of analogy in terms of balancing, this thesis deals specifically with the problems raised by the connection between these two basic operations in the application of law.

2 Analogy step by step: some basic considerations on the sequence

Although it is also used to represent the operation of comparison in itself, analogy is, strictly speaking, a result: the establishment, for any purpose, of a relation of similarity.[3] In order to reach the final point, some steps must be taken: (i) identification of the terms in comparison, (ii) list of comparison factors, (iii) evaluation of similarity or non-similarity under each factor, (iv) choice of the decisive factor, and, (v) conclusion of analogy, if it is the case under the factor chosen.[4] The overall operation is therefore relatively complex.

And it is immediately complex regarding factors of comparison: as we know, they are naturally endless.[5] Regardless of what is being compared, anything can be used as a factor, considering the unlimited properties falling under the terms and the infinite external criteria of analysis. Since the context of the comparison allows us to narrow down the set of factors, this decreasing effect gives some manageability to the process.

- When comparing cars (*c*) and bicycles (*b*), the set of factors is endless: f_1 price, f_2 speed, f_3 metal texture, f_4 comfort, f_5 beauty, f_6 how it pleases John, and so on;
- if *c* and *b* are compared for buying purposes, the set is narrowed: some factors may become irrelevant; for instance, f_3 metal texture or f_6 how it pleases John.

2 The first premise seems undeniable: no legal case can be solved without the fulfilment of an antecedent (of a norm or a decision-norm). The second premise will be explained below.

3 Naturally, the kind of analogy considered here is the one regarding a classification and not the analogy supporting a prediction (Macagno and Walton, 2009, p. 171).

4 On analogy steps, Araszkiewicz, 2011, p. 103.

5 Brewer, 1996, p. 932; Peczenik, 1996, p. 312.

Complexity also comes from the evaluation of similarity or non-similarity that each factor confers. For each of them, a judgment has to be made in order to state or refute similarity. In a way, this step is the core of analogy: it is here that the terms of a comparison are effectively confronted under the specific analysis of resemblance. Its importance cannot be overlooked: inconsistent judgments made at this level often lead to false analogies.[6]

– Comparison between b and c under f_1 can lead to: $\neq$ or $=$[7];
– under f_2 it can also lead to $\neq$ or $=$; and so on for all factors.

Even if it is narrowed by its context, a comparison may still have to be made under a plurality of factors. From this it follows that different evaluations of similarity and non-similarity may be carried out. Therefore, for the terms in comparison, a table with different results appears: terms are similar under some factors and non-similar under others. As would be expected, under a common list of factors, the more proximate are the terms, the fewer are the results of non-similarity.[8]

– For b and c: $f_1 \neq, f_2 \neq, f_3 =, f_4 \neq, f_5 \neq, f_6 =$;
– for b_1 and b_2, hypothetically: $f_1 =, f_2 =, f_3 = , f_4 =, f_5 \neq, f_6 =$.

The complexity of analogy, however, resides in the choice of the decisive factor.[9] If certain terms are similar under a factor and non-similar under another, the conclusion of the analogy is wholly dependent on the selected factor. This choice is, nonetheless, external to the comparison: the equal position of each factor in relation to the terms implies that the operation in itself holds no criteria to define any kind of prevalence (Alexy, 2010, p. 17; Aarnio, 1987, p. 104). Thus, the overall analogy operation is decided through a meta-factor: the one that decides which factor, all things considered, is chosen.

– For b and c: $f_1 \neq, f_2 \neq, f_3 =, f_4 \neq, f_5 \neq, f_6 =$;
– for b and c: $(f_1 \neq) \vee (f_2 \neq) \vee (f_3 =) \vee (f_4 \neq) \vee (f_5 \neq) \vee (f_6 =)$;
– for b and c, hypothetically: $\mathrm{m}f \rightarrow f_3 \rightarrow b = c$.

6 On false analogy, among others analogy counterarguments, Shelley, 2002, p. 489.

7 Symbols = and ≠ are used here for simplification purposes, just to represent similarity and non-similarity.

8 And vice versa. On quantitative similarity see Davies and Russell, 1987, p. 265.

9 Or factors: all references to a decisive factor naturally include a set of decisive factors.

3 The same steps in the analogy of legal cases

The previous scheme is entirely applicable when the operation is used to provide a solution for a case unforeseen under any norm of the legal order. Here, where no answer to the legal question is provided, an operation of analogy is required to define whether the case at hand is similar to another case which fulfils the conditions foreseen in an enacted norm. Legal cases, then, become the terms to be compared. If the conclusion is an analogy, then the *prima facie* inapplicable norm becomes the decision-norm of the case and the legal question is answered (Santiago Nino, 2003, p. 293; Weinreb, 2005, pp. 97ff.).

- Case: 'allowing motorcycle entry into a park';
- no norm on entering the park with motorcycles;
- $norm_1$: 'cars are not allowed to enter the park';
- 'car entry' (*c*) and 'motorcycle entry' (*m*) are terms of comparison;
- if analogous, 'entry on a motorcycle' is also not allowed.

When the terms of comparison are cases, as in legal reasoning by analogy, the context of the comparison is provided by the legal question: what matters here is to have an answer for the deontic status of an unforeseen action. The endless list of factors is narrowed precisely by that question. Factors with no bearing on this normative issue will be irrelevant for the comparison (Araszkiewicz, 2011, p. 102; Roth, 2000, p. 115).

- Cases: 'allowing car entry into a park' (*c*) and 'allowing motorcycle entry into a park' (*m*);
- legal question: is entry of a motorcycle allowed?;
- irrelevant factors: f_1 number of wheels, f_2 comfort for the driver, and so on;
- relevant factors: f_3 pollution, f_4 danger to pedestrians, and so on.

Even if it is narrowed down, there still may be a plurality of factors, which may lead to a table with different results: no matter how reliable each evaluation is, any two cases may be similar under one factor and non-similar under another.

- For *c* and *m*: f_3 pollution, f_4 danger to pedestrians, f_5 freedom of action for driver, f_6 damage to park vegetation, and so on;
- for *c* and *m*: $f_3 \neq, f_4 \neq, f_5 =, f_6 \neq$.

The results of similarity and non-similarity offered by the table of comparison now reveal the main problem of the analogy operation: the selection of the decisive factor. As we have seen, if the decisive factor implies an evaluation of similarity, then a conclusion of analogy follows. If not, the legal question remains without a legal solution, in what strictly regards the analogy operation.

– For *c* and *m*: $(f_3 \neq) \vee (f_4 \neq) \vee (f_5 =) \vee (f_6 \neq)$;
– for *c* and *m*: if $f_5 \rightarrow$ 'motorcycles are not allowed to enter into the park';
– for *c* and *m*: if $f_4 \rightarrow$ no analogical answer.

Generally, the decisive point in legal reasoning by analogy also rests upon the definition of the meta-factor according to which the prevailing factor is selected. However, this meta-factor must be sustained by the legal order: if in an analogy operation the conclusion supports something that works as a 'new norm', no other option can be upheld. The problem is, of course, how.

4 The partial reducibility thesis

In the context of basic operations in application of law, the partial reducibility thesis constructs analogical reasoning under the statement that analogy can be partially explained through balancing (Brożek, 2008, p. 193). The thesis supports the assumption that the analogy operation is only partially autonomous: apart from a strictly analogical step, it is for the remaining part reducible to balancing. Thus, for the legal question at hand, the solution is drawn by weighting conflicting principles, as in any balancing (Brożek, 2008, p. 194).

The partial reducibility thesis depends, however, on a distinction between two levels of similarity: similarity$_1$ and similarity$_2$. The first, which is equivalent to the context of the comparison mentioned above, stands for the proximity of cases brought by the legal question at hand. This question defines as similar all cases whose solution is an answer to the same legal problem, setting the boundaries for an initial stage of similarity.[10] Cases selected here are then subject to further evaluation.

– Legal question: are motorcycles allowed into the park?
– norm$_1$: 'cars (*c*) are not allowed into the park';

10 Which is, as stated, an unproblematic level of similarity (Brożek, 2008, p. 191).

– norm$_2$: 'bicycles (*b*) are allowed into the park';
– no norm on motorcycle (*m*) entrance into the park;
– norm$_3$: 'speed limit for bicycles (*b*) in the park is 10 km/h';
– cases *c* and *b* are similar$_1$ to the '*m*' case;
– *b* speed limit case is dissimilar.

The second, similarity$_2$, is the decisive level of similarity, since it creates a norm for the case establishing the legal solution. Here, cases that were selected at the level of similarity$_1$ have to be compared and a decision on the 'relevant similarity' must be carried out. As similar$_1$ cases are linked to different solutions, the answer to the legal question is given by the case that is evaluated as similar$_2$. For this reason, similarity$_2$ stands for a deeper and conclusive choice of similarity (Brożek, 2008, p. 191).

– No norm on motorcycle (*m*) entrance into the park;
– car (*c*) case: 'cars are not allowed into the park';
– bicycle (*b*) case: 'bicycles are allowed into the park';
– if $m = c \rightarrow m \neg P$ park;
– if $m = b \rightarrow m P$ park.

The core of the partial reducibility thesis, however, is to be found in the way similarity$_2$ is defined and solved. As cases selected under similarity$_1$ are linked to a specific solution, the main point is to discover the principles backing each one of those solutions. Since these principles are, by definition, pointing in different directions, a common scenario for conflicting principles is created (Brożek, 2008, p. 194).

– Car (*c*) case norm$_1$ 'cars are not allowed into the park' is backed by P_1;
– P_1: 'the environment should be protected by law';
– bicycle (*b*) case norm$_2$ 'bicycles are allowed into the park' is backed by P_2;
– P_2: 'everyone has freedom of action';[11]
– on the question of whether motorcycles are allowed into the park, P_1 and P_2 conflict.

11 In its original presentation, the principle mentioned here is 'people are entitled to rest actively' (Brożek, 2008, p. 194.). However, because it is legally more accurate, the principle used in the text is the one adopted, within the same context, by Robert Alexy (Alexy, 2010, p. 16). The change does not affect the scheme in any way.

In the case of conflicting principles, the solution is given through balancing, namely with the 'Weight Formula': here, principles are weighted against each other and one of them will prevail over the other. Accordingly, the prevailing principle yields the solution for the case and a 'collision rule' is created with the case facts and the consequence drawn from the winning principle.[12] With this approach, the problem of similarity$_2$ was transformed into a problem of weighting principles, which encompasses, as the partial reducibility thesis sustains, a significant advantage: instead of asking which terms are similar$_2$, only a simple balancing needs to be carried out (Brożek, 2008, p. 195).

– P_1 (the environment should be protected by law) → m ¬P park;
– P_2 (everyone has freedom of action) → m P park;
– If with the Weight Formula $P_1 > P_2$ → m ¬P park.

5 First problem: random weighting outcome

Despite its undeniable interest, the partial reducibility thesis poses several problems. The first and most intuitive concerns the choice of the principles that stand behind the rules governing similar$_1$ cases. Albeit constructed as a simplified model, the thesis seems to disregard the fact that different principles may be available to back the rules that sustain similar$_1$ cases. This is immediately relevant for two reasons: because it shows that the choice of principles is more complex than it seems and, mainly, because the final result depends on the principle brought to the weighting.[13]

– Car (c) case: rule$_1$ 'cars are not allowed into the park' is backed by P_1 and or P_3;
– P_1: 'the environment should be protected by law';
– P_3: 'physical integrity is inviolable';
– bicycle (b) case: rule$_2$ 'bicycles are allowed into the park' is backed by P_2;
– P_2: 'everyone has freedom of action';
– the legal question is still: are motorcycles (m) allowed into the park?;

12 On the 'collision rule' (law of competing principles), see for instance Alexy, 2002, p. 54; Pino, 2010, pp. 190ff.

13 Of course, nothing prevents there being more than one principle on each side of the question, requiring an extended 'Weight Formula' (Alexy, 2002, p. 409; Sieckmann, 2010, p. 110). However, the point is that, using balancing, analogy becomes dependent on a dubious choice among principles (threatening the consistency of the outcome of the analogy).

– if interferences of P_2 in P_1 and in P_3 are different (how motorcycles cause pollution and how they can damage physical integrity), the weighting result can differ;
– hypothetically: $P_1 > P_2 \rightarrow$ m $\neg P$ park, but $P_3 < P_2 \rightarrow m\ P$ park.

6 Second problem: analogy covered by balancing

Elaborating on the previous point, the partial reducibility thesis also seems to disregard the fact that principles chosen to carry out the weighting process are materially connected with the factors used to compare cases: each principle within the balancing describes a factor for the cases selected in the phase of similarity$_1$. Therefore, not only does the choice of a principle describe the selection of a factor, but, furthermore, the balancing process is merely set out as a scheme to organize the choice of the decisive factor. Hence, this leads to the claim that balancing is used here only as a tool for determining the meta-factor: among the factors selected by the principles chosen, balancing only decides which one of them will prevail. Under cover of balancing, a proper analogy is performed.[14]

– For c, b, and m: f_1 pollution, f_2 freedom of movement, f_3 danger to pedestrians;
– P_1, P_2, and P_3 represent f_1, f_2, and f_3;
– P_1: 'the environment should be protected by law'; in f_1: $m = c$; $m \neq b$;
– P_2: 'everyone has freedom of action'; in f_2: $m = c$; $m = b$;
– P_3: 'physical integrity is inviolable'; in f_3: $m \neq c$; $m = b$;
– selection of P_1 and P_2 means that the 'main factors' are f_1 and f_2;
– if $P_1 > P_2$, than the decisive factor is f_1: $m = c$; $m \neq b$;
– $P_1 \rightarrow f_1 \rightarrow m = c$.

7 Third problem: balancing irrelevant principles

Taking into account that, under the partial reducibility thesis, the replacement of the similarity$_2$ phase is achieved by balancing principles that

14 Since balancing, in its proper sense, only decides which norm will be applied to a case among all those applicable, it becomes clear that, when it is used to select one of several distinct inapplicable norms for a case, balancing merely defines proximity and distance between the case and each one of the inapplicable norms.

support rules that are inapplicable to a case, another problem arises: the principles called upon by these rules become irrelevant. In fact and in spite of similarity$_1$, there is nothing to ensure that these principles are not irrelevant for the unregulated case, in which case they would be unable to justify any solution. The main reason for this result comes from the inapplicability of one of those principles to the case requiring an answer, which follows from the fact that features describing that case do not match the principle's antecedent. Under this scenario, principles called upon in similarity$_1$ do not play any role here. This leads to the following claim: the partial reducibility of analogy to balancing only works if the unregulated case, in spite of similarity$_1$, is analogous to the regulated case to the point that it triggers exactly the same principles as those backing the rules whose application by analogy is being considered.

- Car (*c*) case: rule$_1$ 'cars are not allowed into the park' is backed by P_1;
- P_1: 'the environment should be protected by law';
- bicycle (*b*) case: rule$_2$ 'bicycles are allowed into the park' is backed by P_2;
- P_2: 'everyone has freedom of action';
- new similarity$_2$ case: can a memorial tank (*mt*) be allowed into the park?;
- no norm for allowing a memorial tank (*mt*) into the park;
- under similarity$_1$, nothing has changed: question is still the permission to enter;
- balancing between P_1 and P_2 for *mt* is meaningless: at least, P_2 is irrelevant;
- the unregulated case does not fulfil the antecedent of P_2.[15]

8 Fourth problem: not enough principles for balancing

The obstacle for the partial reducibility thesis that underlies the previous problem can be extended to all normative situations in which the rules that govern similar$_1$ cases are not based on any principle or, probably most often, when those rules are supported by the same principle. In these situations, balancing is not possible for the simple reason that there are not enough principles playing any role in the case at hand. It is known that balancing

15 This is even more clear if the original principle is used as P_2: 'people are entitled to rest actively' (Brożek, 2008, p. 194). It seems undeniable that in any circumstance allowing the memorial tank into the park can be an instance of resting actively.

is an operation used to solve normative conflicts unsolvable by norms for conflicts: for that reason, balancing requires two or more norms.[16] Therefore, when cases are backed by the same principle, no balancing can take place.

– Rule$_1$: 'car circulation is restricted to three days per week';
– rule$_2$: 'plates with an even first digit, Mondays, Wednesdays, and Fridays';
– rule$_3$: 'plates with an odd first digit, Tuesdays, Thursdays and Saturdays';
– no rule was enacted for the few cars whose licence plates begin with a letter;
– even-first-digit (*e*) case: rule$_2$ is backed by P_1;
– odd-first-digit (*o*) case: rule$_3$ is backed by P_1;
– P_1: 'the environment should be protected by law';
– legal question: when can cars whose licence plates begin with a letter circulate?;
– balancing is unusable: P_1 backs both rules: no normative conflict exists.

9 The background problem: analogy and balancing do not match

All the problems with the partial reducibility thesis identified so far are, in a sense, no more than a consequence of a larger one: analogy and balancing do not match. This becomes rather clear when we take into account the fact that each one of these basic operations demands the opposite normative circumstances: while analogy depends on the absence of an applicable norm, balancing relies on the applicability of two or more norms. Based on their reverse opportunity, this opposition points towards mutual exclusion: a case requiring an analogy does not call for a balancing, and vice versa.

– Case: 'motorcycle (*m*) entrance into the park';
– normative circumstances of analogy: no norm on *m*;
– normative circumstances of balancing: about *m*, P_1 conflicts with P_2.

The probable explanation for the overlap between analogy and balancing, notwithstanding their mutual exclusion, seems to be in a reductive understanding of the role played by principles as effective regulating norms. Acceptance of principles as norms like all others, which is an inevitable

16 For instance, Pino, 2010, pp. 185ff.; Duarte, 2010, pp. 56ff.

consequence of their deontic character, has to imply that they govern cases in the same way as rules do. None of the particular features of principles, especially not their ability to be applied in various degrees, would interfere with the fact that they provide legal solutions as well: if a case fulfils the antecedent of a principle, then there is a legal consequence for that case. It is obvious that, if this principle conflicts with another, the solution becomes dependent on their balancing. However, once there is a weighting outcome, a final consequence is obtained and there is no room for the introduction of an analogy.

- Legal question: are motorcycles allowed in the park?;
- P_1: 'the environment should be protected by law';
- P_2: 'everyone has freedom of action';
- motorcycle entrance is an instance of: P_1 and P_2;
- no norm on 'car entrance into the park';
- no norm on 'bicycle entrance into the park';
- legal solution is obtained through balancing P_1 and P_2.

The reductive understanding of the role played by principles as effective regulating norms turns out to affect, then, the proper comprehension of what a gap is. If it still represents an absence of regulation, its extension must consider that both principles and rules are in the same way providing legal consequences, even though principles, bearing expansive antecedents which cover larger amounts of reality, considerably narrowed the space for unregulated cases. For the application of law, thus, no gap exists if the case is an instance of a principle antecedent: if it triggers a rule, the rule is applicable, but if it 'only' triggers a principle, the case is legally foreseen as well and, with or without balancing, the principle has to be applied.[17]

- Legal question: are motorcycles allowed in the park?;
- P_1: 'the environment should be protected by law';
- P_2: 'everyone has freedom of action';
- motorcycle entrance is an instance of P_1 and P_2;
- rule$_1$: 'cars are not allowed into the park'

17 But surely without analogy, as its normative circumstances are absent. This explains why some forms of alleged analogy cannot be considered as such (for instance, Verheij and Hage, 1994, p. 65; also with a reductionist approach, Kaptein, 2005, p. 502). Naturally, in what regards the concept of a gap, only normative gaps are relevant here (on the difference with axiological gaps, Santiago Nino, 2003, p. 281; Rodríguez, 2000, p. 152).

– rule$_2$: 'bicycles are allowed into the park';
– legal solution is not achieved by analogy;
– legal solution is still obtained through balancing P_1 and P_2;
– legal question: are cars allowed in the park?;
– legal solution is given by rule$_1$.

It seems that what is meant by 'gap' has significantly changed pursuant to the distinction between principles and rules and, consequently, to what follows from the 'optimization requirement' character of principles.[18] If one accepts that both principles and rules stipulate legal consequences, and thus that both are capable of solving cases in the very same way, the extension of 'gap' now has a range that seems to cover only two normative situations: (i) the unlikely situation in which no norm is applicable to a case, whether it is a rule or a principle, and (ii) the situation in which a rule, barring the applicability of principles, has a consequence that has not been specified for a category that, among others, also belongs to its sphere.[19] If these normative situations define what can enter into the extension of 'gap', it follows that the basic operation of analogy is confined to such situations.[20]

– Case$_1$: circulation of cars whose plates start with a letter;
– gap situation$_1$: if case$_1$ is not covered by any rule or any principle (gap$_1$);
– gap situation$_2$: with an unspecified consequence for case$_1$; for instance:
– rule$_1$ 'car circulation is restricted to three days per week';
– rule$_2$: 'plates with an even first digit, Mondays, Wednesdays, and Fridays';
– rule$_3$: 'plates with an odd first digit, Tuesdays, Thursdays, and Saturdays';
– no rule was enacted for the few cars whose plates start with a letter (gap$_2$).

10 A final remark

Analogy is goal-oriented: no choice among comparison factors, particularly at the level of similarity$_2$, can be carried out except in view of some purpose.

18 For instance, Alexy, 2002, pp. 47ff.; Brożek, 2012, p. 223.

19 The point here is to claim that normative gaps only exist at the level of rules if rules created the gap or at the level of principles if any one is applicable (Manero, 2005, p. 123).

20 All this presupposes that analogy, as an operation adopted to create a decision-norm not enacted by the normative authority, depends on a norm allowing its use under a specific condition and that this condition is the existence of a gap.

Without some such purpose, the meta-factor deciding which factor prevails is indefinable and, for this reason, the choice among factors lacks justification and becomes a strictly arbitrary option. Since principles provide, on a larger scale and more perceptibly, the ends adopted by the legal order, and since these ends are usually introduced in analogy in order to solve the meta-factor problem, the goal-oriented character of analogy has found in this kind of norm its main source of operability. However, principles behave here under a double condition: as 'end-providers' and, while giving direct solutions for cases, as 'gap-decreasers'. This duplicity should be treated carefully: whenever principles govern a case, they immediately exclude analogy and leave no space for them to be used as criteria by which similarities are established.

About the author

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6. Analogy and balancing*

A reply to David Duarte

Bartosz Brożek

Hendrik Kapein and Bastiaan van der Velden (ed.), *Analogy and Exemplary Reasoning in Legal Discourse*. Amsterdam University Press, 2018
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Abstract
The partial reducibility thesis may still be defended, with appeal to Robert Alexy's theory of legal reasoning. One issue with Duarte's criticism of the partial reducibility thesis is its relative neglect of Alexy's insights. Aspects of analogy which may be of importance for any viable theory of analogy in the law are highlighted as well.

Keywords: balancing, analogy, partial reducibility

1 The partial reducibility thesis and the Alexian framework

Already in 2008 I suggested that – within the context of Robert Alexy's conception of legal reasoning – analogy may be partially reduced to the balancing of legal principles. The procedure looks roughly as follows:

(1) One encounters a problematic case, i.e. a case for which there is no directly applicable legal rule.
(2) One identifies cases *prima facie* similar (or similar$_1$) to the given one, for which there exist definite solutions, i.e. for which there are directly applicable legal rules.
(3) One identifies principles standing behind (backing) the legal rules that govern the *prima facie* similar cases.
(4) Through the balancing of principles, one decides which of the principles should govern the case at hand. (This also establishes which of the

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prima facie similar cases is relevantly similar – or similar$_2$ – to the case at hand.)

(5) The course of action dictated by the prevailing principle(s) is the decision in the case at hand.

In this way, I argued, one is able to solve the most pressing problem for any account of analogical reasoning in the law: that of relevant similarity. Usually, it is quite easy to determine a number of already-solved legal cases which are similar – in one way or another – to the case at hand. The hard problem is to decide which of those cases is relevantly similar, i.e. which is to serve as the basis for the analogical decision. By transforming this problem into the balancing of principles, I believe I have replaced an unfamiliar procedure (e.g. choosing the 'prevailing factor' which the case at hand shares with one of the *prima facie* similar cases) with a familiar one (i.e. balancing of legal principles; of course, it is familiar to those who know Alexy's view of legal reasoning and agree with it).

This means that analogy can be divided into two phases. The first phase consists in identifying cases which are *prima facie* similar to the unregulated case. It is purely heuristic – it may be dispensed with (as when one resolves the problematic case without contemplating any similar cases, but instead directly looks for the applicable principles). The second phase, in turn, is justification-generating and consists in balancing of legal principles which govern the *prima facie* similar cases. More importantly, in the paper I claimed that what makes analogy 'work' – at least in the general case – is that, given a problematic case, there usually is more than one case *prima facie* similar to the contemplated case. Of course, there are instances in which analogy operates with only one *prima facie* similar case. However, this is – or so I argued – not typical. In order to fully appreciate the mechanism of analogical reasoning, one needs to recognize its dialectical dimension. It is that dimension that makes analogy rational, as it is what enables balancing to enter the stage.

Before I examine David Duarte's objections against this view of analogy, and the partial reducibility thesis, it is necessary to devote a few words to the Alexian framework which served as the background for my analyses. In the footsteps of Ronald Dworkin, Alexy distinguishes rules and principles. Principles are norms which require that something be realized to the greatest extent possible given the legal and factual possibilities. Principles are optimization requirements, characterized by the fact that they can be satisfied to varying degrees, and that the appropriate degree of satisfaction depends not only on what is factually possible but also on what is legally

possible (Alexy, 2002, p. 47). Rules, on the other hand, 'are norms which are always either fulfilled or not. If a rule validly applies, then the requirement is to do exactly what it says, neither more nor less' (Alexy, 2002, p. 48).

When one accepts the thesis that any legal system is made of rules and principles (I have my doubts regarding the distinction in question; see Brożek, 2012), important theoretical consequences follow. It is best to grasp them by imagining a legal system which consists solely of principles, i.e. 'optimization requirements' such as 'The environment should be protected by the law' or 'Everyone has freedom of movement'. In such a case, the application of law would become very complex, as for (presumably) every case the judge would have to carry out a balancing procedure (i.e. for any case there would be principles leading to contradictory conclusions). This is the reason why the legislator introduces legal rules, which are applied via simple *modus ponens*. But it is necessary to notice that legal rules are already a result of weighing some principles, although not in relation to a particular case, but to a class of cases. Thus, the legal rule 'Vehicles are not allowed into the park' is an outcome of the balancing procedure undertaken during the legislative process in which such principles as 'The environment should be protected by the law' and 'Everyone has freedom of movement' are weighed against each other to produce a legal rule governing a generic case. Moreover, since the legislative process cannot take into account all the possible circumstances in which the question arises of whether a vehicle (say, an ambulance carrying a seriously injured person) can enter the park, it is still possible that the application of the rule may be blocked by another principle (say, 'Human life should be protected by the law').

However, Alexy emphasizes that such an occurrence is rare, since for a principle to prevail over a legal rule requires that the principle outweighs not only the principle backing the rule, but also the so-called formal principles, such as 'Rules passed by an authority acting within its jurisdiction are to be followed' or 'One should not depart from established practice without a good reason' (Alexy, 2002, p. 58). This changes little, however, when it comes to characterizing the relationship between rules and principles: the latter are logically prior to the former in the sense that each rule is an outcome of balancing some principles (for a class of cases). It is possible to imagine a legal system consisting solely of principles, while it is impossible to imagine a legal system consisting only of rules (this thesis follows from Alexy's insistence that legal discourse is firmly embedded in general, practical discourse; see also Brożek, 2007, pp. 160–189).

One further consequence of Alexy's view of the legal system is that there are no genuine gaps in the law (and here I concur with Duarte's conclusion).

The only kind of 'gap' one can speak of is a situation when there is no legal rule governing the given case; however, there always are principles which are applicable to any given circumstances.

2 Duarte's objections

Let me now turn to examine David Duarte's objections to the partial reducibility thesis. First, he claims that it may be difficult to pinpoint the principles standing behind the legal rule governing the *prima facie* similar cases; further, he observes that there may be more than one such principle. For example, the rule forbidding cars to enter the park may be backed by both the principle pertaining to the protection of the environment, and the principle pertaining to safety in public places. Duarte's first worry is genuine, but it is an objection against Alexy's theory of legal reasoning in general, and not the partial reducibility thesis. Alexy clearly claims that it is possible to identify principles 'standing behind' a given legal rule. It is required, *inter alia*, when one decides a conflict between a legal rule and a legal principle. In such a case, one weighs, on the one hand, the conflicting principle, and on the other, the principles standing behind the formulation of the rule (together with the formal principles). I believe that Alexy's reply to this problem would be quite straightforward: in order to identify legal principles supporting a given legal rule one has recourse to common sense, but also to the general legal provisions of the legal act in which the rule is expressed, as well as the documents produced during the legislative process and doctrinal theories. Duarte's second worry – that there may be more than one principle standing behind the given rule, which would make it necessary to pick one of them for the process of balancing – has been identified and answered directly by Alexy. In 2007 he elaborated his conception of the Weight Formula in such a way that several principles may be simultaneously balanced.

Second, Duarte claims that balancing – as used in analogy – is only a facade: what really goes on, is the determining of the meta-factor: among the factors selected by the principles chosen, balancing just decides which one of them prevails. Under the cover of balancing, proper analogy is performed.

I read Duarte as saying the following: each two cases are similar and dissimilar in an endless number of ways. For example, cars and bicycles may be compared according to an infinite number of factors: price, speed, metal texture, comfort, beauty, how it pleases John, etc. Analogical reasoning aims at identifying a criterion which would determine which of the possible comparison factors should be taken into account to establish relevant similarity

between two cases, and thus resolve the case at hand. Further, Duarte seems to claim that the selection of this meta-factor is the essence of analogical reasoning. It follows that the use of the process of balancing I suggested for establishing relevant similarity between cases is just the determination of the meta-factor 'in disguise'. What really happens, is the selection of the relevant factor; and the selection is described 'as if' it concerned something completely different. I believe that Duarte misses an important point here. The very reason for introducing the partial reducibility thesis was to dispense with all the talk about factors and meta-factors, as such idiom is simply misleading. It is visible already at the surface level of Duarte's argument: when he compares two cases – of whether a bicycle can enter the park and whether a car can enter the park – he ultimately compares cars and bicycles, not cases! Meanwhile, on my account the situation is different. I claim that analogical reasoning is connected to establishing two kinds of similarity. *Prima facie* similarity between two cases pertains to whether those cases are concerned with the same kind of problem. In its simplest form, a problem may be defined as a pair of contradictory statements (not properties!), e.g. $\{p, \neg p\}$, where p stands for 'may enter the park' (of course, it is possible to provide a more complex and intuitively sound definition of a problem). To say that two cases are *prima facie* similar means that they pertain to the same kind of problem. Let us observe that this mode of speaking makes it unnecessary to refer to any factors (as understood by Duarte). This is quite fortunate, since when analogy is conceptualized in terms of factors, any two cases are *prima facie* similar (making the very concept of *prima facie* similarity useless); but it is not true that any two cases address the same kind of problem. Furthermore, according to the partial reducibility thesis the second stage of analogical reasoning consists of balancing legal principles, which also does not involve factors. Thus, my claim is not that the determination of the meta-factor is done through the balancing of principles, but rather that the very idea of the factor-based mechanism of analogy should be rejected. One further consequence of this theoretical manoeuvre is that analogy – understood along the lines of the partial reducibility thesis – becomes firmly embedded in a more general conception of justification (i.e. Alexy's theory of practical discourse). When one sticks to the account of analogy in terms of factors, one is in a more difficult theoretical position regarding the justification force of analogy.

Third, Duarte observes that 'there is nothing to ensure that those principles [identified by determining the *prima facie* similar cases] are not irrelevant for the unregulated case, in which case they would be unable to justify any solution'. This would be so if the *prima facie* similar cases were

determined on the basis of the similarity of some factors; however, when the *prima facie* similarity is limited to those cases which address the same kind of problem (as defined above), this objection seems no longer valid: there is no real danger that the legal principles involved in the analogical case would have no relevance for the case at hand.

Finally, Duarte claims that 'all of the problems with the partial reducibility thesis […] are […] no more than a consequence of a larger one: analogy and balancing do not match'. This point is supposedly justified by the fact that analogy and balancing require 'opposite normative circumstances: while analogy depends on the absence of an applicable norm, balancing relies on the applicability of two or more norms'. As I tried to show above, this is not true, at least within the framework of the Alexian theory of law and legal reasoning, where a situation in which there is no applicable legal norm (i.e. a rule or a principle) can never take place. The only possibility to trigger analogical reasoning is when the given case is not regulated by a legal rule (there always will be at least one relevant and applicable principle).

3 Conclusion

Let me reiterate the main points of my argument:

1 The partial reducibility thesis makes sense only within the framework of the Alexian view of the law (or a similar conception), in which the law consists of both rules and principles, and where there are no genuine gaps in the legal system.
2 The partial reducibility thesis replaces an unfamiliar and somewhat mysterious process of determining the relevant similarity between cases with the more familiar procedure of balancing principles.
3 In this setting, analogy is a two-step procedure and consists of the heuristic stage (the identification of *prima facie* similar cases and the principles that govern them) and the justification-generating stage (balancing of legal principles).
4 My proposal aims at dispensing with analysing analogy by recourse to factors; instead, I suggest determining *prima facie* similarity of cases by referring to the problem involved in the case at hand, and relevant similarity by the process of balancing. This is not intended as another way of saying what the proponents of the factor-based accounts of analogy claim; rather, it is an essentially different conceptualization of analogy.

5 The important insight of my proposal is that analogy is – in the general case – dialectical. In a sense, I try to reverse the traditional picture of analogical reasoning. On the traditional view of analogy, when one is dealing with an unregulated case, one is desperately looking for another case which is relevantly similar to the case at hand. What I suggest is that – given an unregulated case – it is usually easy to identify a number of cases dealing with similar problems, and the hard part is to decide which of these cases is relevantly similar. The existence of various *prima facie* similar cases makes it possible to contrast and compare various possible solutions to the case at hand, what facilitates the determination of relevant similarity, and hence the solution to the case.

One final remark: I have repeatedly observed that the partial reducibility thesis is meaningful only against the background of Alexy's theory of legal reasoning. However, I believe that some aspects of analogical reasoning I have tried to highlight – notably those referred to in theses (4) and (5) above – are relevant to any theoretical attempt to account for analogy in the law.

About the author

Bartosz Brożek is professor of jurisprudence, Jagiellonian University, Krakow. He published extensively on methods of legal reasoning and other major subjects in the philosophy of law.

7. Analogy and balancing once again

A reply to Bartosz Brożek

David Duarte

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Abstract
Against the partial reducibility thesis it may still be brought forward that analogy and balancing presuppose totally opposite normative conditions. This renders 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.

Keywords: Balancing, analogy, partial reducibility, opposite normative conditions

1 The big picture of the disagreement

Although the previous exchange of ideas on analogy and balancing between Bartosz Brożek and myself may speak for itself, it seems convenient to start with a brief idea of the discussion just for framing purposes.[1]

As is known, analogy is an assessment, or the result of one, performed to establish whether terms in comparison can be qualified as 'relevantly similar'.[2] For what matters to the discussion, analogy is used to ascertain whether a case without a legal solution is relevantly similar to another in order to submit the former to the norm regulating the latter. If cases are analogous, the decision-maker is able to give the case a legal solution where the legal order had none. So, irrespective of other applications of analogy in the legal field, this means that only analogy gauged to fill a gap is at stake here.[3]

1 The discussion was in fact started by Brożek (in 2008).
2 For instance, Weinreb, 2005, pp. 68ff., and MacCormick, 1978, p. 185.
3 On the connection of analogy and gaps see Guastini, 1993, p. 432; Kloosterhuis, 2000, p. 183.

It is Brożek's view that overcoming a gap is done through a partial reduction of analogy to balancing. In short, Brożek's scheme runs as follows: (i) if there is a gap for a case, other cases that share the same legal question are similar cases in an initial approach (similarity$_1$); (ii) when similarity$_1$ is recognized, the case without legal solution will be decided through the balancing of the principles that sustain the rules applicable to similar$_1$ cases. Thus, if the first step is analogical, since the identity of the legal question works as a criterion of similarity, the second one, expressing the partial reduction, is already a proper balancing: here, weighting the principles invoked by similarity$_1$ cases will give, under the law of competing principles, a rule for the case at hand.[4]

- Brożek's 'motorcycle case' is a perfect example for the partial reducibility thesis:
- there is rule$_1$: 'cars are not allowed into the park';
- there is rule$_2$: 'bicycles are allowed into the park';
- there is no norm on the entrance of 'motorcycles' into the park;
- the motorcycle case is similar$_1$ to the car and bicycle cases; they pose the same legal question: entrance;
- rule$_1$ is based on principle$_1$ 'the environment should be protected by law' (P_1);
- rule$_2$ is based on principle$_2$ 'everyone has freedom of action' (P_2);
- motorcycle entrance is thus dependent on balancing principle$_1$ with principle$_2$;
- if $P_1 > P_2 \rightarrow$ motorcycle entrance is not allowed; if $P_1 < P_2 \rightarrow$ motorcycle entrance is allowed;
- thus, balancing gives the legal solution to the motorcycle-entrance gap.

By transforming the analogical approach, in a two-step sequence, into an usual process of weighting principles, namely one performed with the Alexyan 'Weight Formula', Brożek sees partial reduction as a scheme that simplifies the whole process of filling a gap. The analysis of factors and meta-factors is no longer needed, be it for facts, cases, or rules, and the absence of a rule for a case becomes a normative situation where only a balancing has to be carried out. In his own words, the partial reducibility thesis allows us to 'get rid of the problematic process of deciding which similarities$_1$ are relevant similarities'.[5]

4 On the law of competing principles see Alexy, 2002, p. 54.

5 See Brożek, 2007, p. 152. This underlying idea that a balancing is an easier task than the definition of a meta-factor for a relevant similarity seems questionable. First, balancing, even

I raised some doubts about the partial reducibility thesis. At one level, there are some relatively detailed doubts that I will address later on. At another level, I raised a main doubt, strictly focused on the connection between analogy and balancing itself: if analogy and balancing have, or presuppose, totally opposed normative conditions, as I think they do, then the whole idea of reduction becomes inconsistent. The underlying claim is as follows: if an analogy depends on a gap and balancing presupposes more than one applicable norm, then analogy and balancing are incompatible.

2 The main doubt: a merely apparent disagreement?

Apart from some radical theories that reject the distinction, developed legal orders, as those we currently know, are systems of norms formed by principles and rules.[6] It has no relevance here under which criteria principles can be distinguished from rules, nor if the distinction has a mere heuristic function or expresses an effective structural difference between two mutually exclusive categories of norms.[7] What matters here is that no doubt is admissible about the fact that both principles and rules are normative, with the effect that in both of them there are legal consequences applicable when their specific antecedents are fulfilled.

This has been clear for rules, but it is now also clear for principles. Regardless of how large the scope of a principle's antecedent, or how its conditions are interrelated therein, the fact is that no norm can have its application dependent on everything, and a selection of the reality in the antecedent is inherent to the concept of a norm.[8] Thus, the consequent assumption that principles also depend on the subsumption scheme, irrespective of eventual later balancings, expresses an 'identitarian' symptom of their status as norms: a principle has a legal consequence for a case whenever applicable to it, based on the fulfilment of its antecedent.[9]

with the support of the Weight Formula, is also a complex evaluative assessment. Second, since the choice of the meta-factor, decisive for defining relevant similarity (similarity$_2$), is only possible by an assessment of proportionality (according to Duarte), no reasons seem to exist to see balancing as an option of increased facility: defining the goal of comparison and setting the appropriate factors (relevant factors) is a proportionality task probably as difficult as balancing.

6 On such rejection see for instance Poscher, 2012b, p. 235.

7 On the original criteria point, Alexy, 2002, pp. 47ff. Defending a mere heuristic function, Brożek, 2012, pp. 224 and 225. On the attempt to define a structural (or morphological) difference, Duarte, 2012, pp. 54ff.

8 Decisive on this Von Wright, 1963, p. 74.

9 On subsumption with principles see Guastini, 2007, p. 5, and Bustamante, 2012, p. 60.

Principles being norms like any others, this has to mean that no gap exists when a case matches a principle's antecedent, at least assuming a 'normal' concept of a gap: a legal consequence is triggered and a solution exists for the case. It is irrelevant, under this frame, that principles might have a larger 'distance of density' regarding facts. If the properties of the case match the conditions foreseen in the antecedent of a principle, then that variable is impotent to prevent the mechanics of conditionality.[10] What matters, therefore, is that a norm – a principle – with a consequence is applicable and a *prima facie* solution can be given to the case.

What has been said can be illustrated with the 'motorcycle case'. However, let us make a change in the case and imagine that no rules existed in this legal order concerning 'entrance into the park': no rules for bicycles and no rules for cars. If, for any reason, a legal decision has to be taken on the entrance of a motorcycle, and we still have P_1 and P_2, no gap exists and this is not a normative situation where an analogy can take place. The legal solution for the entrance of a motorcycle will be obtained through balancing alone and the law of competing principles.

- The legal question is 'can a motorcycle (*m*) enter into the park?';
- P_1 is 'the environment should be protected by law';
- P_2 is 'everyone has freedom of action';
- rule_1 and rule_2 do not exist;
- entrance of a motorcycle is an instance of P_1 and P_2;
- $P_1 \supset$ entrance is not allowed;
- $P_2 \supset$ entrance is allowed;
- no gap exists, and a balancing between P_1 and P_2 gives the solution for the case.
- if $P_1 > P_2 \rightarrow$ motorcycle entrance is not allowed; if $P_1 < P_2 \rightarrow$ motorcycle entrance is allowed.

This seems to me somehow undisputable. After all, the normative scenario created with the modified 'motorcycle case' is no more and no less than those created with principles competing for the solution of a case where no rule within the legal order is applicable. Let us use the well-known '*Lebach* case' as an example: here, two applicable principles give contradictory legal solutions, no rules exist on broadcasting documentaries affecting someone that had just left jail, and the decision is solely dependent on balancing

10 Similarly Brożek, 2007, p. 116.

the competing principles. No gap was recognized and no analogy was ever hypothesized.[11]

- The legal question is 'is it allowed to broadcast the documentary?';
- P_1 is 'freedom of the press';
- P_2 is 'free development of one's personality' (as a norm conferring a right to be let alone);
- no rules exist for the legal question;
- broadcasting the documentary is, in this case, an instance of P_1 and P_2;
- $P_1 \supset$ broadcasting is allowed;
- $P_2 \supset$ broadcasting is not allowed;
- no gap exists, and balancing P_1 and P_2 gives the solution for the case.
- if $P_1 > P_2 \rightarrow$ broadcasting is allowed; if $P_1 < P_2 \rightarrow$ broadcasting is not allowed.

Brożek seems to agree with what has been said here up to this point. Principally, regarding the status of principles as norms and the consequence that they give legal solutions – in his own words: 'I believe principles are norms, and as such they instruct us what to do. In other words, every principle must consist of its conditions of application and a conclusion' (Brożek, 2007, p. 116). But Brożek goes further and also says that, with a principles and rules insight, the 'only kind of "gap" one can speak of is a situation when there is no legal *rule* governing the given case; however, there always are principles which are applicable to any given circumstance'.

This puts the disagreement in a very peculiar place. First, it looks like we totally agree. Second, it looks like the whole discussion has been transferred to two different issues: (i) whether the existence of similar$_1$ rules under applicable principles prevents their application; and (ii) whether it makes sense, notwithstanding its conventional nature, to speak of a gap as a situation without a specific rule for a case where there is an applicable principle. Let us analyse both.

Regarding the first issue, the parallel between the modified 'motorcycle case' and the '*Lebach* case' already gives us a consistent frame of reference to see that nothing seems to justify the premise that, under applicable principles, the existence of similar$_1$ rules, i.e. rules not addressing the given case, prevents the applicability of those principles. A direct subsumption of the

11 The point that no rules existed in the '*Lebach* case' (LBVerfGE 35, 202, Constitutional Court of Germany, 1973) might not be totally accurate. Nevertheless, it is the way the case has been presented and discussed. See for instance, Alexy, 2002, p. 105.

case under those principles occurs and similar$_1$ rules, if not totally irrelevant, might only play a role in the external justification of the balancing. As norms like any others, principles will be applicable under a subsumption scheme, and surely not be affected by rules that, anyway, do not even address the case.

- The legal question is 'can a motorcycle (*m*) enter into the park?';
- P_1 is 'the environment should be protected by law';
- P_2 is 'everyone has freedom of action';
- rule$_1$ ('cars not allowed') and rule$_2$ ('bicycles allowed') do exist;
- if entrance of a motorcycle is an instance of P_1 and P_2, P_1 and P_2 are applicable;
- applicability of P_1 and P_2 leads to their balancing, which gives the solution for the case;
- rule$_1$ and rule$_2$ play no role in the solution: they are (and always were) inapplicable.

If this is right, it follows that the partial reducibility thesis is not the reduction of analogy to balancing, but the extreme opposite, a dispensable intrusion of analogy into a normative situation that just demands balancing. In other words, the partial reducibility thesis appears, not as a reduction of analogy to balancing, but as an effective reduction of balancing to analogy, and, moreover, a forced one, since there are no normative conditions for analogy. If this is right, I think that, at this point, it becomes quite evident that analogy and balancing do not match: how can an analogy be performed if its necessary condition, a gap, is absent?

Now, regarding the second, which is, I think, a smaller issue. The concept of a gap is one of the most ill-defined in legal theory, but, as a conventional matter, it is not right or wrong, but more or less technically functional or adjusted. From this perspective, I do not see any functionality or adjustment in using the concept of a gap to represent normative scenarios where, under applicable principles, 'there is no legal *rule* governing the given case', to use Brożek's words. A gap as the 'mere absence of a rule' will imply that the concept represents all cases where normative authorities had not yet weighted the principles in force, which seems counter-intuitive given that we are talking about existent and valid norms: those principles. But, much more than that, it will give principles the status of 'semi-norms', since it assumes that principles are only applicable through a rule created by a normative authority.

An explanation is required here: it seems that the whole discussion is taking place in a possible world none of us believes in. In developed legal

orders, principles not only became 'gap-decreasers', but, moreover, they erased the space for cases without legal solutions, at least in the case of primary norms. Therefore, the point is not whether or not analogy can be reduced to balancing. The point is, rather, that under a principles theory balancing has 'replaced' analogy.

3 The details: two agreements and two disagreements

In a more detailed approach, I raised four problems that, as I thought, could undermine the partial reducibility thesis in more specific points: (i) that, in the transition from the first step to the second, it could be difficult to know which principles backed the rule applicable to the similar$_1$ case, meaning that the thesis could give a random outcome depending on the principles chosen; (ii) that, also in that transition, there could be normative situations where there was only one principle backing those rules and, thus, not enough principles for carrying out a balancing; (iii) that the similar$_1$ case could call for principles that turn out to be effectively irrelevant for the case missing a legal solution, thus unable to give a response for the legal question at hand; and (iv) that under the balancing in similarity$_2$ what is being done is a mere choice of relevant similarity, i.e. a choice of what is decisive for submitting the unregulated case to a rule, principles acting as a 'disguised' tool for a decision about relevant similarity.

I will drop the first two problems. I think Brożek is right. In fact, regarding the first, not only is it true that difficulty is not an effective objection, but it is also true that similar$_1$ rules select a class of cases that, by definition, are just a part of the broader antecedent of a specific principle: the rule and the principle antecedents intersect and, for this reason, an identifiable principle is always available.[12] Regarding the second, it is somewhat naive, under the current framework of complex legal orders compounded by multiple 'expandable' principles, to think that there could be a case where no competing principles would be invoked. A rule being always the result of a balancing made by the normative authority and, moreover, a choice made among different alternatives, no possibility remains for the absence of principles supporting and being opposed by the rule enacted. Under that

12 If a principle's antecedent is formed by disjunctive inclusive conditions, as I think it is, then the conditions of a given rule will be necessarily part of one of the conditions of the principle that stood behind the rule.

framework, a principle has been necessarily developed and another has been necessarily limited by the rule.[13]

I do not think, however, that Brożek is right regarding the third. In fact, it seems that, with different cases and the same legal question, the use of the same legal principles does not necessarily follow: the legal question can be the clue to similarity$_1$, but applicable principles are not defined solely by that question. It being a current situation of subsumption, the applicability of principles is mainly defined by the properties of the case. Therefore, maintaining that the same legal question cannot remove or bring principles different from those invoked by similarity$_1$ is to disregard both the roles played by the subsumption scheme and the legal question: while the former is a deductive operation, this later is a query on the deontic status of the action (permitted, forbidden, or imposed), possibly answered by 'different' principles.[14]

- P_1 is 'the environment should be protected by law';
- P_2 is 'everyone has freedom of action';
- P_1 and P_2 back rule$_1$ ('cars not allowed') and rule$_2$ ('bicycles allowed');
- without a rule on motorcycles, the legal question is 'are motorcycles allowed to enter into the park?';
- the legal question is, thus, regarding motorcycles, $p \vee \neg p$;
- let us put 'whether a memorial tank can enter into the park' as a similar question ($p \vee \neg p$);
- even if the memorial tank might harm the environment, it will never be an instance of P_2; the deontic status of the action 'entrance' will be given by a competing principle (P_3) on 'promotion of cultural heritage';

13 Because, if not, one would have to admit that the scope covered by all rules of a legal order is not also covered by all principles of that legal order, which I think is false. The evidence that Brożek is right might be seen in the example I gave in order to sustain the criticism (see my contribution to this volume): there is a competing principle applicable, 'freedom of action', that allowed drivers to choose which three days of the week they would drive.

14 There is no necessary connection between the two at all. Two additional notes are needed here. First, it is not totally clear what is 'the same legal question' or, as Brożek also puts it, the 'same kind of problem'. Even if it is a pair of contradictory statements, like p or $\neg p$, nothing prevents the definition of the prevailing statement laying outside the principles invoked by similar$_1$ rules, as the next example will try to demonstrate. Second, this is a point where it is clearly evident that nothing of an analogical nature is going on here: it is not the 'identity' of the legal question that calls for some principle, but, rather, the properties of the case. If similarity$_1$ is removed, the legal question will be answered by the principles applicable independently of the cases under comparison or the question they have raised.

– let us put 'whether a person can enter into the park with a poison snake' as a similar question ($p \vee \neg p$);
– here, if P_2 is applicable, there seems to be no space for P_1: the legal question demands a balancing between P_2 and P_4, where P_4 is 'every person shall have the right to physical integrity'.

I also think that Brożek is not right regarding the fourth. Analogy is an intellectual process of establishing similarities and differences. If an answer is demanded about the similarity of one case to another, a choice has to be made on the 'all things considered' similarity or difference between them. Thus, the decisive task raised by analogical argumentation is the final decision inherent to that choice. It is clear to me that once principles are being weighted in order to reach a solution, the legal answer is the balancing's output, independently of anything else. However, if this balancing is done in order to reach a solution where there was a 'gap' and the outcome will be a similar or a different rule from the rule applicable to a similar$_1$ case, what is being done is to choose whether cases are 'relevantly' similar or not. Balancing, under these circumstances, is just a 'substantial' technique for placing cases on one side or the other of the line dividing relevant and irrelevant similarity.[15]

Brożek denies this precisely with the claim that the balancing step is also adopted in order to remove the analysis of factors and meta-factors between the terms in comparison. Balancing would work and give an outcome beyond that analysis. But this claim seems to miss the main point of the criticism: it does it anyway. If the 'rule'-regulated case A has the features '$a_1 \wedge a_2 \wedge a_3 \wedge a_4$' and the unregulated case B has the features '$a_3 \wedge a_4 \wedge a_5 \wedge a_6$', the outcome of balancing the principles invoked by case A will necessarily be – under the problem '$p \vee \neg p$' – an option, directly or indirectly, on the relevancy of '$a_3 \wedge a_4$': if the outcome is a 'rule' with a solution equal to the one given by the rule regulating case A, case B is relevantly similar to case A; if not, similarity$_1$ is not confirmed in similarity$_2$. So, even if balancing does not address factors directly, the fact is that it will always give an answer to the

15 All this is, however, handicapped by the lack of sense in viewing this normative situation as an analogical one (as is the case in similarity$_1$). Putting it rigorously, for someone defending the view that the partial reducibility thesis is just an intrusion of analogy into balancing, as I do, this only makes sense in the imaginary scenario of a developed legal order lacking a rule or a principle answering the legal question at hand. Only here would a final decision on relevant similarity be needed and only here would one understand that weighting the principles invoked by the similar$_1$ case (principles inapplicable in this scenario) would just be a way to decide whether or not cases are definitely similar.

question of relevant similarity and, therefore, it will always be a 'disguised' way to decide the meta-factors.[16]

4 Going a little bit further: the pertinence of balancing

What has been written in the past years on the connection between analogy and balancing, not only on the defence of the partial reducibility thesis, but also on the understanding of analogy through balancing, also suffers, in my view, from what might be a an indirectly related problem: the precise definition of which methodological operations, within the whole process of the application of law, demand a balancing; in other words, under which normative conditions can or ought a balancing to be carried out.[17]

As initially understood, balancing is the methodological operation that has to be done when two or more principles enter into conflict and, for contingent reasons, the legal order has no norm for conflicts able to solve the conflict. Usually, conflicts between principles are of the partial-partial type and legal orders lack norms for conflicts of this type (if they can be designated as norms for conflicts, since it is a material conflict between conditions not shared by both norms). Thus, when principles conflict without a consequence determining the prevailing one, only balancing can present the applicable principle and give a legal response to the case.[18]

16 And I think that this becomes clear when one poses the 'analogy question': whether or not cases *A* and *B* are relevantly similar. No matter how the solution to the unregulated case is obtained, only two answers are possible – yes or no – answers that in analogical argumentation represent precisely whether or not they were plausibly regulated, and therefore, retrospectively, whether or not they would be qualified as relevantly similar. But this is a general point. I think it is totally applicable to other constructions of analogy intended for different answers than the similarity$_2$ assessment towards a meta-factor justified by a goal of comparison. A good example is the 'questions and sub-questions' scheme (D'Almeida and Michelon, 2016, pp. 28ff.) in which the analogical outcome depends on the 'integration' of the legal question at hand into a broader one. Here, a 'disguised' assessment of relevant similarity is done as well, since 'integration' is only understandable if the distinguishing properties of cases are not relevant enough to prevent both (the regulated and the unregulated) sharing the same legal answer.

17 For instance, on analogy and balancing, Alexy, 2010, pp. 9ff.; Bustamante, 2012, pp. 59ff.; and Brożek, 2007, pp. 140ff.

18 However, it is important to stress that the normative conditions for balancing are just two, no matter how they can be present contingently: (i) conflict of principles (so far); and (ii) inapplicability of a norm for conflicts. For instance, if a conflict between two principles is of the total-partial type and *lex specialis* is non-existent, this conflict also lacks a solution provided by a norm for conflicts, and balancing, here again, is the only operation available for defining the legal consequence applicable to the case.

For those who think that rules are as defeasible as principles, referring strictly to rebutting defeasibility, and think that rules also enter into partial-partial conflicts, or conflicts not solvable by norms for conflicts, as is my contention, what was said about principles is totally applicable to rules.[19] If one rule conflicts with another and no norm for conflicts is applicable, then the definition of a legal solution is only attainable by balancing the conflicting rules. No other way exists to define the deontic status of the action foreseen and, as with principles, only balancing will define the prevailing rule and the applicable consequence for the case.[20]

Without any solution given by a norm for conflicts, a conflict between norms demands a balancing for a very particular reason: it triggers the principle of proportionality and this principle acts, within the legal order, as a kind of residual norm for conflicts. If a legal solution has to be obtained when there are two incompatible legal consequences, necessarily one norm has to be defeated; consequently, the sacrifice of the defeated norm in favour of the defeater is a means to achieve the legal consequence of the prevailing norm. A means → end connection is established, which is precisely what fulfils the antecedent of the proportionality principle: its application and the subsequent consequences of adequacy, necessity, and proportionality in a narrow sense depend on 'something' being a means to another 'something'.[21]

As I see it, this explains why the proportionality principle becomes – or acts as – the residual norm for conflicts within a legal order.[22] Given that

19 On rebutting defeasibility see Prakken and Sartor (2004, p. 121).

20 This is can be illustrated, for instance, by the famous example of the military facilities: a legal solution is needed for the problem of stopping in front of the stop sign and obeying the prohibition to stop near military facilities (Alchourrón, 1981, p. 133). No difference in specificity between norms exists, nothing in the conflict is solvable by a norm for conflicts (since there is none), and, for this reason, the solution is dependent on balancing the two rules in their material and specific context of application. If the legal order has a third rule stating that 'one ought to stop at a stop sign only if the military facility is not classified as an explosives warehouse' the conflict is solved by this 'material' norm for conflicts, and no balancing has to take place. However, the famous example only became famous because it presupposes the non-existence of such a third norm.

21 Using a scheme recognized for defining antecedents, the opportunity for 'something' being or not being adequate, necessary, or proportional in a narrow sense only exists if, and only if, that 'something' has the property of making the other 'something' possible. The reference is to Von Wright, 1963, p. 37. A narrower view of proportionality's antecedent can be seen in Pulido, 2007, pp. 620 and 621.

22 The statement 'proportionality as a norm for conflicts' has to be read carefully: it is a norm whose object is the material specificities of the norms in conflict and the case where they are applicable, which means that it is only on their basis that an outcome for the conflict can be

it is triggered whenever a legal solution has to be achieved and no norm for conflicts exists for a conflict of norms, proportionality becomes the ultimate response of the legal order to the choice of two or more incompatible norms. But, more than this, the proportionality principle establishes how the balancing's outcome can be lawfully achieved: proportionality in a narrow sense expresses both laws of balancing, normative and epistemic, defining the conditions for a legitimate choice of the prevailing norm.[23] Proportionality, therefore, even though it has a projection on the material specificities of the choice, encompasses the 'regime' for legally legitimate balancings.[24]

However, proportionality is not triggered only when two norms conflict without an applicable norm for conflicts. Since its application occurs whenever there is a means → end connection, proportionality is also applicable when a norm or a set of norms give alternative solutions for a case, all of them *prima facie* legally admissible: alternatives imply choice and choice, subsequently, implies the adoption of a specific means, among two or more, in order to achieve the given purpose – exactly the one the norm or set of norms conferring alternatives have. So, there is here a repetition of the previous scheme, particularly with the appeal to those principles that back the distinct alternatives at hand. Consequently, since proportionality in the narrow sense presupposes balancing, a balancing ought to take place.[25]

This happens paradigmatically with discretion, be it legislative, administrative, or judicial. Whenever a normative or an adjudicative authority has to decide on '$x \vee y$', as solutions for a class of cases or a particular one, both *prima facie* legally admissible, a proportionality problem is posed and a balancing has to be carried out. As alternatives for a legal decision, '$x \vee y$', will imply different consequences and each one of them is backed by conflicting principles, necessarily weighted in order to reach a solution, rationally sustained and in accordance with the laws of balancing. Under

reached. Clearly, it is not a norm that chooses another based on its formal (or relational) features, as is the case, for instance, with *lex specialis*, *lex posterior*, or *lex superior*.

23 On the normative law of balancing ('the greater the degree of non-satisfaction of, or detriment to, one principle, the greater the importance of satisfying the other'), Alexy, 2002, p. 102. On the epistemic law of balancing ('the more heavily an interference in a constitutional right weighs, the greater must be the certainty of its underlying premises'), Alexy, 2014, p. 514.

24 Thus, as a 'norm for conflicts', proportionality does not indicate a norm, but it states the conditions by which the prevailing norm has to be chosen. See Alexy, 2002, p. 107, and Clérico, 2009, p. 208.

25 This presupposition is justified by the fact that no conformity of the outcome with the laws of balancing can be evaluated without it. On the connection between proportionality in the narrow sense and balancing, for instance Clérico, 2009, pp. 200ff., and Pulido, 2007, p. 764.

this frame, each and every case of discretion is a case of balancing, for the reason mentioned that no legal decision on '$x \vee y$' can be reached without an assessment on whether or not the prevalence of either one is justified on a proportionality basis.

- The scheme is the following, under rule$_1$, which is 'if $p \supset x \vee y$';
- for an administrative body, if 'p' obtains, then two *prima facie* consequences are admissible '$x \vee y$';
- 'x' is backed by P_1;
- 'y' is backed by P_2;
- the solution is therefore dependent on balancing between P_1 and P_2;
- if $P_1 > P_2 \rightarrow$ 'x' ought to be; if $P_1 < P_2 \rightarrow$ 'y' ought to be.

If this is correct for all cases of discretion, then it is also valid when discretion is specifically of a linguistic nature, as happens when normative sentences have vague or open-textured words, implying that a decision depends on the extension of a word and, thus, on a choice regarding the different alternatives in its meaning.[26] The 'motorcycle case' is useful here again. If there is a prohibition on vehicles entering into the park, and assuming that a motorcycle is a 'borderline vehicle', occupying the uncertain zone of denotation of the word 'vehicles', then the decision-maker has discretion on whether to qualify a motorcycle as a vehicle (Hart 1994, p. 126). This discretion, although it is of a linguistic nature, lies precisely on the choice of '$x \vee y$', both *prima facie* legally admissible: rigorously stated, the choice between 'x = motorcycle $\in$ vehicle' and 'y = motorcycle $\notin$ vehicle'. Since the normative structure of the use of discretion is the same, the previous scheme seems to be totally applicable here.[27]

I think that, despite its broad scope, the pertinence of balancing finishes here. Proportionality ceases to be applicable at this point for the reason that no means → end connection is present. However, if the 'motorcycle case', as set out in the previous section, is, although a problem of discretion, effectively a case of proportionality and, consequently, a case requiring a

26 On alternatives in meaning see Klatt, 2004, p. 62, and Helin, 1997, p. 200.

27 Let us imagine that the decision-maker chooses 'y' ('y = motorcycle $\notin$ vehicle'). If this happens the consequence is that no rule exists for the entrance of motorcycles. But, if no rule exists for the entrance of motorcycles, then the normative situation is exactly the same as shown previously with the help of the '*Lebach* case': the absence of a rule under applicable principles. Thus, it is balancing that gives the legal response. Naturally, these 'two balancings' are done simultaneously while solving the question at issue.

balancing, then there turns out to be no space for analogy there.[28] Doubtless similarity arguments will be relevant within the balancing, namely to compare grades of interference in the 'protection of the environment', but these arguments belong to balancing and they do not sustain or create a proper analogy as one of the three – ultimately – basic operations in the application of law (Alexy 2010, 9). Analogy has no place here.

And the reason for this is exactly what brings it about that, in a way, Brożek and I only apparently disagree under the framework of a principles theory: if an analogy depends on a gap, but there is always a principle applicable to the given case, then no analogy scheme can take place when proportionality applies.

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28 Differently Alexy, 2010, p. 15.

8. Argument by analogy in the law

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Abstract
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 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. The importance of possibly countervailing circumstances in establishing or rejecting analogy in the law is explained as well. Such countervailing considerations may be backed by analogy in their turn.

Keywords: classic conception of analogy, non-deductive logical argument, countervailing circumstances

A classic example of analogical argument is given by the nineteenth-century logician W. Stanley Jevons (1888, p. 226):

> [T]he planet Mars possesses an atmosphere, with clouds and mist closely resembling our own; it has seas distinguished from the land by a greenish colour, and polar regions covered with snow. The red colour of the planet seems to be due to the atmosphere, like the red colour of our sunrises and sunsets. So much is similar in the surface of Mars and the surface of the Earth that we readily argue there must be inhabitants there as here.

The difference between analogical argument and induction by enumeration is that the inference depends not so much on the number of instances as on the resemblance of the compared items. It should be obvious that an argument by analogy, like induction by enumeration, at most establishes its conclusion as *more likely to be true than false*.

The *form* of arguments by analogy may be stated as

(i) *x* has characteristics *F*, *G*, ...
(ii) *y* has characteristics *F*, *G*, ...
(iii) *x* also has characteristic *H*, ...
(iv) Therefore, *y* has characteristic *H*.

In contrast to a good (i.e. sound) deductive argument, the form of a good analogical argument does not guarantee the truth of the conclusion even when all the premises are true. In other words, arguments by analogy are not formally valid; the falsity of the conclusion is compatible with the truth of the premises.

It is extremely difficult to lay out strict criteria for a good analogical argument. Among the considerations that have to be taken into account in evaluating these arguments are such factors as the number of respects in which the compared objects resemble one another (positive analogies) and the number of respects in which they differ (negative analogies). Yet all this is very tricky. The crucial question is whether the compared objects resemble (and differ from) one another in *relevant* respects, that is, respects that are relevant to possession of the inferred resemblance. An argument by analogy based on a few relevant respects is a 'better' argument than one based on many irrelevant positive analogies.

The form of argument by analogy may now be *revised* as follows:

(i) *x* has characteristics *F*, *G*, ...
(ii) *y* has characteristics *F*, *G*, ...
(iii) *x* also has characteristic *H*, ...
(iv) *F*, *G*, ..., are *H*-relevant characteristics.
(v) Therefore, *y* has characteristic *H*.

It seems fairly certain that a characteristic is '*H*-relevant' insofar as it is *causally* related to *H*, even if indirectly. But the relevance of one characteristic (*F*, say) to the possession of another characteristic (*H*, say) is not necessarily restricted to cases in which there is a causal connection between the former and the latter. Instead, *F* could be a criterion, or a member of a set of criteria, for possession of *H*, and thus be '*H*-relevant' in a *criterial* respect.

Let us now turn to an example of a legal use of argument by analogy. The treatment here will enable an important problem concerning legal reasoning to be raised.

In *Adams v. New Jersey Steamboat Co.* (1896) it was held that where money for travelling expenses, carried by a passenger on a steamboat, was stolen from his stateroom at night, without negligence on his part, the carrier was liable therefor, without proof of negligence. Judge O'Brien argued by analogy from the liability of innkeepers. In his opinion he called a steamboat a 'floating inn':

> [...] The two relations, if not identical, bear such close analogy to each other that the same rule of responsibility should govern.
> We are of the opinion, therefore, that the defendant was properly held liable in this case for the money stolen from the plaintiff, without any proof of negligence.[1]

In basic outline, Judge O'Brien's argument fits the pattern of the revised form of argument by analogy. A possible brief formulation is this: (i) A hotel guest procures a room for personal use, and his money and personal effects are highly subject to fraud and plunder from the proprietor. (ii) A steamboat passenger procures a room for personal use, and his money and personal effects are highly subject to fraud and plunder from the proprietor. (iii) A hotel guest's proprietor has a stringent responsibility, such that the proprietor is liable, without proof of negligence, if money is stolen from the guest's room. (iv) Procuring a room for personal use and having one's money and personal effects highly subject to fraud and plunder from one's proprietor are reasons for the proprietor's having such a stringent responsibility. (v) Therefore, a steamboat passenger's proprietor is liable, without proof of negligence, if money is stolen from the passenger's room.

Premise (iv) states that the two mentioned characteristics are, as it were, '*H*-relevant', that is, grounds for imposing this degree of liability on certain proprietors (innkeepers and steamboat companies). But Judge O'Brien has also added another important point, namely, that considerations of 'public policy' are the origin of the liability of innkeepers. This means, presumably, that the liability is imposed by the law in order to afford protection to members of the public who are in these special circumstances. The innkeeper rule on which O'Brien relies rests on an 'appeal to public policy' and, in a sense, so does his argument. Appeal to public policy is an often-used catch-all *kind of reason* for accepting some proposition as a rule of law, though the reason can be made fairly specific in this case. The conclusion of the argument is of course normative. But the two characteristics do not function

1 Adams v. New Jersey Steamboat Co., 151 N.Y. 163, 45 N.E. 369.

in the argument as direct criterial considerations for the imposition of liability, in the way that grade-relevant considerations do for meriting a particular grade. Rather, the characteristics appear to be components of a kind of goal-oriented justification for imposing the liability, the goal being the protection of a segment of the community that is especially vulnerable to theft. We are now in a position to raise an important problem.

The discussion of form began with deductive arguments. A deductive argument purports that its premises are sufficient to establish the truth of its conclusion, and this will be the case if all the premises are true and the argument is formally valid (an instance of a valid argument form). Judges of course give formally valid deductive arguments. But they also give arguments that in terms of logical structure have the form of non-deductive arguments, as we see in the *Steamboat* case. Now, it is a feature of non-deductive arguments that their form is not sufficient to establish the truth of their conclusions even if all their premises are true. Such arguments at best show only that the conclusions are more likely to be true than false.

But would this be an appropriate characterization of Judge O'Brien's argument? Although his argument has the form of a non-deductive argument, he apparently presumes to have established the truth (or correctness), rather than the mere likelihood, of his conclusion on the basis of the premises he uses. And, it would seem, so do other judges make this presumption when they employ arguments by analogy. The problem is whether this presumption is well founded. It may be suggested that this presumption – that legal arguments by analogy can be sufficient to establish the truth or correctness of their conclusions – is connected with the fact that these arguments are normative in character. But this is only part of the story. Meanwhile, we can say that a judicial argument by analogy that has all true (or correct) premises establishes its conclusion as highly plausible. But there is a complication of which we have to take note. Consider the argument

(A) *X* is a goal the law ought to promote.
(B) *Y* is a necessary means to *X*.
(C) Therefore, if there are no countervailing considerations, *Y* ought to be recognized by the law.

Where there are countervailing considerations, one may have two practical arguments, positive and negative, which lead to seemingly opposite results. Presumably, the rider 'if there are no countervailing considerations' should be read into the practical argument implicit in Judge O'Brien's opinion.

When countervailing considerations exist in a case, the judge will have to decide in accordance with the relative 'weights' of the considerations.

Hans Kelsen may be viewed as claiming that there always are countervailing considerations. Kelsen (1992, p. 82) is discussing whether interpretation is an act of cognition or an act of will:

> Every method of interpretation developed thus far invariably leads to a possible result, never to a single correct result. [...] Both familiar methods of interpretation, [analogy and] *argumentum a contrario* [translators' note: deployed as a parry to the argument by analogy, in effect says: because the statute expressly specifies (only) *A* as falling within its scope, then *B*, *C*, *D*, etc., do not fall within its scope, notwithstanding their similarity to *A*.][...] are worthless, if only because they lead to opposite results and there is no criterion for deciding when to use one or the other. [...] [I]t is a problem not of legal theory but of legal policy.

It is interesting that a similar claim is made by Karl Llewellyn, the American legal realist:

> [The] accepted convention still, unhappily, requires discussion as if only one single correct meaning could exist. Hence there are two opposing canons on almost every point. [...] Plainly, to make any canon take hold in a particular instance, the construction contended for must be sold, essentially, by means other than the use of the canon [...].

Llewellyn (1950) goes on to present a table of 28 'thrusts' and 'parries'. For instance, the thrust 'Statutes in derogation of the common law will not be extended by construction' and the parry 'Such acts will be liberally construed if their nature is remedial'.

Kelsen and Llewellyn are not very far apart: legal policy and 'selling' a construction, by laying out the policy that underlies the statute. Both authors are speaking of statutory law. But does Llewellyn's contention apply to arguments by analogy in the common law? I don't think it does. In the common law, which is mostly judge-made law, the rules are, as it were, laid down in the precedents, and they do not have a canonical form. Moreover, I don't think that the 'principle of bivalence' universally holds for the common law (bivalence: every statement of law that can be formulated in a given legal system is valid (correct) or else invalid (incorrect) in that system) (Golding, 2003). It is possible to have two incompatible laws that are tenable. The role of a policy judgment is crucial for a common-law judge. In arguing by

analogy from a precedent, the common-law judge endorses the policy used in the prior decision.

At this point, it would be appropriate to treat the topic of *coherence*. For not only are judges expected to render decisions that are coherent with the existing law and the goals of the system, but it is also assumed that the system's laws and goals are internally coherent on the whole. It can be plausibly argued that there are respects in which our common-law legal system is not internally coherent. But it is extremely difficult to spell out what 'coherence' means. It includes the idea that the reason, or main ground, on which the result is based must have a generality of application that goes beyond the particular case being ruled on and sometimes also beyond the kind of case being decided. A judicial decision may not be *ad hoc*, that is, grounded on the specific facts of the instant case; it must be subsumed under a general principle, so that the instant case is decided in a particular way because the judge regards it right to decide cases of its *kind* in that way. (Analogous to judicial decision, it is a requirement of scientific explanation that it be framed in terms broader than the particular occurrence being explained.)

The requirement that judges should decide cases 'on principle' is related to the idea of *fairness*, which demands that like cases should be treated alike. The notion of decision 'on principle', however, is somewhat broader than the idea of fairness; for principled decision requires that the instant case should be subsumed under a general reason, from which the decision follows for the instant case and all relevantly similar cases. Nevertheless, it is extremely difficult to lay down any exact criterion for the degree of generality that a principle should have. Moreover, it does not seem possible to formulate any rule for determining the relevant similarities among cases. In any event, when a judge thinks it proper to draw a distinction among cases that appear to him to be similar in relevant respects, it is required that the distinction be made in a principled fashion, that is, on a relevant general ground. Principled decision forbids the making of arbitrary distinctions, and its constraints promote judicial rationality and objectivity.

There is also the possibility to conceive of a judicial argument by analogy as concerned with a question of *classification*. This interpretation could plausibly fit the *Steamboat* case, for Judge O'Brien does speak of a steamboat as a 'floating inn'. The judge had the rule, established by prior cases, of the stringent responsibility of innkeepers. The question before him, then, would be whether a steamboat should, for certain legal purposes, be classified as an inn; and the conclusion that it should be is reached by his analogical

argument. In a sense, no new rule about the liability of steamboat proprietors is needed because the case is subsumed under the original rule. This interpretation fits many arguments given in judicial opinions, and it raises an interesting philosophical issue.

Judges are often called on to answer classification questions that are put in the form 'Is *X* a *Y*?' For instance: Is a golf club an inherently dangerous object? Is a bee a domesticated animal? Is a kiddie-car a vehicle? Is a fetus a person? What kind of questions are these? The form of the questions suggests that they are factual questions which have true or false answers, and to which the accumulation of factual information is germane in arriving at the true answers. On the other hand it has also been claimed that they are questions about the application of a name, to which any answer is arbitrary.

The philosopher John Wisdom (1944–45) has argued against these approaches. Wisdom is making a number of claims. A classification question is not a question of fact, and the answer is not the (more likely to be true than false) conclusion of an inductive argument. Nor is it a question about the application of a name, to which any answer is arbitrary. The solution to such a question is a decision, but not an arbitrary one. For it is a decision for which reasons are given by pointing to the features of the items under discussion. But although there is a reasoning process, the decision is not the conclusion of a deductive argument. The process has 'its own sort of logic'. As applied to the *Steamboat* case, this would mean that Judge O'Brien's decision was the 'cumulative effect' of the similarity between the situations of innkeepers and steamboat proprietors – not just a psychological effect but presumably also a logical outcome of a unique sort.

This approach to classification questions might be taken as a response to the issue posed earlier, whether it is appropriate to characterize judicial uses of analogical arguments in the same way as the other non-deductive arguments discussed. The objection was that in these other arguments the conclusion is, at most, shown to be more likely to be true than false, whereas the judge seems to presume to have established his result conclusively, as if it were the outcome of a formally valid deductive argument. According to the approach we have been considering, the conclusiveness of the judge's decision resides in his having *chosen* the result – not arbitrarily, but after a logically unique reasoning process. Under the interpretation of the *Steamboat* case as involving a classification question, this is how one should understand Judge O'Brien's conclusion that a steamboat is to be classified as an inn, especially since the judge saw 'no good reason' for concluding (or choosing) otherwise.

There is a lot be said about all this – although it is not easy to talk about what is supposed to be unique – but we can consider only one point here. Judges do deal with classification questions, but their form is easy to misconstrue. It is not simply 'Is *X* a *Y*?' but rather 'Is *X* a *Y* for certain legal purposes?' – or better yet, 'Should *X* be treated as a domesticated animal for importation tax purposes?' If one wishes to interpret the argument from analogy in the *Steamboat* case as being concerned with a classification question, one should view Judge O'Brien as asking whether steamboat proprietors should be treated as innkeepers for purposes of liability toward their passengers. (It may be clear that for some other purpose they should not be treated as innkeepers.) This way of putting the question has the advantage of revealing that the judge's affirmative answer is based on the claim that the same *practical* legal argument for imposing a stringent responsibility on innkeepers is also applicable to steamboat proprietors, because of the similarity between the two cases. If this construal is to be preferred, then Wisdom's explanation of the conclusive character of the judge's classification decision seems to fail.

It would appear that the revised form of argument by analogy ordinarily will be adequate to represent the analogical arguments used by judges and also how they handle classification questions, although the reasoning given in the opinions may need to be reformulated. Admittedly, there are cases of classification questions to which this pattern of argument does not fit. These occur when judges do not spell out the similarities (or differences) between the new case and the prior cases but simply assert their decision on the classification question because the similarities and differences seem obvious to them. But if the revised form of argument by analogy is ordinarily adequate, it still remains for us to explain the apparent conclusiveness of the judge's result, that is, to explain why a judge thinks his conclusion is not merely established as more likely to be true (or correct) than false (or incorrect). Let us proceed step by step.

It will be recalled, first, that legal arguments are normative arguments, in that they purport to establish how a case or class of cases *ought* to be treated. Furthermore, these arguments are a species of practical reasoning. A legal argument is supposed to provide a court with a reason for doing something, namely rendering a specific judgement. Now it is a characteristic of this context of practical normative reasoning that when a judge has a good reason for accepting a certain normative conclusion, he is *committed* to accepting and acting on the conclusion, unless there is (another) good reason for not doing so. This is a feature of practical rationality

Let us now further revise the form of arguments by analogy. Consider the following:

(i) *x* has characteristics *F*, *G*, ...
(ii) *y* has characteristics *F*, *G*, ...
(iii) *x* also has characteristic *H*, ...
(iv) *F*, *G*, ..., are *H*-relevant characteristics.
(v) Therefore, unless there are countervailing considerations, *y* has characteristic *H*.

This new revision has a *weaker conclusion* than the earlier form. The weakness of the conclusion is brought out by the qualifying phrase 'unless there are countervailing considerations', which is meant to reflect the point made earlier. In a non-normative analogical argument of this form, which has descriptive premises and a descriptive conclusion, it would still be said that the premises do not logically entail the conclusion (the premises could be true while the conclusion is false), although whether this is the case may depend on how (iv) is interpreted and on what the qualifying phrase would mean in the particular context. But in a legal analogical argument, which is normative and practical, it is plausible to hold that the conclusion (v) is, in a sense, 'entailed' by the premises: that is, that the truth (or correctness) of the premises *commits* a judge to accepting the conclusion.

It certainly seems to be the case that if there is a good reason for accepting a particular normative conclusion and no reason at all for not accepting it – which would be to interpret the qualifying phrase in the weakest possible way – then the conclusion ought to be accepted too. And one can go further: if there is a good reason for the conclusion and no good reason for not accepting it – which is how we shall interpret the qualifying phrase – then the conclusion ought to be accepted. If, then, a judge were to accept the premises of an analogical argument and were to draw the qualified conclusion (v), it is not difficult to see why he might consider the result as conclusively established. Let us look at the situation in a bit more detail. Suppose a judge gives an argument by analogy of precedent, which heading we will take to include analogical arguments that use well-entrenched rules of the common (case) law. In such an argument, for which the letters in the above form would be substituted by appropriate terms, premises (i) and (ii) ordinarily will be descriptive statements and their truth will be certified by appeal to the facts. Premise (iii), however, will be a normative statement, and its truth or correctness will generally be established by an appeal to a prior decision or trend of decisions.

Thus in the *Steamboat* case, Judge O'Brien's premise (iii) was the proposition about the stringent liability of innkeepers, which he took to be a settled rule of the common law, repeatedly affirmed in prior cases. Premise (iv) will also be a normative statement, and its truth or correctness may be established by an appeal to the precedent that is appealed to in reference to premise (iii).

Sometimes, however, judges omit their premise (iv), and they go directly from premises (i), (ii), and (iii) to an *unqualified* conclusion ('Therefore, *y* has characteristic *H*'). In other words judges sometimes give arguments that have the form originally given for arguments by analogy. Nevertheless, we must assume that these judges are implicitly, if not explicitly, using a premise like (iv), and we should reconstruct their arguments accordingly. For the mere fact that their case resembles a prior case in some respects is never sufficient grounds for saying that their case has the desired legal resemblance (*H*). There will always be some resemblances holding between their case and any number of cases of many different varieties. It has been said, in fact, any two cases resemble each other in some respects. But since only relevant resemblances count, one is entitled to reconstruct a judge's analogical argument as including premise (iv). In an argument by analogy of precedent in which the judge appeals to the *ratio decidendi* of a prior case, the presence of premise (iv) will be very close to the surface of the argument if not entirely explicit.

Before proceeding to the issue of the unqualified conclusion, two other aspects of premise (iv) should be noted. First, judges who give an argument by analogy of precedent surely will want their premises to add up to a good reason for accepting their conclusion. It may be pointed out that truth or correctness is one of the important criteria for something to be a good reason. But clearly, the truth or correctness of the premises is insufficient in this kind of argument for them to amount to a good reason; they must also be *relevant* to the conclusion. The relevance of premises (i), (ii), and (iii) is established through the relevance premise, namely, premise (iv). Again then, if (iv) is omitted in judge's analogical argument, one is justified in including it in one's reconstruction. The truth (or correctness) and the relevance of the premises seem jointly sufficient to constitute the premises as a good reason for accepting (the qualified) conclusion (v).

Second, given the significance of premise (iv), it could be said that premise (iv) is 'doing all the work', as it were. There is some truth to this remark, although premises (i), (ii), and (iii) are certainly indispensable to the argument. As stated earlier, in an argument by analogy of precedent, judges might establish their appropriate premise (iv) by reference to the prior

case(s) on which they are relying with respect to premise (iii). But they might also try to establish premise (iv) independently, especially if they think there is a better rationale for it than the one in the prior case(s). In either event, however, the truth or correctness of premise (iv) will rest, in a more fundamental way, on underlying considerations of policy or principle. When judges extend a precedent to cover a new kind of case, as Judge O'Brien did in the *Steamboat* case, they should be understood as implicitly, if not explicitly, endorsing some underlying practical argument – perhaps in one of their precedential case(s). It is not difficult to see why a judge can be justified in drawing the weakened conclusion (v) from the premises (assuming them all to be true) in an argument by analogy of precedent. But of course, he will want to draw a stronger conclusion, that is, an unqualified conclusion, which is the decision on the question of law. One possibility is to regard the judge as, in effect, subjoining an additional argument, using (v) as a premise:

(v) Unless there are countervailing considerations, *Y* has characteristic *H*.
(vi) There are no countervailing considerations.
(vii) Therefore, *Y* has characteristic *H*.

Given the truth (or correctness) of premise (vi), the judge's unqualified conclusion follows. Judges sometimes do explicitly affirm a premise like (vi). It will be recalled that Judge O'Brien saw 'no good reason' for not applying the innkeeper rule to steamboat proprietors.

On the other hand, countervailing considerations often do present themselves. One way they arise is through a *competing analogy*. Insofar as arguments by analogy of precedent are concerned with classification questions, a competing analogy would suggest a different way of classifying the material facts of the case before the judge and would imply a different result, as shown by a parallel argument:

(i′) *z* has characteristics *J*, *K*, ...
(ii′) *y* also has characteristics *J*, *K*, ...
(iii′) *z* also has characteristic non-*H*.
(iv′) *J*, *K*, ..., are non-*H*-relevant considerations.
(v′) Therefore, unless there are countervailing considerations, *y* has characteristic non-*H*.

In a legal system, premises (i)–(iv) could all be true (or correct) and so could premises (i′)–(iv′). In a sense, then, both conclusion (v) and (v′) could also

be true (or correct) for they do not contradict each other. What should a judge do in such an event? More generally, what should a judge do if there are countervailing considerations? The standard position is that the judge should weigh the considerations on each side, but there are no rules for how this weighing is to be done.

This problem takes us back to premises (iv) and (iv′). These premises rest on underlying considerations of policy or principle, expressed, for instance, in goal-oriented or rights-oriented arguments. If, as usually will be the case, premise (iv) rests on a different goal or right than premise (iv′), the judge should estimate which goal or right is the more important goal or right; the more important one is the weightier one. This estimate may or may not have 'backing' in the authoritative sources, but it is hard to see how a judge can avoid such an estimate in these circumstances; its deeper roots may lie in the judge's political philosophy and conception of the judicial role.

In view of the above remarks, the qualifying phrase should be interpreted to mean 'unless there are countervailing considerations of equal importance' and (vi) should read: 'There are no countervailing considerations of equal importance.' Given the truth (or correctness) of premises (i)–(vi), a judge is justified in drawing the unqualified conclusion (vii). The fact that a judge might go immediately from premises (i)–(iv) should be taken as an indication that he thinks there are no countervailing considerations of equal importance.

Although a judge, in a given case, might believe premise (vi) to be true (or correct), he might not be able to claim to know it to be true (or correct). Premise (vi) might be disputed, and another judge sitting on the case may believe it to be false (or incorrect). So although the conclusion (vii) may be disputed, it is still said, however, that a judge who accepts (i)–(vi) is rationally committed to accepting the conclusion (vii).

If this statement is right, one can understand why judges presume that the conclusions of legal arguments by analogy are not merely established as more likely to be true or correct than false or incorrect. The explanation of this presumption depends, as we have seen, on the fact that these arguments are normative and a species of practical argument. There thus appears to be at least one kind of good legal non-deductive argument that can establish its conclusion as true (or correct). One could, of course, treat such an argument as an enthymeme and turn it into a formally valid argument by supplying a missing premise (P): *If* (i), (ii), (iii), (iv), (v), (vi), *then* (vii). But there is no reason to regard (P) as true, unless one also accepts that this kind of non-deductive argument can conclusively establish its conclusion.

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9. Undoing damage by analogy

As if (almost) nothing happened, with notes on the meaning of everything

Hendrik Kaptein

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Abstract
A common error in conceptions of argumentation by analogy, precedent, paradigm, and metaphor consists in taking them too seriously, as if they had autonomous argumentative force. Argumentation by analogy is of heuristic value at best. The underlying argument from principle is decisive, reducing argumentation by analogy and like semblances of reasoning to (pia) fraus. Still the importance of analogy, precedent, paradigm, metaphor, and the like is not to be denied, related as they all are to 'outward difference and underlying identity'. Issues of wrongful harm and even matters of rightful or wrongful life and death may be clarified by appeal to analogy and related notions.

Keywords: logical redundancy, heuristics, argument from principle, wrongful harm and damages

1 Introduction

Intellectual – and probably some real – harm has been done by wrong-headed conceptions of argumentation by analogy, precedent, paradigm, and metaphor. The common error consists in taking them too seriously, as if they had autonomous argumentative force. Still this is not to deny the reality of analogy, precedent, paradigm, metaphor, and the like. Let alone to deny the importance of these concepts, all related to 'outward difference and underlying identity'. Issues of wrongful harm and even matters of rightful or wrongful life and death may be greatly clarified by appeal to analogy and related notions. Intellectual and hopefully even some real harm may be warded off in this way. This may be rather more

important than still more analysis of rule application – the usual analogy issue in legal philosophy.

These issues are to be discussed here as follows. Section 2 offers a succinct review of the redundancy analysis of analogy and related notions. The semblance of analogy is of heuristic value at best, the underlying principle is everything. Or: Occam's Razor may be applied to do away with dangers implicit in common conceptions of analogical and related reasoning, notably so in wrong-headed appeals to precedent. But how might underlying principles, in their turn, be justified? This leads to Münchhausen trilemmas and worse: to a lack of any real justification. Thus, not just the analysis of analogy and related notions seems to end up in nothing: no fixed points, no meaning at all (section 3). Even life itself may be meaningless, resembling everything else at least in lacking any justification. But such scepticism starts from wrong-headed analogy: life is not just like one more thing or event, life is the context of everything. Thus any attribution of sense or nonsense to life itself is meaningless (section 4). Still determination of harm presupposes concepts of life, as harm is defined as the difference between two lives: one real and one hypothetical, as if nothing harmful happened. Such comparisons and their consequences are loaded with analogy and metaphor, like the notion of annulment of harm 'as if (almost) nothing happened' (section 5). Section 6 offers further and dramatic illustration of wrongful harm, its well-nigh impossible determination and compensation in matters of birth, life, and death. In the end, annulling at least part of one's own harm and suffering may well presuppose analogy, metaphor, and related notions – however logically redundant – as ways of accepting life and making the best of it (section 7).

2 Argument by analogy, precedent, paradigm, and metaphor: so many cases of coordinated hallucination

Analogy, precedent, paradigm, metaphor, and related concepts play unquestionably major roles in legal and non-legal reasoning. Still their autonomous argumentative force is about nil. But on goes the academic debate on argument by analogy, precedent, metaphor, exemplar, and the like, without heeding the unintentional inexistence of such supposedly sensible reasoning and argument.[1] It is even contended (recently by Weinreb,

1 See, for a reasonably recent overview of the state of the art of such ultimately superficial explanations of analogy and the like, MacCormick, 1998, though this is not to belittle any such contributions, certainly not those found in this book.

in 2005) that all legal reasoning is analogical, by want of literal identity of legally relevant facts. But then the redundancy of analogical argumentation in a broad sense was already exposed by the present author as far back as 1995.[2] The argumentative force of analogy, precedent, paradigm, metaphor, and the like depends on underlying general rules and principles, not on analogy, etc., themselves.

What was and is *analogy* about? As already noted in the introduction, travelling by rail with a non-standard pet may lead to the following ticket collector's reaction (according to Dyson, 2006):[3]

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

So, and *e contrario*, the explicit rule must have been that dogs need a train ticket. Thus the 'analogical' core issue indeed is: how to make cats out of dogs? Or tortoises out of insects? Standard analysis proceeds in terms of relevant similarities, not to be extensively repeated here. Again: what are relevant and what are irrelevant similarities and differences? Everything resembles everything in an infinite number of respects (see among others Hampshire, 1959).

Relevant similarities and differences are to be determined by underlying, more general rules or principles (no principled distinction between rules and principles is made here). Thus the ticket collector may have more or less unconsciously referred to a principle like: small animals and/or other utensils living or dead travel free due to their relative harmlessness.[4]

Such a principle may be taken to be 'implicit' in the dog rule, but it cannot be derived from any dog rule whatsoever. Though the dog rule may be best explained by such a principle, such abductive reasoning or inference to the best explanation does not exclude a completely different explanation or justification of the same dog rule, at least not from a logical point of

2 But see also Prakken, 1997, for still older sources; and Raz, 2009, pp. 201–206.

3 The oldest version of this story has been published in the *Ninth Annual Report of the State Entomologist of Minnesota to the Governor for the Year 1904* (1904), p. 144:

> Everyone has heard the old story about the naturalist who was traveling with some pets, and the railway people had only made provision in their rules for charging for dogs. The ticket seller was therefore in doubt as to whether charges should be made for monkeys, cats and a large tortoise, which accompanied the naturalist. His judgment at last was given forth that the cats and monkeys would have to be paid for because under his instructions, he said, 'Cats is dogs, monkeys is dogs, but that turtle is an insect, so we let them go free.' The story does not state whether he would classify gophers and rabbits as insects also. Possibly not.

4 This is probably based on implicit *e contrario* reasoning again: see on this Kaptein, 1993, explaining why *e contrario* argumentation is a case of unintentional inexistence as well.

view. There may be special reasons to treat dogs as paying passengers, in contradistinction to all other animals. Thus dogs may be regarded as uniquely intelligent living beings, on a par with most humans in having to pay train fares as well, and so on. Then again cats and tortoises enjoy free rides, *e contrario* or otherwise.

So cats can't be made out of dogs after all, or tortoises out of insects, which will come as no surprise. There is analogy, at least in as far as 'existence' may be interpreted in some or other non-literal or even metaphorical sense. But there is nothing like analogical reasoning in the law or otherwise. Still appeal to analogy may yet lead to plausible or even true conclusions. This is the fate of all fallacies of course.

In fact any analogon taken as a starting point is of heuristic value at best. It is no justification at all. The whole weight is on underlying, 'bridging' general rules or principles. Such general rules explain or even justify both the original analogon and the analogical conclusion. Thus it is with all analogical reasoning, not just concerning cats and dogs.

Complete induction from seemingly analogous pet cases to this general conclusion concerning analogy is apposite to be sure. This tears up more than a few textbooks. Or: Occam's Razor indeed, not in order to kill the tortoise but in order to do away with any superfluous notions in understanding of so-called analogy and like reasoning.

What are the dangers in taking analogical reasoning too seriously? Semblances of analogy may play no major roles in adjudication. Still even in criminal law, appeal to misconceived analogy may lead to wrongful harm in the name of the law. Thus in the Netherlands a tongue kiss was treated as analogous to sexual penetration, in order to wrongly punish the innocent. What would be anything like a plausible bridging principle here? Again, the original analogon furnishes no ground at all for such 'analogical' reasoning, creating false impressions of lawfulness of such conclusions.

Less formal analogical argumentation, legal and otherwise, is obviously much more widespread and may be risky as well, or even lethal. Think here of J. Edgar Hoover's infamous analogy:

> Ships rely on lighthouses to navigate safely into harbor, even though we do not know how many such safe arrivals there are because of the lighthouses. In the same way the death penalty deters, even though we do not know how many murders are prevented in this way.

Again, what would be anything like a plausible underlying, bridging principle here? The same holds good for analogous criticism of capital punishment

like: killing convicts is officially authorized murder. And so on. Thus both adjudicative and informal analogy may be as dangerously suggestive as lacking any real backing in some or other plausible principle justifying the conclusion at hand. So hopefully this redundancy analysis of analogy already undoes some serious damage.

The same holds good for *precedent*, logically related to analogy as it is. In fact in adjudication precedent is explicitly appealed to much more often than analogy is, with more harmful consequences by repetition of original wrongs. Again, any precedent as just precedent does not imply anything. Everything may resemble everything here too. Still a case may be qualified as a precedent by a bridging principle or principles applicable in relevantly similar cases as well. Such principles do the real work, as they do in argumentation by 'analogy'.

But is not this supposed sterility of precedent deeply at odds with elementary notions of equality and legal security? Imagine one twin objecting to a supposedly unjust pocket-money allowance 'because the other twin already got more'. Are we sure such a precedent must be decisive in treating both twins equally? No, as any principle, rule, or whatsoever consideration backing the raise in allowance may be wrong. Then handing out more money a second time would be doubling error. Or: the principled solution would be to restore the overpaid twin to a rightful position, by paying less next time or in some other way.

Hobbes presaged this already in 1651 (ch. 11):

> Ignorance of the causes, and original constitution of right, equity, law, and justice, disposeth a man to make custom and example the rule of his actions; in such manner as to think that unjust which it hath been the custom to punish; and that just, of the impunity and approbation whereof they can produce an example or (as the lawyers which only use this false measure of justice barbarously call it) a precedent; like little children that have no other rule of good and evil manners but the correction they receive from their parents and masters [...]

Indeed even in informal argumentation such harmful wrongs are not limited to kids' issues: think of university presidents justifying their chauffeur-driven company cars by appeal to colleagues enjoying the same privileges. 'The difference between men and boys is just the size of their toys': money wasted on such vanities is better spent on universities' core businesses of course.

Even courts wrongly assume autonomous force in precedent 'as such' as well, with sometimes strange or even really harmful and unjust

consequences. Once again, any case may resemble any other in any respect. Thus the same logic of underlying principle is to apply, if there is to be any meaningful connection between a precedent and a later case. In fact courts and other authoritative bodies take pains at times to state one or another general rule applying to the cases at hand.

And then the more general the underlying rule or principle is, the more leeway there is for more or less similar cases to be freely decided upon. Appeal to reasonableness and equity or something like these may be the limiting case, as such principles leave room for just about any aspects of a case to be relevant, or not.

Even if a specific rule is formulated in order to justify a precedent, there is still no binding force at all in such precedent. Why not change the underlying rule? It may be stupid or even plain wrong. If it is so, no argument from equality and/or legal certainty may keep such a rule in place. Better to change it in good time, before things get worse. Lord Simon (1985) quoted once more:

> Not all precedents are good precedent and the fact that it has been done before indicates that it is high time we stop doing it now.

Or Hobbes again (1651, ch. 26):

> But because there is no judge subordinate, nor sovereign, but may err in a judgement of equity; if afterward in another like case he find it more consonant to equity to give a contrary sentence, he is obliged to do it. No man's error becomes his own law, nor obliges him to persist in it. Neither, for the same reason, becomes it a law to other judges, though sworn to follow it. [...] Nor any examples of former judges can warrant an unreasonable sentence, or discharge the present judge of the trouble of studying what is equity (in the case he is to judge) [...]

So no way is there any force in precedent as precedent. It is the same with analogy: any impression of legal authority backed by 'official' precedent is misleading.

The false force of precedent may even be created by the toleration or even furtherance of wrongs. Thus in administrative law an illegal building left standing for a sufficient length of time may lead to still more illegal buildings, as if a precedent tolerated by public administration gains legal force by this reason alone. Again – and in fact analogous to the pocket-money case – a better solution may be to have the original illegal building

demolished. In fact such fallaciousness by wrong-headed appeal to equality amounts to conflation of 'is' and 'ought' as well. Some fact or another does not by itself imply a norm, as a basis for allowing or even prescribing still more such facts or whatsoever.

So argumentation by precedent is unfit to determine legal and other issues of harm and compensation as well. No earlier decisions may be appealed to in order to reasonably and rightfully establish such harm and compensation. Once more the main ground must be found in underlying principle or principles (as further explained in section 5).

Paradigmatic or exemplary reasoning is not really different from reasoning by precedent, and thus not really different from reasoning by analogy as well. A precedent may be paradigmatic, but still its force is completely dependent on underlying principle not determined by any paradigmatic precedent itself. One more reference to children may serve to show this point. Here is Bambrough's attempt to inescapably establish knowledge of at least one moral norm, the wrongness of unnecessary infliction of pain (as stated in 1979, p. 15):

> My proof that we have moral knowledge consists essentially in saying, 'We know that this child, who is about to undergo what would otherwise be painful surgery, should be given an anaesthetic before the operation. Therefore we know at least one moral proposition to be true.'

Even if this may not, or even cannot, be denied, it may be justified by some or other underlying principle establishing some or other special status for children as opposed to adults, or even by advantages of easier surgery upon stationary patients. Again, the principle is not in the paradigm, however much Bambrough may want to convey the objectivity of some or other underlying principle like: inflicting pain for no good reason is really or objectively wrong. This may be right, but then children's surgery is here of heuristic value at best as well. (Even if Bambrough's moral truth prohibiting unnecessary pain may be established, what then about other moral truths, or moral truth? Then the same generalization problem rises again of course.)

A few words on *metaphor* and its paradoxes, not just for the sake of completeness. 'The lion leapt' was said of a Greek God. Still there are no human leaps like a lion's leaps. (Do lions leap to conclusions?) Again, the paradox or even the lie in the metaphor is made good by some or other bridging principle on truly forceful leaping. So the lion does not do any real work here, however strongly imaginative he may be (see already Aristotle, around 330 BC, 1406b20). Or: metaphor is one more case of unintentional

inexistence, at least from a logical point of view, however strongly imaginative and rhetorically forceful it may be.[5]

Why is metaphor discussed here at all, given its generally harmless nature, so positively and poetically different from analogy, precedent, paradigm, and their problems? Because metaphor may be enormously important in reinterpreting harmful human realities for the better. Thus serious setbacks may be negatively interpreted as damaging and darkening any positive prospects, or positively as challenges to be faced and to be learned from, in order to lead a still better life. Epictetus (in about 100 AD) compared life and its hardships to the Olympic Games, one more feast in which only hardship, pain, and perseverance lead to joy and glory – like life itself indeed. Such metaphorical reinterpretation may be a major way of undoing harm after all (to be detailed in section 7).

So analogy and related forms of reasoning are nothing special, at least not so from a logical point of view. It all comes down to application of general rules or principles to specific cases, like rule application in general. At least some intellectual – and real – harm may be undone this way.[6]

3 Touching the void

Still in more than a few cases semblances of analogical and related forms of reasoning will go without much further saying. Who would object to the ticket collector's sympathetic treatment of Dyson's tortoise? Certainly not the tortoise itself, travelling free anyway. But suppose you're travelling with a cat under the dog rule: why pay for the cat? Under what rule or principle not having explicit force of law by definition? Why concede to such window-dressing? Anyone disadvantaged by so-called analogical or like argumentation in the law may at least retort: this is outside the scope of the original rule – or some or other authoritative body would have catered for it. So the whole weight is on one or another bridging principle. How to justify such principles? Indeed if there are no bridging rules or principles, there is nothing like analogy at all, just false semblances of it.

Given the fact that analogy, precedent, and the like are appealed to because there is no 'good enough' rule of positive law at hand, the underlying

5 See on different conceptions of the logic of metaphor, Hintikka, 1994.

6 Relationships between analogy, precedent, etc., induction, abduction, and other non-existent schemes of argumentation are not to be further discussed here: see for example Kaptein, 1999, and 2006.

rule or principle may not be justified by appeal to positive law indeed. Or may such principles be 'implicit' in positive law, in such a fashion that 'the body of positive law' may be best explained and justified by reference to such principles? But then the same problem of endless likenesses arises on a meta-level. One and the same set of given legal rules may be derived from different principles. Of course some of these principles may be more plausible than others, but what are the criteria for plausibility here?[7]

One way to express the general problem behind this is the well-known Münchhausen trilemma, originating in the famously fictional history of a count fully able to pull himself horseback out of a morass.[8] Or: trying to justify some or other proposition, descriptive, normative, or otherwise, presupposes at least another proposition furnishing some or other basis. And so on, leading into an infinite regress. Alternatively attempts at justification by appeal to other propositions may end up in circular reasoning, the proposition at hand being presupposed in argumentation on behalf of it. Thirdly any such attempts at justification by appeal to the authority of 'higher' propositions may be halted at some arbitrary point, which is the predominant variety in practice of course. Not even mighty traditions of natural law against the 'arbitrariness' of legal positivisms may counter this.

For those who find this Münchhausen metaphor still too simplistic, here is another one. In order to determine whether a belief may count as knowledge, there must be a sound criterion of knowledge at hand. The test of such a criterion would then be something like its ability to pick out incontestable pieces of knowledge. If this is not to be circular there must be some other criterion of knowledge, and so on. Chisholm expressed this problem in terms of a wheel, or *dialellus* (in 1973). Less metaphorical are Nelson's earlier observations on the impossibility of any epistemology (as explained by him in 1911). Any theory of knowledge furnishing criteria of knowledge, if it is to be a real theory of knowledge, ought to be knowledge itself, thus senselessly trying to set its own standards.

So up to now redundancy analysis of analogy, precedent, metaphor, and related forms of argumentation and expression does not lead to any really fruitful results either. Analogical reasoning and so on may be unmasked as hoaxes, but then in fact any argumentation purporting to offer reasonable or even rational grounds does not fare any better, trapped as it is in metaphorical

7 Think here of Dworkin's dimensions of fit and of justification, as famously criticized by Altman as early as 1986.

8 A metaphor developed by Albert, in 1968.

but still logically real Münchhausen trilemmas, circular wheels, or worse. No bridging rules or principles? Then no analogy and so on either.

Please note that this kind of debunking argumentation is exemplary as well, making use of two specific metaphors with purportedly more general meaning. Complete induction here again, one may well fear. Even this very debunking discourse falls foul of its own scepticism, pretending to express knowledge as it does.

Or should it simply be said that authority decides, putting up false appearances of argumentation coming down to more or less fraudulent window dressing? This is probably the most practical standpoint from the receiving end, for persons and (other) bodies bearing the consequences of official or not so official decisions or non-decisions. In the philosophy of law such semblance of argumentative underdetermination is discussed in terms of Legal Realism and Critical Legal Studies. Then false appearances of argumentative consistency or even coherence are no more than evening dresses hiding boundless discretion or even *mala fides*.

There seems to be only one way out: surrender to the inescapably irrational, not just in legal practice. What is the sense of it all?

4 The meaning of life, or in fact of everything

What is the sense of it all, including this petty intellectual exercise, this bloodless scribbling? At one small, seemingly inescapable step from this is questioning the meaning of life itself. Its ultimate meaninglessness seems hardly less obvious than the meaninglessness of every human enterprise, legal or otherwise. What is the sense of it all in an endless universe without any memory of any human fate whatsoever? Why write and read this essay, then, without any hope for meaning, value, purpose, or for whatsoever to be established on any firm ground?

If life and its enterprises are to have any meaning, there must be some or other standard or standards determining such meaning. Such standards fall foul of Münchhausen trilemma problems, like all standards do, leaving the meaning of life without any firm cognitive ground. This seems a well-nigh insuperable problem, that is, as long as the meaning of life is treated as an issue of knowledge and truth.

But what are the semantics of 'the meaning of life'? Can there be any meaningful content of this concept, as a presupposition of any knowledge and truth about the meaning of life? Probably not, as false analogies behind semblances of meaningfulness of 'the meaning of life' will show.

Any determination of meaning or value presupposes knowledge of what is to be valued. But how to really know what life is while alive, being 'in' it, part of it, so to say? Thus any determination of the meaning of life presupposes a God-like vantage point of view. But religion in its so many and so often contradictory guises is not the subject here. Anyway, any proof of God's or gods' existence falls foul of Münchhausen trilemmas or worse as well. That is, if 'God' is a meaningful concept to start with. So no living being can have a clear concept of the meaning of life. Then there can be no conception of the meaning of life either.

Put differently, 'meaning of life' in the sense of 'value of life' presupposes a standard or standards determining such meaning. Given the lack of life-independent, 'absolute' standards, such standards must be part of what they are to apply to. Such self-reference excludes any sensible concept of the meaning of life as well. So there is something deeply wrong with the semantic meaning of the (purportedly) real meaning of life. 'What is the meaning of life?' is the wrong question to ask, or maybe the depressingly wrong question. Kant's metaphor of meaningless questions (as stated in 1787, pp. 82–83) may cheer things up again:

> To know what questions may reasonably be asked is already a great and necessary proof of sagacity and insight. For if a question is absurd in itself and calls for an answer where none is required, it not only brings shame on the propounder of the question, but may betray an incautious listener into absurd answers, thus presenting, as the ancients said, the ludicrous spectacle of one man milking a he-goat and the other holding a sieve underneath.

'Life', 'meaning of life', and related concepts are analogical or better: metaphorical at best. Life is not something in life, like the lives and deaths of others are. Even one's own life is not something 'in one's life'. This excludes any real vantage point of view vis-à-vis one's own life or in general. So life as 'the context of everything' may be more or less metaphorically comprehended in terms of one's own life and the lives of others – at best. 'Life is everything', though it may feel like nothing at times.

This again shows dangers of analogy, in likening life to things or events in life. Strong as the inclination to this may be, it still leads to the seemingly inescapable meaninglessness of life. Thus sensations of meaninglessness in life may be translated in terms of the meaninglessness of life, with attendant deadly consequences at times. Why not step out of life if it is senseless after all? This is a really harmful and dangerous analogy, as if life were like a thing, event, or whatever reality in life.

But life is not meaningful or meaningless in any literal sense, and happily so, however strongly subjective experience may go against this grain. Not any meaning of life but meaning in life is what matters. Not everything needs a foundation, given so much sense and meaning to be found in life. There is no sense and meaning outside life. In fact the ends of life are given and chosen with and in life, however ever-changing and however much reason, therapy, passion, and sometimes moral consideration may try to transform them. Hume aptly expressed the point as follows (in 1751, Appendix 1, no. 5) though he is not alone in this of course:

> It appears evident that the ultimate ends of human actions can never, in any case, be accounted for by *reason* [...] Ask a man *why he uses exercise*; he will answer, *because he desires to keep his health*. If you then enquire, *why he desires health*, he will readily reply, *because sickness is painful*. If you push your enquiries farther, and desire a reason *why he hates pain*, it is impossible that he can ever give any. This is an ultimate end, and is never referred to any other object.
>
> Perhaps to your second question, *why he desires health*, he may also reply, *that it is necessary for the exercise of his calling*. If you ask, *why he is anxious on that head*, he will answer *because he desires to get money*. If you demand *Why? It is the instrument of pleasure*, says he. And beyond this it is an absurdity to ask for a reason. It is impossible there can be a progress *in infinitum*; and that one thing can always be a reason why another is desired. Something must be desirable on its own account.

Meaning is and ought to be in life. Acceptance of life as presupposition of anything meaningful may even lead to positively valuing life as having meaning after all, if only in a metaphorical sense (see also section 7, on Epictetus's metaphors of life).

Hume overcame his intellectual scepticism by an elementary escape from loneliness, so easily leading to illogical extrapolation of sadness to senseless of life as such (as published in 1739–40, I.iv.7):

> Most fortunately it happens, that since reason is incapable of dispelling these clouds, Nature herself suffices to that purpose, and cures me of this philosophical melancholy and delirium, either by relaxing this bent of mind, or by some avocation, and lively impression of my senses, which obliterate all these chimeras. I dine, I play a game of backgammon, I converse, and am merry with my friends; and when, after three or four hours' amusement, I would return to these speculations, they appear so

> cold, and strained, and ridiculous, that I cannot find in my heart to enter into them any farther.

With this paradigm case of great heuristic value Hume seated himself back into life. This stance may be compared to Wittgenstein's practical rebuttal of epistemological scepticism concerning facts (as published in 1969, no. 7):

> My life shews that I know or am certain that there is a chair over there, or a door, and so on. – I tell a friend e.g. 'Take that chair over there', 'Shut the door', etc. etc.

This is paradigmatic argumentation again, however implicitly. Any doubts about knowledge, meaning, truth, or whatever presuppose the reality of chairs to sit in – hopefully in good company – and so much more. This is the positive side or in fact the practical solution of Münchhausen- and Nelson-like sceptical issues. Aristotle's salty fishes come to mind here, as noted already by him around 330 BC (1400a):

> Thus, Androcles of Pitthus, speaking against the law, being shouted at when he said 'the laws need a law to correct them', went on, 'and fishes need salt, although it is neither probable nor credible that they should, being brought up in brine; similarly, pressed olives need oil, although it is incredible that what produces oil should itself need oil'.

There is an end to searches for firm ground. So be seated behind fish plates and/or other treats in blissful safety from threats, in flickering lights of cosy fires. Life is not a suicide club after all.[9] But this does not always go without saying, of course. Things may not always be as mellow as they were at Hume's fireplace. If life is to be decently lived some or other way at all, law is indispensable. At least murder and manslaughter, theft, damage, fraud, and like misdeeds are to be sanctioned some or other way, just as there ought to be basic rules of procedural law.

Any natural law theory and/or legal positivism needs to heed such 'laws of nature', rightly summarized not just by Hobbes in the Golden Rule (in 1651, ch. 15; italics original):

> *Do not that to another, which thou wouldest not have done to thy selfe* [...]

9 A rather elementary fact already noted by Hart in 1961.

'As if one is the other person': if any analogy or even metaphor may be fundamental, here it is (culminating of course in Kant's grandiose idea of *Menschheit* or humanity as the fundamental moral concept). Whatever their legal, moral, or even higher status, this Golden Rule and its basic implications are presuppositions and constituents of any decent society (see on evolutionary and other aspects of this Midgley, 1991). Münchhausen-like scepticisms are no threat to this either.

So there is firm ground after all, not just under chairs at cosily sociable fireplaces. While such seating arrangements are better taken for granted, basic norms of decent society may need good hard thinking to further develop them into more or less coherent sets of practicable principles and rules, at least on paper. This is reflective equilibrium, or optimally reasonable statement of such rules and principles in their mutual conflict, coordination and coherence in practice (see on this Rawls, 1951, 1999; and Raz, 1992).

Thus there are general rules and principles not just backing analogy, precedent, and the like. Cats may be dogs in the end, given the reasonable rule that sizeable pets pay fares, while presumably smaller tortoises end up as insects from a legal point of view. Just like crime ought not to pay, or that liability implies lack of due care in principle, or that rights ought not to be enjoyed at the wrongful expense of others, or even that the innocent ought not to be convicted (even if this is not explicitly stated in the law), that other parties ought to be heard as well, and so on. This is the basis of legal reasoning not just by analogy, precedent and the like. (Please note that this is not at all about the sterile natural law versus legal positivism issue.)

5 Undoing damage by analogy, as if nothing happened

Still such principles, however reasonable and right, are violated at times. Fishes may be stolen, chairs wrongfully wrecked, other bodies, and even persons, may be wrongfully harmed or even killed. So much more real harm may be done, against so many more rules. Something must be done about such violations. One obvious sanction is compensation for wrongful harm. Even staunch sceptics probably appeal to such a principle in order to obtain redress for wrongful harm done to them.

Wrongfulness may be determined in terms of legal rules and principles in a wide sense. But how to establish amounts of harm? And why are offenders to pay for what they have done? This is much more important than any issue of legal reasoning, analogical or otherwise, may ever be. Here too the

life of the law is facts, harmful or otherwise, not rules. About 90 per cent of adjudication, and other kinds of conflict resolution, is not about contested law but about contested facts, determination of harm done being a major part of this.

Harm and compensation will be explained here in a four-stage sequence. First: what is harm and amount of harm? Second: what is needed to 'undo' harm? Third: who is to effect this? And fourth: what makes undoing harm equivalent to preventing it?

First, harm is to be understood as 'the difference between the world including a cause leading to a less valuable state of affairs, and a world without such a cause and its consequences, other things equal'. This of course is a counterfactual conception of harm, as discussed by Feinberg, Coleman, and others (see Gardner, 2012). This conception competes with a number of others, among which differential conceptions are predominant: harm as the negative difference between the harmful situation and the situation before harm set in. This discussion is not really relevant here, however much the counterfactual conception seems superior in more than a few respects – which is not to imply that it is completely unproblematic.[10] Note as well that the concept of difference is used here in a metaphorical sense, rather unlike the difference between (e.g.) two physical lengths (this is related of course to the lack of literal meaning of 'life' as used here). So 'harm' is more or less metaphorical as well, however immediate its experience may be.

What kind of difference may be meant here? Is it difference in terms of monetary value, like somebody's or some body's capital 'with' and 'without' harm? This is the legal principle, related to the price or even market value of persons and/or goods harmed or even destroyed completely. What about immaterial harm, then? To what extent may such harm be analogous to material harm, in terms of monetary or other value? This is hard to really determine in differential terms any way of course.

How to apply such a 'differential' concept of harm to specific cases of some importance, legal and/or otherwise? In rather simple cases like damage to a bicycle or a book the harm involved may be determined without recourse to anything like complex calculation of differences between two complete lives. It may be the same with harm done to bodies of different kinds. Thus harm done by crashing a company car without further damage may be none too complex to calculate.

10 See again Gardner, 2012, for a good overview.

But then even bicycles may be involved in or even cause rather more serious harm. Thus a juvenile pushbike rider may have been so seriously smashed in a road accident that he is physically, mentally, and/or emotionally severely handicapped for the rest of his life. How to determine (relevant) harm in such cases? If such harm may be 'measured' in terms of any criteria at all, monetary or otherwise?

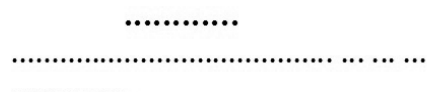
Two lifelines are to be set out, one real, one counterfactual, to be compared in terms of the accidental harm concerned. But then actual or hypothetical lives are not lines to start with, or at best they are so in a metaphorical sense only. Remember the concept of life 'as such' being meaningless. Still this may be no big problem concerning the determination of harm in life. At stake here are two life histories, neither of them real yet, only one to become real, and to be set out in relevant respects and details beforehand.

How to predict such histories that have not yet happened, or that may never happen at all, quite apart from the time-warp paradox involved? This may be difficult if not even well-nigh impossible. About real life one might at least come to know at the very end of it, but then by then it is too late to do anything about any harm done – which is what determination of harm is good for in the first place, at least in legal respects.

Second, what indeed is undoing of harm? By restitution, compensation by payment of damages, or otherwise? This ought to amount to creating a situation as if no harm would have been done at all. Or: victims are to be restored to their original rightful positions. Thus, the theft of a bike may be undone by the return of the bike in its original state, plus damages to compensate for temporary loss of the good concerned.

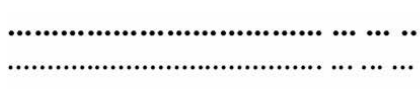
But how to compensate for more serious harm caused by loss of limb and worse? As noted before, it may be impossible to exactly determine amounts of such harm. Even if such amounts could be reliably established, how may later payment of damages or whatever measures *ex post facto* 'make up' for earlier harm done?

This may be expressed in terms of the equivalence of two lives, one actual and including harm and compensation, the other undisturbed (lines above 'the normal line of life' represent added value or compensation, lines below represent loss of value or harm):



This is to be equivalent to

These lines interpreted in temporal terms rather simplify real-life harm and compensation of course, not just because full compensation is a limiting case. Harm may be temporary, done away with by restitution or otherwise, but other kinds of harm may be lasting, for example as a consequence of damaged physical, mental, and/or emotional health. This may be represented as follows:



How then may a harmed and compensated life be more or less equivalent to a life without harm? Or again: how to make cats out of dogs? What is the sense of the moving metaphors in Isaiah 40:4?

> Every valley shall be exalted And every mountain and hill brought low; The crooked places shall be made straight And the rough places smooth [...]

'Bridging' principles may be something like: optimize total value over time, or more specifically: life is not to be harmed. But then what makes a harmed and compensated life equivalent or even analogous to an unharmed life?

This essentially depends on the human capability to transcend time, in order to 'combine' later gains with earlier losses so as to end up with a neutral result and thus with an undisturbed future. That is, in ideal cases of full equivalence of harm and compensation. Then the end result of harm and compensation, 'added' to each other – however distinct at least in terms of time – amounts to a life as if nothing wrong was done in it at all.

Man is more than past, present, and future. As Kant (in 1787, pp. 408 f.) and others rightly expressed it: personality is consciousness of identity in time (see also Kaptein, 2013). Wittgenstein wrote (in 1921, 6.4311):

> If by eternity is understood not endless temporal duration but timelessness, then he lives eternally who lives in the present.
>
> Our life is endless in the way that our visual field is without limit.

Laden with metaphor this all is of course, life and 'lifelines' predominantly so. Two lives are to be equivalent: an unharmed life and a harmed and compensated life. How to determine such equivalence, given the meaninglessness of the concept of life? Also, turning back the clock is a literal impossibility of course. Still it may be effected by compensation for harm done. Ideally, this puts victims back to unharmed positions 'as if they lived eternally', unencumbered by experiences and memories of harm.

Analogy may come ever more clearly to the fore in the third issue: why are offenders and nobody else to undo harm in principle? Offenders' liability presupposes more than harm done. More or less apart from extreme cases of strict liability, basic preconditions of liability for harm are wrongfulness, causation, and absence of overriding excuses.

Still the question remains why offenders satisfying all such conditions are to pay for harm done. Why do offenders incur debts for wrongful harm done by them? Why are they to pay in a wide sense? Concepts of retributive justice and other intuitively attractive but intellectually ultimately unsatisfying notions have been appealed to in order to establish this obligation or even duty.

Analogy may be a heuristic tool here as well, in showing things to be rather simpler. Remember wrongfulness being a condition for liability. Harm to be compensated for must have been a consequence of wrongful conduct. Compensation in its turn comes down to undoing harmful consequences in principle. Or: such undoing is equivalent to having done the right thing from the start. The bridging principle may be something like: do not disturb the peace. One implication is: do not do wrongful harm. Another is: undo wrongful harm done. It is consequences that count, and here consequences of not inflicting wrongful harm and compensating for it ought to be equivalent in principle, by leading to undisturbed lives in the end.

This is why offenders are to pay and nobody else in principle. Undoing consequences of harm done is doing the right thing after all, leading to the same harmless consequences. Relocating burdens of harm, however sensible according to economic or other criteria, violates this equivalence from the start. Still insurance and/or public fund money and/or other means of compensation may do victims much good. Indeed not all offenders are able and willing to fully pay for what they did wrong, if they are brought to task at all.

The analogy – or better, equivalence – of doing the right thing and compensating for wrongful harm by offenders themselves may also be one or even the main force behind the deeply felt difference between some or other accidental gain, like winning a lottery, and compensation by

offenders themselves. Such accidental benefits may be helpful in handling consequences of harm, still they do not amount to anything like undoing harm by offenders themselves. Indeed victims' satisfaction on compensation in large part depends on offenders bearing the burden of it (see on this Kaptein, 2004).

Thus full compensation for harm done by offenders is equivalent to doing the right thing from the start. Though it may be rather much cheaper and more comfortable for both victims and offenders to abstain from doing wrongful harm of course. Costs of compensation may be rather much higher than of rightful conduct, even if paid for by third parties like insurance companies, just as so much harm cannot be fully compensated for in principle. And in no way could any compensation afterwards be any sort of license to inflict wrongful harm with the promise – however sincere – to undo it later on.

Fourth, forcing offenders to pay is analogous to prevention of wrongful harm in principle. Again, payment for harm done ideally comes down to undoing harm, as if nothing wrong had ever happened. Payment may be necessitated by failed prevention. Still there is a second chance here as well, by preventing harm 'as if' it never happened. Thus regarded retribution in its original sense of full restitution is analogous or even equivalent to prevention of harm.

So analogy is important in analysis of harm, compensation, liability, and prevention. Again bridging principles do the work, demonstrating identity behind semblances of difference, linking factors not at all analogous at first sight.

6 Wrongful death, wrongful birth, wrongful life: priceless?

Too much wrongful harm 'within' life may not be adequately compensated for. Wrongful harm transcending life – concerning matters of wrongful birth, life, and death – cannot really be undone at all in principle. Serious or probably the most serious harm however is caused by killing, or at least by wrongful killing. How to determine such harm and related compensation, if such harm may be meaningfully compensated for any way at all? What may be roles here not just of analogy but also of concepts of life, literal and/or metaphorical? Like issues arise in cases of wrongful birth – the mirror image of wrongful killing so to say – and in cases of wrongful life.

First, then, the problem of harm through wrongful killing, so often unspeakably tragic. Such harm relates both to direct victims and to their

more or less intimately related survivors. How to determine harm done to the wrongfully dead, including harm through suffering so often preceding involuntary death? How to determine the difference between life and death? Between a living person and 'its' dead body? The following solution may be unsatisfactory for more than scientific reasons:[11]

> What differentiates a person from a thing? Not as simple a question as it may appear, yet we all behave as though we know the answer. Our modest experimental approach is to transform persons into things and things into persons, observing what has been gained or lost in the process. A simple way of transforming a person into a thing is by the skilful use of a gun, but this technique is frowned upon as unscientific.

Dead bodies are things inside life, but remain outside life by definition as well. Indeed life being the context of everything meaningful, death, or at least one's own death, cannot be comprehended as a thing or event in life at all. Death is the end of life at best, at least in a literal sense. Wittgenstein (1921, 6.4311) quoted once more:

> Death is not an event in life. Death is not lived through.

Put differently one cannot say, 'I am dead', as more or less analogous to 'he is dead'. In fact even 'he is dead' cannot be taken literally, as there is no more 'he' left. One's own death or in fact any death 'in itself' cannot be any kind of experience in life.[12] There is nothing like death, or at least there is nothing known about death as death by definition. So any difference between life and death, however fearful death may seem, may not serve in any determination of harm. Which is not to say that there is no difference between life and death.

Or may harm as a consequence of wrongful killing still be determined by the 'difference' between two lives, that is, by comparing a normal life expectancy with a wrongfully shortened life? This of course leads back to the standard conception of harm as the difference between two lives. So it is plagued by all the problems noted before, and even more of them. What makes a longer life more worthwhile than a shorter life? Anyway an all too long life or even eternal life would be rather dreary to say the least.

11 As offered by MacLeod in 1964, p. 63.

12 See also Edwards's classic contribution to this subject, as published in 1967.

Still this impossibility of determining harm through wrongful killing does not at all imply that wrongful killing does not make a difference. Life is not a suicide club (*bis*). Most people do not want to die, let alone be killed, for whatever reasons. This and nothing else is the main rationale behind moral and legal prohibitions of killing without some or other really overriding excuse like the need for self-defence.

Indeed religious fanaticism violates this basic prohibition of killing on the basis of really harmful analogies of life and death. Thus death is taken to be like life in being some or other kind of afterlife. If virtuous death leads to rewards of eternal bliss in heaven death may not be so bad after all, just as living in hell may be regarded as just punishment for dead unbelievers. But then such analogies of varieties of life and death as afterlife are totally unfounded of course, lacking any bridging principle outside life as it is known. It is deadly belief at best, at odds with any rationality but still showing the enormously suggestive power of wrong-headed analogy. (So much for religion inspired by fear of death and its wilful transformation into eternal life in heaven or hell.)

The prohibition of killing is not just based on normal people's aversion to premature and oftentimes violently painful death. It is also justified by human aversion to losing near or even distant relations. At least subjectively, harm caused by such losses may be enormous. One's own death may not be imaginable in principle, other people's death is a stark human reality. There are real differences between life with loved ones, with family and friends, and life without them, especially in the knowledge of their wrongful suffering and death.[13] At least here such harm may be determined by the 'difference' between harmed and unharmed lives. Immeasurable harm in more than one sense is the result in most cases. Is this the reason why most jurisdictions do not offer compensation to relatives' for deaths 'as such'? Though damages may be paid for economic contributions ended by wrongful death of relatives of course. Thus damages may be ordered in order to compensate for the loss of a family income earner, in order to at least more or less restore such a family's financial situation to a state as if nothing wrong happened.

The ideal solution for both victims and their relatives would of course be literal restitution here as well, by reversing MacLeod's probably unscientific experiment in resurrecting the dead at the expense of their wrongful killers, with extra payment to compensate for harmful pain preceding killing and for lost time in life. This would be realization of original positions after all.

13 Think here again of Hume's escape from loneliness as quoted in Section 4.

Again this is impracticable, at least for now. Indeed one thing making deadly crime so chillingly special is its definitive and final doing away with real creditors entitled to whatever restitution and/or compensation by offenders. Which of course is no good reason to let such offenders go free.

Next there is the problem of wrongful birth. This relates to seriously handicapped human life and incurable suffering. How to determine harm in such cases? The relevant difference must be: wrongful life compared to no wrongful life born at all. Again and as in the case of wrongful death, such a difference is meaningless in principle. What is non-life?

Still the problem of wrongful life may be simpler than the problem of wrongful death. The dead may not be resurrected, but the wrongfully born may simply be killed, 'as if nothing happened', apart from payment for wrongful harm suffered by parents concerned. This would come down to perfectly undoing harm in principle. But this is probably frowned upon as unscientific as well, or at least as immoral, as it comes down to killing in its turn.

Here difficult issues arise: where are relevant distinctions between abortion and killing very young children, probably being scarcely conscious of who they are and what is happening to them?[14] Again what is the value of life? What is the 'sanctity' of a life spent without any conscious meaning whatsoever? As explained before, the ends of life are in life or there are no ends at all (section 4). Raz's standpoint as expressed in 1991 (p. 94) may be as unpopular as it is rational in the end:

> [...] I find it difficult to accept a transcendent value of survival. Life seems not so much intrinsically valuable as a precondition for doing anything valuable. But if so life should not be valued (except on instrumental grounds) except in as much as it is spent in valuable pursuits. There is no intrinsic value in vegetating life. [...] Survival is to be (intrinsically) valuable only if it is used to engage in valuable activities.

Indeed all meaning is in life (see already section 4). So why not end vegetating life, probably spent in serious suffering as well? Still parents and others may very strongly object to any 'euthanasia' as the principled solution to problems of wrongful birth. At least as far as the parents are concerned this involves a paradox or even outright contradiction. They did not want the child, wrongly born as it is. But as soon as the harm sets in, or even before the harmful occurrence of birth, they may staunchly refuse to part with it.

14 On this see previously, and most interestingly, Singer, 1995 [1994].

Indeed from parents' point of view harm done through wrongful birth is the difference between their lives without and their lives in the company of the children concerned. How to determine relevant differences between such lives? And what would make up for such differences in terms of damages, if restoring original positions by eliminating the wrongly born is no option after all? 'Difference', 'damage', and 'damages' are no more than vague metaphors here again, without any clear underlying principles, however starkly real tragedies concerned may be.

And what about the wrongfully born themselves, in as far as they are able to form any conception of themselves and their place in the world? How to live in the knowledge that one ought not to have been born, ought not to be there at all? How are the wrongfully born to determine the harm done to them? Or how to imagine one's own non-existence? Living without or with compensation expressing their unintentional existence? That is, in as far as severely and oftentimes severally handicapped children reach sufficient levels of consciousness and self-consciousness to conceive of such questions? And so on, and so on, with nothing like any clear answer in sight.

Lastly, wrongful life may be the simplest case in principle, concerning determination of harm. 'Life itself' is no longer at stake here. As in the standard case two lives are to be compared, one real and one hypothetical, without interference causing wrongfully harmed life. Still relevant differences may not be reliably established at all, at least because prediction of a full human life is impracticable in these cases as well of course. Restoration of the original position 'as if nothing wrong happened' is impossible in such cases anyway. So damages may be paid for harm done to children concerned and to their parents, at least in order to secure a more or less tolerable life. Also such damages may serve as expressions of respect to the harmed, like: 'Yes, wrong was done, so payment for it is due.'

Again, and of course reflected in positive law and in adjudication, putting prices on human lives is deeply problematic. Lack of quality of life may be restored or at least compensated for by monetary means to a certain extent. But valuing life as life, life being the context of everything valuable in whatever respect, remains deeply problematic. All that may be said is something like: life is valuable as a precondition for anything valuable. So any compensation for life issues is analogous to compensation for harm in life at best. Remember life itself is nothing, and everything.

What is the sense of this analogical analysis of wrongful birth, life, and death issues? Probably not much more than still more bringing their inexorable tragedies to light. The analysis may seem more or less intractable.

Sure enough, but this intractability is not so much an issue of the analysis as of life and death themselves.

7 Man from dog to God – not just so to say

So what is undoing damage by analogy? At least three things. First there is the autonomous 'logic' of analogy unmasked. Nothing like argumentation by analogy, precedent, paradigm, or metaphor has any logical force at all. Again this does not imply that there are no analogies, precedents, metaphors, etc. Their differences and identities are determined not by themselves, but by underlying rules or principles. So do not be fooled and do not fool anyone else by taking such argumentation at face value.

Remember that underlying or bridging principles are to be explained and justified in their turn, at least to parties bearing the consequences of their application in adjudication and in other kinds of conflict resolution. Some wrongful harm may be prevented this way, both by avoidance of fallacies and by more adequately justifying consequences for parties concerned.

Second, any such principles may be put in doubt, up to and including doubts about the meaning of life itself. But depressing thoughts on the meaninglessness of life and living may be dispelled by the insight that 'life', the 'meaning of life', and related concepts are analogical or metaphorical at best, or just non-concepts. So there can be no meaninglessness of life. All meaning is in life. This may not undo all melancholy, but still. Life is to be lived, by basic principles more or less given by life and society itself. Not everything can be put in doubt. Thus even staunch sceptics rightly want their wrongful harm undone by offenders in the first place.

Third, more or less useful semblances of analogy also serve in analysis of harm and amounts of harm, including well-nigh indeterminable and interminable harm done by wrongful death, birth, and life. Undoing wrongful harm is 'analogous' to not doing such harm in the first place. Still undoing harm in as far as feasible at all is rather more expensive than doing the right thing from the start in most cases, both for offenders and for victims. Indeed so much wrongful harm is not really undone 'as if nothing happened', in as far as such 'turning back the clock' is feasible at all.

No doubt such rational recommendations are most helpful on paper, clearing up intellectual confusion. But may propagation of such insights really forestall wrongful harm and thus lead to a better world? This makes one think of one more dog-like set of analogies or even metaphors – leaving out cats, tortoises, and insects this time:

> A stationmaster and a passer-by are engaged in casual conversation, while the station master's dog walks around on the platform. An express train runs past at speed. The dog tries to race the train, in vain of course. The passer-by inquires after any possible reasons, motives, or causes why the dog would do so. 'I have no clue', the station master retorts. 'Actually I'd rather like to know what the dog will do with the train if it ever gets hold of the thing.'

However lucid the analysis of undoing damage by analogy may be, it relates to legal and real-world practice like the dog to the train. No great influence to the better in legal handling of damage may be expected from this contribution anyway. Abstraction galore, so far removed from legal realities and real life.

Thus regarded, efforts are better redirected from scholarly to more useful activities. Try to abstain from doing wrongful harm in the first place, however hard it may be to really determine what is right and wrong, legally and otherwise. And try to undo wrongful harm as well, equivalent as such undoing is to doing the right thing in principle. Do not live and let others live with unnecessary burdens of debt and associated guilt feelings. Debts are to be paid, unnecessary guilt and guilt feelings are to be avoided.

Most harm is left to be borne by victims themselves of course, without any prospects of outside compensation. One last and in fact grandiose set of analogies and metaphors may serve to show how experiences of harm may be transformed for the better.

Harm may make victims feel like proverbial dogs. Sad and harmful thoughts and emotions on the meaninglessness of life may be based on wrong-headed analogies, life being taken for something unjustifiable in life. This and so much more may make one feel depressingly insignificant, small, paltry, and worse. But again life is not a thing, or fact. Life is the ultimately inexplicable 'context' of everything. This holds good not just for human life, but also for any individual human life. So man need not feel small, sad, 'outside the world'. Wittgenstein quoted one more time (1921, 5.621 and 5.63):

> The world and life are one.
> I am my world [...].

Experiences of unhappiness may feel like absence, as not being there in and with the world. But man is or at least ought to be 'everything'. If God is everything, then man may be God or at least ought to feel like being a, no more or less than any other human being. Bad logic? Abstract metaphor?

Sure enough, but then no less plausible and consoling for that. Better feel like God than like a dog. So forget yourself, simply be there, 'be your world', as Hume so vividly suggested in his doing away with scepticism by simply living (see above, section 4).

But then human or so often inhuman life-worlds are not always that cosy and comfortable at all. So often such worlds may not be changed at will. Still human powers in reinterpreting reality for the better may be unlimited in principle. This is another analogy of man and God, based on a bridging principle of omnipotence. Man may conceive of a life-world in which nothing necessarily is what it is. Not everything needs to be taken literally. Reality does offer so much playroom for the better. Reality may be 'recreated' in order to be more acceptable from a human point of view. Setbacks may be seen as challenges, losses may make room for new gains and so much more. Or: let reality shine in the best possible light.

So much harm is self-inflicted, by wrongful interpretation and experience of realities which do not need to be what they seem to be, and by human self-interpretation forgetting that man is or at least ought to be God. At least some harm may be undone this way, by recreating reality as if it never happened. Man offends against himself in the first place, and this is not just a metaphor. Try not to be a victim, try to be the master of your own world.

Remember that all harm comes down to subjective experience in the end, not always changeable at will, but still …. Epictetus tried to convey part of this by noting that everything has two handles. The art of life is finding the right one. When Epictetus lost his lamp to a thief he reacted by pondering whether the thief might make still better use of the lamp and next got himself a simpler source of light.

'The soul is like a vessel filled with water' reflecting reality according to the quality of the soul. Paradigmatically metaphorical argumentation here of course, offering real enlightenment still highly relevant in modern lives and times. He even compared life to the Olympic Games, reinterpreting setbacks as challenges to be proudly overcome. Or even to a festival (in about 100 AD, bk. 4, ch. 1, § 108):

> God has no need of a fault-finding spectator. He needs those who join in the holiday and the dance, that they may applaud rather, and glorify, and sing hymns of praise about the festival.

Here indeed it is not logic, but heuristics and well-nigh poetic suggestion doing the real work of conveying human possibilities or even omnipotence.

Which of course is not to say that well-nigh infinite varieties of physical and psychic suffering are all amenable to radical reinterpretation for the better at will. Suggestions of reinterpretative omnipotence are not to be taken as belittling of so much suffering. Any undeserved suffering ought still to be undone in the first place. Such undoing may not just be effected by material means, including compensation. Sincere apologies for wrongful harm done may do much good as well. Also, physical, mental, and emotional therapies remain indispensable in many cases. But at least some depression may be more or less healed by trying to become master of one's own world.

This holds good for reinterpretation of reasons and/or causes behind wrongful harm done as well (as in fact is already implicit in Epictetus' handling of the stolen lamp). Too much resentment against offenders may sadly and seriously add up to suffering as a consequence of being wrongfully harmed. Human reality may be more positively interpreted. Pain as a consequence of mere accident is more easily borne than pain wrongfully inflicted.[15] As movingly expressed by Rousseau, probably unconsciously following Epictetus in this (in 1782, Eighth Walk):

> Whatever our situation, it is only self-love that can make us constantly unhappy. When it is silent and we listen to the voice of reason, this can console us in the end for all the misfortunes which it was not in our power to avoid. Indeed it makes them disappear, in so far as they have no immediate effect on us, for one can be sure of avoiding their worst buffets by ceasing to take any notice of them. They are as nothing to the person who ignores them. Insults, reprisals, offences, injuries, injustices are all nothing to the man who sees in the hardships he suffers nothing but the hardships themselves and not the intention behind them, and whose place in his own self-esteem does not depend on the good-will of others.

Victims are to free themselves from their offenders, *qua* offenders to be conceived 'as nothing'. Sometimes semblances of intentional or even *mala fide* harmful conduct are better reinterpreted as accidental events with unhappy consequences, 'as if' offenders did not really do it. At least such offenders are not to be taken too seriously in wrong respects. They may be respected as fellow human beings, but not always as fully responsible offenders setting out to do harm to specific victims. Also, too many victims take anonymous wrongdoing as directed against them personally, and/or

15 See on this paradigmatically Sacks's telling story about different and in fact sometimes rather indifferent hospital treatments undergone by him after a mountaineering accident (1984).

misinterpret accidental wrongdoing as fully intentional, with again harmful consequences for both victims and offenders. Again this is far from totally effective against so many varieties of victimization, and still less anything like complete practical wisdom of course.

Reinterpretation of seemingly saddening realities does not imply that there is no reality left at all. Trying to make everything relative and subjective, as if nothing is what it is, leads to loneliness and worse. Indeed there is no 'we' without reference to truth and falsity with respect to a common reality.[16] This goes rather further than unquestionable chairs to sit in. This common reality has to be taken for what it is in so many respects. Not respecting inevitable facts leads to frustration only. In fact positively interpreting the world starts with acceptance of ultimately unchangeable givens, to be charitably reinterpreted. Such benign relativism is the total opposite of any sceptical relativism and its indifference to what there is and may be for the better.

Nothing needs to be what it is. What is the meaning of everything? To be as good and beautiful as it may be. 'Ethics and aesthetics are one' (as Wittgenstein famously noted in 1921, 6.421). Man makes the meaning of everything. So make the best of it. Nothing in life needs to be what it is on sometimes so ugly faces of it. Thus analogy and metaphor may be as logically redundant as they are indispensable for any human life and any human relationship in and with the world. Indeed the very reason why there is nothing like argumentation by analogy and the like is the very same reason why the world may be positively reinterpreted after all: everything resembles everything in an infinite number of respects. So leave your intellectual pets like the logic of analogy and worse – and some more real bugs – behind.

About the author

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16 As so convincingly explained once more by Frankfurt, in 2006.

10. Analogy in the strict liability rules in the Dutch Civil Code

Bastiaan van der Velden

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Abstract
In the Civil Code of the Netherlands analogy and related legal techniques are appealed to in order to fill gaps in the Code. The Civil Code instructs courts to apply contrary-to-fact reasoning, in rewriting the facts of a case into an analogous scenario, in which, in the case of liability for animals, the 'possessor' is imagined to be in control of the behaviour of an animal that causes damage. This discussion is extended to other issues, showing 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.

Keywords: Analogy, contrary-to-fact reasoning, analogous scenarios, damage, damages, paradigmatic civil code

1 The Dutch Civil Code of 1992

In 1992 a new Civil Code (Burgerlijk Wetboek or BW) was promulgated in the Netherlands to replace the Civil Code of 1838. This was not a rupture with the old Code or existing court decisions. Ever since E.M. Meijers was given the task of drafting a new Code in 1947, Dutch lawyers have been getting used to the new legal concepts. On the one hand, legal concepts that had already been developed in the courts since the beginning of the twentieth century (such as torts) were codified in the 1992 Civil Code. On the other hand, the courts used the drafts of the new Civil Code that were published from 1954 on for an *anticiperende interpretatie* ('anticipatory interpretation') of the provisions of the 1838 Civil Code, thus anticipating future legislation (Hartkamp, 1975, p. 1085; Van Geffen, 2001, p. 24).

A civil code cannot contain rules for every possible individual legal dispute to occur now or in the future – it cannot thoroughly address every issue – but it should present a system that is able to solve such cases. Naturally, the drafters of the new Dutch Civil Code were aware of this issue. The Dutch Minister of Justice stated that when the text of the Code does not provide a rule, this does not allow for an *a contrario* argument.[1] This characteristic is not found in statutes in the common-law system of England, where a statute is drafted for a specific application, and legal disputes outside the scope of the statute are settled by appeal to common law. Such a gap in the Civil Code must be filled by applying rules of analogy and *redelijkheid en billijkheid*, 'reasonableness and fairness'. In the Dutch Civil Code of 1992, the legislator authorizes analogy and related legal techniques in several ways to fill in these gaps. The 'layered structure' of the Dutch Civil Code makes it necessary to use *lex specialis* sections in connection with general rules on contract law. To apply these rules with regard to a specific contract, for example those codified in Book 7 for sale, rent, and labour contracts, one always has to use the general parts of Books 3 and 6, unless analogical application is incompatible with the nature of the juridical act.

Other legislative techniques related to analogy, like deeming provisions in legal fictions, are authorized by the Dutch legislator in the 1992 Civil Code as well (De Maat and Winkels, 2010, p. 177). But in the 1992 Civil Code there is no preliminary title or other chapter with rules on the interpretation of the law. De Graaf points to a recent increase in Dutch Supreme Court decisions in which analogy is applied in the field of civil law (De Graaf, 2013, pp. 20–24). In one of the Court decisions mentioned by De Graaf, the Supreme Court made the rules on the contract of sale in Title 7.1 BW applicable to standard software, software which has not specifically been developed for a client.[2] This was done via the so-called connecting provision (*schakelbepaling*) in art. 7:47 BW. According to art. 7:1 BW the title on sales is only applicable when there is an agreement under which one party undertakes to deliver a 'movable', a *zaak*, and the other party has to pay a price in return. According to art. 3:2 BW this *zaak* or 'thing' must be a tangible object that can be controlled by humans. In art. 7:47 BW a connection is made

1 Except for those fields of law where the legal system is a closed system, where only those legal institutes are recognized that are in the Code, for example legal persons (BW Bk. 2) and real rights (BW Bk. 5) and mandatory rules, like consumer protection. See also: Hartkamp, 1977, p. 16.

2 HR (Hoge Raad, the Dutch Supreme Court) 27 April 2012, ECLI:NL:HR:2012:BV1301, *NJ* (*Nederlandse Jurisprudentie*) 2012, no. 293, and ECLI:NL:HR:2012:BV1299, *NJ* 2012, no. 294; Rinzema and Melis, 2013, pp. 88–97.

between the sale of rights outside the scope of art. 3:2/7:1 BW and the rules on sale in Title 7.1 BW: 'In that case the provisions of the previous Sections of this Title 7.1 BW apply according to the sale agreement as far as this is in line with the nature of that valuable right' (see for all BW translations Warendorf et al., 2013). According to the Supreme Court, standard software is bought for an unlimited period, and the buyer has individualized access to it and can exert power over it. These characteristics make the fact that it must be downloaded irrelevant.[3] To complicate matters, the Dutch Minister of Justice stated a while later in Parliament that such 'streaming' of digital content could not be considered as a sale of goods under Title 7.1 BW, and that only the general parts of contract law (*algemeen overeenkomstenrecht*) in Title 6.5 BW are applicable to this kind of sale, resulting in a lower level of buyer protection.[4]

At least three distinct dimensions of analogy can be observed in the Dutch Civil Code. The judge may, if a set of facts is analogous to a situation anticipated in the Code, apply these rules. Second, if there are no rules for certain facts of a case, the Code makes sections applicable via a connecting provision (also called *wettelijke analogie* – an analogy prescribed in the Code), but specifies in this provision the parts of the title to neglect if contrary to the use made of that title, for example sections 3:59, 3:78, 6:216, and 6:261 BW (Kloosterhuis, 2002, pp. 123–125). In the third place, the Civil Code instructs the judge to re-envisage the facts of a case to resemble a new, analogous situation. This third technique will be analysed in depth. Dutch tort law in Book 6 of the Civil Code codifies the strict liability of the 'possessor' for his animals and of the owner for buildings and movables. This strict liability of the possessor and owner is limited in certain situations.[5] To decide if a limitation is applicable, the judge has to reformulate the facts of a case. This use of analogy – in the strict sense of the word, as prescribed by the law – is the subject of my chapter. Liability for tort in the general provisions of tort law (art. 6:162–168 BW) for animals (art. 6:179 BW), dangerous constructed immovable objects (art. 6:174 BW), and dangerous equipment (art. 6:173 BW) are a sort of benchmark used to determine whether there is a ground of liability for damages on the side of the tortfeasor. The actions

3 HR 27 April 2012, ECLI:NL:HR:2012:BV1301, *NJ* 2012, no. 293, consideration 3.5.

4 Kamerstukken ('Parliamentary documents') I 2013/14, 33 520, no. E, p. 2.

5 Strict liability and its limitations (in the 'old' 1838 Civil Code) are discussed by the eminent Dutch jurist Paul Scholten in his thesis: Scholten, 1899, pp. 126–153. Some further developments in this area have been described by Slagter in his thesis: Slagter, 1952, pp. 92–94. With regard to animals, Eduard Maurits Meijers discusses the liability without fault in his gloss on HR 15 October 1915, *NJ* 1915, pp. 1071ff. (*Op hol geslagen paarden*).

on the part of the victim that have contributed to the tortious act and may lead to a reduction of the damages are taken into account in the sections of the Dutch Civil Code on the determination of damages (art. 6:101 par. 1 BW).

In the nineteenth century Von Savigny and others treated legal fiction and analogy as equivalent, and in Vaihinger's *Philosophy of as If* (1922) fiction was given a theoretical framework of its own. More recently a division between these concepts has been proposed, even subdividing legal fiction into a legal fiction in the Code and a dogmatic legal fiction (Haferkamp, 2006, p. 1078). In legal fiction two sets of facts of a case are treated in the same way.

2 Analogy and the rules on strict liability

In the Dutch Civil Code there is a strict liability of the possessor for the damage caused by his animal. The Civil Code names one possibility to avoid this liability: if the circumstances were such that 'if the possessor had had control over the behavior of the animal which caused the damage' (irrespective of whether or not she actually had control), 'there would have been no liability' according to the general sections on tort.[6] In legal fiction, two sets of facts are treated in the same way. In the case of liability for animals, one set of facts is directly dealt with (the facts in the case in which the possessor has the animal under her control), the other set of facts needs to be adapted: as if the possessor has the animal under her control.

An example of such a liability for animals is the case of *Bardoel v. Swinkels*. A pig belonging to Swinkels escapes on its own from the farm and is found by a neighbour, Mr. Bardoel, who places the animal in his barn. Here the pig infects the stable. To determine liability the Dutch Supreme Court compared the behaviour of the pig with one in an imaginary setting: the possessor is walking around with his pig on the premises of his neighbour and the pig infects the other's stable. The question whether the possessor is liable in the situation of a farmer who is simply walking around with a pig in his custody and 'is capable of controlling the behavior of the animal that caused the damage', is answered by the Supreme Court as follows:

> Liability in this section is not so strict that it also exists in the case of the animal's behaviour, for whose consequences the owner, even if he had

6 This article in the Civil Code (6:179 BW) was drafted by Jan Drion, one of the three members of the committee that took over the drafting of the Dutch Civil Code after the premature death of E.M. Meijers; see Nieuwenhuis, 1983, p. 582.

> had control over its behaviour and had wilfully allowed it, nevertheless would not have been liable according to the general rules of tort. This occurs in this case: if Swinkels had made it possible for his pig to come into bodily contact with Bardoel's pigs, he would have been liable, if he knew or should have known the risk of infection, and he is only liable for tort when he ought to avoid contact.[7]

When applying art. 6:179 BW, the judge has to deny the actual facts of the case, and has to rewrite these facts into an analogous scenario in which the possessor controls the behaviour of the animal that caused the damage. It is like the Shaolin monks in the Chinese movie who live in an analogous world where they can defy gravity (Van Boxsel, 2003, p. 195).

3 Liability for animals

The article in the Dutch Civil Code on liability for animals (art. 6:179 BW) states:

> The possessor of an animal is liable for the damage caused by that animal, unless, pursuant to the preceding Section, there would have been no liability if the possessor had had control over the behavior of the animal which caused the damage.

References to a preceding section or even to articles in other books of the Dutch Civil Code are quite common due to its layered structure. In some cases the reference is explicitly defined in the article, in others not. What constitutes a possessor as mentioned in the article on liability for animals is defined in art. 107 par. 1 of Book 3 BW: 'Possession is the fact of detaining property for oneself.'[8] The possessor of the animal is liable, irrespective of whether he does or does not actually have control over the animal.[9]The word 'unless' in art. 6:179 BW, in the Dutch text *tenzij*, refers to the previous section codifying the general provisions of tort law (art. 6:162–168 BW) and

7 HR 24 February 1984 (Bardoel/Swinkels), ECLI:NL:HR:1984:AG4766, *NJ* 1984, 415 (applying art. 1404 of the Civil Code of 1838, but anticipating the new legislation introduced in 1992).

8 Art. 3:107. See also: Rechtbank Amsterdam, 6 June 2012, ECLI:NL:RBAMS:2012:BW9368.

9 *Parlementaire geschiedenis van het nieuwe Burgerlijk Wetboek, Invoering boeken 3, 5 en 6, Boek 6: Algemeen gedeelte van het verbintenissenrecht* ('Parliamentary history of the new Civil Code, Introduction books 3, 5 and 6, Book 6: General contract law'; 1990), p. 1382.

introduces elements that limit strict liability as defined in art. 6:179 BW.[10] According to the Supreme Court, the highest court in the Netherlands, the legal basis and justification for the restriction of strict liability can be found in the *eigen energie van het dier*, the 'actions of the animal' and its unpredictability.[11] There is no liability when such liability does not exist under the general provisions of art. 6:162–168 BW.[12] The word *tenzij* (unless, used as a specific legal notion) introduces elements to limit strict liability for animals, but not all the elements of fault-based liability mentioned in the previous art. 6:162–168 BW must be taken into account by the judge. Four elements are necessary to constitute liability according to art. 6:162 BW: unlawfulness, fault, damage, and a causal connection (Van Hoey Smith and Weterings, 2011, p. 183). On the one hand, a defence by the possessor implying lack of causality, as codified in art. 6:162 BW, can be used to avoid strict liability as defined in art. 6:179 BW. On the other hand, an assault by an animal in an act of self-defence can (sometimes) limit strict liability if this amounts to a justification (*rechtvaardigingsgrond*) of the act that could take away the liability for tort. Furthermore, art. 6:163 BW contains the so-called *Relativiteitsvereiste* (or *Schutznormtheorie*, in German, § 823 par. 2 BGB, Bürgerliches Gesetzbuch, the German Civil Code), meaning that there is no obligation to repair the damage if the standard breached does not serve to protect against damage such as that suffered by the person suffering the loss – the question arises whether there was a duty of care (art. 6:163 BW). According to art. 6:162 BW, however, the tortious act of the tortfeasor must result 'from his fault'. In the case of strict liability or 'no fault liability' as defined in art. 6:179 BW, a 'fault' of the animal's possessor is not necessary – a 'ground for exculpation' (*schulduitsluitingsgrond*) is contrary to the concept of strict liability. The animal's possessor is liable due to the fact that he is the possessor. It must be emphasized that the separate elements of art. 6:162–168 BW that can or cannot be taken

10 Asser/Hartkamp, 2006 (*Verbintenissenrecht*, pt. 3, no. 179); Bauw, 2008, pp. 63ff.

11 HR 24 February 1984 (Bardoel/Swinkels), ECLI:NL:HR:1984:AG4766, *NJ* 1984, 415. And: HR 23 February 1990 (Zengerle/Blezer), ECLI:NL:HR:1990:AD1041, *NJ* 1990, 365; Van Dam, 2000, p. 351.

12 Article 6:162 BW:

1. A person who commits a tort against another which is attributable to him, must repair the damage suffered by the other in consequence thereof.

2. Except where there are grounds for justification, the following are deemed tortious: the violation of a right and an act or omission breaching a duty imposed by law or a rule of unwritten law pertaining to proper social conduct.

3. A tortfeasor is responsible for the commission of a tort if it is due to his fault or to a cause for which he is accountable by law or pursuant to generally accepted principles.

into account by the judge in connection with liability for animals are not defined in art. 6:179 BW or any other section of the Code, and can only be deduced by looking at the general legal principles to be found in academic literature on law and parliamentary history.

As stated, the rule – that the 'possessor of an animal is liable for the damage caused by that animal, unless, pursuant to the preceding Section, there would have been no liability if the possessor had had control over the behavior of the animal which caused the damage' – gives the judge an instruction to adapt or adjust the facts of the case to resemble a new situation. Let us give an example. Someone is sleeping in his garden, and a watchdog is laying on the veranda. A burglar enters the garden, and is bitten by the dog. It is clear that the possessor does not have the dog under his control at that particular moment. The possessor of an animal is normally liable for the damage caused by that animal. But could the liability be limited? To adjudicate this case, the judge has to adapt the facts of the case in such a way that in the new situation the possessor is able to control the animal's behaviour that caused the damage, and then the judge has to check whether the possessor would not have been liable under the previous section under the general provisions of tort law. So, the judge adjusts the facts to resemble a new situation: someone is sitting with the dog on the veranda, controlling the animal, and the burglar enters the garden. The possessor is liable, unless art. 6:162–168 BW provides an argument to waive liability. A justification of the act could take away the liability for tort; self-defence or *noodweer* could be such a circumstance. But would the act of entering a garden in broad daylight legitimate such a self-defence?

In sum, analogy is applied in two ways in this article. On the one hand, an analogy has to be made between the general rules of tort law and the limited requirements of this article that apply to liability for animals. On the other hand, the facts of a case at stake have to be reformulated in such a way that the owner is presumed to be in control of a tortfeasing animal. The judge has to transfer the information from the source domain or case to a target domain; the case must be rewritten in such a way that the possessor of the animal which caused the damage had control over the behaviour of that animal, creating a negative analogy by taking out the argument that the possessor did not actually have the animal under his control.

The new situation to be envisaged by the judge, in which the possessor has the animal under his control, is described in different ways in Dutch academic writing. In the Parliamentary report on the Civil Code, it is described as follows:

> this is a criterion derived from a hypothetical case, which entails grafting the liabilities referred to onto the rules on tort.[13]

The *tenzij* clause limits strict liability, and to describe the analogy the judge has to create, Sieburgh uses the words 'hypothetical case' (*hypothetisch geval*) and 'simulate' (*fingeren*).[14] A Dutch court uses the words 'imaginary' (*denkbeeldig*) case.[15] To explain the reference in the *tenzij* clause, Hijma and Olthof (2005, p. 284) write: 'The "tenzij" clause is not a fiction. These articles do not *assume* a liability as defined in chapter 6.3.1, but only *compare* the situation in which someone is liable under 6:162.'

Article 6:179 BW has come under criticism from several legal scholars. Nieuwenhuis (1983, p. 582) calls it 'a criterion which, even after prolonged meditation, is certainly not revealing all its secrets'. Hartlief (1996, p. 219) is of the opinion that the formulation of the *tenzij* clause could have been more elegant. The wording of art. 6:174 BW has been called a 'brain-teaser' (Spier et al., 2009, nos. 102 and 111). But Sieburgh (2000, p. 194) insists that it is outside the scope of legal research to determine whether an article is auspicious or well-formulated.

The link made in the Dutch Civil Code between strict liability for animals and the general clauses of tort law is a unique legal solution (Van Dam, 2000, p. 352). In France and Belgium, strict liability for animals is limited by the rules of *force majeure* (*overmacht*).[16] In the UK, liability for animals is considered with regard to the dangerousness of the animal.[17] In Germany, a strict liability for animals exists when they are classified as 'luxury' animals.[18]

4 Defective buildings and goods

Strict liability for buildings and structures and for defective goods is also formulated with a *tenzij* clause urging the judge to reformulate the facts of

13 *Parlementaire geschiedenis van het nieuwe Burgerlijk Wetboek: Boek 6* ('Parliamentary history of the new Civil Code: Book 6'; 1981), Memorandum of Reply II, p. 748; see also Meijers's explanatory note, p. 607.

14 See Sieburgh, 2000, pp. 188–189. The words 'hypothetical case' are also used by the judge in the case: Gerechtshof Arnhem, 22 June 2010, ECLI:NL:GHARN:2010:BN0684.

15 Rechtbank Limburg, 24 April 2013, ECLI:NL:RBLIM:2013:BZ8474.

16 Art. 1385 *Code Civil* (Belgium); art. 1385 *Code Civil* (France); Van Dam, 2000, p. 352; Overeem, 1988, pp. 451–457.

17 Animals Act 1971; Van Dam, 2000, pp. 140–141 and 352.

18 § 833 BGB; Van Dam, 2000, pp. 97–101 and 352.

the case. Owners of buildings and structures are responsible for damage caused by those building and structures. If a building does not meet the standards which may be set for them, for example in the case of deferred maintenance, and if that deferred maintenance is the cause of damage to persons or property, then the owner is liable. When roof tiles fall down (under normal circumstances) and cause damage to persons or vehicles, the owner of that building is liable. Article 6:174 BW formulates liability for dangerous constructed immovable objects:

> A possessor of a building or structure which does not meet the standards which, in the given circumstances, may be set for it and thereby constitutes a danger for persons or things, is liable if this danger materializes, unless, pursuant to the preceding Section, there would have been no liability if the possessor would have known of the danger at the time it arose.

On the one hand, the strict liability of the owner is restricted to damages to people or property. A crane on a construction site collapses, resulting in damage to a gas pipeline. Three hours after the accident has occurred, an explosion takes place. The court considers that too much time has elapsed to see a justification on the side of the gas pipeline owner, since he could and should have taken action within that three-hour time frame.[19] Starting from the moment the danger arose, the courts introduce a time frame within which action has to be taken to put an end to the dangerous situation, a so-called *overmachtsperiode* or *force majeure* period (Van Hoey Smith and Weterings, 2011, p. 183). Once this period has elapsed, the possessor is liable for damages if he has not taken action, even if he was unaware of the danger. Article 6:173 BW is applicable to liability for dangerous equipment:

> A possessor of a movable thing which is known to constitute a special danger for persons or things if it does not meet the standards which, in the given circumstances, may be set for such thing, is liable if this danger materializes, unless, pursuant to the previous Section, there would have been no liability if the possessor would have known of the danger at the time it arose.

The owner of a movable object is responsible for the risk that this movable object poses to persons or property. Thus the owner of a worn axe chopping

19 Rechtbank Utrecht 30 September 1998, *NJ Kort* 1999, 29 (Moira Vastgoed/REMU).

wood for his fireplace is liable for the consequences when things go wrong. When the axe disengages from the axe handle and hits and wounds a bystander, then the owner of the axe is liable for personal injury to the bystander. The axe did not meet the relevant safety requirements.

5 A comparative view

The French, Belgian, and Luxembourgian Codes impose strict liability upon the owner of an animal, regardless of whether the animal was actually in the custody of the owner (Civil Code art. 1385, France & Belgium). The model rules of the DCFR (Draft Common Frame of Reference) has a rule that imposes strict liability upon the keepers of animals of all types (VI. – 3:203: Accountability for damage caused by animals; Von Bar et al., 2009, p. 3494). In Spain, there is strict liability for the possessor of an animal even when it has escaped or strayed, although liability shall cease if damage is the result of *force majeure* or of a fault on the part of the victim (Civil Code art. 1905, Spain). The German Civil Code makes a distinction between a risk-based liability of the keepers of 'luxury animals', and a liability for the keepers of domestic animals that is based on a rebuttable presumption of fault (§ 833).

A more recent codification, the Hungarian Civil Code (§ 351(1)), contains a provision similar to the Dutch one, linking the damages caused by the animal to another person with the general provisions on tort. An exception is made for the keeper of wild animals whose activities are likely to pose a considerable hazard (§ 351(2)). The recent Polish Civil Code uses an 'unless' clause stating 'whoever keeps or uses an animal shall be obliged to redress the damage it caused regardless of whether it was under his care or went astray or ran away, unless he or the person for whom he is responsible is not at fault' (art. 431 § 1).

6 Conclusion

There are two ways in which analogy is used in the sections on liability for animals (art. 6:179 BW), dangerous constructed immovable objects (art. 6:174 BW), and dangerous equipment (art. 6:173 BW). On the one hand, it is used as a way to make the general provisions of tort law (art. 6:162–168 BW) applicable to limited liability. This is the classical way in which analogy is applied in jurisprudence, when sections written for certain circumstances are used to solve legal cases in other fields. Here we see that the legislator

does not explicitly define the premises of the general provisions of tort law (art. 6:162–168 BW) that are applicable in limited liability cases.

The other way of applying analogy authorized by the Dutch legislator calls for a different systematic approach. The facts of a case of animal liability have to be rendered in such a way that the 'real facts' are changed to a situation seen from a new point of view, according to which the possessor has control over his animal.

When the legislator drafts the Civil Code in such a way that it instructs the judge to use analogy, analogy acquires autonomous argumentative force.

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