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van der Velden, Bastiaan, Kaptein, Hendrik

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8. Argument by analogy in the law

Martin Golding

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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

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. [...] It 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.
About the author

Martin Golding is professor emeritus of philosophy and law, Duke University, Durham (US). He published extensively on philosophy of law, ethics, and political philosophy.