# Analogical Reasoning in Law

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"*The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.*"

Oliver Wendell Holmes [1]

[1] The Path of the Law, reprinted in: Boston University Law Review vol. 45 (1965), p. 42.

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# PART I:

# THEORETICALLY POSSIBLE APPROACHES TO LEGAL ANALOGY

# CHAPTER ONE

# INTRODUCTORY REMARKS

## 1. The enormous appeal and "unbeatable" merits of legal analogy

Analogical reasoning has been of special interest to philosophers, theologians, logicians and other scientists since time immemorial. Amongst its many functions and usages, analogy achieved recognition as a means of conceiving new ideas, advancing propositions as to how a given problem may be resolved or the putting forth of tentative hypotheses. Moreover – apart from its heuristic, illustrative, explanatory, concept-creation, categorization and systematization function – analogy is also widely utilized for probative purposes. This means that it is resorted to in order to find the truth or confirm the aptness of a particular thesis. However, the application of analogy as a means of proof is not indisputable and sometimes tends to be rebutted, which concerns more natural science than philosophy and theology. Nonetheless, analogical reasoning is readily used for the sake of argumentation and during choice-, decision- and prediction-making. It also features in art and entertainment, notably in literature, poetry and humor.[1] In the legal domain, the role and position of the analogical mode of inference seems to be of even greater significance. Besides its diverse potential applications, analogy aspires here to constitute the central method for legal thought and analysis. It has also managed to attract enormous acclaim and reverence on the part of judges, lawyers and academics.

For instance, Keith J. Holyoak and Paul Thagard indicate that: "One of the most important domains in which analogy is routinely used is the law."[2] Douglas Walton remarks that: "Arguments from analogy are common in

[1] For more details see Maciej Koszowski, Multiple Functions of Analogical Reasoning in Science and Everyday Life, Polish Sociological Review no. 1 (2017), pp. 3-19.

[2] Keith J. Holyoak and Paul Thagard, *Mental Leaps: Analogy in Creative Thought*, The MIT Press: Cambridge 1996, p. 149.

law."[3] Lloyd L. Weinreb states that, despite the relevance of other forms of legal reasoning, "[a]nalogical arguments are, however, especially prominent in legal reasoning, so much so that they are regarded as its hallmark."[4] Sharon Hanson notes that argument by analogy is the most common form of argument in law.[5] Ruggero J. Aldisert claims that: "The importance of legal reasoning by analogy cannot be overstated. It is the heart of the study of law…[6] Cass R. Sunstein contends that it is legal reasoning within the court system where analogical reasoning finds its natural home,[7] adding also that "[a]nalogical reasoning lies at the heart of legal thinking and for good reasons."[8] Scott Brewer points out that: '[L]egal argument is often associated with its own distinct method, usually referred to as "reasoning (or argument) by analogy," indeed, if metaphor is the dreamwork of language, then analogy is the brainstorm of juris'-diction.'[9] Eileen Braman speculates that "[p]erhaps the best-known domain where analogy operates is legal reasoning"[10] and announces that "[a]nalogical reasoning is clearly a fundamental aspect of legal decision making."[11] Dan Hunter expresses the opinion that: "Analogy plays a

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[3] Douglas Walton, *Informal Logic: A Pragmatic Approach*, 2nd ed., Cambridge University Press: Cambridge 2008, p. 312.

[4] Lloyd L. Weinreb, *Legal Reason: The Use of Analogy in Legal Argument*, Cambridge University Press: Cambridge 2005, p. 4.

[5] Sharon Hanson, *Legal Method & Reasoning*, 2nd ed., Cavendish Publishing Limited: London 2003, p. 218.

[6] Ruggero J. Aldisert, *Logic for Lawyers: A Guide to Clear Legal Thinking*, 3rd ed., National Institute for Trial Advocacy: 1997, p. 96.

[7] Cass R. Sunstein, *Legal Reasoning and Political Conflict*, Oxford University Press: New York 1996, p. 62.

[8] Sunstein, *Legal…*, p. 99.

[9] Scott Brewer, Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy, Harvard Law Review vol. 109 no. 5 (1996), p. 926.
It is also noteworthy that, in Brewer's opinion, there are many forms of argument in law which are not commonly recognized as analogical despite their being so (e.g. argument by counterexample, argument under the ejusdem generis canon of construction or the doctrine of equal protection). Into the bargain, according to this author, '[p]erhaps the most important of these unrecognized analogical arguments is the argument that proceeds by effecting a "reflective equilibrium" between general norms and particular application of those norms' (see Brewer, pp. 927-928).

[10] Eileen Braman, *Law Politics & Perception: How Policy References Influence Legal Reasoning*, University of Virginia Press: Charlottesville 2009, p. 84.

[11] Braman, p. 111.

central role in legal reasoning."[12] Barbara A. Spellman is of the view that "…law school is largely about analogy; law schools just fail to tell students that explicitly. And the reason law school is largely about analogy is because common law – and the principle of precedent – is totally about analogy."[13] Frederick Schauer admits that "[a]nalogies, after all, are a ubiquitous feature of legal argument and judicial opinions."[14] For Edward H. Levi and Jan M. Broekman, "[t]he basic pattern of legal reasoning is reasoning by example"[15] and "the analogy remains a basic operation which establishes the legal discourse" [16] respectively. Similarly, analogy is regarded as one of the principle modes of legal reasoning by Grant Lamond and Steven J. Burton.[17] Robert Alexy, in turn, ranks it – together with *argumentum e contrario*, *argumentum a fortiori* and *argumentum ad absurdum* – among special forms of legal argument.[18]

The adoration – not to say veneration – of the analogical reasoning employed in law does not, naturally, amount only to general remarks of the sort presented above. A multitude of specific virtues and benefits of legal analogy have been singled out and underscored in the literature.

It is thus first noted that analogy equips the law with more consistency and coherence. By resorting to it, the values and goals the law strives to

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[12] Dan Hunter, *Teaching and Using Analogy in Law*, Journal of the Association of Legal Writing Directors vol. 2 (2008), p. 151.
[13] Barbara A. Spellman, Reflections of a Recovering Lawyer: How Becoming a Cognitive Psychologist – and (in Particular) Studying Analogical and Causal Reasoning – Changed my Views about the Field of Psychology and Law, Chicago-Kent Law Review vol. 79 (2004), p. 1190.
[14] Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning*, Harvard University Press: Cambridge 2009, p. 85.
[15] Edward H. Levi, *An Introduction to Legal Reasoning*, The University of Chicago Press: Chicago 1949, p. 1.
[16] Jan M. Broekman, *Analogy in the Law*, [in:] *Legal Knowledge and Analogy: Fragments of Legal Epistemology, Hermeneutics and Linguistics*, ed. Patrick Nerhot, Kluwer Academic Publishers: Dordrecht 1991, p. 217.
[17] Grant Lamond, *Precedent and Analogy in Legal Reasoning*, [in:] *The Stanford Encyclopedia of Philosophy*, first published 2006, http://www.science.uva.nl/~seop/entries/legal-reas-prec, p. 1 and Steven J. Burton, *An Introduction to Law and Legal Reasoning*, 3rd ed., Aspen Publishers: New York 2007, p. 25.
[18] See Robert Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification*, translated by Ruth Adler and Neil MacCormick, Oxford University Press: Oxford 1989, p. 279.

promote can be extended and harmonized.[19] Moreover, the consistency which analogical reasoning produces seems to be rather of a local (fragmentary) character and thereby more easily attainable. Namely, the achievement of global (total) consistency in law appears to be too idealistic and virtually impossible, i.e. at least as far as the legal systems of contemporary Western countries are concerned.[20] As a consequence, analogy, in contrast to some other legal methods or theories, may be perceived as something which is not too demanding and ambitious, something that allows legal reasoners to remain humble and circumspect while restraining them from being immodest and hubristic.[21]

Secondly, analogy is considered as providing the law with the predictability and certainty, thus rendering it more affable, safe and workable. Hence, apart from facilitating planning and protecting warranted expectations,[22] as Broekman points out, "[l]egal analogy transforms risks into acceptable risks, and uncertainty into reasonable expectation."[23]

Thirdly, it may be intimated that analogical reasoning helps the law to be more efficient and effective.[24] Analogy is of particular use for lawyers and judges as a means of filling the so-called gaps or lacunas. Particularly, it helps them to cope with situations in which the case at hand is not covered by already existing laws, although this case is to be decided in a lawful manner. Indeed, – by virtue of the constraints that analogical reasoning imposes on the reasoner and the reference which is here made to operative law – an unregulated case that is resolved analogically can still be

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[19] See Sunstein, *Legal…*, p. 67, 76, 97, Joseph Raz, *The Authority of Law*: *Essays on Law and Morality*, Oxford University Press: Oxford 1979, p. 205, Lamond, p. 24, Neil MacCormick, *Legal Reasoning and Legal Theory*, Oxford University Press: Oxford 1978, p. 153, 187.

[20] Cf. Cees W. Maris, *Milking the Meter – On Analogy, Universalizability and World Views*, [in:] *Legal Knowledge and Analogy: Fragments of Legal Epistemology, Hermeneutics and Linguistics*, ed. Patrick Nerhot, Kluwer Academic Publishers: Dordrecht 1991, especially pp. 79-80, 102; cf. also Cass R. Sunstein, Commentary on Analogical Reasoning, Harvard Law Review vol. 106 no. 3 (1993), pp. 775-778.

[21] Cf. Sunstein, Commentary…, p. 782, see also pp. 785-786.

[22] See Sunstein, *Legal…*, p. 76, 97, Sunstein, Commentary…, p. 783, Lamond, pp. 23-24, 25; cf. Emily Sherwin, Defense of Analogical Reasoning in Law, The University of Chicago Law Review vol. 66 (1999), pp. 1192-1193.

[23] Broekman, p. 236.

[24] Cf. Kazimierz Opałek and Jerzy Wróblewski, *Zagadnienia teorii prawa*, Państwowe Wydawnictwo Naukowe: Warszawa 1969, p. 322.

regarded as being decided in line with the law, not as a product of judicial discretion or a mere whim. By setting limits on judicial power, analogy appears to give judges the opportunity to make the law in a way that is different from the mode in which law is laid down by the legislature. And, as such, it makes the upholding of the idea of the separation of powers viable without the necessity of depriving judges altogether of their law-making capacity.[25]

Fourthly, analogy – due to its internal autoproductive ability – accelerates the development of law and endows the law with some flexibility, also helping law remain up-to-date and adjust to the everchanging conditions of life and the needs of those who are governed by it.[26] As is pointed out, analogy serves the modernization of legal content.[27] Moreover, the development of law by analogy operates in a peaceful way. In this respect, analogical reasoning is deemed to be conservative and backward-looking and not aimed at introducing new disorder or new conflicting values to the legal order. In addition, the changes that legal analogy brings about in operative law are – as a rule – only incremental and modest in themselves, thereby even if they are sometimes erroneous, they entail no risk of overwhelming catastrophe.[28] As a result, on the one hand, legal analogy is perceived as something in which creativity "is bound to the continuity of experience, which refers fluctuations in real life to an equilibrium model which, in the end, will buffer order from chaos,"[29] while on the other, its important advantage is to consist in "allowing a large degree of openness to new facts and perspectives."[30] In other words, it might be considered as "a happy medium between constraint and flexibility," as something that "constrain[s] judicial judgment without displacing it."[31]

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[25] Cf. MacCormick, *Legal…*, pp. 187-188, 191.
[26] See Eugeniusz Smoktunowicz, *Analogia w prawie administracyjnym*, Państwowe Wydawnictwo Naukowe: Warszawa 1970, pp. 22-23 and Karl-Heinz Ladeur, *The Analogy between Logic and Dialogic of Law*, [in:] *Legal Knowledge and Analogy: Fragments of Legal Epistemology, Hermeneutics and Linguistics*, ed. Patrick Nerhot, Kluwer Academic Publishers: Dordrecht 1991, pp. 12-13.
[27] See Smoktunowicz, pp. 23, 24-25.
[28] See Raz, p. 204, Sunstein, Commentary…, p. 768, Sherwin, pp. 1193-1194, Larry Alexander and Emily Sherwin, *Demystifying Legal Reasoning*, Cambridge University Press: Cambridge 2008, p. 66, Schauer, *Thinking…*, pp. 100-102.
[29] Ladeur, p. 16, see also pp. 19-20.
[30] Sunstein, Commentary…, p. 782.
[31] See Alexander and Sherwin, p. 66.

Fifthly, analogical reasoning is regarded as rendering the law not only more effective and able to develop but also capable of self-improvement (self-correction) in places in which it already exists but is unsatisfactory. Particularly, analogy may enable legal reasoners to prevent damage that may be brought about by ill-designed or obsolete legal rules[32] – i.e. by giving these reasoners the possibility not to apply a given rule in cases that, despite being covered by this rule, present themselves as atypical in comparison to most of the other cases that fall under this rule.[33]

Sixthly, legal analogy is recognized as a direct form of the execution of the principle of equal treatment ("like should be treated alike"),[34] also called the principle of equality[35]or the principle of formal justice,[36] as well as the principle of universalizability.[37]

Seventhly, when an analogical argument is employed in law it is believed to improve legal reasoning, making this reasoning more effective, informed, objective, just and rational. Namely, as is pointed out, the practice of analogical reasoning from a past decision "produces a habit, a method, that will lead judges to do the intellectual work of study and comparison." [38] Furthermore, the examining of legal cases that have already been decided on is to provide legal decision-makers with the possibility of modelling their decisions on solutions which can be found in such cases (saving thus considerable time which they would otherwise waste on in-depth analysis stemming from the need to reconsider the same issue each time). It allows legal decision-makers to capitalize on the accumulated collective experience reflected in such cases and enables them to get to know what counts in law or at least what the others have found persuasive and noteworthy in the legal sphere.[39] Moreover, by

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[32] See Smoktunowicz, pp. 25-27.
[33] See Lamond, p. 25.
[34] Alexander and Sherwin, p. 66-67, Sunstein, *Legal…*, p. 76, 97, Jerzy Stelmach, *Kodeks argumentacyjny dla prawników*, Zakamycze: Kraków 2003, p. 72; see also Aleksander Peczenik, *On Law and Reason*, 2nd ed., Springer Science+Business Media: 2009, p. 321, 322.
[35] See Alexy, p. 282.
[36] Zbigniew Pulka, *Podstawy prawa: Podstawowe pojęcia prawa i prawoznawstwa*, Wydawnictwo Forum Naukowe: Poznań 2008, p. 145, 150; see also Józef Nowacki, *Analogia legis*, Państwowe Wydawnictwo Naukowe: Warszawa 1966, pp. 200-202, 226.
[37] Alexy, p. 282; see also Peczenik, p. 321, 322.
[38] Sherwin, p. 1188; see also Alexander and Sherwin, p. 120.
[39] See Sunstein, *Legal…*, p. 76, 77, Sherwin, pp. 1189-1190 and Lamond, p. 23.

equipping judges with a wide array of legal cases and a wealth of data theses cases comprise, their horizons are broadened[40] and at the same time they are secured against the making of idiosyncratic, out of line decisions, at least to some extent. As a result, analogy may be considered as a safety belt against the abuse of judicial discretion and arbitrariness, a remedy for judicial "hubris" and "sectarianism," a measure by which prejudices can be reduced and irrationality can be curtailed,[41] something that contributes significantly to the "rationality of legal thought by providing a framework for analysis, identifying starting points for reasoning, and framing legal issue"[42] or something that enriches lawyers and judges in "a wealth of facts, reasons and techniques pertinent to how a new case should be decided."[43] It is also sometimes maintained that analogy enables judicial decision-making to be objective and fair.[44] Even the improvement of the judicial framing and development of good legal rules happens to be attributed to analogy.[45]

Eighthly, analogy is said to help facilitate agreement between people or at least make it possible for them to start talking, placing at their disposal some uncontested point from which their discussion may begin from.[46] As Broekman points out, "[e]very lawyer, both of the common law and the continental legal system, is able to separate relevant and non-relevant factors of the case. And in doing so, lawyers create, perhaps unknowingly,

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[40] See Sherwin, pp. 1186, 1187-1189, Alexander and Sherwin, pp. 119-120, Richard A. Posner, *The Problems of Jurisprudence*, Harvard University Press: Cambridge 1990, p. 89.

[41] See Sunstein, *Legal…*, p. 76, 97.
Particularly, the practice of using analogy can counteract biases which stem from the non-representativeness of the case *sub judice* against the class of cases it belongs to; see Sherwin, pp. 1190-1192 and Alexander and Sherwin, pp. 118-120.

[42] Burton, p. 40, see also p. 39.

[43] Posner, *The Problems…*, p. 89, 98.

[44] See George C. Christie, *Law, Norms & Authority*, Duckworth: London 1982, p. 58, 72.

[45] As noted by Alexander and Sherwin, analogy may have "a practical function for judges" and exert "a positive influence on legal rules" in the sense that it helps judges in drafting rules [*rationes decidendi*] by providing the more representative scope of cases than the mere case at hand the rule being drafted is to cover (see Alexander and Sherwin, pp. 103, 118-120). As they also assume, analogical methods "require the judge to engage with the facts of prior cases, make comparisons, and formulate rules that explain the importance or unimportance of common facts" (see Alexander and Sherwin, p. 120, see also Sherwin, pp. 1189-1190).

[46] Sunstein, *Legal…*, p. 77; cf. also Sunstein, Commentary…, pp. 771-773, 782.

the main features of the legal discourse. Analogy is an instrument of that discourse."[47] Moreover, the method of deciding the case at hand on the basis of its similarities or dissimilarities with other cases whose legal consequences are known may be the only acceptable way for disputants who disagree, at the more abstract level, as to the principles which are to govern the case at hand.[48]

Ninthly, due to its focus on resolving particular problems rather than establishing general laws, analogy can also be linked with the virtue of postponing decisions on many difficult issues until they arise.[49]

Tenthly, analogy is said to be a kind of bottom-up reasoning,[50] which is not dependent on the large scale-theory of good and bad. Relatedly, in order to operate, analogy does not need the universal metric of abstract values whose adoption seems unattainable in contemporary, pluralistic societies. When reasoning by analogy, the law may realize divergent goals which in addition may be incommensurable and collide with each other without the necessity of pursuing only one single aim, such as the maximization of wealth or utility.[51] In addition, analogy is suspected to be of help in resolving such questions in which incommensurable social goods are at stake and in which some such goods have to be sacrificed.[52]

Finally, analogical reasoning – as it is based upon equality – is comprehended as a measure that enables legal reasoners the avoidance of "a head-on examination of issues of policy."[53] Consequently, it permits legal decisions to be different from those which are made by members of parliament or the government.

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[47] Broekman, p. 223.
[48] Cf. Alexander and Sherwin, p. 67, Sunstein, *Legal…*, p. 69, 92 and Sunstein, Commentary…, pp. 747-748.
[49] See Edward H. Levi, The Nature of Judicial Reasoning, The University of Chicago Law Review vol. 32 no 3 (1965), p. 402.
[50] '[A]nalogical reasoning, as a species of casuistry, is a form of "bottom-up" thinking. Unlike many kinds of reasoning, it does not operate from the top down' (see Sunstein, *Legal…*, p. 68).
[51] See Sunstein, *Legal…*, pp. 63, 68-69, 82-83, 96, 98-99, Sunstein, Commentary…, pp. 788-789; cf. also Lamond, p. 24.
[52] See Sunstein, Commentary…, pp. 788-789; cf. however Sunstein, *Legal…*, p. 99 (where he states that the mere fact of analogical thinking does not provide an answer in this respect).
[53] See Levi, The Nature…, pp. 402-403.

Thus, in sum, even if in some circumstances it may prove to be suboptimal, analogy aspires to have the status of a method which "will serve the best in the mass of ordinary decisions by ordinary judges."[54]

## 2. The symptoms of self-doubt

The appeal to analogical reasoning presented above, in conjunction with the enumeration of its numerous and unrivalled virtues and merits, does not, however, mean that those who promote analogical reasoning in law do so unreservedly. Their doubts concern the sense or even the very existence of something such as reasoning through analogy. The cause of such self-doubts is twofold. Firstly, despite presuming that analogical reasoning is possible, even some of the keenest eulogists of this reasoning cannot explain its workings in any intelligible terms. Secondly, and relatedly, they have serious difficulties in indicating from which source particular analogical conclusions derive their force, much less in elucidating how these conclusions can be regarded as conclusive and compelling.

Thus, Brewer generally notes that what is distinctive of analogy is that, despite its importance to all disciplines and its special prominence in law, "it remains the least well understood and explicated form of reasoning."[55] Jefferson White – while regarding similarity recognition as traditionally understood to "be a central factor in legal reasoning and legal judgment"[56] – avows that at present we do not understand how the process of analogical reasoning works both in legal applications and the acquisition of other kinds of knowledge.[57] With regard to the law, he also underlines that what is behind our cognition is particularly "how similarity recognition interacts with normative legal judgment in case-by-case adjudication."[58] Raz admits that there are no legally agreed standards and special legal requirements concerning the use of analogy apart for the general advice that analogy should establish a harmony of purpose in law ("between the proposed and established rules") and that analogical arguments should be assigned the weight morally right to give them.[59] Levi unceremoniously states that analogy is "reasoning, but it is

[54] See Sherwin, p. 1197.
[55] Brewer, p. 926.
[56] Jefferson White, *Analogical reasoning*, [in:] *A Companion to Philosophy of Law and Legal Theory*, ed. Dennis Patterson, Wiley-Blackwell: Malden 1996, p. 583.
[57] White, p. 589.
[58] White, p. 589.
[59] Raz, p. 206.

imperfect."[60] Sunstein and Lamond, in turn, openly claim that "a reference to analogies helps us to figure out what we think, but it does not dictate particular outcomes"[61] and that "analogies provide non-conclusive reasons for reaching a particular outcome"[62] respectively.

Only a few protagonists of legal analogical reasoning are convinced of the conclusive nature of this kind of reasoning – as Martin Golding who in relation to an analogical argument points out that there "appears to be at least one kind of good legal non-deductive argument that can conclusively establish its conclusion as true (or correct)."[63] He also dares to say that, since legal analogy is normative and practical, it is plausible to hold that its premises entail in a sense the judicial decision, i.e. that here "the truth (or correctness) of the premises commits a judge to accepting the conclusion."[64] More enigmatic is Weinreb who states in this respect that "[i]n law as in life, analogical argument is a valid, albeit indemonstrable, form of reasoning that stand on its own and has its own credentials, which are not derived from abstract reason but are rooted in the experience and knowledge of the lawyers and judges who employ it."[65]

## 3. Mutual accusations amongst the protagonists of legal analogy

The difficulties in comprehending the gist and strength of given analogical conclusions do not, however, prevent heated arguments among particular legal theorists and philosophers. There are mutual accusations as to whose account of analogy is the more correct or appropriate one, accompanied by cutting remarks, taunts and, of course, boasting and bragging.

For instance, Hunter bitterly complains that "[a]nalogy plays a central role in legal reasoning, yet how to analogize is poorly taught and practiced"[66] and that "when it comes to explaining why certain analogies are

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[60] Levi, *An Introduction…*, p. 3.
Similarly, Sherwin "concede[s] that analogical reasoning is an unscientific practice with imperfect results…" (see Sherwin, p. 1179).
[61] Sunstein, Commentary…, p. 766.
[62] Lamond, p. 25.
[63] Martin P. Golding, *Legal Reasoning*, Broadview Press: Peterborough 2001, p. 111.
[64] Golding, pp. 107-108.
[65] Weinreb, p. 12.
[66] Hunter, p. 151.

compelling, persuasive, or better than the alternative, lawyers usually draw a blank. They have little idea how to create an analogy, what an analogy is or why one analogy might be more effective than any other. The teaching of analogy reinforces this sense that analogies are a mystery…"[67] In response to such a deficiency, he in turn maintains that having support in a number of theories of analogy-making in cognitive science, he offers a simple model that can be used to teach and learn how analogy actually works and what makes one analogy better than other.[68] Next, Brewer proudly terms his own account of legal analogy "modestly *rationalistic*" in the sense of something that is between "hyperrationalism and hyper-antirationalism" and nominates his own person as a "Modest-Proposal Rationalist." Moreover, his own stance is to be in opposition to those who he takes for mystics ("who evince almost mystical faith that, even though analogy does not have the rational force of either induction or deduction, it still has ineffable quality that merits our entrusting it with deep and difficult matters of state") and those who are described by him as skeptics ("who are deeply skeptical about the argumentative force of analogical argument"). Clinging also to this division, in Brewer's recognition, a mystic is for instance Sustain since he has a "mystical faith" in analogy, while Schauer and Posner join the ranks of the skeptics.[69]

Weinreb, another devotee of legal analogy, considers Brewer as someone who 'seems at one with a group to whom he refers as the "skeptics," who reject analogical reasoning altogether',[70] claiming also that '[i]n sum, purporting to explain the prominence of analogical arguments in legal reasoning, Brewer relegates the analogy itself to an insignificant role. Because he believes that an analogy on its own terms rests on an invalid inference and has no rational force, he assigns it merely the incidental function of setting his three-step sequence of abduction, induction, and deduction in motion. One may well wonder why the completed sequence is called an "analogical" argument at all, if not to account, however superficially, for the fact that the use of analogy is a distinguishing characteristic of legal reasoning. (…) When all is said and done, he [Brewer] leaves unexplained the puzzle of lawyers' and judges' reliance on analogical reasoning, on the one hand, and its widespread disparagement and rejection by legal scholars, on the other.'[71] As a result,

[67] Hunter, p. 151.
[68] Hunter, p. 152.
[69] Brewer, pp. 933-934, 951-955.
[70] Weinreb, p. 30.
[71] Weinreb, pp. 37-38.

according to Weinreb, Brewer's reconstruction of analogical legal argument "does not succeed, because it has the effect not of validating analogical arguments but of making them irrelevant." [72] Not only is Brewer's attitude to analogical reasoning inadequate in Weinreb's assessment, but also Sunstein's and Levi's. Thus he astutely asks: "If, as they [Sunstein and Levi] say, analogical arguments are bad arguments, why should we count on them regularly to produce good results?," to which question he replies "[e]ither Levi and Sunstein must be mistaken about the formal weakness of the arguments or, one supposes, they must be mistaken about their merits."[73] Sunstein, when "taking his words at face value", is in addition judged by Weinreb as "a skeptic in a mystic's clothing."[74]

Bartosz Brożek, while referring to Brewer's account, also raises the point that "[i]t is striking how little his conception resembles actual analogical reasoning." [75] This author also announces that he "find[s] Weinreb's conception problematic for one simple reason: he offers no structural account of analogical reasoning, and the fact that we do (and often successfully) use analogies on daily basis is not a strong argument to the effect that analogy can serve as justification in rational legal discourse."[76]

Raz, in turn, distinguishes between two opposing stances. The first is endorsed by those who, "noting the possibility of drawing different analogies leading to different conclusions in many cases and the fact that other considerations may justify refusing the conclusion, have concluded that analogical argument is mere widow-dressing, a form of argument

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[72] Weinreb, p. 39.

[73] Weinreb, p. 32.
On the full extent of Weinreb's critique of Brewer's account see Weinreb, pp. 27-39.

[74] Weinreb, p. 31.

[75] Bartosz Brożek, *Rationality and Discourse: Towards a Normative Model of Applying Law*, a Wolters Kluwer business: Warszawa 2007, p. 145.
He additionally points out that while '[o]ne can argue that we should not be misled by the surface structure of such arguments and maintain that the "real" or "deep" structure of analogy is well accounted for by Brewer, who himself admits that his conception avoids the mysterious notion of "similarity," the most troublesome element of the "surface" of analogical arguments,' there also are other objections to Brewer's account such as misuse of the notion of abduction or the lack of a proper reflection of the phenomenon of choosing the relevantly similar case from among a greater number of such cases (see Brożek, pp. 145-146).

[76] Brożek, p. 147.

without legal and other force resorted to for cosmetic reasons." The second is represented by those who consider analogical argument as "a powerful tool which is legally binding and is the only route to the correct solution of all hard cases."[77] Amongst the adherents of the latter, he sees above all Dworkin with his theory of adjudication which – as he captured that – is "the most extreme case of total faith in analogical arguments."[78] His own approach to analogical reasoning is in turn to be "yet another attempt to steer a middle course [between these two extremes]."[79]

Against the background of possible attitudes to analogical reasoning, Brewer also proffers some other divisions to the already mentioned one between "mystics" and skeptics." He distinguishes thus between "reductivist" and "non- or antireductivist"/"sui generis" theories of analogy – dependently on whether analogy is to be reduced to some other argument form or some type of proposition such as a principle. Accordingly, reductivist theories are especially those which look on analogy as reducible to deduction and which for this reason can be called "deductivist" and those in line with which analogy can be boiled down to induction and which correspondingly may be called "inductivist." To inductivist theories he, *inter alia*, enrolls the accounts proffered by Holyoak, Thagard and Aldisert as well as, albeit with some reservation that it can also be sui generis, the conception put forth by Levi. Antireductivist theories – in his opinion – tend to be those endorsed by mystics.

Advancing his taxonomy, Brewer differentiates further between "propositionalist" and "argumentative" theories. The latter are said to treat analogy as a distinct type of argument, while the former consider analogy rather as a type of proposition. As examples of propositionalist theories, i.e. such that 'see analogical argument as reducible (or very nearly so) to "principles" or to some other type of justificatory *proposition*, rather than to some type of argument,' he seems to single out MacCormick's and Schauer's accounts of analogy. Those of Raz and Sunstein, however, are regarded by him as conflating the argumentative and propositionalist approach. In turn, the proposition he defends is basically to be qualified as an argumentative (sui generis) theory. But because this proposition also allows analogical argument to "have different logical forms in different settings" and aspires "to have some of (…) the virtues of broad explanatory

[77] Raz, p. 205.
[78] Raz, pp. 205-206 footnote 19.
[79] See Raz, pp. 205-206.

scope" the theories of these sort are inclined to have, it should be also placed amongst the "pluralist theories" – i.e. the theories which "mix and match" the features of the theories distinguished above. Similarly, Golding offers – according to Brewer – a pluralistic account since he "recognizes an inductive form of analogy, and a sui generis form in the specific setting of legal argument, while also treating legal analogies as being closely tied to, if not reducible to, principle propositions."[80]

## 4. Skepticism and the condemnation of analogical reasoning in law

Obviously, one may not only detect moments of self-doubt and division on the part of supporters of legal analogy, but also be confronted with the merciless criticism cast on the presence of analogical reasoning in law. Thus, for instance, Posner argues that he "merely question[s] whether reasoning by analogy, when distinguished from logical deduction and scientific induction on the one hand and stare decisis on the other, deserves the hoopla and reverence that members of the legal profession have bestowed on it."[81]

One of the pivotal axes of this criticism revolves around the charge that legal analogy is often a guise, a mere cover, whose only function is to hide some other kinds of reasons or reasoning that the reasoner is unwilling to disclose. As such, legal analogy may make legal reasoning and the law only more obscure and unintelligible. At its extreme, this charge assumes that something like legal analogical reasoning does not exist at all, while in its weaker version, to reason by analogy is possible but the value of such reasoning is dubious if not null.

This strand of critique finds itself in statements of the sort that "analogies are often boilerplate disguising a political judgment, rather than a helpful guide to judicial reasoning"[82] or that "argument by analogy and the closely related technique of the legal fiction are often used to disguise change as continuity, making it difficult to evaluate or even to understand legal

[80] For Brewer's "taxonomy" see Brewer, pp. 955-962.
[81] Posner, *The Problems…*, p. 90.
[82] See Sunstein, *Legal…*, p. 93; cf. also Józef Nowacki, *Analogia legis a sprawiedliwość legalna*, [in:] *Valeat aequitas: Księga pamiątkowa ofiarowana Księdzu Profesorowi Remigiuszowi Sobańskiemu*, ed. Maksymilian Pazdan, Wydawnictwo Uniwersytetu Śląskiego: Katowice 2000, pp. 329-330 with footnote 44.

development."[83, 84] It is also well reflected in Alexander and Sherwin's claim that "in our view, there is no such thing as analogical decision making, case to case. Judges who resolve disputes by analogy either are acting on a perception of similarity that is purely intuitive and therefore unreasoned and unconstrained, or they are formulating and applying rules of similarity through ordinary modes of reasoning."[85] The weaker version of that charge might be discerned in MacCormick's opinion that analogy can only show the permissibility of a given solution without making it obligatory,[86] or suspecting analogy of making legal decisions appear more solid than they really are.[87] The assertion that analogy needs a good deal of agreement that already exists in order to work under the threat of being indeterminate and, in fact, only uncovers this agreement fits also into this version well.[88]

The second main objection to the employment of analogy in law is the threat which this employment poses to legal certainty and the predictability of law. Thus Alexander and Sherwin state that even if analogies could in fact operate as an elements in judicial reasoning, "they would tend to lead judges into error, without the compensating benefits of

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[83] Posner, *The Problems…*, pp. 92-93.

[84] This charge is sometimes combined with American Legal Realism (see, e.g., Sherwin, p. 1183). It must be noted, however, that the Realist Movement is sometimes also perceived not as an enemy but an ally of analogical reasoning one employs in law (see Zenon Bankowski, D. Neil MacCormick, Lech Morawski and Alfonso R. Miguel, *Rationales for Precedent*, [in:] *Interpreting Precedents: A Comparative Study*, eds D. Neil MacCormick and Robert S. Summers, Ashgate/Dartmouth: Aldershot 1997, pp. 498-499), which stance, incidentally, seems to be better-founded – see for instance Karl N. Llewellyn, *The Bramble Bush. The Classic Lectures on the Law and Law School: With a New Introduction and Notes by Steve Sheppard,* Oxford University Press: New York 2008, p. 4 (where he urges that legal rules alone, as mere forms of words, are worthless and that their meaning lies in the heap of concrete instances, which may suggests that these rules should be applied not deductively but analogically, i.e. upon the ascertainment of similarity between the one or more aforementioned instances and the case at hand).

[85] Alexander and Sherwin, p. 234.
On the other hand, however, they admit that "[a]nalogical reasoning appears to be firmly established at present: our critical analysis of analogical methods is not likely to prevail over pervasive legal training and professional acceptance" (see Alexander and Sherwin, p. 127).

[86] See MacCormick, *Legal…*, pp. 188-189.

[87] Cf. Posner, *The Problems…*, p. 93.

[88] See Sunstein, *Legal…*, p. 91 (he associates such a view with legal realism).

settlement,"[89] while Posner cautions that analogical reasoning can be "a method of undermining legal certitude (at least initially) rather than of establishing it… ."[90] This accusation in particular seems to be connected with the possibility of disapplying some legal rules by analogy and, as a corollary, making these rules non-conclusive or defeasible or more defeasible than they would be if this possibility was not allowed.[91]

As a third kind of charge, one may invoke the claim that analogical reasoning – and the principle of equal treatment which stands behind it – may petrify some injustices and wrongs which have already been caused. In this manner, analogy may lead to the endless replication of evil which should to be stopped immediately. This is because of the backward looking and conservative nature of analogy, which its features can impede the development of law in the appropriate direction.[92] The very principle that similar cases should be treated alike is also claimed to be of questionable merit, allegedly being in fact morally flawed, tautological, empty and unworkable in constantly changing world. In addition arguing from it is to be able to hide low impulses such as selfishness or resentment [93] – as Alexander and Sherwin point out here "equality furnishes absolutely no reason to extend past immoralities," the aptness of which thesis they illustrate by referring to the following argumentative

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[89] Alexander and Sherwin, p. 65.

[90] Posner, *The Problems…*, p. 91.
Albeit, he also admits that the use of analogy is "inevitable in fields where theory is weak, as it is in military science, in advertising, in law, and in many other fields of human endeavor" (see Posner, *The Problems…*, p. 90).

[91] Cf. Alexander and Sherwin, pp. 125-126.
However, it is intriguing that Sherwin has performed a volte face in this respect and has now almost completely rejected legal analogy. Previously, among the many merits of analogical reasoning in law which she herself highlighted, she concluded that "a practice of analogical reasoning, ingrained by training and tradition, can work indirectly – in the manner of a rule – to improve the quality of judicial decisionmaking" (see Sherwin, p. 1197).

[92] See Sunstein, *Legal…*, p. 95, Sunstein, Commentary…, pp. 768-769 and Alexander and Sherwin, pp. 36-39.
For a further critique of the principle of equal treatment see also Chaïm Perelman, *Imperium retoryki: Retoryka i argumentacja*, translated by Mieczysław Chomicz, edited by Ryszard Kleszcz, Wydawnictwo Nukowe PWN: Warszawa 2004, pp. 82-83.

[93] See Neil Duxbury, *The Nature and Authority of Precedent*, Cambridge University Press: Cambridge 2008, pp. 172, 174-176, 179 and Alexander and Sherwin, pp. 37-39.

setting: "Does killing half of an ethnic group as an act of genocide create any reason based on equality, however weak, to complete the task?"[94]

Fourthly, analogical reasoning might be accused of distracting the decision-maker. That is, it may draw the attention of judges away from the peculiarity of the case at hand by forcing them to also take into account some other cases and instances that are only similar (not identical) to this case.[95] Moreover, decision-makers' attention can be deflected here from the practical consequences of the ways in which the case at hand may be resolved, the consequences that should be a court's proper interest.[96] Eventually, the employment of analogy might also be charged with impeding or at least not encouraging legal agents to use other methods that are more scientific, empirical and of an interdisciplinary character.[97]

Fifthly, analogy is generally condemned as constituting a method which is firstly non-logical, secondly non-scientific and thirdly non-rational. It is thus claimed to be "insufficiently scientific, unduly tied to existing intuitions, and partly for theses reason static or celebratory of existing practice"[98] or "too insistently backward-looking, too skeptical of theory, too lacking in criteria by which to assess legal practices critically."[99] Such a challenge may – according to Sunstein – be traced back as far as Jeremy Bentham.[100] Nowadays, the most virulent critics of analogical reasoning on this score seem to be Richard A. Posner and Larry Alexander together with Emily Sherwin.

In general, Posner perceives analogy as something belonging to the "logic of discovery" rather than to the "logic of justification",[101] or belonging to "legal rhetoric" rather than to "legal thought."[102] Accordingly, he states that "analogies cannot resolve legal disputes intelligently. To say that something is in some respects like something else is to pose questions rather than answer them."[103] Instead of seeking to find the similarity

[94] Alexander and Sherwin, p. 38.
[95] See Sunstein, *Legal…*, p. 74.
[96] See Weinreb, pp. 116-117.
[97] Cf. Posner, *The Problems…*, p. 100.
[98] See Sunstein, *Legal…*, p. 94.
[99] Sunstein, *Legal…*, p. 94.
[100] Sunstein, *Legal…*, p. 94.
[101] Posner, *The Problems…*, pp. 91-92.
[102] Richard A. Posner, *How Judges Think*, Harvard University Press: Cambridge 2008, p. 186.
[103] Posner, *How Judges…*, p. 181.