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Why Precedent in Law (and Elsewhere) is Not Totally (or Even Substantially) About Analogy

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Abstract

Cognitive scientists and others who do research on analogical reasoning often claim that the use of precedent in law is an application of reasoning by analogy. In fact, however, law's principle of precedent is quite different. The typical use of analogy, including the use of analogies to earlier decisions in legal argument, involves the selection of an analog from multiple candidates in order to help make the best decision now. But the legal principle of precedent requires that a prior decision be treated as binding, even if the current decision-maker disagrees with that decision. When the identity between a prior decision and the current question is obvious and inescapable, precedent thus imposes a constraint quite different from the effect of a typical argument by analogy. The importance of drawing this distinction is not so much in showing that a common claim in the psychological and cognitive science literature is mistaken, but that the possibility of making decisions under the constraints of binding precedent is itself an important form of decision-making that deserves to be researched in its own right.

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Reasoning by analogy is a central and domain-general characteristic of human cognition (Forbus, 2001; Hofstadter, 2001; Holyoak & Thagard, 1997), as well as being a key component of expert and professional decision making (Blanchette & Dunbar, 2000; Holyoak, 1982, 2005; Khong, 1992; Spellman & Holyoak, 1992; Tetlock, 1999). Politicians, physicians, scientists, and countless others reason analogically, and there is much to be learned about how people think by understanding how analogies work and are used in ordinary and professional life.

Although analogical reasoning is a key component of human thought, claims about the importance of analogy research become more open to challenge when psychologists maintain that reasoning by analogy is what lawyers do when they argue from the legally pervasive phenomenon of *precedent* (Kokinov & French, 2003), or what

judges do when they use precedent as an essential component of their reasoning and decision making (Hofstadter, 2001). One series of studies, for example, suggests that we can learn about judicial reasoning and legal decision making generally from studying how ordinary people construct analogies (Holyoak & Simon, 1999; Simon, Krawczyk, & Holyoak, 2004). A recent survey of analogy research asserts that the use of legal precedents "is a formalized application of analogical reasoning" (Holyoak, 2005), while another overview (Ellsworth, 2005) points to the pervasiveness of precedent in law as a reason for lawyers and judges to study analogy. Another recent article (Hunt, 2006) describes the analogical reasoning that psychologists study as "typical of the law." And clearest is the claim by one cognitive psychologist that "the principle of precedent [in] the common law" is "totally about analogy" (Spellman, 2004).

Legal scholars have indeed written extensively about analogy (Ashley, 1990; Brewer, 1996, Hunter, 1997; Levi, 1949; Sunstein, 1993, Weinreb, 2005), because the use of analogies to past cases is a common feature of legal argument. But the frequent use of analogical reasoning in law does not entail the conclusion that precedential reasoning is the same thing (Alexander & Sherwin, 2001, Lamond, 2006).[1] Rather, following precedent is a form of reasoning in which judges are expected to adhere to prior decisions addressing the same issue regardless of their own views about how the issue out to be decided. Judges are thus obliged to answer the same question in the same way as others have answered it earlier, even if they would prefer to answer it differently. Precedential constraint in law is precisely this obligation to follow previous decisions just

[1] "There is no word which is used more loosely, or in a greater variety of senses, than Analogy" (Mill, 1861).

because of their existence and not because of their perceived (by the current decision maker) correctness, and this counter-intuitive form of reasoning, ubiquitous in legal reasoning and widespread elsewhere, is importantly different from the typical form of analogical reasoning, whether in law or outside it. Although lawyers use analogies frequently, the use of analogies by lawyers does not support the view (Hofstadter, 1995) that analogical reasoning is all or even most of legal reasoning, precisely because the obligatory following of earlier decisions is substantially different from the selection of an analogy to illuminate or inform a current decision. An argument from precedent does require an initial determination of relevant similarity, but from there the paths diverge, and the typical use of precedent, especially by judges, bears far less affinity to analogical reasoning than most psychologists and perhaps even some lawyers appear to believe. Or so I argue here.

My goal is not (only) to demonstrate that a common claim in the psychological literature is mistaken. That alone might be useful, but even more so is showing how following a precedent represents a distinct but rarely studied form of decision making. If this conclusion is sound, then recognizing the distinctiveness of precedential reasoning may open the door for psychological research on precedent that can be as rich and useful as the psychological research on analogy has been.

Consider, for example, the contemporary criticism (Editorial, 2007) of the Supreme Court for failing to follow precedents from previous Courts.[2] When critics chastise the Supreme Court for disregarding precedent on issues like abortion, defendants' rights, or affirmative action, they are not suggesting that the Court employed the wrong analogy, identified as analogous a prior case with only superficial but not structural similarities to the current case, or failed to map the proper features of the earlier (source) case onto the features of the current (target) case. Rather, they insist that when presented with a situation in which the very *same* issue was decided previously by the same (even if differently staffed) Supreme Court, the current Court is obliged to reach the same conclusion about the same issue, even if a majority of the current members of the Court believe the earlier decision mistaken.

It is open to argument whether the Supreme Court is now doing what its critics charge, just as it is open to argument whether it is wise to require judges (and not only the Justices of the Supreme Court) to make decisions contrary to their own best judgment solely because someone else has made what appears to them to be a mistake in the past. What is less open to question, however, is that a form of reasoning in which past decisions are taken as binding just because of their existence and not because of their wisdom is quite different from a form of reasoning in which current decision makers choose from an array of previous decisions the one that will be most helpful to them, or

[2] Technically, the obligation of a court to follow previous decisions of the same court is referred to as *stare decisis* ("stand by what has been decided"), and the more encompassing term *precedent* is used to refer both to *stare decisis* and the obligation of a lower court to follow decisions of a higher one. What I say here applies to both kinds of precedent, although *stare decisis* is to many non-lawyers more counter-intuitive.

most persuasive to others. Reasoning from precedent, I maintain, is a central component of legal argument and legal reasoning, as the recent criticisms of the Supreme Court make plain, but it is a component whose features will remain misunderstood and unstudied as long as psychologists and others mistakenly equate it with reasoning by analogy.

What makes understanding and studying reasoning from precedent even more important is that its use is not restricted to the legal system. This is well understood by parents of more than one child, for when a younger child claims the right to be given permission to do at a given age what his or her older sibling was permitted to do at the same age, the child is arguing from precedent and demanding that previous decisions be followed regardless of the current views of the decision maker about the wisdom of the earlier decision (Alexander, 1991; Schauer, 1987). Like judges, children do reason analogically (Brown, Kane, & Long, 1989) at times, but children also make arguments from precedent, so understanding the difference between the two will help in understanding the thinking and reasoning of children (and adults) just as it will help do the same for lawyers and judges. So too with administrative decisions in government and universities, where again it is commonly argued that administrators should follow previous decisions and past practices solely for the sake of consistency, without regard to whether those administrators have good reasons for believing the previous decisions and past practices wise. And even the consumer who demands the same deal from a retailer as one that had been offered in the past is relying on precedent for precedent's sake, again underscoring the pervasiveness of the phenomenon whose mistaken equation with

analogical reasoning has precluded the psychological research that would facilitate knowing whether and under what circumstances reasoning from precedent is possible, what kinds of mental processes it involves, and whether some reasoners, by virtue of natural inclination or specialized training, can do it better than others.

I. Analogy as a Friend

Albeit with some disagreement (Hofstadter, 2001; Forbus, *et al.*, 1998), there is broad consensus among psychologists about the basic structure of analogical thought. So it is more or less common ground that analogical reasoning involves, first, the process of *retrieval*, in which a decision maker seeing guidance or the advocate seeking to persuade selects the source analog to which to compare some aspect of a target situation; second, the *mapping* process, where the relevant similarities between source and target are identified; and, third, *transfer*, where the structural elements of the source are used to reach a conclusion or make an argument with respect to the target (Gick & Holyoak, 1980, 1983).

An implicit but rarely analyzed implication of the standard picture of analogy is that the analogical reasoner typically has a choice of source analogs, and that the source analog selected is one that is "potentially useful" (Holyoak, 2005) either in making a decision or in persuading someone else of the wisdom of a chosen course of action (Spellman & Holyoak, 1996). We use analogies, therefore, because they are helpful. They assist in making decisions, they help persuade others of the correctness of our decisions, and they illuminate aspects of a current situation that may otherwise have been

obscured. And at their best they enable us to identify or construct generalizations that connect the source and the target, thereby facilitating the development of new theories that in turn might help in predicting future events. So when President George H.W. Bush analogized Saddam Hussein to Adolph Hitler in order to glean support for the first Iraq war (Spellman & Holyoak, 1992), and when opponents of the second Iraq war analogized that war to the American misadventure in Vietnam, they both selected their source analogs – Hitler and Vietnam respectively – from among multiple potential candidates, and they selected the ones they did because of the capacity of the ensuing analogy to persuade those who might otherwise have disagreed with the position offered by the user of the analogy.

Consistent with the foregoing account, one searches in vain in the psychological literature for examples of constraining analogies. Although analogies are often used to argue against rather than for some course of action – cigarettes should not be banned because of the lessons of Prohibition – and although people often select mistaken analogs (Khong, 1992), it remains the case that analogies are selected because of the guidance they are believed to offer, the illumination they are believed to provide, or the persuasion they are thought to facilitate. The intentional selection of an analogy that prevents the selector from doing what would otherwise be (to the selector) a good idea is a stranger in the psychological literature, with the implicit message being that decision makers never (or rarely) select or see the analogies that would impede a course of action that, but for the analogy, would have much to recommend it.

II. Precedent as a Foe

With this simplified sketch of analogical reasoning in mind, we turn to the legal concept of precedent. More particularly, we turn to the scenario in which legal precedents impede an otherwise preferred current decision, rather than where some previous decision is selected in order to support an argument now. The latter is law's well-studied version of analogical reasoning, but the former, which is quite different, is what I (and the law) mean by genuine precedential constraint.

We can start with an example. So consider the opinion of Supreme Court Justice Potter Stewart in the 1973 abortion case of *Roe v. Wade*. The central issue was whether a right to privacy, not explicitly recognized in the text of the Constitution, could be used to support a woman's right to choose, just as it had supported the right to purchase contraceptives in the 1965 case of *Griswold v. Connecticut*. For the Justices who agreed with the outcome in *Griswold*, the result in *Roe* was unexceptional. From their perspective, they were merely extending in a small way the broad principle of privacy set forth in the earlier case. But Justice Stewart did not fit this mold, for he had been one of the dissenters in *Griswold*. For Justice Stewart in *Griswold*, the lack of textual embodiment of a right to privacy was conclusive as to its non-existence. Yet although Justice Stewart so believed in *Griswold*, and by all accounts had not abandoned this view eight years later, he did not dissent in *Roe*, concluding that the obligation to follow even those precedents he thought mistaken mandated that he follow *Griswold* even as he continued to believe its outcome erroneous.

Although such crisp deference to precedent is rare in the Supreme Court (Segal & Spaeth, 1996), it is hardly absent. In the 1950s and 1960s Justice John Marshall Harlan often joined the majority in criminal procedure decisions from whose basic principles he had dissented in previous cases, just as Justice Byron White in 1981 in *Edwards v. Arizona* felt obliged faithfully to follow the Supreme Court's earlier decision in *Miranda v. Arizona*, a case in which he had been among the dissenters. And in *Ring v. Arizona* in 2002, involving the requirement that a jury determine any fact necessary to support the punishment in a criminal case, Justice Anthony Kennedy stated explicitly that "[t]hough it is still my view that [the earlier case of] *Apprendi* was wrongly decided, *Apprendi* is now the law, and its holding must be implemented in a principled way."

These examples could be multiplied greatly were we to examine state and federal lower court decisions, as well as the law in other common law jurisdictions, but the point should now be clear: The legal system's use of precedent is not about retrieving one from among numerous candidates for the source analog, nor is it about using analogy to help a decision-maker reach a better decision now. Rather, it is about a decision-maker's obligation to follow a mistaken (to her) earlier decision solely because of its existence. It is, to put it bluntly, about a decision-maker's felt obligation to make what she believes is the wrong decision.

III. On the Differences Between Analogy and Precedent

Perhaps the most striking difference between precedential constraint and the classic case of reasoning by analogy is the typical lack of freedom a follower of

precedent perceives in the selection of that precedent. Whereas analogical reasoners are widely understood to have a choice among various candidate source analogs, and whereas it is often argued that experts can be distinguished from novices by the way in which they retrieve their source analogs on the basis of structural rather than superficial similarities to the target (Gentner, 1983; Gentner, Rattermann, & Forbus, 1993; Holyoak & Koh, 1987), such freedom is ordinarily absent with respect to constraint by precedent. Justice Stewart would have thought bizarre the suggestion that finding another earlier case could let him avoid the constraints of *Griswold*, just as Justice White would surely have laughed at the idea that feeling constrained by *Miranda* was simply a function of not having selected the best source case. Although it is true that on occasion creative and effective advocates can persuade a court to see a case or an issue in an entirely new light, far more often a previous decision about issue *X* looms so large that it is implausible for a judge to avoid that decision by maintaining that the current case is about *Y* and not about *X*. . So although, in a very attenuated technical sense, no 2004 forest green Toyota Corolla is the same car as some other 2004 forest green Toyota Corolla, it would be peculiar to criticize one owner of such a car from saying to another owner that "I have the same car." So too here. Any two previous cases, instances, acts, or events are in some respects different, but in reality their equation is often inescapable.

Thus, it is characteristic of the ordinary instance of precedential constraint that the current question is so widely perceived to be the same as answered in a prior decision that it is not open – politically or professionally – for the current decision-maker to maintain that there is a relevant difference. A foreign policy decision-maker in 1990 might have

been able with roughly equivalent plausibility to analogize Saddam to Hitler and Iraq to Vietnam, but a Supreme Court Justice asked in 2008 to rule on the constitutionality of a state law totally prohibiting abortion would find it virtually impossible – logically, linguistically, psychologically, professionally, and politically – to distinguish that case from *Roe v. Wade.*

So too with precedent outside of law. The child who demands to be able to stay up until ten because her older sister was allowed to do so at the same age will not be persuaded by arguments about different circumstances, just as the bureaucrat who justifies an action by reliance on past practice will rarely be convinced that this case is relevantly different. For past practice – precedent – to determine an outcome solely because of the past practice's existence and not because of its perceived correctness, the similarity between the past practice and current issue must be seen as inescapable, but legal and non-legal decision-making appear to furnish numerous examples of just this kind of perceived inescapable similarity between the source and the target.

Once we understand that that the choice of source decisions is in the case of precedent typically not perceived as a choice at all, we can see the most dramatic difference between analogy and precedent. Whereas in the case of analogy the reasoner is looking for assistance in reaching the best decision (or in persuading someone else of the best decision), in the case of precedent the effect is just the opposite. The unavoidable similarity between the source and the target, when combined with a systemic requirement that the target case be in the same way as the source case, means that the

decision maker operating under a norm of precedent will at least sometimes feel constrained to reach what she believes, quite simply, to be the wrong result. Whereas in the case of analogy the decision maker is looking for a source decision (or event) in order to help her make the right decision now, in the case of precedent the decision maker feels constrained and compelled to make what she now believes to be the wrong decision

IV. Does Precedential Constraint Make Sense?

From this description, it is hardly self-evident that precedential constraint is a desirable approach to thinking, reasoning, and decision making. Why, after all, would anyone want to make the wrong decision, and why would a society want decision makers to make what those decision makers believe to be the wrong decision, and which often may in fact be the wrong decision?

One answer is that usually society does not. Once we appreciate that reasoning from precedent typically requires the decision maker to make what she believes to be the wrong decision,[3] we can see why reliance on precedent is the exception and not the rule. Citizens did not expect President Bush to follow the lead of President Clinton just because Clinton had dealt with the same issue, just as we do not expect scientists to reach the conclusions reached by their predecessors for that reason alone. Indeed, there are introductory logic texts describing arguments from precedent as logical fallacies. But

[3] Of course it is often the case that the precedent case or event or decision is consistent with what the decision maker now wishes to do. In such instances, however, the existence of the precedent has no effect. Only when the existence of a precedent constrains a decision maker to do what she would otherwise not do does the precedent make a difference, and that is what distinguishes a precedent as make-weight from a precedent that has some causal effect on the decision.

although denial of the value of the constraint by precedent is the rule, there are noteworthy exceptions. When we expect parents or bureaucrats or retailers to do what they have done before even if they now think it mistaken, or to do what their predecessors have done even if they think their predecessors misguided, we recognize the mandate to treat like cases alike, and we recognize as well, as Justice Brandeis famously put it, that "in most matters it is more important that [the issue] be settled than that it be decided right" (*Burnet*, 1932). As Brandeis recognized, it is often desirable to recognize the value of settlement for settlement's sake, and consistency for consistency's sake.

It is, arguably, the special responsibility of law to embody the values of settlement, stability, and consistency. While these values do have their place in other decision making domains, the centrality of precedent in law may reflect a certain role that the legal system is expected to play more than, say, a legislature enacting a law, an executive administering the law, a physician diagnosing an illness, or a therapist counseling a patient. Reasoning from precedent, and the constraints that precedent imposes, exist in numerous places, but may exist more in law than elsewhere because of the particular function that legal systems are expected to fulfill.

V. Towards a Research Program on Precedent

Two conclusions emerge from the foregoing. First, the structure of an argument from precedent is very different from the structure of an argument by analogy. And second, making decisions constrained by precedent – doing the wrong thing just because

it has been done before -- is highly counter-intuitive, consequently making it difficult for many or even most people to do.

But if reaching the wrong (first-order) decision because of the (second-order) constraints of precedent is both difficult yet expected, there arise important questions about how often decision-makers can make what they believe to be wrong decisions, whether some people are better at it than others, whether some people – prospective lawyers and judges, most obviously – can be trained to do what they might have otherwise have thought difficult or impossible, and whether skill at subjugating one's outcome preferences for this case, like the skill at generalizing from the particular context (Stanovich & West, 2000), correlates with common measures of general intelligence. In part because of the erroneous assumption that reasoning from precedent is the same as reasoning by analogy, however, there has been virtually no research on any of these important questions.

Merely by way of preliminary suggestion, therefore, one can imagine experiments aimed at determining, for example, whether those who self-select for legal training (or are selected for legal training) are better, prior to receiving that training, at subjugating their preferences for the right answer to a norm of precedent; whether those who are trained in the constraints of precedent (recent graduates of law school, for example) are better at following uncomfortable (to them) precedents than those who have, controlling for self-selection, yet to receive such training; or whether those who self-select for

judging, or who are selected to be judges, are better at following precedent than practicing lawyers of similar experience.

All of this is by way of trying to determine if there are experts at following precedent, what characteristics these experts possess that non-experts do not, and what skills these experts have that novices do not. As the recent discourse about the Supreme Court makes clear, many people expect judges to follow precedents with which they disagree, but we have little research on whether such a task is possible, and, if so, who is likely to be good at it, and how people might be trained to perform it. This is a research task for psychologists and not lawyers, and it is unfortunate that the mistaken equation of precedent and analogy has prevented psychologists from addressing this issue. Moreover, if following precedents even when they seem wrong to the decision-maker is not only a large part of law, but a substantial even if not as large a part of much of personal, family, administrative, bureaucratic and commercial decision making, then psychological research about following precedent in law may tell us much about following precedent in these even more pervasive decision making domains.

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