Faculty Scholarship

2019

Law's Enterprise: Argumentation Schemes & Legal Analogy

Brian N. Larson
Texas A&M University School of Law, blarson@law.tamu.edu

LAW'S ENTERPRISE:
ARGUMENTATION SCHEMES & LEGAL ANALOGY

Brian N. Larson[*]

ABSTRACT

Reasoning by legal analogy has been described as mystical, reframed by skeptics using the deductive syllogism, and called "no kind of reasoning at all" by Judge Posner. Arguments by legal analogy happen every day in courtrooms, law offices, and law school classrooms, and they are the essence of what we mean when we talk of thinking like a lawyer. But we have no productive and normative theory for creating and evaluating them. Entries in the debate over the last twenty-five years by Professors Sunstein, Schauer, Brewer, Weinreb, and others leave us at an impasse: the "skeptics" are too focused on the rational force offered by the deductive syllogism when they should attend to the kinds of arguments that can provide premises for deduction—exactly the work that legal analogy accomplishes. Meanwhile, the "mystics" expect us to accept legal analogy without an account of how to discipline it. Using the argumentation schemes and critical questions of informal logic, this article constructs a theory grounded in philosophy, but kitted out for action. The theory is not skeptic or mystic, but dynamic.

663

TABLE OF CONTENTS

INTRODUCTION

Lawyers make arguments before judges using legal analogies every day. A lawyer claims the judge should grant his or her client's motion because this case is *like* earlier cases where courts granted the same type of motion and *unlike* earlier cases where courts denied such a motion. Law students invest considerable effort during their first year learning this form of argument. They learn it not just in their legal theory, analysis, and writing courses, but also in their common-law courses such as torts and contracts, and especially in courses where professors engage in Socratic dialogue. This kind of reasoning occurs in other fields,[1] but it has a "special prominence" in the law.[2] Indeed, arguing by legal analogy may

---

1. Grant Lamond, *Precedent and Analogy in Legal Reasoning*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Spring 2016), § 1, http://plato.stanford.edu/archives/spr2016/entries/legal-reas-prec/ (last visited May 19, 2018).

2. Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 925, 926 (1996).

be what we mean when we say "thinking like a lawyer."[3]

We may live in *law's empire*, a realm that highly values rational consistency and logically determinate, correct answers about the law, in which "propositions of law [are] taken to be sound or true."[4] Nevertheless, on a day-to-day basis, the work we do consists of legal analogy and related categories of argumentation, *dialogic* activities where conceptions of soundness and truth compete—what I call "law's enterprise." And so, law professors tell their students that they need to think logically, but arguments from analogy are not logically valid; that is, they cannot achieve the highest degree of rational force, where the truth of the premises guarantees the truth of the conclusion.[5] There is a sense in which every law student and lawyer knows this, and the problem has not escaped the attention of jurisprudes and other philosophers of law.[6] Two stances toward the problem purportedly predominate: on the one hand are the *skeptics* (as Harvard Professor Scott Brewer calls them),[7] who doubt the rational force of legal analogy, though some of them attempt to clean it up by converting it to a form of rule-based argumentation. They deny the existence of legal analogy or acknowledge it and attempt to convert it to deduction. On the other hand are the *mystics* (Brewer's term again),[8] who say legal analogy is a special kind of reasoning, with its own way of working, but they do not explain how to discipline it—how to produce and evaluate it according to some set of normative standards. They essentially ask us to trust them, or at least to trust legal analogy.

But trust is in short supply among lawyers, especially when evaluating the argumentation of opposing counsel. Legal scholars, judges, and lawyers want means for assessing, critiquing, and possibly attacking such

---

3. *See* Frederick Schauer & Barbara A. Spellman, *Analogy, Expertise, and Experience*, 84 U. CHI. L. REV. 249, 261 (2017). *See also* Lloyd L. Weinreb, LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT ix (2d ed. 2016) ("[T]he use of analogy is at the very center of legal reasoning, so much so that it is regarded as an identifying characteristic not only of legal reasoning itself but also of legal education."); Richard A. Posner, THE PROBLEMS OF JURISPRUDENCE 86–87 (1990) [hereinafter *Posner*, PROBLEMS] (Legal "analogy is the principal candidate for a method that will set lawyers apart from everyday reasoners.").

4. Ronald Dworkin, LAW'S EMPIRE 110 (1986).

5. *See infra* Part I(C).

6. *See infra* Part I(C).

7. Brewer, *supra* note 2, at 953. *See generally infra* Part I(C). Among texts discussed there that are at least arguably those of skeptics are Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 571 n.2 (1987) [hereinafter Schauer, *Precedent*]; Posner, PROBLEMS, *supra* note 3; Larry Alexander, *Bad Beginnings*, 145 U. PA. L. REV. 57, 57 (1996); Frederick Schauer, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING (2009) [hereinafter Schauer, THINKING].

8. Brewer, *supra* note 2, at 952. Schauer and Spellman prefer the terms "celebrants," *supra* note 3, at 250 and "defenders," *id.* at 266. *See generally infra* Part I(C). Among texts discussed there that are at least arguably those of defenders are Cass Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993) and Weinreb, *supra* note 3. Brewer classes himself as neither skeptic nor mystic, but I contend that he aligns most closely with the skeptics.

argumentation. Lawyers want these means when evaluating judges' opinions and deciding whether to appeal. They may also want them as tools for creating stronger arguments of their own. In short, they want a theory of legal argument that is not skeptical or mystical but *dynamic*.[9]

This article provides a theoretical framework for legal analogy that is both normative and productive.[10] In other words, this framework equips legal scholars, judges, and lawyers with tools to reconstruct (where necessary) and rationally criticize the legal analogies of others. It also provides this group with tools to construct strong arguments and counterarguments of their own from legal analogy. It makes a case for using dialogical *argumentation schemes*[11] as models for constructing and assessing legal arguments, and particularly legal analogies. Finally, it provides a more detailed explanation of the process of identifying or reconstructing relevant similarities and dissimilarities between cases than is currently available in existing literature.[12]

Argumentation schemes do not make legal analogies deductively valid—nothing can do that. Nevertheless, though argumentation schemes do not deliver that level of rational force, they do provide the means to assess legal analogies, to subject them to rational critique that can lead to more-or-less confident assertions about their quality as legal argumentation. And that, too, is a central part of law's enterprise.

Part I describes the course legal scholarship regarding legal analogy has taken so far, after clarifying what this article means by "argument(ation)" and "legal analogy." It then shows that logical deduction, the gold standard for rational force and legal argumentation and the darling of the skeptics, can do only a small part of the hard work of the legal analyst and the proponent of legal arguments. Nevertheless, skeptical scholars generally try to convert legal analogy into a deductive type of argument to shore up its rational force—the strength of an argument's form. In so doing, however, scholars focus too closely on the logical form of an argument and not enough on the complexity of the premises. Part I also shows that induction, as philosophers understand the term, has very little to do with law at all. What we are left with is non-inductive analogy—an unruly type of argument—and an impasse or *aporia*.

---

9. *Dynamic*, OXFORD ENGLISH DICTIONARY ONLINE (March 2018), http://www.oed.com/view/Entry/58818, last visited May 20, 2018 ("Of or pertaining to force in action or operation; active."). The word comes from Greek *δυναμικός* meaning "powerful," and from *δύναμις* meaning "power, strength." *Id.*

10. Whether this theory is empirically descriptive is a matter for future study. *See infra* Part III(D) and note 256; Schauer & Spellman, *supra* note 3, at 268.

11. *See infra* Part II(B). *See generally* Douglas Walton, Chris Reed & Fabrizio Macagno, ARGUMENTATION SCHEMES (2008).

12. *See infra* text accompanying notes 204–217.

Part II proposes a new tack, introducing informal logic and dialogical argumentation schemes to achieve practical rationality in natural-language arguments, like those we see in the law. Informal logic and argumentation theories do not abandon deduction, but rather they acknowledge that the premises for deductions must themselves be the product of argumentation, and that those foundational arguments usually are not deductive. Rather, argumentation theory calls on arguments' proponents and opponents to be rational people arguing reasonably in "a critical dialogue known as philosophical 'dialectics.'"[13] One way they can do so is by employing argumentation schemes, presumptively acceptable argument forms that can be defeated with the use of critical questions. Part II shows how, in the law, even valid deductive argument forms are defeasible.

Part III pursues this new course, describing and applying the legal analogy and legal (dis)analogy argumentation schemes. This part also extensively considers the challenge of identifying relevant similarities and dissimilarities—a problem of great theoretical and practical concern. Finally, this section offers an extended analysis of the briefs leading to an opinion in a real case.

After the article provides a solid foundation for future research into argumentation schemes generally, and legal analogy and (dis)analogy argumentation schemes specifically, the conclusion will look to future work to broaden and deepen these efforts. It will claim that the study of legal argumentation and argumentation schemes should be dialogical—just like argumentation schemes themselves. Thus, empirical work may warrant changes to the argumentation schemes presented here; and the principles of reasonableness and rationality undergirding argumentation schemes may ultimately provide grounds for changes in how lawyers argue.

I. THE OLD COURSE: ARGUMENT BY LEGAL ANALOGY

We expect the law to "[t]reat like cases alike."[14] This is an important principle in American legal thinking. In theory, it supports fairness and predictability: the law should treat similarly situated individuals the same,[15] and predictability permits those subject to the law to plan their activities efficiently in such a way that their expectations are not

---

13. Harm Kloosterhuis, *Analogy Argumentation in Law: A Dialectical Perspective*, 8 ARTIFICIAL INTELLIGENCE & L. 173, 174 (2000).

14. Schauer, *Precedent*, *supra* note 7, at 595. *See* Brewer, *supra* note 2, at 936.

15. *See* Posner, PROBLEMS, *supra* note 3, at 42 (noting principles like "equal justice under law, equal protection of the laws, equality before the law, one law for rich and poor, and so forth").

frustrated.[16] We also expect that legal theory or jurisprudence will provide "a body of objective norms . . . or a set of analytic methods . . . that can be used to ensure that judicial decisions will be objective, determinate, impersonal."[17] Consequently, the law needs a theory to account for production and criticism of arguments by legal analogy given their widespread use. Nevertheless, "despite its . . . special prominence in legal reasoning . . . , it remains the least well understood and explicated form of reasoning."[18] This article takes important steps to address this gap by providing a theory of legal argument using argumentation schemes and by providing an argumentation scheme specifically for legal analogy.

A. Argumentation

This article is concerned with *argumentation*, defined here as a series of propositional sentences—called "premises"—arranged in a form that supports the truth or acceptability of another propositional sentence, called a "conclusion."[19] As used here, "argumentation" includes both the premises and conclusion.[20] Based on this definition, any written or spoken legal analysis—whether it appears in a memorandum analyzing some aspect of the law, a lawyer's brief written to persuade to a court, or a court's opinion written to justify or explain a decision—contains argumentation.[21]

This article is *not particularly* about legal *reasoning*, defined here as a "*mental activity* of marshaling one's premises, detecting logical

---

16. This view is not without shortcomings. Predictability may to some extent justify the use of precedent and legal analogy, but we are still confronted with the question: "To what extent is a decisionmaking environment willing to tolerate suboptimal results [i.e., bad precedents] in order that people may plan their lives according to decisions previously made?" Schauer, *Precedent*, *supra* note 7, at 597.

17. Posner, PROBLEMS, *supra* note 3, at 7.

18. Brewer, *supra* note 2, at 926. Not everyone agrees that legal analogy actually exists, or if it does, that it is good to have around. *See* Alexander, *supra* note 7, at 57.

19. *Cf.* Leo Groarke, *Informal Logic*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY, § 2 (Edward N. Zalta ed., Spring 2017), http://plato.stanford.edu/archives/spr2017/entries/logic-informal/ (last visited May 21, 2018) (claiming argumentation is "an attempt to provide evidence in favour of some point of view," consisting of "collections of premises and conclusions.").

20. *See* J. Anthony Blair, *Relevance, Acceptability and Sufficiency Today*, GROUNDWORK IN THE THEORY OF ARGUMENTATION: SELECTED PAPERS OF J. ANTHONY BLAIR 87 (2012) [hereinafter Blair, *RAS Today*] (An argument is "a claim and a reason or reasons that support it."); Trudy Govier, THE PHILOSOPHY OF ARGUMENT 45 (1999) [hereinafter Govier, PHILOSOPHY] ("[A]n argument is minimally composed of premises (one or more) and a conclusion."); Trudy Govier, A PRACTICAL STUDY OF ARGUMENT 1 (7th ed., 2014) [hereinafter Govier, STUDY] (same).

21. Professor Schauer might disagree, as he distinguishes the *argument* of lawyers from the *justification* of judges, which, though they share a logical structure, he says are "separate events within a larger rhetorical setting." Schauer, *Precedent*, *supra* note 7, at 571 n.2. As we are interested in the schematic, if not logical, structure of all such events, the distinction is not productive here.

connections, and making inferences."[22] It "is a cognitive process, or various kinds of cognitive process."[23] In other words, reasoning is what goes on in our heads and argumentation is a presentation in words of premises and conclusion.[24] The distinction has occasionally hung up theorists thinking about legal analogy and other problems of legal theory.[25] Looking into folks' heads is considerably more difficult than analyzing what they say or write in support of their conclusions. The means to do the former are not accessible to most legal scholars and practitioners.

Nevertheless, some entries in the literature exploring legal analogy focus on the cognition that underlies or typifies it. For example, Professors Schauer and Spellman discuss whether experience and expertise in the law permit lawyers and judges to reason analogically in the ways particularly relevant to law, but they do not explain how lawyers and judges *argue* for their conclusions.[26] They note that scientific research suggests reasoners jump from particular to particular without the need for explanatory rules.[27] For them, "[w]hat makes analogical reasoning distinctive is that although people who draw analogies see similarities that are necessarily based on principles or theories, these principles or theories are often so embedded in their thought processes that they are not consciously perceived."[28] Professor Weinreb offers a full-throated defense of analogical reasoning, principally on cognitive grounds.[29] Professor Berger also explores the cognitive nature of thinking by and about analogies, focusing on the role of intuitive (System 1) thinking with and about them rather than reflective (System 2), or rational, thinking.[30]

---

22. Stephen F. Barker, ELEMENTS OF LOGIC 269 n.2 (6th ed. 2003) (emphasis added).

23. J. Anthony Blair, *The "Logic" of Informal Logic*, GROUNDWORK IN THE THEORY OF ARGUMENTATION: SELECTED PAPERS OF J. ANTHONY BLAIR 101, 102 (2012).

24. Barker, *supra* note 22, at 5. This distinction in terminology might not be acceptable to all scholars. *E.g.*, Robert Alexy, A THEORY OF LEGAL ARGUMENTATION 14 (Ruth Adler & Neil MacCormick trans., 1989) ("Legal reasoning will be understood here as a linguistic activity."). And the *OED* offers "argue" as a synonym of the verb "reason." *Reason*, OXFORD ENGLISH DICTIONARY ONLINE (March 2018), http://www.oed.com/view/Entry/159070, (last visited May 21, 2018).

25. Consider Judge Posner's critique of Professor Weinreb: "Weinreb has confused how judges think with how they talk [or write]." Richard A. Posner, *Reasoning by Analogy*, 91 CORNELL L. REV. 761, 765 (2005-2006) [hereinafter Posner, *Reasoning*] (reviewing Lloyd L. Weinreb, LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT (1st ed. 2005)).

26. *See generally* Schauer & Spellman, *supra* note 3.

27. Schauer & Spellman, *supra* note 3, at 266 (citing Adam E. Green, et al, *Neural Correlates of Creativity in Analogical Reasoning*, 38 J. EXPERIMENTAL PSYCHOLOGY: LEARNING, MEMORY & COGNITION 264, 269–71 (2012); Adam E. Green, et al, *Connecting Long Distance: Semantic Distance in Analogical Reasoning Modulates Frontopolar Cortex Activity*, 20 CEREBRAL CORTEX 70, 73 (2010)).

28. Schauer & Spellman, *supra* note 3, at 266.

29. *See* Weinreb, *supra* note 3, at 114–22.

30. *See generally* Linda L. Berger, *Metaphor and Analogy: The Sun and Moon of Legal Persuasion*, 22 J.L. & POL'Y 147 (2013). For discussion of the System 1–System 2 distinction popularized

Professor Brewer discusses the role of *abduction* in legal analogy. Abduction is a process where a "reasoner notices some phenomenon . . . that calls for explanation," then "notices that the existence of some other factor or set of factors could explain the given phenomenon," and settles on that explanation "as the tentatively correct explanation of the phenomenon."[31] Thus, abduction is sometimes called "inference to the best explanation."[32] Though it might be nothing more than an educated guess, it is doubtless a useful way of thinking about and solving problems, and it may be the principal way in which scientists develop hypotheses that they then test experimentally.[33] The problem for anyone but the reasoner, however, is that abduction calls on "creative insight" from a person to resolve a question in a context of doubt.[34] It "requires what is inevitably an imaginative and somewhat untamed moment of rational insight."[35]

To present argumentation is to present in words the reasoning that supports a conclusion.[36] Though interesting in terms of exploring the psychology of legal decision-making, studies like Schauer and Spellman's, Weinreb's, Berger's, and Brewer's do not offer a means for someone outside the head of the legal reasoner to assess the quality of the reasoning. That is what a good theory of legal argumentation does—or at least should do.

B. Legal Analogy

This article also discusses legal analogy—the effort of lawyers and judges to classify or evaluate operative facts in an instant case, with reference to cited cases, to determine whether a particular legal consequence should apply—the effort to treat like cases alike. But what counts as likeness is a "hard question."[37] At this point, it may be useful to

---

by Daniel Kahneman, *see id.* at 159–63. On the use of "rational" in this article, *see infra* notes 158 and 166–167.

31. Brewer, *supra* note 2, at 947–48.

32. Igor Douven, *Abduction*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Summer 2017), http://plato.stanford.edu/archives/sum2017/entries/abduction/ (last visited May 21, 2018).

33. *See generally id*.

34. Brewer, *supra* note 2, at 979.

35. *Id.* at 1026.

36. I apply this stricture for purposes of this article. In other contexts, argumentation might be pursued using modes other than the verbal, including the visual, symbolic, and bodily. *See, e.g.*, Kevin Michael DeLuca, *Unruly Arguments: The Body Rhetoric of Earth First!, Act Up, and Queer Nation*, 36 ARGUMENTATION & ADVOCACY 9 (1999); Assimakis Tseronis, *Multimodal Argumentation: Beyond the Verbal/Visual Divide*, 220 SEMIOTICA 41 (2018).

37. Schauer, *Precedent*, *supra* note 7, at 596. *See also* Posner, PROBLEMS, *supra* note 3, at 42 (The concept of treating like cases alike is "empty without specification of the criteria for 'likeness,' and in law

consider a hypothetical example.

Imagine that the legislature in the state of Springer enacted Springer Code section 15.15 in 1999: "[a]nyone who operates a vehicle in a municipal park is guilty of a gross misdemeanor."[38] The preamble of the act (adopted by the legislature but not included in the code compilation) included legislative findings that numerous persons had driven their cars and pickups onto park lawns, damaging lawns and, in one instance, injuring a pedestrian. It cited enhancing safety and preventing damage to public property as motivations for the act. The new statute was codified within the chapter of Springer's code relating to parks and recreation. During ensuing years, there were many cases in state court against those who drove their cars or pickups onto the park. Some defendants appealed, but not on grounds that the charge did not involve a vehicle.

There are, however, two reported cases on the matter. In *State v. Cyclist* (2006), a citizen riding a bicycle in the park "flipped the bird" at a police officer, who promptly arrested her for operating a vehicle in the park. She pled guilty subject to an appeal on the issue of whether her bicycle was a vehicle within the meaning of the statute. The court of appeals reversed the conviction, ruling that a "bicycle is not a vehicle," emphasizing that "a bicycle is not motorized." In its account of the facts of the case, the court noted that the bicyclist was wearing a neon yellow-green reflective safety vest. A dissenting judge objected that the dictionary definition of "vehicle" includes some things that are not motorized.[39] In *State v. Biker* (2008), police arrested a person sitting next to a motorcycle on the grass of the park. The defendant claimed he had walked, not ridden, the bike to bring it in the park. The police officer noted the lawn was heavily damaged near the motorcycle. After a trial conviction, the defendant appealed, arguing that the motorcycle was not a vehicle.[40] The court of appeals affirmed in a brief opinion, recounting these facts and noting only that "a motorcycle is a vehicle of the kind the legislature sought to exclude with the statute."

Fast forward to 2019. Imagine a citizen riding a *Boosted* brand of motorized skateboard on a sidewalk in the park collided with a pedestrian.

---

those criteria are political."); Brewer, *supra* note 2, at 936–37 ("[T]he principle is often too vague to resolve particular cases.").

38. This example, among a few well known to first-year law students, is of course adapted from H.L.A. Hart, THE CONCEPT OF LAW 126–27 (2d ed. 1997). Another well-known example is the ordinance requiring dogs in the park to be leashed. Kent Greenawalt, LAW & OBJECTIVITY 42–44 (1992). So far as I know, no one has empirically studied the propensity of legal philosophers to use regulation of public parks as examples.

39. *See Vehicle(b)*, OXFORD ENGLISH DICTIONARY ONLINE (March 2018), http://www.oed.com/view/Entry/221903 (last visited May 20, 2018) ("A means of conveyance or transport on land, having wheels, runners, or the like; a car, cart, truck, carriage, sledge, etc.").

40. Let us assume he did not appeal on the issue of whether he *operated* the motorcycle because the jury inferred that he had ridden it under power onto the park based on other evidence presented at trial.

672   UNIVERSITY OF CINCINNATI LAW REVIEW   [VOL. 87

The motor was engaged at the time of the collision, but several bicycles nearby were going faster than the boarder. There was no evidence the skateboard ever left the sidewalk, and the boarder wore a reflective safety vest. An officer on the scene arrested her. The pedestrian did not suffer injury and asked the officer not to arrest the boarder. A Kickstarter website for *Boosted* described its board as the "[w]orld's lightest electric vehicle."[41]

Counsel for the defendant in *State v. Boostrider* is likely to argue for acquittal on grounds that the Boosted Board is not a vehicle because the facts in *Boostrider* (motorized skateboard that stays on sidewalks and goes slower than bicycles) are more like the facts in *State v. Cyclist* (bicycle) than in *State v. Biker* (heavier motorized machine). Of course, the prosecutor will attempt to draw the comparison rather differently. This is the type of argument that I shall refer to as "argument from (or by) legal analogy."

Use of "analogy" here means that lawyers "compare whatever is at all doubtful with something similar concerning which there is no doubt, so as to prove the uncertain by the certain."[42] The outcome in *Boostrider* is doubtful, but those in *Cyclist* and *Biker* are well documented. When deciding whether *Boostrider* is more like *Cyclist* or *Biker*, the court will consider the relevant differences and similarities among them. A court generally may consider some differences, "such as differences in skill and effort," and generally may not consider others, such as "differences in religion, race, social class, income, or relationship to the judge,"[43] or the color of the hat one of the parties wore.[44]

I conjecture that the most frequent use of legal analogy in legal arguments is to resolve what Professor Neil MacCormick referred to as "problems of classification," where one considers whether a situation comes within the meaning of a rule,[45] or "problems of evaluation," where one attempts to apply a legal standard like fair use in copyright.[46] One

---

41. *Boosted Boards—The World's Lightest Electric Vehicle*, KICKSTARTER, https://www.kickstarter.com/projects/170315130/boosted-boards-the-worlds-lightest-electric-vehicl (last visited May 31, 2018).

42. Quintilian, ON THE TEACHING OF SPEAKING AND WRITING: TRANSLATIONS FROM BOOKS ONE, TWO, AND TEN OF THE INSTITUTIO ORATORIA bk. 1, ch. 6, at 49 (James J. Murphy ed., 1987).

43. Posner, PROBLEMS, *supra* note 3, at 42.

44. *See* Oliver Wendell Holmes, *The Path of the Law*, 78 B.U. L. REV. 699, 699 (1998). Of course, in the *Boostrider* case, counsel might try to make something of the reflective safety vest the defendant wore.

45. Neil MacCormick, RHETORIC AND THE RULE OF LAW: A THEORY OF LEGAL REASONING 41, 141 (2005). *But see* Fabrizio Macagno & Douglas Walton, *Argument from Analogy in Law, the Classical Tradition, and Recent Theories*, 42 PHILOSOPHY & RHETORIC 154, 155 (Legal "analogy is used to apply general legal rules to cases not directly falling under the classifications of the rule.").

46. *See* MacCormick, *supra* note 45, at 41, 73–75.

compares the instant case to cited cases[47] to see whether it is appropriate to ascribe the legal label—be it "vehicle," "operate," or "fair use"—to some component of the instant case. For MacCormick, the classification or evaluation determines whether operative facts (OF) are present, calling for application of some normative consequence (NC).[48]

Lawyers and law professors often refer to this process as "analogizing" or "disanalogizing." Properly speaking, in cognitive science, argumentation and rhetorical theory, case-based arguments of this kind may be more fairly described as "argument from example" or "argument from illustration." Theorists in these fields consider "analogy" to apply to a comparison that can "transfer information and procedures *from one domain to another*."[49] The analogy user transfers information from one domain, the *source*, to the other, the *target*.[50] So scientists might use the flowing of water in pipes—a source domain that the audience understands from direct personal experience—as an analogy for the flow of electricity—a target domain of which most have no direct personal experience.[51] But for these properly to be called "analogies," the source and target come from *different* domains—like water in pipes and electricity in wires.[52] In the *Boostrider* example and others discussed in this article, the problems of classification and evaluation will not fit this profile.[53] It is worth noting here that analogy in legal reasoning has a very

---

47. Generally, I will use "cited case" instead of "precedent case" to refer to the source case of legal analogies throughout this article, because I recognize that not all cases that might be used as authorities in arguments by legal analogy have precedential value for the instant case and may therefore not be "precedent cases" in the fullest sense.

48. MacCormick, *supra* note 45, at 24.

49. John H. Holland et al., *A framework for induction*, INDUCTION: PROCESSES OF INFERENCE, LEARNING, AND DISCOVERY 1, 4 (1986) (emphasis added).

50. Simon Farrell & Stephan Lewandowsky, *Computational Models as Aids to Better Reasoning in Psychology*, 19 CURRENT DIRECTIONS IN PSYCHOL. SCI. 329, 329 (2010). *See also* Berger, *supra* note 30, at 164. Alternatives to technical terms abound. For example, Perelman and Olbrechts-Tyteca use "phoros" (*phore*) for "source" and "theme" (*thème*) for "target." Chaïm Perelman & Lucie Olbrechts-Tyteca, TRAITÉ DE L'ARGUMENTATION: LA NOUVELLE RHÉTORIQUE 501 (6th ed. 2008). Govier uses "analogue" for "source" and "primary subject" for "target." Govier, PHILOSOPHY, *supra* note 20, at 139–40; Govier, STUDY, *supra* note 20, at 318. In the legal literature, Schauer and Spellman use "source" and "target." *Supra* note 3, at 253-54.

51. Farrell & Lewandowsky, *supra* note 50, at 329.

52. *See* Farrell & Lewandowsky, *supra* note 50, at 329; Perelman & Olbrechts-Tyteca, *supra* note 50, at 502 ("[T]hème et phore doivent appartenir à des domaines différents."). "Where the two relationships one compares come from the same domain and can be subsumed under a common structure, reasoning by example or illustration takes place, the [target] and the [source] providing two particular cases of the same rule." *Id.* at 502 (my translation). Berger, *supra* note 30, at 165, distinguishes "literal similarity or category-like abstraction" from "analogy," with an example of the former being "The X12 star system in the Andromeda galaxy is like our solar system" and an example of the latter being "The hydrogen atom is like our solar system."

53. There *are* analogies in the law, as, for example, when a court applies a doctrine from one part of the law to another part of the law by analogy. *See generally* MacCormick, *supra* note 45, 205–12. Brewer, *supra* note 2, at 941–94, conflates argument from analogy and argument from example. In any

different function in statutory interpretation in continental European law, where it is used to fill a *gap* or *lacuna* in the body of statutes.[54] Logicians also use "analogy" to refer to certain logical forms, which we will discuss below.[55] This article uses the term "legal analogy" to distinguish the sense of the example given above and discussed below from the senses of "analogy" that prevail in other fields.

The preceding sections make clear what this article means by "argument by legal analogy" and why it is important. As the next section will show, however, the leading legal theorists who have taken on the issue tend to focus their attention on whether legal analogy can live up to their own preferences on broader questions in legal philosophy or jurisprudence. Though their perspectives function to refine the problem, they fail to account for legal analogy and to provide a means for producing and evaluating it.

C. *Accounts of Legal Analogy Thus Far*

Accounts of legal analogy in legal scholarship thus far have failed for two principal reasons. First, the skeptics reject legal analogy because it does not have the rational force of logical deduction. Skeptics either deny legal analogy exists, converting it into a deductive form, or they doubt its utility. Their perspective fails because deduction cannot do the work that legal analogy must do; nevertheless, lawyers use legal analogy every day without worrying about the absence of the deductive form. Second, the mystics embrace legal analogy as a form of argument distinct from deduction, but they fail to provide a framework for creating and assessing such arguments. Their perspective leaves legal analogy dangerously undisciplined. To make sense of these positions, it is helpful to discuss them in the context of a refresher on logical forms.

It is commonplace in legal education and in observations about lawyers' performances that legal argumentation should be *logical*. But that term is difficult to define. It comes from the Greek word *logos*, which the Greeks used to mean a notoriously large number of things, including "word," "speech," "argument," "reason," etc.[56] For some contemporary theorists, a *logical* argument is one that can be reduced to mathematical certainty by converting it into formal, symbolic logic, or at least to a

---

event, the discussion below may ultimately suggest that the distinction between them is less one of kind and more one of degree.

54. Katja Langenbucher, *Argument by Analogy in European Law*, 57 CAMBRIDGE L.J. 481, 482–84 (1998).

55. *See infra* text accompanying notes 137–154.

56. *See* George A. Kennedy, A NEW HISTORY OF CLASSICAL RHETORIC 11–12 (1994).

deductive syllogism.[57] Others embrace a larger ambit for "logic." Barker, for example, calls it the "critical study of reasoning."[58] For the moment, we will use Barker's definition.

We must distinguish logical "types" from logical "forms;" here, "types" are "the broadly recognized patterns of argument that are known under the headings 'deduction,' 'induction,' 'abduction,' and 'analogy,'" and "form" demonstrates the "relation between the truth of an argument's premises and the truth of its conclusion."[59] The *rational force* of an argument's form is "the degree to which the form . . . yields a reliable judgment about the truth of its conclusion based on the assumed truth of its premises."[60]

As we will see in subsection (1), a valid deduction provides the greatest force: if one accepts the premises as true, the argumentation form compels the truth of the conclusion.[61] The skeptics embrace the valid deduction as the only logical form that can yield good arguments. Subsection (2) separately considers the approach of Professor Brewer, who appears to be a skeptic, despite denying that he is. Subsection (3) considers inductive generalization. Valid induction provides some rational force, though less than deduction: the truth of the premises makes the conclusion probable. But induction (as we will define it) is of no use in the kinds of arguments we are considering here. Subsection (4) considers arguments with the most uncertain rational force: analogies.[62] Finally, subsection (5) recapitulates and identifies the *aporia* at which we find ourselves.

1. Deduction and Legal-analogy Skeptics

The most well understood form of deductive argument is the deductive syllogism, which is well known among those in the law and looks something like this:

---

57. *See* Posner, PROBLEMS, *supra* note 3, at 39 n.3 ("[B]y 'logic' I mean deductive and mathematical logic, not systematic thinking in general or specialized logics such as inductive logic."). According to Brewer, "'logic' was for the [Legal] Realists a (somewhat misleading) metonym for 'deduction.'" Brewer, *supra* note 2, at 931.

58. Barker, *supra* note 22, at 1. Throughout this article, I will cite Barker's text on logic for propositions about logic and for discussion of logical forms. I use it principally because some of the legal scholars taking up these issues have cited it, or earlier editions of it. *See, e.g.*, Sunstein, *supra* note 8, at 743 n.7; Brewer, *supra* note 2, at 944 n.63. I make no claim that Barker's terminology and definitions are standard among logicians, though I have attempted to ensure his usage does not vary widely from his peers.

59. Brewer, *supra* note 2, at 942.

60. *Id.* at 928.

61. *Id.* at 943.

62. This "analogy," defined *infra* in text accompanying notes 137–154, has the meaning given to it by the logicians that are sources of the discussion there.

VALID DEDUCTIVE FORM ("MODUS PONENS")	
Major Premise:	All persons who operate a vehicle in the municipal park are guilty of a gross misdemeanor.
Minor Premise:	Mr. Biker operated a vehicle in a municipal park.[63]
Conclusion:	Mr. Biker is guilty of a gross misdemeanor.[64]

In the syllogism, there are three propositions: the major and minor premises and the conclusion.[65] In the deductive form shown here, known sometimes as *modus ponens*,[66] the major premise states a general or universal rule in the form of antecedent—"all persons who operate a vehicle in the municipal park"—and consequent—"guilty of a gross misdemeanor;" the minor premise presents an instance of the antecedent; and the conclusion applies the consequence to that instance. Thus, the syllogism can also be restated in the form of a conditional categorical rule and its application, with the rule in our example being: "if *x* operates a vehicle in the municipal park*,* then *x* is guilty of a gross misdemeanor." More generally, legal rules can be stated in valid deductive form: "[w]henever *OF* [operative fact(s)] then *NC* [normative consequence]."[67] In this sense, the deductive syllogism is at play in the application of

---

63.   When calculating the rational force of this deductive form, we assume the premises are true. There was debate in the *Biker* case about whether his motorcycle was a "vehicle," and given the facts, there might have been debate about a mixed question of law and fact: whether he "operated" it in the park.

64.   Aristotle described the forms of valid deductions in the *Prior Analytics*, but his descriptions there relate to categorical sentences, such as if we "let A belong to every B and B to some C" then "it is necessary for A to belong to some C." Aristotle, PRIOR ANALYTICS, bk. A, ch. 4, at 5 (Robin Smith tran., 1989). The example here applies the predicate "is guilty of a gross misdemeanor" to a singular subject, a kind of deduction in which Aristotle was less interested, because it could not yield generalizable knowledge. Note, too, that the *Prior Analytics* provides Aristotle's (and as far as we know, the world's) first comprehensive listing of the various valid forms that a deduction with three "terms" can take. *See* Robin Smith, *Appendix I* to Aristotle, PRIOR ANALYTICS 229 (Robin Smith tran., 1989) (forms listed in assertoric and modal versions). For a discussion of "categorical sentences," *see* Barker, *supra* note 22, ch. 2. I am grateful to Professor Pannier for the observation, correct I think, that Aristotle did not identify the example given here as one of the valid syllogistic forms because of Aristotle's interest in universally quantified sentences—his way to *knowledge*. I have nevertheless continued the common practice of referring to this form as a "syllogism." For discussion of categorical syllogisms of the type Aristotle embraced, *see* Barker, *supra* note 22, at 44.

65.   *See* Barker, *supra* note 22, at 44.

66.   "*Modus ponens*" is properly a label for a move in sentential logic, rather than syllogistic logic. *See generally* Barker, *supra* note 22, chs. 2 and 3. I adopt the practice here because it provides a convenient and conventional label.

67.   MacCormick, *supra* note 45, at 24. Note that I have been, and will continue to be, loose about wording of premises, taking no pains to make consistent use of propositional, predicate, or quantified terms. The differences, though important in formal logic, are not important here.

(almost) any legal rule.[68]

In a deductive syllogism, if the premises are true, they compel the conclusion; just as in application of a legal rule, if the rule and operative fact are correctly and truthfully stated, they compel the conclusion. In neither case is any further inquiry needed, and none could change the outcome.[69]

It is, however, possible to make an argument of the deductive *type* fail if the arguer uses an improper *form*. Consider this legal example:

INVALID DEDUCTIVE FORM (DENYING THE ANTECEDENT)

Major Premise:	If a witness statement is excluded under the dead man's statute, then it is inadmissible to prove a claim against a decedent's estate.
Minor Premise:	The dead man's statute does not exclude the statement at issue.
Conclusion:	The statement at issue is not inadmissible (i.e., it is admissible).[70]

The author of this argument offers us: (A) "if antecedent, then consequent;" (B) "not antecedent;" therefore (C) "not consequent." The argument holds itself out as being of a deductive type, but it has a defective form, committing the logical fallacy of *denying the antecedent*.[71] The court in a case where a party made this argument concluded there were other reasons that a statement might be excluded and thus rejected the argument.[72]

Deduction is the gold standard of legal reasoning and the end-point that proponents of legal arguments wish to reach in them.[73] However, the reason one cannot rely too heavily on deduction in actual legal arguments—the reason deduction is insufficient for legal argument—is premises: Aristotle recognized the syllogism only *operates* on its

---

68. *See* Posner, PROBLEMS, *supra* note 3, at 42 ("[M]ost legal questions *are* resolved syllogistically. A legal rule has the form of the major premise of a syllogism.").

69. *See id.* at 38.

70. This example is drawn from Kevin W. Saunders, *Informal Fallacies in Legal Argumentation*, 44 S.C.L. REV. 343, 379 (1993) (citing Harry Levitch Jewelers, Inc. v. Jackson, 573 S.W.2d 746 (Tenn. 1978)).

71. *See id.* at 379. "[D]enying the antecedent involves a misunderstanding of the nature of a conditional. The conditional 'if p, then q' asserts that when p (the antecedent) is true, q (the consequent) is also true;" but "[t]he conditional allows no inference about the truth of q when p is false." *Id.* Saunders notes that the *Levitch* court referred to this (technically incorrectly) as a "non sequitur."

72. *See* Saunders, *supra* note 70, at 379.

73. See MacCormick, *supra note* 45, at 32; Posner, PROBLEMS, *supra* note 3, at 39 ("So compelling and familiar is syllogistic reasoning that lawyers and judges, ever desirous of making their activity seem as objective as possible, try hard to make legal reasoning seem as syllogistic as possible.")

premises; it cannot *provide* them.[74] In law, this challenge takes (at least) two forms: (1) the difficulty of asserting that the major premise is really true as stated, that is, that it correctly states the legal rule, and (2) the difficulty of applying legal-categorical labels to actual instances. Consider both in the context of the *Boostrider* case.[75]

The statute definitively states the major premise or rule in *Boostrider*: "anyone who operates a vehicle in the municipal park is guilty of a gross misdemeanor." However, in a court subject to the *Cyclist* and *Biker* cases, counsel for the defendant might argue that the rule now contains an exception: "anyone who operates a vehicle, *except a bicycle or smaller vehicle*, in the municipal park is guilty of a gross misdemeanor." Counsel for the state might similarly argue that that the rule is now "anyone who operates a vehicle, *except a non-motorized vehicle*, in the municipal park is guilty of a gross misdemeanor." Either of these formulations is plausible, given the precedents, but clearly counsel on each side would formulate the exception in such a way as to support their claim.

As for assignment of legal categories, in *Boostrider* we have a statute that uses a word to refer to a category of things we do not want in the park; let us call it "VEHICLE$_{statute}$,"[76] but the statute itself cannot tell us what the contents of VEHICLE$_{statute}$ are. Admittedly, there are hints in the statute, particularly the preamble the legislature adopted, which specifically identifies cars and pickups, and might be interpreted to have an application limited to things that could endanger public safety or damage public property. We can read a dictionary to see the defined meaning and examples. The *Oxford English Dictionary* defines "vehicle" as a "means of conveyance or transport on land, having wheels, runners, or the like; a car, cart, truck, carriage, sledge, etc."[77] Assuming we could see the category of things as reasonably definite, we might call it "VEHICLE$_{dict}$." Another approach is to ask what use people commonly make of the word. For example, we could collect a great body or *corpus* of language used on

---

74. Posner, PROBLEMS, *supra* note 3, at 54 notes: "Logic, like mathematics, explores relations between ideas rather than correspondence to facts. The legal system cannot be indifferent to issues of empirical truth." Aristotle acknowledged this difficulty regarding universal major premises of the form "All A are B," in the *Posterior Analytics*, when he asserted that "[i]t is impossible to perceive what is universal and holds in every case." Aristotle, *supra* note 64, bk. A, ch. 31, at 43. He admits that we can "grasp the universal from seeing," *id.*, but this is, of course, a form of induction. Nevertheless, one syllogism can provide as its conclusion a premise to be used in another syllogism.

75. *See supra* text accompanying notes 38–49.

76. Here, I use small-caps to indicate that "VEHICLE$_{statute}$" refers to a word's meaning or a category of things to which it refers (the distinction is important philosophically, but not for our purposes here). When I refer to the word/label "vehicle," I use quotation marks, and when I refer to an actual thing, like my own car, I do not set the word off with any marks. So, if I say I call my vehicle a "vehicle"—intending to mean that is a VEHICLE$_{statute}$, I am applying a label to a thing to assert that is an instance of the category defined in the statute.

77. OXFORD ENGLISH DICTIONARY, *supra* note 39.

websites, like the *iWeb* corpus.[78] We could then systematically examine in which contexts "vehicle" appears. If it appears most commonly with automobiles and similar large, heavy machines, but rarely with bicycles or skateboards, we might conclude that uses outside the large-heavy-machine context should not be part of the meaning of "vehicle"—that is, should not be part of VEHICLE$_{corpus}$.[79]

Deduction cannot tell us whether VEHICLE$_{statute}$ should overlap completely, or at least more nearly completely, with VEHICLE$_{dict}$ or VEHICLE$_{corpus}$. But lawyers must argue and the court must explain whether a Boosted Board falls into that category to apply the deductive rule.[80] As Judge Posner notes: "[l]egal rules frequently treat as referential words (like 'day' and 'night') that do not have a definite referent," as there is no definite boundary between day and night.[81]

Deduction is not sufficient—but neither is it *necessary* to resolve questions of these kinds. Consider the court's decision in *State v. Biker*, where it did not articulate a deductive rule that it derived from the statute, or from the statute in conjunction with *State v. Cyclist*. It simply concluded after describing the facts of the case that they fell within the statute. This is not an uncommon argumentative move for a court to make.[82] In fact, on the traditional theory of the common law, if a court announces a covering rule that covers more ground than required to resolve the case against it, that rule is dictum.[83] That silence regarding a

---

78.   BYU CORPORA: BILLIONS OF WORDS OF DATA: FREE ONLINE ACCESS, corpus.byu.edu (last visited May 23, 2018).

79.   Some jurists and scholars believe corpus-linguistic methods like this to be useful for establishing the meaning of statutory text, especially older texts. *See generally*, Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L. J. 788 (2018). *See id.* at 836–43 (addressing specifically whether a bicycle is a "vehicle" within the meaning of a hypothetical statute that was the model for this article's hypothetical Springer Statute § 15.15). Others are not so convinced. *See generally*, Carissa Byrne Hessick, *Corpus Linguistics and the Criminal Law*, 2017 BYU L. REV. 1503 (focusing on criminal statutes); Ethan J. Herenstein, *The Faulty Frequency Hypothesis: Difficulties in Operationalizing Ordinary Meaning Through Corpus Linguistics*, 70 STAN. L. REV. ONLINE 112 (2017) (criticizing more broadly the "frequency hypothesis" upon which the author claims Lee and Mouritsen's arguments depend).

80.   Of course, this is the task of *classification,* the narrower use of legal analogy that is the focus of this article. *See supra* text accompanying notes 42–55.

81.   Posner, PROBLEMS, *supra* note 3, at 46. *See also* Weinreb, *supra* note 3, at 58 ("[A]lthough the words that we use to describe our experience are cast as discrete categories, the actual phenomena are mostly continuous.").

82.   *See, e.g.*, Adams v. N.J. Steamboat Co., 45 N.E. 369 (N.Y. 1896), discussed at length in Brewer, *supra* note 2, at 1003–06, and in Weinreb, *supra* note 3, at 16–19, 79–81. Weinreb asserts vigorously that such a rule is "not normally to be found." *Id.* at 79.

83.   *See* Edward H. Levi, AN INTRODUCTION TO LEGAL REASONING 2 (2013) ("Where case law is considered . . . [the judge] is not bound by the statement of the rule of law made by the prior judge even in the controlling case. The statement is mere dictum."); Weinreb, *supra* note 3, at 61 n.31 (noting that stating a "covering rule" in a case "would have been dictum, because it was not necessary to the decision"); Schauer, THINKING, *supra* note 7, at 56 ("Because a reason is necessarily broader than the outcome that it is a reason for, giving a reason is saying something broader then [sic] necessary to decide

680   UNIVERSITY OF CINCINNATI LAW REVIEW   [VOL. 87

covering rule in *State v. Biker* need not prevent the lawyers in *State v. Boostrider* from arguing that there is such a rule as suggested above.[84]

Nevertheless, when discussing legal analogy, some scholars—Brewer's *skeptics*—are prepared to accept it only if it is recast in valid deductive form, where either a covering rule or general principle is the major premise. In the *Boostrider* case, this effort might take this form:

VALID DEDUCTIVE FORM: VEHICLE IN *BOOSTRIDER*	
Rule/principle:	Every machine in or on which a person can ride that has a motor is a "vehicle."
Minor Premise:	Ms. Boostrider operated a machine with a motor.
Conclusion:	Ms. Boostrider operated a vehicle.

Once this determination is made, it is a trivial matter to apply the statutory rule deductively and convict Ms. Boostrider. But how does one identify the rule or principle?

In his discussion of the application of legal analogy—in arguing from precedent—Professor Schauer asserts there is a process first of identifying relevant similarities between a cited case and an instant case, then assigning "categories of assimilation"[85] that make the cited case serve as a guide in the instant case.[86] We identify the relevant similarities, making "this determination from some other organizing standard specifying which similarities are important and which we can safely ignore."[87]

Schauer offers an example to help define what he means by categories of assimilation. He asks us to "[i]magine a faculty meeting considering a request from a student for an excused absence from an examination in order to attend the funeral of his sister."[88] Assuming the faculty grants the request without comment, for what is it a precedent? Can students expect to be excused "to attend the funerals of grandparents, aunts, uncles, cousins, nieces, nephews, close friends, and pets"?[89] The answer, he tells us, depends on how broadly the category of assimilation is drawn. The decedent in the first case could be characterized as "a sibling, a relative,

---

the particular case. And that seems to be dicta."); Schauer, *Precedent*, *supra* note 7, at 580 (noting that the rule of the case is considered dictum, though even dictum from a precedent places an argumentative burden on a present-day arguer).

84. *See supra* text accompanying notes 75 and 76.
85. Schauer, *Precedent*, *supra* note 7, at 582.
86. *See id.* at 586 (discussing use of categories of assimilation in Fed. Baseball Club v. Nat'l League, 259 U.S. 200 (1922)).
87. *Id.* at 577.
88. *Id.* at 578.
89. *Id.* at 578.

a blood relative, and one with whom the student has a 'meaningful relationship.'"[90] The breadth of the category chosen will bring the new case into it or not. Thus "we must consider the way in which the size of the categories of assimilation might largely determine the strength of precedent."[91]

But is there a *rule* or *principle* of categorization? On the one hand, the earlier court or faculty may not have specified the category into which it assimilated the cited case. It may just have granted or denied the request. The next student to come before the faculty can argue for any of the candidate categories mentioned in the previous paragraph. On the other hand, it may have adopted a rule of the case—"canonical language" with an "articulated characterization."[92] For example, perhaps the faculty adopted a resolution to excuse the student from examinations to attend the funeral, reciting the fact that the student has a "bona fide relationship" or "close familial relationship" with the decedent.[93]

In any event, Schauer appears to believe that a category of assimilation must be drawn to join the cited case to the instant case or to distinguish the two. This then permits a quasi-deductive application as in the example VALID DEDUCTIVE FORM: VEHICLE IN *BOOSTRIDER* above.

In Professor Sunstein's view, the legal arguer must use some low-level principle (but not a general legal rule) to bring the precedent and instant case into alignment. So, in an extended example drawn on *R.A.V. v. City of Saint Paul*,[94] a case addressing a local ordinance that prohibited cross-burning, Sunstein purports to use analogical reasoning to develop and test possible theoretical statements at this low level of abstraction, such as "[a]cts that qualify as speech can be regulated if they produce anger or resentment"[95] and "[u]nprotected acts of expression may not be regulated on the basis of viewpoint."[96] The result of this process is some quasi-deductive form applying a principle or rule that underlies the analogy for it to work.

Judge Posner appears to share Schauer's view that a rule must be adopted to make the move from precedent to instant case, and that it

---

90.   Schauer, *Precedent*, *supra* note 7, at 579.

91.   *Id.* at 591.

92.   *Id.* at 579.

93.   The Ninth Circuit dealt with such an issue when it decided that a grandparent had a "bona fide relationship" with a visa-seeker for purposes of President Trump's ban against travel from certain countries; concluding that a grandparent belonged in those categories at least as much as a mother-in-law, which the Supreme Court had previously ruled was close enough. State v. Trump, 871 F. 3d 646, 651, 659 (9th Cir. 2017) (quoting Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2087–88 (2017)).

94.   505 U.S. 377 (1992).

95.   Sunstein, *supra* note 8, at 760.

96.   *Id.* at 762.

"presupposes some, and possibly extensive categorization."[97] He offers this example:

> The property lawyer who says that oil and gas are analogous to rabbits, deer, and other wild animals is really proposing that the rule governing property rights in such animals—the "rule of capture"—is an instance of a more general rule that subsumes oil and gas: the rule that there are no nonpossessory rights in fugitive resources.[98]

Posner acknowledges that "[t]he problem then is to justify the general rule, which cannot be done either syllogistically or analogically."[99]

Posner appears less concerned with identifying the categories of assimilation from previous cases along the lines of Schauer. Though he acknowledges that to "see one problem as being like another that has already been solved is indeed to place the new problem on the road to solution,"[100] what matters for him from the precedents are the "values, considerations, policies, and ethical insights found in" them.[101]

Professor Alexander claims that "analogical reasoning in law," or "ARIL," as he calls it, does not exist, that it is a fantasy; and that if it did exist, it would be "deformed."[102] He argues that if a court's decision is justified, it must be by one of three means: "showing it is morally justified," "showing that it follows deductively from an authoritative rule that governs the case," or "discernment [and presumably application] of principles immanent in cited cases.[103] Alexander concludes that the first two forms of justification cannot provide an account of legal analogy, but he believes the third can provide "the best account that can be given to ARIL." For him, the immanent principles need to be applied deductively to have rational force.

Alexander doubts even this account of legal analogy is worth pursuing, though, because he notes that those who wrote the cited cases may have made mistakes—these are the "bad beginnings" to which his title refers. The deductive form may be valid, but the premises might prove to be

---

97. Posner, PROBLEMS, *supra* note 3, at 90.

98. *Id. supra* note 3, at 89.

99. *Id.* at 89. *See also id.* at 91 ("A set of cases can compose a pattern. But when lawyers or judges differ on what pattern it composes, their disagreement cannot be resolved . . . by the methods of scientific induction.").

100. *Id.* at 91.

101. Posner, PROBLEMS, *supra* note 3, at 93.

102. Alexander, *supra* note 7, at 57.

103. *Id.* at 70–72. Note that Alexander contends that the first two "two types of justification exhaust the field for law," *id.* at 70, despite then acknowledging that "both of these methodologies have room for analogical reasoning of the type Brewer endorses," *id.* at 72. For details on Brewer's approach, *see infra* text accompanying notes 107–130.

incorrect. As for the case-to-case reasoning identified above and in some other models of legal analogy, Alexander argues that because "the relevance of . . . similarities and dissimilarities remains unjustified, . . . this version of ARIL lacks any rational force."[104]

According to Professor Brewer "the rule of law ideal norms of clarity, notice, and accountability presuppose that legal commands . . . are deductively applicable, and that vague norms—of the sort with which one is left if legal commands are not deductively applicable—are inconsistent with those basic values."[105] First, it is fair to acknowledge the Brewer was writing about legal norms rather than legal arguments. Nevertheless, the principal evidence we have about the content and application of legal norms in practical contexts is what appears in the arguments of lawyers and judges. Consequently, if Brewer's assertion is true of legal norms, it should also be true of legal argument. A dedication to deduction in legal argument is in some sense, however, trivial: a valid deductive form has the highest degree of rational force precisely because it is difficult to imagine anyone arguing with the form of a valid deduction. The conclusion really does not tell us anything that we did not know after reading the premises.[106]

Given that deduction cannot do all the work of legal argument and is not needed for some of it, we must consider other candidates. Before we do, however, we will consider Professor Brewer's account; though he says it is not skeptical, it appears still to lean too heavily on deduction.

2. Abduction and Brewer's Account

Professor Brewer is the first of these scholars to propose a method for producing arguments by legal analogy. His goal is ultimately to "construct and rely on a type of deductively applicable rule,"[107] what he calls an "Analogy Warranting Rule."[108] In brief, the process involves the proponent of the argument using "abduction" to find a candidate analogy-warranting rule; the testing and justification of the candidate rule using what he calls an "Analogy Warranting Rationale;" and then applying the rule to the instant case.[109] The analogy-warranting rule should be a "relatively precise norm . . . so as to provide guidance in relevantly similar

---

104. *Id.* at 86-87 n.96.

105. Brewer, *supra* note 2, at 992–93.

106. As a result, the syllogism is either empty of value or is a form of question begging or *petitio principii. See* Barker, *supra* note 22, at 244.

107. Brewer, *supra* note 2, at 927.

108. *Id.* at 962. The choice of "analogy warranting rule" as the name is peculiar because, as we shall see, the rule Brewer offers does not warrant the analogy but is the result of it.

109. *Id.* at 962–63.

cases."[110]

Brewer makes the case for needing a rule. He claims that no precedent or example "can serve *as* an example without a rule to specify what about it is exemplary."[111] In a sense, this is a form of question begging. It is also apparently not true in practice. If we consider a precedent, an example of where the plaintiff won in a products liability dispute, one need not have any more "rule" than that for it to be an example.[112] Whether it is a useful example for legal analogy of course depends on characteristics it shares with a case at bar: whether they are subject to the same jurisdiction's laws; whether the plaintiff's claim arises from the same (or similar) substantive law; and whether the facts of the cases are similar. Once we have answered these and perhaps other non-rule questions, we may argue that the case at bar should (or should not) come out for plaintiff. Brewer could argue that the principle that allows the identification of these particular similarities is a rule, but that reduces all identification of similarities to the application of rules, only because the need to do so is assumed.

Brewer provides the following schema for his approach:

> Where *x, y, z* are individuals and *F, G, H*, are predicates of individuals:
> *Step 1:*   *z* has characteristics F, G, ...
> *Step 2:*   *x, y*, . . . have characteristics *F, G*, ...
> *Step 3:*   *x, y*, . . . also have characteristic *H*.
> *Step 4:*   The presence in an individual of characteristics *F, G*, . . . *provides sufficient warrant* for inferring that *H* is also present in that individual.
> Step 5:   Therefore, there is sufficient warrant to conclude that H is present in z.[113]

This schema works a little differently than the deductive argument forms described above. This is in part because there are two arguments here. The first argument *derives* the analogy-warranting rule shown in step 4; the second applies that rule to *z*.

On Brewer's model, the abduction to the rule in step 4 happens as a result of the argument's proponent "sifting through examples . . . that seem instructively similar to his own case"—here the examples in *x, y,*

---

110. *Id.* at 981.

111. *Id.* at 974.

112. Indeed, Professor Weinreb argues the presence of an explicit rule in the cited case is not dispositive: "The rule is a generalized statement of the decision, not the predicate on which the decision rests." Weinreb, *supra* note 3, at 85.

113. Brewer, *supra* note 2, at 966 (notes omitted).

etc.—and then constructing a rule that explains the similarities.[114] The abduction itself is as Brewer says "an imaginative and somewhat untamed moment of rational insight," though he argues that the rest of the process constrains it.[115] In short, the analogy-warranting rationale must explain and justify the rule, and if no such rationale can be found, the rule must be changed or discarded.

As we are interested in argumentation, abduction is not helpful for our model. The imaginative leap of the abducer—a "creative insight" or "flash of insight"[116]—might be difficult to describe, and even if it is described, it will seem irrelevant in the presence of the analogy-warranting rule and its rationale, which do not become more acceptable in virtue of the abduction being described.

Missing from Brewer's schema is the step of creating the analogy-warranting rationale. This is especially important given Brewer's reliance on the rationale to tame any rule arising from the untamed insight of the abduction. His article also devotes comparatively little space to the topic.[117] Nevertheless, he asserts an important role for these rationales: namely the establishment of the justification or "acceptability" of the analogy-warranting rule.[118]

Brewer offers mostly clues about what the rationale should look like. First, he considers whether the analogy-warranting rule is consistent with other legal rationales, whether it "cohere[s] sufficiently with explanatory and justificatory rationales that the reasoner is unwilling to amend."[119] Second, he considers whether it "effects an acceptable sorting" of the precedents and the instant case.[120] As for consistency with other legal rationales or values, Brewer identifies some specific lines of argument: an "inherent fairness" value and the value of stare decisis,[121] and the "rule of law value" which "requires laws to be consistent."[122]

Brewer does not explain how or why it is that the extended analogy-warranting rationale does not appear in most legal arguments, or why its absence does not tend to draw critiques from the opponents of those arguments.[123] He gives an example of only one instance where a court appears thoroughly to provide the rationale, and even that one he

---

114. *Id.* at 979.

115. *Id.* at 1026.

116. *Id.* at 979.

117. Fewer than 10 of more than 100 pages in the article.

118. Brewer, *supra* note 2, at 1022.

119. *Id.* at 1022-23.

120. *Id.* at 1022–23.

121. *Id.* at 1025.

122. *Id.* at 1025–26.

123. *See* Weinreb, *supra* note 3, at 10.

686   UNIVERSITY OF CINCINNATI LAW REVIEW   [VOL. 87

concludes was wrongly decided.[124] It may well be, however, that he sees legal analogies as "structurally enthymematic exemplary arguments"[125] and concludes that the rationale is an omitted premise.

As the term "enthymeme" will come up again, it is worth explaining now: an enthymeme is a common technique in argumentation, in which the argument's proponent suppresses one or more propositions where the context can supply them.[126] Interpreting and critiquing such an argument requires reconstruction of the suppressed proposition(s). For example, a conservative political candidate might say: "my opponent will attempt to curtail gun rights because she is a Democrat." The argument represents a valid deduction with a suppressed major premise: "all Democrats attempt to curtail gun rights."[127] Speakers use enthymemes for at least two reasons: first, speakers avoid accountability for uttering the suppressed proposition(s); they can honestly say, "I never said that!" and disagree with a critic's reconstruction of the argument. Second, speakers encourage the audience to supply the suppressed proposition(s), which may enhance the audience's adherence to the proposition(s).[128]

---

124. *See* Brewer, *supra* note 2, at 1024–26 (discussing E.I. Du Pont De Nemours & Co. v. Claiborne-Reno Co., 64 F.2d 224 (8th Cir. 1933)).

125. *Id.* at 987.

126. *Id.* at 984, describes them as "any argument—valid or invalid, deductive or nondeductive—the logical form of which is not perspicuous from its original manner of presentation." According to Barker, "[a]n argument is called an *enthymeme* if at least one of its premises is unstated," Barker, *supra* note 22, at 221, but the term can also be "extended to arguments whose conclusions have been left unstated," *id.* at 222.

127. It is possible that even two propositions might be suppressed. For example, if a reporter asks a conservative political candidate, "Do you think your opponent would attempt to curtail gun rights?" the candidate might respond simply, "She's a Democrat." Here, the major premise and conclusion are suppressed.

128. According to contemporary researchers in organizational communication:

> Through enthymemes, the [rhetor] persuades the audience by drawing on its cultural beliefs and attitudes. It invites the audience to complete the argument based on identification with the rhetor's background . . . . Enthymemes are a powerful tool of persuasion because they allow audience members to draw on their preexisting beliefs—those that are integral to the institutional order.

E. Johanna Hartelius & Larry D. Browning, *The Application of Rhetorical Theory in Managerial Research*, 22 MGMT. COMM. Q. 13, 24 (2008). George Kennedy characterized Aristotle's view:

> The real determinant of an enthymeme in contrast to a syllogism is what a popular audience will understand without tiresome pedantry. Aristotle regards . . . the enthymeme[] as addressed to an audience that cannot be assumed to follow intricate logical argument or will be impatient with premises that seem obvious.

ARISTOTLE, ON RHETORIC: A THEORY OF CIVIC DISCOURSE 42 n.55 (George A. Kennedy tran., 2d ed. 2007).

Arguments, even in law, are commonly enthymematic.[129]

Brewer's schema for legal analogy obscures the work of the analogy, and his description of the analogy-warranting rationale is too rudimentary to provide clear guidelines. Consequently, it seems unlikely that Brewer's model "provides clear criteria that lawyers, judges, students, and scholars can use critically to assess any given argument by analogy."[130]

3. Induction: Not Helpful for Legal Argument

I will follow Barker in describing inductive arguments as "arguments whose conclusions do not strictly follow from the premises and are not claimed to do so, but whose conclusions can in principle be tested by further [empirical] observations."[131] So "if the premises of an inductive argument are true and the reasoning is good, then it is reasonable to believe the conclusion; the conclusion is *probably* true."[132] An inductive argument, even if valid when made, is by definition *defeasible*. In other words, even if all the premises are true, further observations of particulars in the world could yield evidence that defeats the conclusion.

There are two brands of induction: inductive generalization, also called "enumerative induction,"[133] and inductive analogy, which is a special case of hypothesis evaluation.[134] Each of these types of argument is important in managing day-to-day human affairs but has limited utility in legal argument.

Lawyers may refer to "induction" when talking about legal arguments, but neither of these argumentation forms will sort out the problems in *State v. Boostrider* because "induction," at least by Barker's definition, requires circumstances where the truth of the conclusion in the argument can be tested by further observation.[135] Legal argumentation is normative and productive, in that if a court adopts a conclusion, it becomes the law. But it is not defeasible in the same way as an inductive argument; more observations about the world cannot defeat the conclusion of a legal

---

129. Brewer, *supra* note 2, at 984.

130. *Id.* at 925.

131. Barker, *supra* note 22, at 13. *See also* Brewer, *supra* note 2, at 945 ("In inductive argument, the truth of the premises never guarantees the truth of the conclusion.").

132. Barker, *supra* note 22, at 181.

133. James Hawthorne, *Inductive Logic* § 1, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Spring 2018), http://plato.stanford.edu/archives/spr2018/entries/logic-inductive/ (last visited May 23, 2018).

134. *Id.*

135. *See supra* text accompanying note 131. *See also* Weinreb, *supra* note 3, at 2 (distinguishing legal reasoning from inductive reasoning; "The reasoning of a doctor or an engineer is readily and in the normal course put to the test. The patient's health improves, or it does not; the bridge stands, or it falls."); *id.* at 5 (An inductive argument is not formally bound in the same way [as deductive], but the conclusion can be tested experimentally, and, again, either it is verified or it is not.").

argument. If the court in *Boostrider* concludes the Boosted Board is a vehicle, no later-discovered instance of a court saying a Boosted Board is not a vehicle will change the outcome in *Boostrider*. There is no way to observe empirically whether the conclusion is correct.[136] What lawyers need is what Barker calls "non-inductive analogy."

4. Analogy and the Mystics

The non-inductive analogy is a way to reason about normative outcomes from past events. This is the form that Sunstein identifies with legal analogy. Barker asks us to imagine that a university honor code prohibits "lying" and "cheating" and that the honor council must then determine whether a student who has written a bad check[137] has violated the honor code.[138]

> Lying and cheating are indisputably offenses against the honor code. Now, writing a bad check is like falsely stating that you have money in the bank. Also, writing a bad check is very like cheating, for you persuade the merchant to accept the check in exchange for merchandise by deceptively suggesting that the check is good. Since writing a bad check is so like lying and cheating in these respects, it therefore resembles them also in being a violation of the honor code.[139]

We might formalize the lying side of this argument in this way:

NON-INDUCTIVE ANALOGY: HONOR CODE	
Major premise:	Lying is an honor code violation in virtue of the fact that the liar makes a false statement.
Minor premise:	Writing what one knows to be a bad check involves making a false statement about funds available in one's bank account.[140]
Conclusion:	Writing what one knows to be a bad check should be classified as a violation of the honor code.

---

136. Though, of course, there can be further arguments about whether the argument supporting the conclusion was a good one. *See also* Sunstein, *supra* note 8, at 745 n.18.

137. Some readers may never have handled a checkbook, though they are still quite common, I believe. A check is a "draft . . . signed by the drawer, payable on demand, drawn on a bank, and unconditionally negotiable." *Check*, BLACK'S LAW DICTIONARY (10th ed. 2014). A bad check is one "that is not honored because the account either contains insufficient funds or does not exist." *Id.*

138. *See* Barker, *supra* note 22, at 225.

139. Barker, *supra* note 22, at 226–27.

140. I am grateful to Dr. Randy Gordon for pointing out on an earlier draft that this minor premise did not include the drafter's knowledge; without the check writers' knowledge that the account would be overdrawn, this minor premise would probably be false.

Barker notes that this is not a deductive argument, something that is perhaps self-evident from its lack of deductive form.[141] It "differs from induction—the conclusion being argued for does not embody predictive conjectures going beyond what the premises say."[142] This is like a legal analogy, in that further observation cannot test the honor council's decision. The conclusion of the council will prove its own truth.

Weinreb makes a defense of non-inductive analogy and legal analogy as a reliable type of reasoning that is distinct from deduction and induction. He pushes back against the thinking of Brewer and others who appear to accept legal analogy, despite that fact it is "logically flawed," as part of a "hierarchy of rules" deductively applied; Posner, who appears to view it as existing but of little or no value; and Alexander, who claims it does not exist in law.[143]

Weinreb's central defense of legal analogy is that analogical reasoning works in many human contexts perfectly well without the need for formal deductive or inductive machinery.[144] He also notes that it is acceptable to lawyers and judges: though analogies are at "the center of contention between lawyers on opposite sides and between majority and dissenting judges, there is scarcely a trace of criticism of analogical argument generally. On the contrary, the importance that is usually attached to the choice of analogy suggests quite the opposite."[145] "The persistent effort of legal scholars to downgrade analogical reasoning, if not, indeed, to dismiss it altogether, is simply ignored by the lawyers and judges who regularly employ it."[146] Thus, "[i]f the normative force of law depends on its commitment to reason, a place has to be found for analogical arguments on their own terms."[147]

This is fine as far as it goes, but while Weinreb critiques the approach proposed by Brewer in some detail,[148] he does not offer his own model for constructing or evaluating arguments. Instead, he grounds his support for legal analogy *sans* deductive covering rules in the practical wisdom of attorneys practicing it. He writes, for example, that a legal reasoner

---

141. *Id.* at 227. Given the brief discussion of the enthymeme above, *see supra* text accompanying notes 126–128, it might be tempting to reconstruct this in a deductive argument form. What is missing is perhaps a major premise along the lines of "Whatever is like lying and cheating ought to count as an honor offense." *Id.* at 282 n.46. The problem, as Barker notes, is that such a premise may not be both "known to us and sufficient to render the argument deductively valid." *Id.* Worse, it may simply function as *question begging* or *petitio principii*, that is, the premise assumes the conclusion. *Id.*

142. *Id.* at 227.

143. Weinreb, *supra* note 3, at 8–9.

144. *Id.* 114–22.

145. *Id.* at 10.

146. *Id.* at 134.

147. *Id.* at 113.

148. Weinreb, *supra* note 3, at 107–13.

"will quickly dismiss most of the concrete details of the situation before him . . . as irrelevant to [a party's] liability, not because he knows and can recite a multitude of rules so providing but because his accumulated experience in the law tells him that those facts are not likely to count."[149] This continues the cognitivist approach discussed above, which argues for the reasonableness of *reasoning* by legal analogy but does not provide a structure for constructing and assessing *arguments* by legal analogy.[150]

The problem is that arguments by analogy are hard to discipline. Even when used by logicians, analogies can be unruly. Consider two examples from Barker:

> Suppose the postman once met a boxer dog and found that it had a bad temper and tendency to bite. If he now meets another boxer dog, he may reason by analogy that this dog also is likely to have a bad temper and a tendency to bite. Here his reasoning rests upon analogy.[151]

Barker does not criticize this conclusion, implying that it is reasonable. And he offers another example:

> [S]uppose there has been a thunderstorm every afternoon at five o'clock for the past week, and I infer that there will rather likely be one tomorrow too. Here my data are true and my reasoning may well be perfectly logical, and yet is possible that my conclusion is false; perhaps no storm occurs on the morrow. Here it was *reasonable* for me to make this inference, even though the conclusion turned out not to be true.[152]

Here, Barker overtly calls this reasoning *reasonable*. But given the premises in these arguments are true, does the form of either make a reasonable argument? My neighbor Rosie is a rescue boxer with a sweet temperament. Would the postman's argument be equally strong if he concluded, after encountering Rosie, that the next boxer he meets will also be sweet tempered? And why is it reasonable to conclude tomorrow's weather will be like today's, or last week's? Is it not just as reasonable to conclude that tomorrow's weather is due for a change? In each of these cases, either a small number of instances or a failure to theorize the

---

149. *Id.* at 123. He does offer some observations that may be helpful for addressing those questions, which I will take up below. *See infra* text accompanying notes 204–217.

150. *See supra* notes 26–36 and accompanying text.

151. Barker, *supra* note 22, at 191–92. On Barker's account, this in an inductive analogy, because it could be confirmed by further empirical observations.

152. *Id.* at 183 (emphasis added). Again, this is inductive analogy on Barker's account.

relevance of each instance could weakly support a conclusion.

Barker proposes that an opponent can attack an analogy by saying it is not a good comparison (that is, by pointing out differences) or by employing a second analogy that is no less reasonable but reaches a different conclusion.[153] The former advice may not be particularly helpful, in that one can always find differences and similarities between any two instances or cases.[154] The question is which differences are relevant and how many are needed to warrant a different conclusion. The latter advice helps little more, given that the opponent offers another argument, which must itself be subjected to criticism.

Despite Barker's claim that "some analogies really are better than others,"[155] neither his model nor Weinreb's provides the means of constructing or evaluating them. Given that a deductive argument form could not operate in our legal context without assistance, and induction is inapplicable to decisions of this kind, we must explore possible frameworks for non-inductive and legal analogies.

D. The Aporia: Why We Still Need Answers

So far, Part I has shown that deduction can do only a tiny part of the work of legal argument. At the moment just *before* the proponent of a legal argument applies a universal rule deductively to the facts of her case, she has already done all the heavy lifting—ascertaining the legal rule (major premise) and classifying operative facts and assigning legal categories to the instant facts (minor premises). Induction cannot help. And we have a sense that analogy, at least as described here, is insufficiently disciplined to permit reliable argument construction and critique.

Legal scholars who have previously approached legal analogy have taken three tacks: some believe that a deductive rule lies behind every apparent use of legal analogy. Weinreb does not believe this but leaves largely unexplained how legal analogy works in its absence. Schauer embraces quasi-deductive application of assimilating categories. But Alexander and Brewer, and probably Posner, support the claim that a deduction must lie beneath the conclusion of any rational legal argument. Alexander and Brewer ground that position on the rational force of deduction. But of course, that is question begging: rational force is a measure of the confidence we can have in the conclusion if the premises are true; it ignores the truth of the premises. The law, however, is very

---

153. *Id.* at 227.

154. *See* Brewer, *supra* note 2, at 932 ("[E]verything is similar to everything else in an *infinite* number of ways, and everything is also *dissimilar* to everything else in an infinite number of ways.").

155. Barker, *supra* note 22, at 227, quoted in Brewer, *supra* note 2, at 952.

concerned with whether the premises are true.[156] Deduction cannot deliver the premises, and applying deduction to premises that are not derived deductively can deliver conclusions that are only as sound as the weakest argument in the chain. From a practical-theoretical standpoint, we need to strengthen that link.

The solution I propose is to increase our confidence in arguments by legal analogy by providing a formal model for creating and criticizing them. Part II begins by introducing a different standard for creating and assessing legal arguments, drawn from the field of informal logic, and it explains the general formal model of the *argumentation scheme*. Part III then presents the argumentation scheme(s) for legal (dis)analogy, including a means for assessing relevant (dis)similarity. That section concludes with some examples from real legal arguments.

II. A NEW TACK: INFORMAL LOGIC AND ARGUMENTATION SCHEMES

This section proposes a pivot from deductive logic to standards that are still rational and, though not formally valid, reasonable given the circumstances in which we use them. I contend here that by "reasonable" arguments we always mean to imply "dialogical" arguments. That is, any standard of reasonableness for legal arguments must anticipate that all legal arguments withstand critical scrutiny: every argument has a proponent and an opponent.[157] Even when lawyers predict the outcome of legal disputes for clients, they are anticipating the counter-arguments that other parties will make. Subsection A introduces informal logic and its conception of arguments that proponents assert are rational and reasonable but which are defeasible—subject to the critical questions of their opponents. Subsection B explains how argumentation schemes formalize such dialogic arguments.

A. A Standard for Good Legal Arguments

How should we make or assess a *good* legal argument? Deduction plays some role, of course, in application of every general or universal rule, but the previous section showed that it is not sufficient or even necessary to resolve the questions of classification and evaluation that are at the root of many sticky legal problems. This section argues that the law should employ argumentation that meets standards of rationality and

---

156. *See supra* note 74.

157. *See* Weinreb, *supra* note 3, at 46–47 ("A judicial decision of any significance is carefully considered and is not likely to be reached until the issue has been debated and alternative outcomes forcefully defended. Once rendered, it is subject to review and reconsideration by other judges as well as by lawyers and legal scholars.").

reasonableness that are acceptable in the community of law practitioners. The next section introduces argumentation schemes.

First, "[t]he normative order constituted by the legal system, informed by 'rule of law' principles as well as by many others, aspires to be rational in significant ways."[158] According to Professor Brewer:

> The criteria that comprise the ideal of the rule of law forge links between the correct interpretation of legal texts and two of the basic requirements of that ideal, predictability and notice, on the one hand, and governmental accountability (restraint on arbitrary governmental power, including judicial power), on the other.[159]

So, "in offering [an] argument, the speaker aspires to satisfy the aforementioned rule of law ideals."[160]

Professor Weinreb, meanwhile, notes that "law provides an overarching structure within which most human affairs are conducted, and it reaches down to the smallest details. If its demands are not to be felt as arbitrary and oppressive, they must be, and must be perceived to be, *reasonable*."[161] We can paraphrase Judge Posner to say that legal argumentation is "practical argumentation"—"the methods by which people who are not credulous form beliefs about matters that cannot be verified by logic or exact observation."[162] Posner claims that judges reason using many tools:

> It is a grab bag that includes anecdote, introspection, imagination, common sense, empathy, imputation of motives, speaker's authority, metaphor, analogy, precedent, custom, memory, "experience," intuition, and induction (the expectation of regularities, a disposition related both to intuition and to analogy).[163]

These—along with whatever the judge had for breakfast—may in fact

---

158. Brewer, *supra* note 2, at 929. I take Brewer to mean *rational* in the sense that Govier means it. *Compare* Govier, PHILOSOPHY, *supra* note 20, at 45–46 ("*Rational* persuasion is persuasion by considerations that affect the assent of another person by supplying evidence or grounds that make a claim seem more believable because of a cogent connection between that claim and the claims cited as its support.") *with* Chaim Perelman, *The Rational and the Reasonable*, 10 PHILOSOPHIC EXCH. 29, 29 ("The rational corresponds to mathematical reason, . . . which grasps necessary relations, which knows a priori certain self-evident and immutable truths, which is at the same time individual and universal.").

159. Brewer, *supra* note 2, at 991–92 (internal citations omitted).

160. *Id.* at 992.

161. Weinreb, *supra* note 3, at 3 (emphasis added).

162. Posner, PROBLEMS, *supra* note 3, at 71-72.

163. *Id.* at 73.

694   UNIVERSITY OF CINCINNATI LAW REVIEW   [VOL. 87

influence judges' decision-making.[164] Consequently, Posner distinguishes judges' methods for making such decisions from their methods for justifying those decisions in writing—their reasoning from their argumentation.[165] But our system requires that (many) judges justify their decisions in writing according to standards the legal community accepts, and the considerations Posner lists are not all equally acceptable under those standards. Legal argument does not value intuition, imagination, and speaker's authority, for example, as much as imputation of motives, precedent, custom, and induction. When lawyers write persuasive briefs, they are attempting not just to persuade judges, they are demonstrating that arguments—acceptable in the context of the legal community—exist for the judges to grant their requests.

Philosophers of informal logic and argumentation theorists call on arguments to "involve[] an appeal to the addressee as *a rational judge who judges reasonably*,"[166] where we use the terms "'rationally' in the sense of using one's faculty of reason and . . . 'reasonably' in the sense of utilizing one's faculty of reason in an appropriate way" based on "appropriateness standards prevailing in the exchange concerned."[167] In short, we must move from concern with the rational force of abstract argumentation forms to the *cogency* of an actual argument: a cogent argument has "premises which are acceptable to the audience to whom it is addressed, relevant to its conclusion, and sufficient to warrant belief in its conclusion."[168]

As long ago as Aristotle, thinkers acknowledged the distinction between the kinds of arguments that work in one situation and those that work in another. Aristotle, for example, believed that science/knowledge (*epistêmê*) was possible only regarding universal truths that could be demonstrated with deductive reasoning.[169] Unfortunately, the deductive "validity of an argument does not guarantee the truth of its conclusion. Logic cannot itself establish or guarantee the truth of the premisses."[170] Pure deduction and demonstration, then, is available only in fields like

---

164.   Though not actually studying what judges had for breakfast, Danziger and colleagues showed that "extraneous variables" influenced judges' decision-making. Shai Danziger, Jonathan Levav & Liora Avnaim-Pessoa, *Extraneous Factors in Judicial Decisions*, 108 PROC. OF THE NAT'L ACAD. OF SCI. (PNAS) 6889, 6892 (2011). They examined a large number of decisions in a class of very similar cases, noting differences between those that had happened just before a meal break and those happening just after. *Id.* at 6889–90.

165.   *See* Posner, *Reasoning, supra* note 25, at 91.

166.   van Eemeren et al., HANDBOOK OF ARGUMENTATION THEORY 5 (2014).

167.   *Id.* at 6 n.13.

168.   Govier, PHILOSOPHY, *supra* note 20, at 119.

169.   *See* Robin Smith, *Notes* to Aristotle, PRIOR ANALYTICS 105, 127 (Robin Smith tran., 1989). *See also* Aristotle, POSTERIOR ANALYTICS 13 (Jonathan Barnes tran., 2d ed. 1993).

170.   Neil MacCormick, RHETORIC AND THE RULE OF LAW 25 (2005). Common usage among some European theorists is to use "premiss" for "premise."

geometry, where the premises are postulated.[171] In his treatises about reasoning and argumentation on matters of public affairs, including legislation and judicial tribunals, Aristotle acknowledged that the premises of arguments, whether deductive or no, in those contexts had to be drawn from less certain sources, including the views of "most people, or the wise . . . . and such opinions as are derived from any established arts."[172]

Contemporary philosopher Stephen Toulmin concluded that the standard of reasonableness depends on the *field* in which an argument appears, and reasonable arguments may have characteristics that are both *field-invariant* and *field-dependent*.[173] Arguments "belong to the same field when the data and conclusions in each of the two arguments are . . . of the same logical type."[174] So, for example, arguments about geometry proofs, legal status, biological categorization, etc.—all different fields— might all be subject to deduction, which is field-invariant. But arguments about legal status might properly include evidence from witness testimony, where arguments about geometry will permit premises only from the stock of postulates and theorems already proved; these are field-dependent constraints. The concept of "field" can be read hierarchically. For example, Toulmin notes: "[t]he sorts of evidence relevant in [legal] cases of different kinds will naturally be very variable. To establish negligence in a civil case, willful intent in a case of murder, the presumption of legitimate birth: each of these will require appeal to evidence of different kinds."[175] Whether a legal argument is reasonable is thus a field-dependent question, with different fields within the law potentially having different standards. At the same time, we can expect some standards of rationality to be field-invariant in the sense that they apply throughout all fields of law. I contend we should expect such standards for arguments by legal analogy.

J. Anthony Blair, Ralph H. Johnson, and Trudy Govier are philosophers credited with foundational work in the field of informal

171. *See* J. Anthony Blair, *Informal Logic and Logic*, GROUNDWORK IN THE THEORY OF ARGUMENTATION: SELECTED PAPERS OF J. ANTHONY BLAIR 120–21 (2012) [hereinafter Blair, *Informal*].

172. Aristotle, TOPICS: BOOKS I AND VIII 9 (Robin Smith tran., 1997). The subject of Aristotle's *Topics* is "dialectic problems," *id.* at 10, each of which is "a question which is both important for some purpose and the subject of significant disagreement," Robin Smith, *Commentary* to *id.* 41, 56. Aristotle incorporates dialectic into his theory of rhetoric, calling rhetoric an "offshoot" of dialectic and "partly" dialectic. ARISTOTLE, ON RHETORIC *supra* note 128, at 39. For Aristotle, rhetoric is the art focused on deliberative, judicial, and other civic assemblies in Athens. *Id.* at 47–48.

173. Stephen E. Toulmin, THE USES OF ARGUMENT 14–15 (updated ed. 2003).

174. *Id.* at 14.

175. *Id.* at 16.

logic.[176] The work of Blair, Johnson, and Govier—and their progeny—have been widely taken up and discussed.[177]

Blair and the founders of informal logic sought to replace "the then-dominant (in analytic philosophy circles) logico-epistemological criterion of 'soundness'" under which "a 'good' argument is a 'sound' argument, that is, one with true premises and a (deductively) valid inference from the premises to the conclusion."[178] They recognized that human beings make many good decisions based arguments that are not deductions or inductive generalizations.

They proposed three criteria for a good argument: relevance,[179] acceptability, and sufficiency. So in their view, "an argument is a good one if its grounds or premises are . . . relevant as support for the claim in question, individually acceptable, and together . . . sufficient to support the claim on behalf of which they were offered."[180] What counts as sufficient, acceptable, and relevant in a given context depends on the circumstances of that context.[181] So "[s]pecial fields such as the various sciences or professions will have standards peculiar to them for arguments about their subject matters."[182] "For example, if the conclusion is 'meteorological conditions are excellent,' and the premise is, 'Meteorologists say so,' we scrutinize the authority much more carefully if our purpose in knowing the conclusion is to launch a satellite rocket than if it is to proceed with an informal family picnic."[183]

Informal logic is about *defeasible* arguments, those whose "premises supply good reasons for accepting their conclusions" but where "challenges from critics or simply the discovery of additional information

---

176. *See* van Eemeren, *supra* note 166, at 373. Informal logic arose in philosophy classrooms in the 1960s and 1970s, in response to a sense among philosophy professors and students that courses in formal logic did not allow students "to understand and criticize the public policy arguments of the day, particularly those published in the media." Blair, *Informal, supra* note 171, at 120–21.

177. *See generally* van Eemeren, *supra* note 166, at 381-87, 390–94, and works cited there. *See also* Blair, *Informal*, *supra* note 171, at 119 (noting use of argumentation schemes in artificial intelligence).

178. Blair, *RAS Today*, *supra* note 20, at 88. *See also* Govier, PHILOSOPHY, *supra* note 20, at 6 ("[T]he [deductive] paradigm is questionable at best. It implies a uniformly negative verdict on the soundness of all inductive arguments. Furthermore, it is untrue to the world of partial certainties in which human beings function.").

179. This is the relevance of premises to the conclusion they purport to support, not of analogical (dis)similarities between cases.

180. Blair, *RAS Today*, *supra* note 20, at 87. *See also* Govier, PHILOSOPHY, *supra* note 20, at 6 ("[R]eal arguments are based on premises deemed *rationally acceptable* by arguers and put forward as rationally acceptable to the particular audience to whom their argument is addressed and as providing reasons *sufficient in some context* for accepting that conclusion, or at least taking it seriously.").

181. Blair, *RAS Today*, *supra* note 20, at 90, 95, 97. Blair acknowledges that "[a]ttempts have been made to characterize relevance and sufficiency . . . but no results have found widespread endorsement." Blair, *Informal*, *supra* note 171, at 126.

182. Blair, *RAS Today*, *supra* note 20, at 100.

183. *Id.* at 95.

can 'defeat'" them—can "reduce or remove the force of any justification that the original premises supplied for their conclusions."[184] It is in this sense a brand of what Judge Posner calls "practical reason."[185]

Many of the scholars whose work was discussed in Part I might be uncomfortable with this conception of "logic." But the non-deductive components of legal argument are where the heavy lifting is, despite being the logically weaker links in the argument chain. We need to strengthen them to the extent we can. One way to do so is through argumentation schemes.

B. Argumentation Schemes and Critical Questions

Argumentation schemes are formal abstractions of types of argument that are commonly used in natural-language discourse, like legal arguments. In the conception used here, each argumentation scheme consists of a set of premises and the conclusion they support, much like the valid deductive form above. Schemes, most often identified with the work of philosopher Douglas Walton,[186] provide a formal structure to construct and evaluate natural-language arguments from the perspective of informal logic.

"These schemes rely on the presumption that reasoning from the kinds of grounds and via the kinds of inferences that are identified by such a scheme is justified. They presume that such inferences are warranted."[187] Consequently, once an argument's proponent constructs it according to a valid argumentation scheme, its conclusion is presumptively acceptable, and the burden shifts to the argument's opponent to defeat or weaken it.[188] Thus associated with each argumentation scheme is a set of *critical questions*, the answers to which may defeat the argument or diminish its acceptability. Argumentation schemes rely for their rational force on the fact that they are routinely exhibited in contexts where their forms go largely unchallenged, even if the critical questions throw particular arguments into doubt.

The sort of inquiry suggested by the argumentation scheme, and particularly the critical questions, is necessary and sufficient to determine in a given context whether to accept a legal argument in that context. Argumentation schemes are a *necessary* adjunct to deductive argument forms in that deduction alone cannot deliver an acceptable legal argument.

---

184. Blair, *Informal*, *supra* note 171, at 123.

185. *See supra* note 162.

186. *See supra* note 11.

187. Blair, *Informal*, *supra* note 171, at 119.

188. *See* Blair, *RAS Today*, *supra* note 20, at 90.

Consider the challenges with applying a deduction discussed above.[189] In fact, we can frame the legal deductive syllogism as a defeasible argumentation scheme, showing that the argumentation scheme influences the seemingly simple application of deduction in actual legal argumentation.

ARGUMENTATION SCHEME: ARGUMENT BY LEGAL DEDUCTION[190]

Major Premise:	According to legal authority J, in every instance with features $f_1 \ldots f_n$, legal category A applies.
Minor Premise:	The instant case has features $f_1 \ldots f_n$.
Conclusion:	Legal category A applies in the instant case.

We can instantiate this scheme using *State v. Boostrider* from above:[191]

ARGUMENT BY LEGAL DEDUCTION: *STATE V. BOOSTRIDER*

Major Premise:	According to Springer statutes section 15.15, any person who operates a vehicle in the municipal park is guilty of a gross misdemeanor.
Minor Premise:	Ms. Boostrider operated a vehicle in a municipal park.
Conclusion:	Ms. Boostrider is guilty of a gross misdemeanor.

In an appropriate context of informal logic, this argument is presumptively valid. Indeed, these allegations (perhaps with some more detail) are probably sufficient to sustain a prosecutor's indictment of Ms. Boostrider. But every lawyer knows that Ms. Boostrider's attorney will explore, and the prosecutor had better be ready to respond to, at least the following critical questions.

---

189. *See supra* text accompanying notes 73–81.

190. See the comment below about the preliminary nature of this argumentation scheme. I do not intend it to be complete; there may indeed be other critical questions applicable to it. A more through discussion of the scheme will have to wait until another time.

191. *See supra* text accompanying notes 38–41.

CRITICAL QUESTIONS: ARGUMENT BY LEGAL DEDUCTION

CQ1 Acceptable Scheme Question: Does legal authority *J* actually say that legal category *A* applies in every instance with features $f_1 \ldots f_n$? That is, is the legal rule advanced a deductive one?

CQ2 Jurisdiction Question: Does legal authority *J* have authority over the persons or things in the instant case?

CQ3 Authority Question: Does legal authority *J* govern the law applicable in the instant case?

CQ4 Exception Precedent Question: Has any legal authority identified an exception to the rule or is there any previous similar case where the rule was not applied?

CQ5 Exception Policy Question: Does the policy underlying the rule suggest there should be any exceptions?

CQ6 Instant Features Question: Does instant case have features $f_1 \ldots f_n$?

CQ7 Feature Question: With regard to each feature $f_1 \ldots f_n$, has any legal authority defined it or narrowed or expanded its definition?

Each of the critical questions can spawn an argument of its own regarding its outcome, the result of which may be to weaken or defeat the presumptive argument. Each question addresses one or more of the factors for assessing arguments, whether the premises and argument form are relevant, acceptable, and sufficient to support the conclusion. So, for example, with regard to CQ1, what counts as an *acceptable* argumentation scheme is context dependent. For example, if section 15.15 had been a factor test or other kind of legal standard,[192] the deductive argumentation scheme would be inappropriate here. This question tests whether the argument's proponent has misstated the major premise/rule.

The rest of the critical questions test the truth of the premises, CQ2–CQ5 testing the major premise and CQ6 and CQ7 testing the minor premise. CQ2 and CQ3 address the applicability of the legal authority to the current case. In our example, perhaps the alleged offense took place in one jurisdiction but *J* is the law in a different jurisdiction. Or perhaps *J* is a statute that by its own terms governs only the use of motor vehicles subject to registration with the state, but the instant case involves a motorized skateboard. CQ4 and CQ5 consider whether there is or should

---

192. For Weinreb, rules "provide a determinate response to specific facts" and standards "call for consideration of all the circumstances," though he notes that it is debated whether the difference is meaningful. Weinreb, *supra* note 3, at 6 n.3.

be any exception to this rule. In our example under CQ4, perhaps a court concluded that a person who drives onto parkland by necessity is excused. The second prong of this question identifies where there might be an implied exception based on a previous case where the rule was not applied. As for CQ5, perhaps a legislative pronouncement identifies a policy, and giving the rule too great or too small a scope would frustrate that policy or interfere with other policy objectives of equal importance.[193]

CQ6 asks only whether the proponent of the argument has actually asserted that all of features $f_1 \ldots f_n$ are present. CQ7 does the more complicated work of exploring the features to see if they are properly applied here. For example, *State v. Cyclist* appears to have narrowed the definition of "vehicle" in Springer statutes section 15.15. Perhaps "vehicle" is defined somewhere else in Springer's statutes that by its own terms applies to section 15.15 or that may be applied by analogy.[194]

I contend that when an argumentation scheme is properly characterized, the list of critical questions it provides is exclusive; that is, *any* challenge to an argument made in the form required by the argumentation scheme will come in the form of one or more of the critical questions identified.[195]

While this article is about the argumentation scheme for legal analogy, not legal deduction, this example appears here to demonstrate how readily critical questions complicate deductive argument forms in the law, and how argument-schematic thinking is a necessary adjunct to legal argument. The instance where a legal deduction can take place without consideration of critical questions is rare, and once the questions are settled, the deduction itself is trivial (and really, not that informative).

Argumentation schemes are a *sufficient* adjunct to deductive argument forms according to two perspectives. First, inasmuch as it is the best we can hope to do, it has to be sufficient. The two types of argument—deduction and induction—that might have a claim to greater rational force are simply not up to the task.

Second, in contexts subject to human judgment about normative matters, argumentation schemes represent good arguments. Lawyers, who are motivated to find flaws in their opponents' arguments, do not attack

---

193. *See generally* Chi. Bd. of Trade v. United States, 246 U.S. 231 (1918), in which the Supreme Court read the word "reasonable" into the Sherman Act.

194. In the *Boostrider* case, the analyst must of course also consider the same question with regard to whether the defendant *operated* and whether the event happened in a *municipal park*.

195. This is both an empirical and normative issue, however. Normatively, we must ask whether a certain critical question *should* be permitted to defeat the argumentation scheme; in other words, is it rational to pose the critical question? Empirically, we must ask whether a certain critical question *is* permitted; in other words, do practitioners in the field object to its use? The latter question is the focus of the empirical work described *infra* note 256.

the form of their opponents' arguments when their opponents use the techniques described here. A lawyer who has offered a presumptive legal deduction does not react with outrage when her opponent attacks it with the critical questions noted above.[196] In short, argumentation schemes present evidence that the arguer is using one's faculty of reason in an appropriate way based on appropriateness standards prevailing in the exchange concerned.[197]

Of course, it is possible that two such arguments can be constructed regarding a given legal question that point to contradictory conclusions; they should nevertheless have sharpened the issues to give the decision-maker the best chance of making (and justifying) a good choice.

As we saw in Part I, analogy is too undisciplined to satisfy our expectations about rationality in the law. Part II has shown that argumentation schemes discipline legal argument by establishing burdens—the premises the proponent must assert for the argument to be presumptively acceptable—and critical questions—the acceptable avenues upon which an opponent may attack or undermine the argument.

Part III proposes, discusses, and applies the legal analogy and legal (dis)analogy argumentation schemes in legal argument.

III. THE LEGAL (DIS)ANALOGY ARGUMENTATION SCHEMES

Part II demonstrated that legal arguments (even the apparently air-tight deduction) can be recast schematically using argumentation schemes and that this approach to legal argumentation is rational and reasonable. This part delivers on the promise of this article to provide a formal description of legal analogy as an argumentation scheme. It also describes the legal (dis)analogy argumentation scheme and explores the question of relevant similarity more deeply. It concludes with an analysis of some actual lawyers' arguments.

A. Legal Analogy Argumentation Scheme

Here is the argumentation scheme for legal analogy with a cited case, and a case at bar, the instant case.[198]

---

196.   *See* Weinreb, *supra* note 3, at 10.

197.   *See supra* text accompanying notes 166 and 167.

198.   This argumentation scheme is adapted from Walton et al., *supra* note 11, at 55–66.

ARGUMENTATION SCHEME: ARGUMENT BY LEGAL ANALOGY

Major Premise:	Cited case and instant case are relevantly similar in that both have features $f_1 \ldots f_n$, and features $f_1 \ldots f_n$ are relevant to legal category A.
Minor Premise:	Legal category A applies to cited case.
Conclusion:	Legal category A applies to instant case.

Notice that the major premise in this scheme is really a *relevant similarity* premise and actually contains three assertions for each feature $f_1 \ldots f_n$: that instant case has the feature, that cited case also has the feature, and that the feature is relevant to legal category A.

If we are considering the case *State v. Biker* (cited case) while analyzing *State v. Boostrider* (instant case),[199] we might construct this simplified argument.

ARGUMENT BY LEGAL ANALOGY: *BIKER* & *BOOSTRIDER*

Major Premise:	*Biker* and *Boostrider* are relevantly similar in that both interpreted Springer statute section 15.15, and in both, the machine had a motor and the machine had wheels; and the presence of a motor and wheels is relevant to whether the machine is a vehicle.
Minor Premise:	The machine in *Biker* was a vehicle.
Conclusion:	The machine in *Boostrider* is a vehicle.

But further inquiry might defeat this argument. Like most argumentation schemes, the argument from legal analogy has its critical questions:

---

199. *See supra* text accompanying notes 38–41.

CRITICAL QUESTIONS: ARGUMENT BY LEGAL ANALOGY

CQ1 Acceptable Scheme Question: Do the circumstances of this argument permit application of legal analogy from a cited case?

CQ2 Similarity Question: With regard to each feature $f_1 \ldots f_n$, is the feature present both in the cited case and the instant case?

CQ3 Relevance Question: On what basis are features $f_1 \ldots f_n$, relevant to legal category A?

CQ4 Precedent Outcome Question: Did cited case really assign legal category A?

CQ5 Relevant Dissimilarity Question: Are there dissimilarities $g_1 \ldots g_n$ between the cited case and instant case that are relevant to legal category A? (These may be differences in facts or in the law that was applied.)

CQ6 Inconsistent Precedent Question: Is there some other case that is also similar to instant case in that both have features $f_1 \ldots f_n$, except that legal category A is not applied in that case?

CQ7 Binding Precedent Question: To what extent is the cited case binding on the court in the instant case?

CQ8 Precedent Quality Question: Was the cited case wrongly decided?

Here as in the legal deduction scheme, CQ1 asks the threshold question for every argumentation scheme: Is it appropriate here? In theory, there may be some circumstances where appeal to a cited case is not tolerated, but it is difficult to identify common examples, even when one is attempting to interpret statutory language according to its plain meaning.[200] Also as usual, CQ2–CQ4 test the accuracy of the premises. CQ2's reference to similarities between the cases refers both to factual similarities (like whether the machine had a motor) and similarities in terms of the body of law that each was applying. CQ3 considers whether the similar features between the cases are relevant to the present body of law. This question, taken up in more detail below, is important whenever

---

200. Note, however, that at least in European civil law, the use of analogy is prohibited in certain contexts. Harm Kloosterhuis, *Analogy Argumentation in Law: A Dialectical Perspective*, 8 ARTIFICIAL INTELLIGENCE & L. 173, 182 (2000) ("Legal theory, as a rule, claims that the area of law to which the legal standard belongs, determines the possibilities of using that standard analogically . . . . The most telling example of this rule is the ban on analogy in criminal law: 'stretching penalization' on the basis of analogy argumentation is contrary to the very nature of criminal law. Tax law is yet another area of law that limits the possibilities to apply legal rules analogically [where it is] admissible only if advantageous to the taxpayer . . . . [C]ivil law too limits the possibilities of applying analogy argumentation to legal rules.").

a case-to-case comparison is made. Generally, the arguer should be able to articulate the policy considerations that make the features relevant. CQ4 merely tests whether the proponent of the argument has correctly stated the outcome of the cited case.

CQ5 and CQ6 invite new information that might undermine or defeat the argument. CQ5 looks at dissimilarities between the cited case and instant case. These may be factual: for example, the machine in *Biker* was much heavier than the machine in *Boostrider*, and the weight of the machine is probably relevant to its ability to injure people and damage property. The differences may also relate to the body of law: it is possible, in our example, the argument's proponent might want to use the meaning a court gave to "vehicle" under a statute different than Springer statutes section 15.15, perhaps the motor-vehicle registration statute. The opponent might argue that the purposes of a vehicle registration statute— to collect revenue to fund road construction and maintenance—and of section 15.15—to prevent harm to persons and park property—make it appropriate to use different definitions of "vehicle." CQ6 is related to CQ3 because if the answer to this question is "yes," it casts the relevance of features $f_1 \ldots f_n$ into doubt; if they can be present both when legal category A is assigned and when it is not, it is not clear that they are relevant to assigning the category.

Finally, CQ7 and CQ8 situate the cited case and its value within the legal system. If the answer to CQ7 is that the cited case is binding precedent, that is, the cited case comes from a higher court in the same court hierarchy and constrains the action of the court in the instant case, then the answer to CQ8 may be irrelevant.[201] If the answer to CQ7 is "no," then an opponent of the argument has the option to try to dispose of the analogy by challenging the quality of the decision in the cited case.

As noted above, it is most productive to see the argumentation scheme as a presumptively acceptable argument, unless it is challenged with the critical questions. The proponent should assert, or at least imply (remember the discussion of the enthymeme above),[202] each of the premises in the form before the burden shifts to the opponent. Once she has done so, however, the critical questions provide an exhaustive list of avenues for attacking the argument.

Of course, paired with the argumentation scheme for legal analogy should be one for legal *(dis)analogy*.

---

201. Of course, it may still be relevant to a party who plans to seek appellate review in hopes of overturning or distinguishing the precedent. Everything is arguable in the law, and arguing that a binding precedent reached an incorrect decision is something that both lawyers and judges do, whether or not they choose to follow or distinguish the precedent.

202. *See supra* text accompanying notes 126–129.

B. Legal D (dis)analogy Argumentation Scheme

Here is the argumentation scheme for legal (dis)analogy:

ARGUMENTATION SCHEME: ARGUMENT BY LEGAL (DIS)ANALOGY

Major Premise:	Features $f_1 \ldots f_n$ are relevant to legal category A.
Minor Premise:	Cited case and instant case are different in that cited case has features $f_1 \ldots f_n$, and instant case does not have features $f_1 \ldots f_n$.
Conclusion:	Cited case should not be used as a basis for applying legal category A to instant case.

If we are considering the case *State v. Biker* (cited case) while analyzing *State v. Boostrider* (instant case),[203] we might construct this simplified argument.

ARGUMENT BY LEGAL (DIS)ANALOGY: *BIKER & BOOSTRIDER*

Major Premise:	The extent to which the weight of a machine is great enough to damage park grounds is relevant to whether the machine is a vehicle.
Minor Premise:	*Biker* and *Boostrider* are dissimilar in that the machine in Biker (motorcycle) was heavy enough to damage park grounds but the machine in *Boostrider* (Boosted Board) was not heavy enough to damage park grounds.
Conclusion:	*Biker* should not be used in *Boostrider* as a basis to conclude the Boosted Board is a vehicle.

We must consider again the critical questions. In effect, this argumentation scheme is agnostic about the outcome of the cited case. If the two cases are relevantly dissimilar with regard to category A, there is no need to consider the outcome of the cited case. Instead, the major premise here takes the form of an assertion of relevance of the features, and the minor premise asserts that these features are present in one case and not the other. Note that despite the framing of the scheme, either the cited case or instant case may lack particular features; the cited case could have NOT HEAVY, and the instant case's failure to have that feature means that it has HEAVY.

---

203. *See supra* text accompanying notes 38–41.

CRITICAL QUESTIONS: ARGUMENT BY LEGAL (DIS)ANALOGY

CQ1 Acceptable Scheme Question: Do the circumstances of this argument permit application of a cited case?

CQ2 Relevance Question: On what basis are features $f_1 \ldots f_n$, relevant to legal category A?

CQ3 Similarity Question: With regard to each feature $f_1 \ldots f_n$, is the feature present in the cited case and absent in the instant case?

CQ4 Inconsistent Precedent Question: Is there some other case that is also dissimilar to instant case in that it has features $f_1 \ldots f_n$, except that legal category A *was* applied in that case?

CQ5 Binding Precedent Question: To what extent is the cited case binding on the court in the instant case?

CQ6 Precedent Quality Question: Was the cited case wrongly decided?

Because the role of this argumentation scheme is to exclude consideration of the cited case in assessing legal category *A,* the information in the argumentation scheme and in the critical questions is considerably reduced from the legal analogy argumentation scheme. Like all schemes, CQ1 addresses the question of whether the scheme is appropriate. Generally, the answer will be "yes" in any context where the legal analogy argumentation scheme is appropriate. CQ2–CQ3 ask whether the premises are true. CQ4–CQ6 ask the same questions that the analogous questions in the legal analogy argumentation scheme do.

As we can see from both the legal (dis)analogy schemes, what counts as a relevant (dis)similarity is perhaps the central question this article places in issue, a question the next section takes up.

C. Relevant (Dis)Similarity in Depth

An important theoretical concern about the account of legal analogy given in this article is the question of relevant similarity. As noted above, some theorists have challenged legal analogy as lacking rational force because it is impossible to say with certainty which (dis)similarities are

relevant and which are not.[204] Others have argued that by identifying principles under which two cases are (dis)similar, an argument's proponent is simply identifying a legal rule, for example, "a machine with a motor is a vehicle because a motor means the machine can move faster, raising the risk of injury to pedestrians" or "a very light machine is not a vehicle because it is not nearly as likely to injure pedestrians and damage park property as a car or motorcycle." The critics say that if there is no legal rule, then the argument has no rational force, and if there is a legal rule, it is merely deductively applied and there is no legal analogy.

But in applying *Biker* and *Cyclist* in the *Boostrider* case, the court may see the cited cases as embodying competing principles that lie behind the rule in section 15.15. "Every rule has a background justification—sometimes called a rationale—which is the goal that the rule is designed to serve."[205] In the case of section 15.15, the justification could plausibly be stated as "avoiding injury to pedestrians and damage to park property."[206] Another general principle might be "users of the park should be able to get around by the means they choose unless some rule or principle provides otherwise." Neither of these is a rule in the sense used by legal theorists because they are not sufficiently definite. They lack the definiteness of rules because "people understand that the background justifications themselves are often too vague to be helpful, too fuzzy to give people the kind of guidance they expect from the law, and too subject to manipulation and varying interpretation to constrain the actions of those who exercise power."[207]

So, for example, if the statute read "anyone who does anything in the municipal park that risks injury to pedestrians or damage to park property is guilty of a gross misdemeanor," its application could scoop up a wide

---

204. *See supra* notes 104 and 148–149 and their accompanying text. *See generally supra* Part I. Not just the relevance of similarities, but the quantity of them, factors into some conceptions of analogy. *See* Lilian Bermejo-Luque, *Deduction Without Dogmas: The Case of Moral Analogical Argumentation*, 34 INFORMAL LOGIC 311, 313–15 (comparing characterizations of analogy based on quantitative assessment of similarities–called there "a posteriori" analogies–with characterizations of analogy based on similarities that consider "both analogs . . . members of a category that is settled, a 'new' category for which the very analogy stands . . . [that] may be difficult or just impossible to specify in so many words without losing part of the analogy's insight.").

205. Schauer, THINKING, *supra* note 7, at 15.

206. Note that the approach described here could certainly be subject to criticism from advocates of the movement described as "new textualism." *See generally* William N. Eskridge, Jr., *The New Textualism & Normative Canons*, 113 COLUM. L. REV. 531 (2013) (reviewing Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2013)). I hoped to curb that criticism in part by making the hypothetical's purpose part of its enactment. In any case, the new textualists may be right; and then again, they may not. *Id.* at 533–34. The job of the *middle-level theory* in this article is not, however, to choose winners in debates about high theory. Rather, it is to impose normative constraints on practitioners, some of whom may have one high theory, others another, but many of whom have only their argumentative folkways.

207. Schauer, THINKING, *supra* note 7, at 16.

variety of activities. Practically, the risk of overreach and inconsistent application by law enforcement would rise, and the courts would spend much more time determining whether particular instances of behavior were in or out of the rule. By enacting section 15.15 as they did, legislators chose to govern only one potentially dangerous or damaging activity.

Thus, I contend that frequent need to balance justifications and the practical utility of legal analogy dispose of this complaint; or should at least cause us to take it with a grain of salt in practical contexts.

But at least two other complaints are very important. The first complaint: why do proponents and opponents of legal analogies fail to identify the bases upon which the (dis)similarities are relevant? Because the relevance of the (dis)similarities in a legal analogy is critical to its work, it seems essential to making the basic argument. Leaving it out is tantamount to leaving out the minor premise (that the cited case was decided in a certain way) or failing to mention what the (dis)similarities are. Nevertheless, it seems lawyers and judges routinely do so.[208] The second complaint: when argument proponents do identify those bases, what criteria should we use to evaluate them? Every conception of legal analogy discussed above, and in particular the argumentation schemes for it, make reference—either admiringly or grudgingly—to the relevance of (dis)similarities. The argumentation schemes must account for it, and so, presumably, must arguments by legal analogy. I can provide at most a schematic answer here to develop both theoretically and empirically in future.

As to the first complaint—the absence of an assertion of relevance of (dis)similarities, at least two approaches present themselves: Note first that we can interpret arguments by legal analogy that do not express the relevance part of the major premise as enthymematic. Remember that we use the concept of enthymeme to reconstruct omitted premises from argument forms.[209] Weinreb supports this view: the basis for relevance "is obvious or taken for granted and need not be stated expressly; but some such indication must be contained in or implied by a declaration that two things are similar, to establish the relevance of the particular similarities (and irrelevance of the dissimilarities) at stake."[210] So on this view, an argument that asserts the cited case and instant case share—or diverge on—some characteristics is implying that those characteristics are relevant to the legal category. Even if we accept that relevance is implied, we are left with one of two responses.

On the one hand, we may take the normative stance that an argument

---

by analogy is defective in the absence of an explicit assertion of relevance. We might view this as an instance of a conventional rule in the legal community that a legal argument that does not fully state the premises and conclusions of its argumentation scheme is defective. One reason for this convention might be that a failure to state all the premises and conclusion places a higher burden on the opponent of the argument. Rather than just challenging an explicit principle that would make the (un)shared characteristics relevant, she must imagine and reconstruct all the possible principles the proponent of the argument could have adduced and respond to them or find another authority that declares a given characteristic irrelevant. If this is the norm, we should expect argument proponents to typically expressly state their bases for the relevance claim and judges and argument opponents to criticize them when they do not.

On the other hand, we could react to the absence problem by removing the relevance element from the argumentation scheme. Argumentation schemes represent the forms of arguments warranted by their contexts of use, in this case, by the conventions of American courts and the community of American judges and lawyers. If argument proponents typically do not assert how the (dis)similarities in arguments are relevant to the legal category in question, then perhaps our system has effectively allocated the role of reconstructing that part of the major premise to the argument's opponent; the critical question regarding the relevance of the (dis)similar features would remain, but instead of testing one of the premises in the argumentation scheme, it would invite new information, in the form of an argument for or against relevance. Whether this is the correct course probably also depends on whether judges and argument opponents criticize argument proponents for the omission—the same empirical question mentioned in the previous paragraph.

What is conventional in American law, and therefore, which of these approaches is appropriate, thus depends on what lawyers and judges do—an empirical question. This article provides the basis and direction for the research necessary to answer that question.[211]

The second complaint was a lack of evaluative criteria for claims about the relevance of (dis)similarities between cases, whether those claims are made as part of the argumentation scheme, the critical questions, or both. This is in a sense to open a whole new avenue of inquiry. Because an assertion that (dis)similarities are relevant can be justified only by another argument, the acceptable form(s) of such arguments is an empirical and normative question: empirical in that what is acceptable in the American legal community requires study of what is accepted there, and normative in that it affects how we judge (and teach) the work of legal analogy.

---

211. *See infra* note 256 (describing a current effort to study this empirical question).

Given that we will have to postpone the empirical inquiry, at least for now,[212] the following paragraphs can provide the first important steps for a normative framework for arguing about the relevance of (dis)similarities.

First, an argument about relevance is simplified by "the extent to which a previous case, especially a controlling one, has announced which similarities are relevant and which are not."[213] Such an announcement can be express or implied. For example, the court in *Biker* could expressly have announced that "whether a machine has a motor is relevant to determining whether it is a vehicle." Instead, it strongly implied that when it noted that the motorcycle had an engine and that the bicycle did not. The wise proponent of an argument by legal analogy (whether she states the basis for the relevance of (dis)similarities or not) will be prepared to offer more in response to this question: why is it relevant whether the machine has a motor? She will likely argue that it is relevant "on the basis of policy, principle, or something else."[214] The argument might take this form:

1. Motors tend to be heavy and make a vehicle capable of greater speeds.

2. Greater weight and speed increases the probability of injury to pedestrians and damage to the park.

3. Protecting pedestrians and park property is identified as a goal of the statute in its preamble.

4. Consequently, whether a machine has a motor is relevant to the determination whether it is a vehicle for purposes of the statute.

Of course, the court in *Biker* or *Cyclist* could have expressed this argument. But in its absence, the legal analyst must still be prepared to assess the relevance of motors.

The identification of rationales of this type requires invention or discovery. Different lawyers may identify different bases for relevance of (dis)similarities. This argument for relevance of motors is one that the defense in *Boostrider* might identify; it permits Ms. Boostrider to argue that despite the motor on her Boosted Board, it does not go as fast as bicycles (not vehicles) and is not nearly so heavy as a motorcycle or car. The prosecutor might offer a different justification for relevance, better

---

212. *See infra* note 256.
213. Schauer, THINKING, *supra* note 7, at 95.
214. Schauer, THINKING, *supra* note 7, at 98.

suited to her case. Either lawyer would be unwise not to consider other possible characterizations.

The mere mention of a fact by a court *in its analysis* may be a basis for concluding that the fact is relevant to the legal category—so with the motor issue discussed here. We might conclude that the opinion is enthymematic in just the same way we suggested above.[215] But what if the court mentions a fact in its description of the facts of the case but does not mention it again during its analysis? Given that the judge in a case might have great compendia of facts from which to characterize the case, the mere mention of a fact *anywhere in the opinion* might be enough to start an argument about its relevance.[216] But then the argument about relevance may have to appeal to other cases and extrinsic evidence about what policies or principles apply.

"Relevance is . . . a function of . . . contextual constraints put on language uses . . . made explicit by means of legal arguments: the argument from intention . . . from purpose . . . from legal history, and the various sorts of systemic argument used in legal practice."[217] Legal expertise, then, arises as one develops a mature sense of what types of arguments about relevance are acceptable in the community of lawyers. For purposes of a theory of relevant (dis)similarity, the framework should develop after an empirical assessment of what is acceptable.[218]

D. The Argumentation Schemes Applied to a Legal Argument

For the argumentation schemes to be useful, we must be able to apply them to the argumentative practices of lawyers and judges, and that application should provide insights for producing and evaluating arguments of the kinds we analyze. This section provides an example

---

215. *See supra* text accompanying note 209.

216. As Weinreb notes:

> Only a small number of the details of the situation out of which the controversy arises will affect the outcome; but all the details are potentially available for consideration, because it is that specific situation and no other that needs to be resolved. *The lawyers' arguments and the judge's opinion recite only those facts that they respectively believe are material to the outcome.* Although there are likely to be facts the relevance of which is disputed, there are a great many others the relevance or, more likely, the irrelevance of which is not in doubt.

Weinreb, *supra* note 3, at 50 (emphasis added). Whether an arguer can distinguish the instant case from the cited case by reference to lawyers' briefs filed in the cited case, which are widely available online now, is another matter, which will have to keep until another time.

217. Damiano Canale & Giovanni Tuzet, *Analogy and Interpretation in Legal Argumentation*, SYSTEMATIC APPROACHES TO ARGUMENT BY ANALOGY 227, 238 (H. J. Ribeiro ed., 2014).

218. *See infra* text accompanying notes 256–257.

drawn from the United States District Court, Southern District of New York, adjudicating the issue of fair use in a copyright infringement case. The example worked here provides evidence of the argumentation schemes and critical questions described above, suggesting that the argumentation schemes are a useful tool to analyze and produce such arguments. It also shows lawyers engaging in an argumentative practice—the use of straw-man arguments—that judges and law teachers may wish to discourage.

Federal law provides copyright owners the exclusive right to make copies and derivative works of copyright-protected works.[219] A rights holder can be either a plaintiff or defendant in a copyright infringement case, as a secondary user can bring an action for declaratory judgment on infringement.[220] A secondary user may assert the affirmative defense of fair use, which is a bar to the rights holder's recovery for infringement, and courts assess the defense using a four-factor test.[221] The first factor is "the purpose and character of the [secondary] use."[222] One issue in assessing this factor is whether the secondary use is transformative—that is, "whether the new work merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning or message."[223]

The opinion of Judge Cote in *Associated Press v. Meltwater U.S. Holdings, Inc.*,[224] resulted from the parties' cross motions for summary judgment, which had in turn precipitated six briefs: defendant's memorandum in support of its motion ("defendant's motion"), plaintiff's opposition to it, defendant's reply to plaintiff's opposition, plaintiff's motion ("plaintiff's motion"), defendant's opposition to it, and plaintiff's reply to defendant's opposition.[225] The Associated Press (AP)—a cooperative enterprise owned by 1,400 U.S. newspapers that produced

---

219. 17 U.S.C. § 106 (2018).

220. 22 U.S.C. § 2201(a). *See*, *e.g.*, Adjmi v. DLT Ent. Ltd., 97 F. Supp. 3d 512, 515 (S.D.N.Y. 2015).

221. 17 U.S.C. § 107 (2018). The statute requires that "the factors to be considered shall include" the four named factors, but it does not preclude courts considering other factors. *Id.*

222. 17 U.S.C. § 107(1).

223. Campbell v. Acuff–Rose Music, 510 U.S. 569, 579 (1994).

224. 931 F. Supp. 2d 537 (S.D.N.Y. 2013).

225. Mem. of Law of Pl. the Assoc. Press in Supp. of its Mot. for Sum. J. on its Copyright Infringement Claim, ECF No. 54 (Dec. 19, 2012) [hereinafter Pl.'s Mot.]; Mem. of Law in Supp. of Defs.' Mot. for Sum. J., ECF No. 56 (Dec. 19, 2012) [hereinafter Defs.' Mot.]; Pl.'s Mem. of Law in Opp'n to Defs.' Mot. for Sum. J., ECF No. 57 (Dec. 19, 2012) [hereinafter Pl.'s Opp'n]; Defs.' Mem. of Law in Opp'n to Pl.'s Mot. for Sum. J., ECF No. 58 (Dec. 19, 2012) [hereinafter Defs.' Opp'n]; Pl.'s Reply Mem. of Law in Further Supp. of its Mot. for Sum. J. on its Copyright Infringement Claims, ECF No. 118 (Jan. 23, 2013) [hereinafter Pl.'s Reply]; Reply Mem. of Law in Further Supp. of Defs.' Mot. for Sum. J., ECF No. 123 (Jan. 23, 2013) [hereinafter Defs.' Reply].

between 1,000 and 2,000 news stories every day—was the rights holder and plaintiff in this case.[226] AP typically constructed its stories so that the first part, or "lede," contained the most critical information in the article, with the balance of the article elaborating on it.[227] AP licensed its stories, each subject to copyright, to print newspapers but also for display on news websites that paid it a fee; AP licensed at least some of them to display the entire story on the internet to consumers who paid no fees to access them.[228] AP had also licensed to "news clipping services" that permitted "the distribution of excerpts from or snippets of its articles" to businesses that wished to monitor mentions of them in the news.[229]

Meltwater used "automated computer programs or algorithms to copy or 'scrape' an [AP] article from an online news source, index the article, and deliver verbatim excerpts of the article to its [paying] customers in response to search queries."[230] Meltwater's customers could search for content, including AP stories, both by setting up a software "agent" to find and store excerpts of all applicable stories,[231] and by performing "ad hoc" searches, the results of which Meltwater's service did not save.[232] The record showed that Meltwater competed for—and sometimes won—customers from AP and its news-clipping licensees.[233]

Important in this context was the Ninth Circuit's opinion in *Kelly v. Arriba Soft Corp*.[234] The *Kelly* court found that a free publicly available search engine's use of "thumbnail" versions of photographs displayed elsewhere on the web was transformative and a fair use; the thumbnails were lower-resolution versions of the entire photos displayed elsewhere.[235] Each party in its briefs, and the court in its opinion, cited *Kelly* in support of its argument about whether Meltwater's secondary use of the works here was transformative.

In its motion memo's discussion of transformativeness, AP did not immediately raise *Kelly*, instead discussing other cases that it concluded were similar to Meltwater's secondary use and that found those secondary uses not to be transformative.[236] Anticipating Meltwater's reliance on *Kelly*, however, AP devoted the next subsection of its argument to *Kelly*

---

226. 931 F. Supp. 2d at 541.
227. *Id.* at 541.
228. *Id.* at 542.
229. *Id.*
230. *Id.* at 543.
231. 931 F. Supp. 2d at 544.
232. *Id.* at 545.
233. *Id.* at 543.
234. 336 F.3d 811 (9th Cir. 2003).
235. *Id.* at 815.
236. Pl.'s Mot., *supra* note 225, at 10–15.

and related cases.[237] Rather than merely distinguish those cases, AP constructed the argument it claimed Meltwater *would* make and then dissected it by application of the critical questions. AP asserted that Meltwater would argue its service:

> constitutes a transformative use because it offers access to a search engine that allows its customers to discover information in the news media relevant to their business and because many of its customers only look for mentions of their company or its press releases rather than the content of the news articles, an allegedly different purpose. Meltwater [will base] this argument on two Ninth Circuit cases, *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003) and *Perfect 10, Inc. v. Amazon.com*, 508 F.3d t 146 (9th Cir. 2007), which held the search engines at issue in those cases to be transformative uses as electronic reference tools whose use of thumbnail images of photographs in search results served a different purpose than the original.[238]

We can easily recast this in the legal analogy argumentation scheme.[239]

ARGUMENT BY LEGAL ANALOGY: *KELLY* & *ASSOCIATED PRESS*	
Major Premise:	*Kelly* and the instant case are relevantly similar in that both interpreted fair use, and in both, the secondary use could function as a search engine.
Minor Premise:	The secondary use in *Kelly* was transformative.
Conclusion:	The secondary use in the instant case is transformative.

The relevance of the similarity is implied enthymematically.

AP's critique of this argument focused on the last critical questions first, beginning with *CQ 7 Binding Precedent Question*. AP asserted that the "Second Circuit has never found a transformative use when the original work was not incorporated as raw material into a new work with a further *expressive* purpose or new *expressive* meaning. Nor has it found that merely making a work more accessible constitutes a transformative use sufficient to justify extensive verbatim use of it."[240] By reference to the Second Circuit, AP drew attention to the fact that *Kelly*—a Ninth

---

237. *Id.* at 15–20.

238. *Id.* at 15–16 (internal quotations and some internal citations omitted). Plaintiff's motion actually asserted that Meltwater already *had* made this argument in a declaration. *Id.* at 15.

239. *See generally supra* Part III(A), for the argumentation scheme and critical questions.

240. Pl.'s Mot., *supra* note 225, at 16.

Circuit case—was not binding on the New York district court, and that no Second Circuit case had adopted *Kelly*'s holding. It answered CQ 7 in the negative.

AP then answered both *CQ 8 Precedent Quality Question* and *CQ 6 Inconsistent Precedent Question* by offering another argument by legal analogy to the Second Circuit case *Infinity Broadcasting Corp. v. Kirkwood*.[241] We can reconstruct this argument using the argumentation scheme as well:

ARGUMENT BY LEGAL ANALOGY: *INFINITY* & *ASSOCIATED PRESS*

Major Premise:	*Infinity* and the instant case are relevantly similar in that both interpreted fair use, and in both, the secondary user provided "snippets" of the rights holder's works, took rights holder's unaltered works and marketed them to its customers, and claimed its use was of benefit to society.
Minor Premise:	The secondary use in *Infinity* was not transformative.
Conclusion:	The secondary use in the instant case is not transformative.

Without explicitly saying *Kelly* was wrongly decided, AP presented an analogy that strongly suggested it was, answering CQ 8 in the affirmative. It also answered CQ 6 in the affirmative by locating a presumptively valid legal analogy for the instant case that came out against a finding of transformativeness.

Finally, AP embarked on a lengthy attack based on *CQ 2 Similarity Question*, arguing that Meltwater's service is not a search engine in the sense that the service in *Kelly* was.[242] At the same time, it offered an affirmative response to *CQ 5 Relevant Dissimilarity Question*, arguing that Meltwater's service replaced AP's products, unlike the search engine in *Kelly*, and that Meltwater's service was more commercial in that it charged for the search-engine function, while the defendant in *Kelly* did not.[243]

So far, of course, we have considered only AP's arguments, and its effort to anticipate Meltwater's *Kelly* argument was a straw man if in fact Meltwater did not make that argument.

In fact, Meltwater did use *Kelly*, but only as one among a larger number

---

241. 150 F.3d 104 (2d Cir. 1998). *See* Pl.'s Mot., *supra* note 225, at 16–17.

242. Pl.'s Mot., *supra* note 225, at 18–19.

243. *Id.* at 18–20.

of cases, including cases from the Second and other circuits. One sentence and the string cite that follows it together make an interesting example:

> While some transformative uses may change the original work, that is not necessary, as a "transformative use can also be one that serves an entirely different purpose." *The Authors Guild, Inc. v. HathiTrust*, No. 11-cv-6351(HB), 2012 WL 4808939, at *11 (S.D.N.Y. Oct. 10, 2012) (full copies of books made by digital archive were transformative "because the copies serve an entirely different purpose than the original works"); *accord Bill Graham*, 448 F.3d at 609 [(2d Cir. 2006)] (use is transformative where the defendant's purpose in using images "is plainly different from the original purpose for which they were created"); *Lennon v. Premise Media Corp.*, 556 F. Supp. 2d 310, 324 (S.D.N.Y. 2008) (defendants' use "transformative because they put the song to a different purpose"); *A. V. ex rel Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 639 (4th Cir. 2009) (a use "can be transformative in function or purpose without altering or actually adding to the original work").[244]

Note that the string cite, taken together with facts about the present case provided in nearby paragraphs, provided at least two fully formed, though enthymematic, legal analogies. For both *Author's Guild* and *Lennon*, Meltwater's description of the cited cases' facts and outcomes in the explanatory parentheticals implied that the instant case should come out the same way because of these similarities. We cannot quite be certain about *Bill Graham*, though, because of the use of the present tense in the parenthetical—"use *is* transformative." We can read this in at least two ways: on the one hand, the *Bill Graham* court may have found the defendant's use there *was* "plainly different" and therefore transformative. On the other hand, perhaps the court there adopted a rule to the effect that *if* a defendant's purpose *is* plainly different, it *is* transformative; but in that case, we do not know whether the court found the defendant's use *was* plainly different.[245] A similar question arises with regard to *Vanderhye*'s "a use *can be* transformative"—*was* it in that case? Meltwater did not tell us.[246]

Meltwater did not mention the *Infinity* case in its motion memo, a fact

---

244. Defs.' Mot., *supra* note 225, at 9.

245. Of course, the reader can probably look up the cited case, but the argument's author should not foist the work onto the reader.

246. Meltwater would have done better to follow the advice of the *Bluebook* and begun its parenthetical with a gerund, e.g., "finding a use transformative because the defendant's purpose in using images was 'plainly different from the original purpose for which they were created.'" *See* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, rule 1.5 (20th ed. 2015).

that AP addresses in it its opposition to Meltwater's motion: "Meltwater's failure to grapple with—or even acknowledge—the Second Circuit's decision in *Infinity* is particularly egregious."[247] In the text that follows, we can perhaps read AP as claiming an argumentative victory in its application of the *Infinity* case as precedent, because Meltwater's failure to challenge AP's presumptively acceptable application of the argumentation scheme to *Infinity* means that the court should accept that argument. Of course, Meltwater would have been disinclined to mention a case that goes against it its own motion memo.

AP's opposition also went on to critique Meltwater's use of *Kelly*, offering yet another answer to *CQ 5 Relevant Dissimilarity Question*, this time a more detailed statement of the difference between Meltwater's use of AP's stories and ArribaSoft's use of Kelly's photos: "use of thumbnail images of Kelly's photographs was transformative only because the thumbnails were of such low resolution that they could not be used to fulfill an aesthetic purpose."[248] It contrasts the instant case, where it claimed Meltwater's products superseded AP's own.

Meltwater propped up its use of *Kelly* and attacked AP's use of *Infinity* in its opposition to AP's motion. With regard to *Kelly*, Meltwater took the tack of reframing AP's argument as a deductive one. Meltwater wrote:

> AP claims . . . only a use that adds new expression to the original work can be transformative . . . . To the contrary, the case law consistently recognizes that "making an exact copy of a work may be transformative so long as the copy serves a different function than the original work." *Perfect 10*, 508 F.3d at 1165. This understanding repeatedly has been applied in cases involving search engines. The Ninth Circuit in *Kelly* thus rejected the argument that "because Arriba reproduced [plaintiff's] exact images and added nothing to them, Arriba's use cannot be transformative" and found that Arriba's thumbnails, although "exact replica[s]," were transformative because they "served an entirely different function than Kelly's original images." *Kelly*, 336 F.3d at 818-19.[249]

Meltwater recast AP's argument as a deductive argument in what I shall call "*modus tollens*" form, which it then refuted by use of a critical question.[250] The deductive argument takes this form:

---

247. Pl.'s Opp'n, *supra* note 225, at 9.

248. *Id.* at 9.

249. Defs.' Opp'n, *supra* note 225, at 3–4 (some citations omitted; emendations in original).

250. *Modus tollens* is a variant of the deductive syllogism under which the consequent of the major premise is false, compelling the conclusion that the antecedent must also be. Contrast this with the faulty deductive form in the example of denying the antecedent above. *See supra* text accompanying notes 69–

ARGUMENT BY LEGAL DEDUCTION ("MODUS TOLLENS"): *KELLY* & *ASSOCIATED PRESS*	
Major Premise:	According to copyright case law (*Kelly*), if a secondary use is transformative, it must add new expression to the original work.
Minor Premise:	Meltwater did not add new expression to AP's stories.
Conclusion:	Meltwater's use of AP's stories are not transformative.

As we saw above, the *modus ponens* deductive argumentation scheme includes *CQ 4 Rule Question*, which asks whether the cited case actually states the rule that the argument proponent has offered as its major premise.[251] Meltwater shows that the answer must be negative, as the *Kelley* court continued to conclude the secondary use there was transformative *despite* the fact that it included "exact replicas" of the rights holder's works. It remains unclear, however, whether AP made its argument in such a categorical form; in other words, it appears likely that Meltwater constructed and tore down its own straw man here.

Meltwater also used a critical question from the legal analogy argumentation scheme (about relevant differences) to distinguish *Infinity*, asserting simply that the earlier case "did not involve an Internet search engine, or a service analogous to one."[252]

Both parties continued their efforts in their reply briefs,[253] but perhaps this is sufficient analysis to offer two observations. First, the arguments of these two parties show the structures of the legal analogy (dis)argumentation schemes and their critical questions. The parties are generally explicit in asserting the premises necessary to fill the argumentation scheme, with the exception that the relevance of the (dis)similarities must be inferred, and at least one conclusion is omitted enthymematically but clearly implied. The argumentation schemes (or something like them) would have been a useful way to come up with the arguments that the attorneys actually used.

The second observation here is of a bit more concern. Each party constructed in its own brief at least one straw-man argument, where it used an argumentation scheme to impute an argument to the other side—

---

72. As with my use of *"modus ponens"* there, I take some technical liberty by applying *"modus tollens"* as the name of a sentential logical form.

251.   *See supra* text accompanying notes 190–192.

252.   Defs.' Opp'n, *supra* note 225, at 7.

253.   *See generally* Pl.'s Reply, *supra* note 225; Defs.' Reply, *supra* note 225.

an argument the author of the brief knew to be unacceptable—in order to demolish it using critical questions. In each case, the argument the brief's author imputed to its opponent was a highly reduced form of the argument the opponent made or was likely to make. This kind of argumentative practice forces the other side to reframe or rebut arguments that it has not actually made; and it forces the reader—the judge and her clerks—to engage in comparative reading of the briefs to test whether the authors of briefs say what their opponents say they said. This raises questions of fairness and efficiency in legal arguments.

If empirical study shows these straw-man practices are commonplace, they may be acceptable, at least on some level, to legal practitioners. Given the inefficiencies they engender, however, judges and law teachers may seek to reframe conventional attitudes by pointing out these practices and criticizing them.

CONCLUSION

This article argues that current theories of legal analogy are too deeply grounded in deduction as the *sine qua non* of all types of good legal arguments. As a result, they leave too much reasonable and rational legal argumentation unexplained and undisciplined. Informal logic and argumentation schemes offer a means of providing and assessing the rational discipline that legal analogy should exhibit.

This article provides a solid foundation for future research into argumentation schemes generally and the legal (dis)analogy argumentation schemes specifically by demonstrating the reasonableness of arguing by legal analogy. Broader study is required to develop argumentation schemes for other types of informal legal argument. This article has provided two—for legal analogy and legal (dis)analogy—and has tentatively offered one for legal deduction. Professor Walton and his colleagues have described a great many more argumentation schemes,[254] and many of them may be adapted to legal argumentation. Others do not exist in the argumentation-scheme literature but may nonetheless be useful for legal practice. For example, some lawyers *do* make use of covering rules when arguing with legal analogies.[255] An argumentation scheme that warrants the adoption of such a rule as part of a legal deduction would prove valuable.

But before work to broaden use of argumentation schemes and informal logic in the law is undertaken, deeper theoretical study is required to ground the argumentation schemes given in this article and

---

254. *See generally* Walton et al., *supra* note 11.

255. *See supra* note 83.

argumentation schemes generally in theories of legal argumentation and reasoning broadly accepted in the courtroom and legal academy.

Deeper study in another direction is required to ascertain what the conventions of the legal community actually are relating to the argumentation schemes presented in this article.[256] As Schauer and Spellman note: "it remains to be seen just how often genuinely analogical reasoning takes place in legal argument and judicial decisions. That inquiry is of necessity empirical."[257] Such studies should provide evidence about whether the argumentation schemes are valid and provide reliable descriptions of legal professionals' argumentation. They will serve a quasi-normative function, because an empirical description of what practitioners find acceptable functions as description of their norms. This does not mean, however, that judges, scholars, and teachers of law cannot advocate for norms that do a better job living up to standards of ethics and efficiency. For example, if straw-man arguments of the kind discussed in Part III(D) are typical, judges and scholars may call out practitioners who engage in them to curb the practice.

One important question is whether judges and lawyers tend, as Weinreb claims, not to use covering rules when arguing with the use of cases.[258] Central to his claims and those of this article is the assertion that logical deduction is not necessary to draw a legal analogy from a cited case to an instant case. The skeptics discussed above assert that legal analogy, to have rational force, must include a deductively applied rule that brings the cited case and instant case under a single "covering rule."[259] So far, no empirical study has confirmed Weinreb's assertion and this article's intuition that judges and lawyers frequently use legal analogy without covering rules.[260]

This study of the argumentation schemes in law should be dialogical: empirical work will support inductive generalizations about what lawyers and judges do, and those generalizations may warrant changes to the argumentation schemes presented here. At the same time, principles of reasonableness and rationality—which lie at the heart of argumentation-schematic thinking—are inconsistent with practices such as straw-man arguments, for which there may be widespread empirical evidence. That

---

256. *See supra* Part III(C) for a discussion of empirical questions related to the argumentation schemes and particularly in the context of relevant (dis)similarities. I am currently performing an empirical study that examines some 200 lawyers' briefs and court opinions in a random selection of federal copyright cases from the last several years. My team is coding and analyzing the argumentative uses of cited cases in those artifacts in an effort to characterize the relative frequency and characteristics of arguments by legal analogy.

257. Schauer & Spellman, *supra* note 3, at 268.

258. *See supra* note 82.

259. *See supra* Part I(C)(1).

260. *See supra* note 82.

may be grounds for arguing for changes in how lawyers argue.

I acknowledge that nothing said in this article, and nothing that comes from the proposed empirical work, will be demonstrated deductively. But I hope I have persuaded the reader that nothing interesting about the law ever is.