

# Legal principles and analogical reasoning

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## Extended abstract<sup>1</sup>

Reasoning by analogy is integral to legal reasoning in common law based legal systems. It is argued that any theory of legal analogizing that seeks to explain the way in which precedents are utilized must account for the influence of legal principles on the creation of legal analogies and for the use of analogies as a means to test and refine these principles. Consequently, any attempt to simulate legal analogizing must simulate the influence of legal principles on legal analogizing and the role of analogizing in determining the breadth of these principles.

Jurists provide many accounts of legal analogizing. Such accounts emphasize that the determination of similarity or difference is the key step in legal analogizing. However, saying 'similar cases' should be decided alike is empty to the extent that it does not provide guidelines for determining which similarities and differences are important.

Jurists argue that it is considerations of principle that ultimately establish what generalization a precedent or precedents establish. Legal principles influence which facts are required to establish an analogy. Stated alternatively, with a particular set of facts, what precedents are regarded as analogous is influenced by the principles to which the reasoner adheres. The focus when constructing legal analogies, from the generalization said to govern the analogy, to the characteristics used to demonstrate that the generalization applies, to the particular facts of cases which demonstrate the presence of those characteristics, are all dependent on the principles to which the reasoner adheres. If different principles are adhered to then a different generalization may be regarded as relevant, different characteristics may be regarded as relevant to establishing that generalization and different facts might be sought to demonstrate the presence of those characteristics.

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However, principles do not exist pre-packaged to be applied in the determination of problems. Legal analogizing plays an important role in determining the scope of principles themselves. Principles are empty without testing by reference to concrete examples. The application of principles is itself a refinement of those principles. It is argued that the principles which underlie analogies, and which can be referred to as supporting the analogy in its reconstruction, are the result of the interaction of and compromise between other principles. Thus, while principles influence the creation of analogies, they do so by weighing for one result or another and are themselves refined in the process.

Any comprehensive attempt to simulate legal analogizing must simulate the role of legal principles in legal analogizing. Numerous systems have been constructed that simulate aspects of legal analogizing. These approaches simulate some of the influence of principles on the justification of analogies. However, these approaches do not simulate the way in which legal principles influence the creation of legal analogies. Nor do these approaches simulate the interaction and compromise between legal principles that occurs during legal analogizing.

Any complete model of legal reasoning and legal analogizing must simulate the manner in which principles influence the creation of analogies and the way in which principles are themselves tested and refined on a case by case basis. The influence of principles on the construction of analogies, not only the influence of principles on the justification of analogies needs to be incorporated into simulations of legal analogizing.