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A. Introduction

Some time ago, our honored friend Detlef Leenen [cit.] introduced me to the idea of legal methodology, as that field has developed in Germany. I was at first perplexed, because the subject has no real counterpart in common-law countries, but what a revelation! Americans do of course occasionally notice methodological problems. But few of us envision a single field of study that unites theoretical and practical aspects of law. Methodology in this grand sense strives to make the speculative and the everyday so conversant with each other that they form a seamless web. And the overview that German legal methodology provides is applicable, with some adjustments, to any legal system. Prompted by our friend’s comments on his own work and on this “brooding omnipresence” of method, I began to ask myself, how does United States law get along without it?

General legal methodology may just be in hiding from me and my compatriots, camouflaged by our traditional approach to teaching law. A small but important literature has been devoted to American statutory interpretation based in part on precedent, and in a sense, much of the vast literature on the United States Constitution is methodological, because interpreting such super-legislation presents special problems. But much of the everyday work

1 “The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified.” So. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Oliver Wendell Holmes, Jr., dissenting). Holmes was not only skeptical of unidentified sources of law but also of the rational articulation of legal methodology. This article, with due respect for the great man, must take the opposite view.


of the American legal system goes largely unanalyzed. For example, we think of certain aspects of statutory interpretation as flowing from the Due Process Clause rather than as methodologically grounded. My colleagues and I also pay serious attention to aspects of Anglophone philosophy of law, but we rarely think theories like legal positivism or legal realism impinge on the practical work of legal interpretation. In contrast, German methodological scholarship has made the subject systematic and achieved great success in exhibiting relationships among all levels of interpretative theory, relationships that American and perhaps other common-law legal scholars rarely consider.

My goal in this paper is to search for the methodology of American law, drawing on my honored friend’s writings and conversation for inspiration. I conclude that the obsession of common-law scholars and jurists with analogy, the apparent bedrock of stare decisis, has obscured our vision of the actually quite varied patterns of legal reasoning, even as we ourselves practice it. The problem is that analogy is too capacious a concept to be used effectively in defining a single sort of inference or analysis. This is a problem German methodological thought has confronted and dealt with, but in the United States it is left unexamined. The following discussion attempts to correct that.

B. What does Methodology Include?

I. All the bits and pieces

Keeping a legal system alive and well is of course primarily a mental task. Given the common gamut of human affairs with which law must deal, the maintenance of law seems likely to exhibit the same concerns in different jurisdictions. To harmonize rules that sometimes function independently, for example, is a legal task that every legal system must undertake. There are, however, legitimate differences as well. Systems based chiefly on highly explicit codes emphasize the patterns of interpretation associated with reading statutes. Common-law systems have idiosyncratic precedential rules, which are elusive because precedent by its nature is constantly being reformulated, and all the reformulations by courts have a sort of communal authority. But

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4 For example, because an overly broad reading of a statute would be arbitrary, it would violate the Due Process Clause, which is understood to condemn as arbitrary any sweeping restriction of freedom that serves no purpose. Overbreadth, however, would also be a defect on non-constitutional grounds in any interpretation of a statute.

these superficial observations about how reasoning varies from one legal system to another only expose the tip of the iceberg. A full inventory of legal reasoning would tell a more uniform tale of how legal systems bring particular cases under statutory or precedential rules, harmonize nonfactual rules and more elusive principles, ensure the potential or actual fairness of rule applications, and so forth. The task of creating such an inventory is normally a vital part of any work on legal method. Before asking how an American jurist would carry out this task, it is useful to describe briefly the monumental work Germany has done in making methodology a thriving project.

II. The Contents of German Methodology

German legal methodologists approach their subject with two broad goals: surveying the subject in its full breadth and seeking to locate its parts within a single landscape. The core of this project is to give an inventory of the types of intellectual task involved in navigating and applying the law. In a modern civil law jurisdiction like Germany, statutory interpretation plays a predominant part. Thus, the manifold task of interpreting the German Civil Code inspires scholars to recognize and discuss the following aspects of the interpretative task: (1) the harmonization of the smallest, more or less arbitrarily distinguishable elements of a legal system (Rechtsätze) into larger, coherent subject-matter-specific schemes of legal regulation (Regelung); (2) the application of rules and broad schemes of regulation to factual situations, which entails the selection of the relevant facts from a more inclusive factual context in reliance on judgments of value and experience that are just as much part of the structure of the legal system as its primary norms of conduct and competence; (3) the articulation and practical use of canons of statutory construction; (4) the exercise of judicial discretion in maintaining and extending the application of previously settled law to new fact situations and in filling what are patently holes in the existing fabric of settled law; (5) the development of concepts that are used only or in an idiosyncratic way in each of the foregoing compartments of the legal process, recognizing that

once-empirical descriptive concepts are changed as they become embedded in a network of legal uses; and (6) the role of “types” in the law, especially in the more pronounced areas of legal concept formation. Lawyers from other legal traditions would be able to find each of these headings intelligible and to recognize them as describing aspects of legal reasoning their native legal systems also exhibit. Methodology in Germany, however, integrates the examination of the parts, recognizable to practicing lawyers and legal scholars alike, with a concern for the overall functioning of legal systems, and does so in articulate response to broad jurisprudential theories like those of Savigny, Puebla, Windscheid, Jhering and Lubmann. Integration of the more general with the more specific is not mere window-dressing but belongs to the core of the enterprise.

Exploring the subheadings just described, German scholars keep the subject from disintegrating into a pointlessly refined taxonomy of the legal process. On the contrary, they strive on various levels to preserve its relevance as a unified subject. For example, in extending or completing an area of law, talk of “filling holes” is only metaphorical, and there is a serious question whether principled creativity on the part of the judge is distinguishable from the exercise of unauthorized discretion. Where Dworkin describes the judge as developing the law by articulating the principles implicit in settled law, Canaris and Larenz distinguish reliance on the nature of the legal subject matter (die Natur der Sache) from reliance on a legal/ethical principle (das rechtsethische Prinzip), and both of these from responsiveness to how law currently shapes dealings among private parties (den Rechtsverkehr). Under each of these headings, they note distinctive pressures and limits, which practitioners in other legal climates would also recognize on reflection.

C. Muddling-Through as an Alternative to Systematic Analysis of Legal Reasoning

In comparison, the legal literature of the United States and other common law countries seems not at all conscious of the problem, much less its solution, or the advantages forgone by their fragmented default position. Although specific puzzles about legal reasoning have figured in important shifts in American legal thought, the task of surveying how law works in all its branches has never gotten off the ground. We seem instead to regard such

10 Ronald Dworkin has in fact surveyed much of the sweep of interpretation in United States legal system, Ronald Dworkin, Hard Cases, in Taking Rights Seriously 81–130 (2d ed. 1978); Ronald Dworkin, Law’s Empire, supra note 9, 225–275, 313–354. His characterization of the law is always acute but it is devoted to various arguments concerning the nature of law rather than to the goal of articulating a neutral legal methodology.
comprehensive effort as high-flown, the prerogative of retired judges and wandering philosophers. Until recently, even the intricacy of statutory interpretation had not, for quite some time, drawn the explicit attention of American lawyers. This asymmetry is my starting point: the development of methodology into a highly sophisticated field in Germany, and the natural, un-self-conscious avoidance of methodological thought in the United States.

The "case method," the dominant method of teaching law in the United States, is more than a century old. Harvard Law School invented it, while becoming the model of an academically ambitious professional school for lawyers, influenced to a great extent by German universities’ recognition of the "science" of law.11 The case method, however, suggested skepticism about the need for broad vision and generality, and smacked of dissent from assertions about the very existence of that science.

As is well known, the hegemony of high-minded mandarins like Christopher Columbus Langdell prompted the next generation of Harvard professors to debunk and castigate "formalism," that almost indefinable fallacy of which the previous generation had been especially guilty. Formalists were linked in some way with the influence of Savigny and beyond him of Immanuel Kant.12 But the scuffle was more local in flavor: those who believed in the "internal juristic necessity" of certain basic legal concepts and rules13 were the target, and these miscreants were American.

The flight from formalism led many to American Legal Realism, which contained within it a host of new attitudes towards legal reasoning and the interpretation of laws. At the moderate end of the spectrum were those who merely insisted on the close reading of statutes in the light of legislative policy and of judicial precedents in the light of custom. This could be called "pragmatism" and satisfy the maxim that "the life of the law has not been logic but experience."14 But reading the sources of the law with a view to their purposes quickly became equivalent to giving the force of law to its perceived purposes without regard to legal sources, and "rule skepticism" followed – the belief that "talk of rules is a myth, cloaking the truth that law consists simply of the decisions of courts and the prediction of them."15

25 H. L. A. Hart, The Concept of Law 133 (1961). Before the current conception of legal methodology took hold in Germany, a debate like that between formalists and realists
Reaction inevitably set in. Between 1939 and 1949, a return to textualism and grounded interpretation emerged in American law schools, taking its name from The Legal Process by Henry M. Hart, Jr., and Albert M. Sacks.16 “Legal process” became a buzzword among a generation of law professors who were intent on rejuvenating the case method.17 This approach to teaching, however, also pointed away from system building. Since the case method still reigned in law schools, a close inquiry into the origin and implications of a particular case—this being the hallmark of “legal process” analysis of cases—routinely focused as closely on the peculiar posture of the case, the specificity of its facts, the relationship between the parties, and its procedural history, as on the issues of law. Purely legal analysis therefore had only a co-equal role at best in the classroom experience.

In the last half of the twentieth century, rule skepticism, and skepticism about the integrity of law, characterized the Critical Legal Studies movement and various strains of allied “critical” approaches. Disdain for formalism came back in full strength, though with less universal appeal. It is fair to observe now, as many “Crits” themselves say, that the critical heyday is over. It is no slight to these movements or their importance to accord them little place in this survey, because they were deliberately scornful of the details of the maintenance of legal systems, having decided on general principle that the law fundamentally misrepresents itself and deserves to be treated as pathological.

D. Argument from Analogy and Common-Law Methodology

I. Myopic Concern With the Handling of Precedent

Anti-systematic fashions in American legal thought mask undercurrents that could dash any attempt on our part to replace piecemeal with comprehensive discussion of interpretative issues. Two problems such an effort would bring to the surface are that of unpacking how analogical reasoning works in the common law but also that of describing how stare decisis and other common-law strategies play out in the interpretation of statutes. The scant literature on these topics has not kept them distinct.

Reasoning from precedent is of paramount importance to common lawyers, but it does not follow that “case crunching,” as we Americans call it, is a dominated legal theory in Germany for a few decades. See Vogenauer, An Empire of Light, supra note 5, at 492–500.


17 William N. Eskridge, Jr., Dynamic Statutory Interpretation, supra note 2, at 257–58.
single kind of task. Many think it is, and that it is all about analogy. Proponents of this expansive view, not surprisingly, give very different accounts of how analogical reasoning works. Does analogy fly from fact pattern to fact pattern, or from rule to rule? Does it reflect the global or the narrower goals of law, or both? Does it govern or is it governed by our efforts to harmonize discordant elements within the law? The following two sections attempt to answer these questions.

II. The Substrate of Analogy

To reason by analogy involves recognizing the importance of similarities among things. These "things" can be events, norms, policy goals, and virtually anything else. Similarity is a fundamental and ubiquitous relation. Similar things also of course exhibit differences that make them distinguishable. If they were not different in some respect, and their indiscernibility would make them identical, as Leibniz taught. If similarities point to worthwhile conclusions, the dissimilarities among the similar things in question must be less important than the similarities, at least for the purpose in view. For most purposes, a white dog is more like a black cat than it is like a white pencil. Thus, the epistemological value of similarity obviously lies in the fact that such similarities and dissimilarities as there are have varied degrees of relevance, or more accurately, importance. For some similarities to be instructive and useful, and for a few to be uncontestably basic, other similarities must be trivial, the indefinitely large majority of them, in fact. Which similarities are most important is also a matter of debate. Changes in the debate can herald vital changes in our world view. Although the hard sciences are empirical, they are also theoretical in the sense that they change the importance ranking of similarities among physical phenomena. A "paradigm shift" in science exalts some similarity, e.g., the

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18 A recent debate between Scott Brewer and Lloyd Weinreb underscores the attraction of this characterization of how one case leads to another, even though Brewer argues that analogical reasoning must be understood differently than others have described it. Scott Brewer, Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy, 109 Harv. L. Rev. 923 (1996). Contra Lloyd L. Weinreb, Legal Reason: The Use of Analogy in Legal Argument (Cambridge U.P. 2005).

19 The locus classicus for this view is Edward Lein, An Introduction to Legal Reasoning (1949), but Brewer and Weinreb provide a historical survey of popularity of this view. Brewer, supra note 18, at 929–32; Weinreb, supra note 18, at 4–17.


21 See Panayot Butchvarov, Resemblance and Identity (2nd ed. 1975); Mary B. Hesse, Models and Analogies in Science (1963).
speed of light, over others, e.g., the constancy of the shape of space and the invariance of time between frames of reference.\textsuperscript{21}

The similarity between two things can be simple and unanalyzable.\textsuperscript{22} Similarity can also depend on subordinate or less complex similarities. Two athletes may be similarly good at their sport, but we may break that similarity down by noting that both are fast runners and tactically intelligent. Although reducible similarities may give way to other more detailed similarities, the reduction must stop somewhere, and at that point we can only judge the more fine-grained similarities important or unimportant. Similarity can thus be discussable, vulnerable to criticism and assessment, or just there — take it or leave it. Analogies, being similarities that we choose to dwell on, have the same possible duality — they may be complex and analyzable, or they may successfully resist analysis. Another useful point: when a similarity outweighs dissimilarity, this is not a matter of counting points of similarity and dissimilarity but of assessing their relevance.

How does analogy add to what we know? Deductive inference leads from undisputed propositions to previously unproven, and sometimes unexpected, further propositions. Deduction is the standard-bearer of reliable inference, although it has been argued that inductive or some other kind of probabilistic inference also fits this description.\textsuperscript{23} Charles Sanders Peirce famously invented the term “ampliative” to describe reasoning that takes us from known facts to predictions or retrospective explanations of other facts, not included in broader generalizations already taken to be true, like the premises of deductive inference.\textsuperscript{24} He thought analogical reasoning deserved equal status with deduction and induction as a type of ampliative reasoning.\textsuperscript{25} Analogical reasoning does look ampliative, because it takes us beyond our factual, or in the case of law normative, starting point, but what makes it distinctive is that it first reaches out to discover or postulate novel premises about the relevance of similarities between similar objects. In fact, it is best to think of analogy as providing premises rather than rules of inference.

\textsuperscript{21} Thomas S. Kuhn, The Structure of Scientific Revolutions (1962).
\textsuperscript{22} G. E. M. Anscombe, On Brute Facts, 18 Analysis 69–72 (1958) (arguing that some descriptions and hence some underlying similarities are so basic or “brute” that no change of perspective can make them less fundamental).
\textsuperscript{23} See Rudolf Carnap, The Continuum of Inductive Methods (1952) and the large literature on Carnap’s project of formulating an inductive logic, e.g., I. Hacking, An Introduction to Probability and Inductive Logic (2001).
\textsuperscript{25} It may be tempting to think that argument from analogy is deductive, following the pattern: A, B, C, etc. are all alike in this respect; therefore, A, B, C, etc. are all alike in that respect. But this pattern identifies no inference whose form along guarantees its reliability. Sometimes items that are alike in one respect are not alike in others, as in the example of the white dog and the white pencil.
III. A Dispute Over Argument From Analogy

It is partly because analogy both does and does not look like a type of inference that it has given American methodologists much to disagree about. Recently, Scott Brewer\textsuperscript{17} and Lloyd Weinreb\textsuperscript{18} have taken sharply opposed views regarding it. Brewer stresses that relevance governs the value of any analogy, which is true, as we have seen. He insists in effect, however, that the salience of an analogy is never enough to support a conclusion.

All arguments involving analogy, in Brewer's account, exhibit the same pattern. He believes that when a legal interpreter is uncertain about the extension of a legal concept or in doubt about the classification of a phenomenon, she may "abduce" (reason backwards to) an "analogy-warranting rationale" (AWR) from items or phenomena that have previously been classified in the relevant respect. An AWR is a generalization that covers the new item or event as well as those previously classified, but it is only a tentative solution to the problem at hand. The legal interpreter must test the AWR by showing that one can deduce from it the occurrence of the problem phenomenon (as well as other phenomena whose established classification is part prompted the AWR).

The process Brewer describes is essentially the same as that expounded by traditional views about scientific discovery. The scientific researcher begins with data to be elucidated, makes an unfettered leap to a tentative hypothesis that may cover or "save" the phenomena, then tests the hypothesis by using it as the premise of a deductive inference, which with other already established theoretical premises and known factual premises yields the prediction or postdiction of the phenomenon in question.\textsuperscript{19} On Brewer's account checking the application of the AWR is likewise a necessary step. But more importantly, the similarity or analogy that prompted the legal interpreter to formulate the AWR in the first place "drops out" and need no longer figure in the interpretation that is carried forward. Because analogies have no continuing role in legal reasoning on the topics they help us to deal with, "argument from analogy" is at best a misnomer and at worst a seriously misleading description of this important aspect of legal methodology. It is worthwhile to note that Edward Levi, who affirmed the importance of argument from analogy in the common law, and Richard Posner have characterized analogy as defective by comparison with deductive reasoning.\textsuperscript{20} Brewer can justly claim that their objections should not apply to the combined procedure of abduction to an AWR and deduction from the AWR to a legal holding.

\textsuperscript{17} Scott Brewer, supra note 18.
\textsuperscript{18} Weinreb, supra note 18.
\textsuperscript{19} See, e.g., Norwood Rusk Hallon, Patterns of Discovery (Cambridge U.P. 1958).
His description of analogical argument does fit some judicial reasoning. In *Howard v. Kwanto*, for example, a Washington State court concluded that a couple who purchased land in good faith from a previous possessor could count their own and their grantor's time on the land towards the statutory limitations period that would give them a right to it by adverse possession. Before *Howard*, the common law rule was that for successive periods of possession to "tack" or be counted together, the successive possessors must be in "privity of estate." This amounted to the requirement that they have successive undisputed rights in some other parcel of land, perhaps land adjoining that in dispute. In *Howard*, the possessors had relied on a mistaken survey and had believed themselves to be on land to which they held record title, while in fact they had been on a neighboring but entirely separate parcel. There was no privity of estate. The court reasoned, however, that privity would have been relevant only to establish a "reasonable nexus" between the successive adverse possessors, to justify treating them as acting in concert. It therefore held that their successive periods of possession counted towards the running of the statute, so that the current possessor prevailed over the record title holder.

The case can be described as based on reasoning by analogy. The court saw a strong similarity between successive possessors in privity of estate and successive possessors like the defendants and the prior possessors who purported to sell them the land. The analogy prompted it to generalize (or "stretch", as an unsympathetic observer might say) the settled common-law rule. The court expressly commented on how well the new, broader tacking rule covered past precedent. *Brewer* would be pleased to note that the AWR concerning "reasonable nexus" does not mention or rely on the continued scrutiny of the analogy between the older cases and future cases. Instead, the analogy dropped out of the court's reasoning, as he thinks typical of legal argument from analogy.

*Weinreb*, however, rejects Brewer's claim that analogy cannot by itself support a legal conclusion. Argument from analogy, he argues, often stands on its own legs, without the necessity for separate testing of the relevance of the asserted analogy and the disappearance of the analogy from the holding. He illustrates this with *Adams v. New Jersey Steamboat Co.*, which held that a steamboat operator had the strict liability of an innkeeper for losses suffered by passengers who rented steamboat staterooms rather than the limited liability of a railroad for losses suffered by occupants of berths in a train sleeping car, because the modern palatial steamboat resembled a hotel

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31 477 P.2d 210 (Wash. Ct. App. 1970). This is not one of Brewer's examples.
32 151 N.Y. 163 (1896).
more than it did a train. Courts do thus sometimes rely directly on similarities to support a holding and do not resort to the search for Brewer's AWR or test their results by deduction.

It is notable that the analogues in Howard were not norms or objects but relationships between parties to a conveyance. Another such case is United States v. Chadwick, which Brewer and Weinreb both analyze, though quite differently. There, the problem was to decide whether the use of a dog to detect something humans cannot detect was more like the use of a bugging device or wiretap than like looking through an open window with binoculars. Some Fourth Amendment cases elicit generalizations from the courts about the scope of a search-target's expectations of privacy. Thus, even the sniffer-dog case could be recast as requiring a solution in which analogy generates an AWR (something about the target's expectation of privacy for things hidden from view and not detectable by the human sense of smell). But when the more normal way of understanding the holding, both by the bar and the bench, is in terms of the analogy between sniffer dogs and bugging devices. They just seem more alike than sniffer dogs and binoculars.

Note, however, that Chadwick applies written law - the Fourth Amendment, which forbids "unreasonable search and seizure" in a criminal law context. There can also be "pure" argument from analogy in common law decisions that do not proceed from constitutional or statutory provisions. The law of bailment, for example, is still entirely non-statutory common law throughout most of the United States. Early cases held that unknown items of value contained in boxes or other containers were not included with the bailment of the latter, and the bailee was not liable for the concealed items' loss. In Peet v. Roth Hotel, the court held that even the bailment of an unusually valuable fur coat did not make the checkroom of a hotel liable for the undisclosed diamond necklace in its pocket, because the fur coat was essentially a container disguising the true risk of loss, so that the bailee could not assess it. The rule is not that the bailee is exempt from responsibility for all undisclosed contents. Containers normally contain things of some value, and these would be included in the bailment of the containers. The nature of the container was important. A jewelry box would give notice of jewels inside. But in Peet the court did not consider the fur coat to have the notice function of a jewelry box.

Yet the view that common law cases, at least hard ones, always involve identifying and evaluating similarities between old and new fact patterns is misleading as well. There are such hard cases, as we have seen. Both Brewer and Weinreb correctly identify other plausible examples of reasoning from

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33 Id. at 165.
35 253 N.W. 546 (Minn. 1934).
analogy that satisfy their opposing characterizations of that pattern of inference. Even these examples, however, suggest that further analysis may yield other, possibly better ways of classifying the use of similarity in common-law decisions. To this possibility, we now turn.

E. Overbreadth of Category of Analogical Reasoning

Brewer and Wemrib agree that analogy figures vitally in common-law judicial reasoning but they notice little else about the setting in which analogies have been persuasive to courts. The American obsession with analogy in legal reasoning combines dangerously with our lack of methodological ambition. We instinctively believe that so much depends on inherently analogical reasoning from precedent in our law that we ignore all else and oversimplify even that one preoccupying aspect. In effect, we presuppose that coming to grips with the “chain novel” process of the common law will solve most of our problems, and we therefore stretch the concept of analogy beyond its capacity to enlighten. Because other kinds of legal reasoning have no clear place in our landscape, our catch-as-catch-can approach has allowed analogy to become a euphoric conceptual bubble.

I rely on Detlef Leenen’s writings as inspiration for making the reach of common-law reasoning more self-conscious concerning the use of analogy. He offers, in his recent book, an overview of the methodological aspects of German contract law. Admittedly, statutory interpretation is alone at issue, his subject being the general part of the German civil code (Allgemeiner Teil des BGB). Nevertheless, within this sphere, he calls attention to applications of several distinct kinds of interpretation that are alternatives to analogy. Each has as its purpose the filling of gaps in the pre-existing statutory (as well as, in common-law jurisdictions, precedential) framework. Gap-filling, of course, is not a type of legal reasoning, merely a broad class of problems for legal reasoning to solve. Following earlier methodological writings, including his own, Leenen distinguishes three broad ways in which gaps can be filled: analogy, teleological reduction, and general judicial development of the law (allgemeine Rechtsfortbildung) from existing law. Within each of these, he notes some variety.

Leenen’s restrictive view of analogy as a gap-filling technique sheds light on our inquiry. The term “analogy” he reserves, as is customary in Germany, for the application of a statutory norm or norms from the area of expressly intended application to another problematic area for which the Code makes

35 Doerr, Law’s Empire, supra note 10, 228–32 (“chain of law”).
36 Leenen, BGB Allgemeiner Teil: Rechtsgeschäftstheorie § 23 (DeGruyter 2011).
37 Id. § 23 Rdn. 67–97.
no provision. The similarity of the two areas provides the analogy that underlies this genus of interpretative move. Examples: (1) § 388 Satz 2 BGB applies to declarations of a contract termination or rescission, by analogy with express application of § 388 to setoff declarations (Erklärungen der Aufrechnung). (2) The expert view is that the Law of Sales (Handelsgesetzbuch), which allows a merchant to limit sales personnel's authority, should be interpreted as subject to the express rule on the apparent authority of a different category of agents. (3) Analogy associates the translation error of an interpreter, who changes the content of a declaration of intent (e.g., an offer or acceptance) in communicating it to the intended, with a broker's miscommunication of a declaration of intent, with the result that the BGB's explicit rule imposing liability on the latter is also applied to the former. (4) Analogy grounds the requirement of notarized agreement for the termination of a land sale contract, relying on the principle implied in § 311 b Abs. 1 BGB, which requires the sale contract itself to be notarized. A parallel lies in the common-law application of the Statute of Frauds to the termination of land sale agreements, requiring a written memorandum with certain features.

The common thread here is the existence of a fully explicit and specific statutory rule the scope of whose application is not expressly left indefinite, as is true of some common-law "principles" in Dworkin's sense, but whose role in the complex network of the BGB and other codified laws the legislator did not foresee. Although civil-law jurisdictions do not acknowledge the possibility of legitimate judicial activism, the use of any rule system requires that the best sense be made of its component parts. Analogy in the restricted sense illustrated by our examples is an interpretative technique that is grounded in legislative intent precisely because it allows purpose, guided by similarity of subject matter, to prevail. This of course is true of the common-law use of analogy as well. Thus, we borrow aspects of the doctrine of adverse possession in constructing the doctrine of prescriptive easement because of their similar rationale; many constitutional rights against the federal government become rights against the States by "incorporation" (gap-filling) into the fourteenth amendment of the Constitution, and delivery like that required for the valid use of a deed in the conveyance of land becomes a requirement, with certain adjustments, for the completion of a gift.
Stephen Utz

F. Beyond Analogy

I. Two Views of Two Celebrated Cases

We have just seen the error of the view that common-law reliance on analogy is merely heuristic (Brewer) or basically illegitimate (Levi). But I will now argue that there more to be gained by exploring the use of analogy is a systematic manner. In the often discussed case of Riggs v. Palmer, the New York Court of Appeals reasoned that the analogy between the case before it, in which a murderer claimed an inheritance from the murder victim under the New York succession statute, and a previously decided case, Mutual Life Insurance Co. v. Armstrong, in which a murderer claimed an insurance recovery under a policy on the life of another murder victim, was strong enough to support the application in the new case of the equitable principle that "No man may benefit by his own wrong," which had defeated the plaintiff's claim in the earlier case. The cases were different in many respects. A statute dominated one, whereas an insurance contract had been central to the other. But both involved opportunist murderers, intent on benefiting from their murders under innocent views of the law. Analogy, at first glance, seems perfectly to capture what was at stake here. But does reasoning by analogy account for all of the court's reasoning in Riggs?

For Cardozo, who made Riggs famous in an often cited essay on legal reasoning, the case represented the force of attraction between fundamental acts, viewed pre-legally for the relevance of their similarities and differences. In that light, the case and the precedent relied on were both primarily about murderers and the need for the law to abstain from complicity in their bad acts. For Dworkin, on the other hand, Riggs illustrates the importance of principles, as opposed to all-or-nothing rules, that sweep over diverse domains within the law and support decisions that bend and reshape previously settled rules, even if those rules were not judge-made but legislated.

The difference of perspective illustrated by Cardozo's and Dworkin's accounts helps us understand why proponents of the importance of analogical reasoning in the common law stress its power, and detractors argue that it is illegitimate, especially when compared with deductive and other forms of reasoning for which straightforward rules of inference can be identified.


115 N.Y. 506, 22 N.E. 188 (1889). The case became a landmark illustration of various points in the jurisprudential literature after Justice Benjamin N. Cardozo discussed it in his The Nature of the Judicial Process 40 (1921).

117 U.S. 591 (1886).


The straightforward category of teleological reduction,\textsuperscript{49} which in Leenen’s words, “adds a fact-specific exception to a norm,” thereby filling a “hidden gap”\textsuperscript{50} seems appropriate here too. When the purpose of a rule is inconsistent with the application of the rule to a given set of facts, we can in a sense recognize that these facts fall into a gap that should not be filled by the application of the rule. For example, the German Civil Code prohibits the creation of a contract with oneself, yet the purpose of this prohibition is to prevent a person from artificially placing himself or herself under an obligation that conflicts with other contractual obligations and may interfere with the normal application of rules concerning ultra vires acts. The rule against contracting with oneself should not prevent an agent from binding himself as a fiduciary in an agreement between the agent and the principal.\textsuperscript{51} Thus, the literal application of BGB § 181 to the latter situation is curtailed. The restriction of the stated norms in both Riggs and Mutual Life was also based on their purposes, for which the norms were too broadly formulated.\textsuperscript{52}

This may seem to leave out something tantalizingly bold about Riggs. What of the analogy between the murderers in Riggs and Mutual Life who sought to frustrate the bona fide purposes of the testator and the insurance company? Despite the longevity of Riggs, it is not clear that a murder should be denied the benefit of his crime, if the benefit should flow from application of the bankruptcy, patent, or tax law, and yet such subversions of the purpose of these legal regimes is possible. Thus, the analogy between different sorts of murderers may have attracted the attention of common-law methodologists only because analogy has cast its net so widely. Here the analogy is promising but not at all clear in its implications.

Howard v. Kunto\textsuperscript{53} provides another telling example of legal reasoning that is superficially analogical but also grounded in the adjustment of a broad rule to new circumstances. Although it is not incorrect to detect analogical thinking in the court’s rejection of privity of estate as a prerequisite for tacking periods of adverse possession, it makes more sense to understand the court has moving beyond privity estate as a poor attempt to capture the ultimate purpose of restrictions on tacking. By not requiring privity of estate for tacking on the facts of Howard, the court recognized that the purpose of the privity requirement was inappropriate there.

The purpose of a rule is sometimes inconsistent with its application to a gap in the law. In Howard, analogical reasoning could account for the court’s

\textsuperscript{49} Delief Leenen, supra note 37 at § 23 Rdn. 91–92; Canaria/Larenz, supra note 7, at 210–15.
\textsuperscript{50} Id. § 23 Rdn. 91.
\textsuperscript{51} Leenen, supra note 37, § 23, Rdn. 92.
\textsuperscript{52} Rambold Zappelius, supra note 7, § 11, II b), at 94–95.
\textsuperscript{53} See supra note 51.
selection of privity of estate as a prerequisite for tacking periods of adverse possession, but it makes more sense to understand the court as looking beyond privity when the parties otherwise stood in a reasonable nexus for the purpose of tacking. Similarly, the holding of *Riggs v. Palmer* can be understood as a refusal to apply the statutory rules of succession so as to further the criminal scheme of a potential estate beneficiary. The purpose of the succession regime was to carry out testamentary distributions that had not been manipulated by the recipients. In *Riggs*, the analogy on which the privity requirement depended was trumped by the stronger analogy between earlier cases covered by the privity rule and the new case from which it was absent. In the second, it was the analogy between the murderous schemes of the defendants in *Riggs* and the earlier *Mutual Life*. But neither of these analogies has other clear consequences, precisely because both cases are so closely bound up with the purposes of the broader norms they apply, viz., those of adverse possession and statutory succession. The type of gap-filling reasoning involved in *Howard* and *Riggs* could be styled analogical, given the elastic American usage of that term, but this would obscure what is really at stake. It is better to regard both as examples of teleological reduction.

II. General Development of an Area of Law

A more discriminating classification of gap-filling techniques has begun to clarify the scope of analogical reasoning in the non-statutory context. We have considered analogy and purpose-based restriction of overly broad norms. It is useful now to consider a class of bold judicial decisions that do not seem to rely on analogy.

Despite the reputation of the common law for gradual change, more decisive change is also reasonably characteristic. To take examples again from the law of property, English courts spontaneously permitted substantial weakening of the requirements for the running of covenants with the land at several stages in the development of private land use restrictions during the nineteenth century, and United States federal courts went along with these changes, sometimes liberalizing them even further, at about the same time.54 A little more than forty years ago, the District of Columbia Circuit Court of Appeals drastically changed residential landlord-tenant law by declaring residential leases more akin to contracts than conveyances and strategically changing the older common law’s strictures on which lease covenants were mutually dependent on others.55 This led to statutory change in twenty-two

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states and judicial adoption of similar rules in most other states. These case
developments illustrate another recognized form of gap-filling that does
not fall within even the most generous view of analogical reasoning. "General
judicial development of the law"56 describes these more radical changes
accurately.

Statutory interpretation and the harmonization of prior case law, as this
occurs in the common law, share a feature that may overlap with what is
called analogical reasoning. When it is necessary to understand "the interplay
of separable rule-like statements (Rechtssätze) that qualify each other and
through their mutually dependent meanings yield a regulatory scheme,"57
the order of the rule-like parts of the rule-like whole indicates which charac-
teristics of a fact situation are dispositive under that whole, and this is the
same thing as to indicate which similarities between this fact situation and
others governed by the same rule are relevant, in effect, how and when one
fact situation is analogous to another. It may be objected that to reduce two
notionally distinct kinds of reasoning — argument from analogy and argu-
ment from the coherence of a set of rules — is to ignore how differently they
appear when one or the other of these descriptions more closely fits a particu-
lar piece of legal analysis. But the point is that unrestricted talk of coherence
and of analogy is not particularly helpful in classifying examples of legal
reasoning, no matter how useful it may be in understanding what goes on in
any particular instance. As taxonomic categories they are less useful than
they are in providing an abstract portrait of their subject matter. Abstract
characterizations can of course overlie each other in Gestalt-shift puzzles,
and that is arguably what happens with these overlapping descriptions of
legal reasoning. There is, however, another way of describing both analogical
and coherentist reasoning about networks of legal rules.

The English courts that gave deed covenants the power to bind successors
to the original parties reasoned that the underlying purpose of the land
conveyances to which those covenants were a crucial element would be
frustrated if they were not held against successors. They did not expressly
state that the covenants resembled the more traditional conveyance of
easements. Their reasoning, however, could scarcely have been understood as
having no reference to the existing law of easements. To allow covenants to
run with the land as easements did was just to expand the category of non-
possessory property rights. The bold invention of real covenants (clearly a
case of allgemeine Rechtsfortbildung) can thus be regarded as dependent on
analogy.

56 Lefevre, § 23 Rdn. 96–97 (Die allgemeine Rechtsfortbildung).
57 Canaris/Lorenz, supra note 7, at 264 (II.2.3 "Der Rechtssatz als Teil einer Regelnung").
The same is true of the American courts' twentieth-century transformation of the rights of residential tenants. In fact, *Javins* expressly says that residential leases are more like contracts than like conveyances and should therefore be subject to something more like the rules regulating the remedy of contract breaches than the forfeiture remedies of defective conveyances. Yet analogy seems only a decorative effect of a much deeper, purposive adjustment of the legal structure. *Javins* clearly heralded a change to which many previous unsatisfactory adjustments of residential tenants' rights had pointed.

In brief, growth points of the common law are not so dissimilar from those recognized in German methodological commentary. Both *Tulak* and *Javins* should be regarded, not as relying on argument from analogy, but as broad adjustments of the legal network. The rough-and-tumble of the common law, especially when directed to the emendation of statutory law, may provide still further distinctive categories of legal reasoning. For now, however, it suffices to reflect on the utility of seeing those identified in this paper thus far as more easily recognized in a scheme that is less dominated by an overly broad conception of analogical reasoning.

G. Typifying Thought in the Construction of Entire Legal Areas

It is useful to focus on another somewhat narrower category of legal thought to which our friend has devoted his attention. The term "type" plays an important role in the conception of certain forms of empirical research, largely through the influence of Max Weber's contributions to our understanding of the methodology in the social sciences and in law. In *Leenens* *Der Typusbegriff und Rechtsfindung*, he explored the use of this unusual conceptual element of certain parts of the law: the field of special contracts. In a cautious assessment of how the concept of a type in earlier works both legal and scientific, *Leenens* dissects discordant usages and develops a clear and adaptable version of typifying analysis for law. Types play a more significant role, he points out, in property law than in general contract law, because the latter is inherently devoted to flexibility and content neutrality in contracting, whereas the former is shaped by a *numerus clausus* principle that limits the property rights private parties can create.

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58 *Detlef Leenens, Der Typusbegriff und Rechtsfindung* (Berlin: Dunkler & Humblot 1971).
60 *Leenens*, supra note 37, § 1 Rdn. 43 ("Im Interesse der Rechtssicherheit [vom Sachenrecht] gilt ein Typenzwang.")
In general, Leenen sees the actual function of types in law as more flexible and adaptive than others have. For some purposes, as in Max Weber's philosophy of the social sciences, the distinction between average and ideal types is relatively firm. An average type embodies "empirical/statistical" information about a kind of person, event, etc., while an ideal type raises a standard by which information about a variety of instances of that kind can be recognized, classified, or judged, depending on the nature of the intellectual enterprise. An empirical science should be exclusively descriptive, whereas legal and many other conceptual frameworks have, though not simultaneously, both descriptive and normative functions. In the latter ideal types are often of great constructive value, yet can be confusing because as standards they provide tests both for classification and for evaluation. Thus, the "reasonable person" posited by tort law both distinguishes children from adults and justifies attributing of different standards of care to children and adults in conduct affecting third parties. Leenen has described this duality, as it surfaces in legal reasoning, as giving ideal types the task of "similarity testing" (Ähnlichkeitsprüfung).

Other key concepts in law also have both a descriptive and a normative function. An example is the concept of possession, to which Roman law and virtually all other legal systems, ancient and modern, assign a central role in regulating property rights. A basic application of the term has a dispositive role in regulating disputes over rights to animals ferae naturae and to other unowned or abandoned movable property. The ancient maxim qui prior est tempore potior est jure gave the first to possess or occupy such a thing superior rights to a later possessor or occupant. Applying that principle, Armory v. Delmarre held that a chimney sweep's boy had a superior right to a jeweled brooch he had found than did the goldsmith to whom he entrusted the brooch for valuation. Pierson v. Post held that a huntsman who had pursued a fox on a public beach had an inferior right to another who shot the fox during the chase and promptly took it away. In these and many other instances, priority of possession or occupancy was the sole issue. But it is a "thick concept," to borrow a term from recent Anglophone ethical theory.

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61 Leenen, supra note 59, 18, at 193.
62 Petersen, supra note 60, at 143-45.
63 Leenen, supra note 59, at 183; see also Petersen, supra note 60, at 144.
64 Strange 505 (K.B. 1722).
66 The late Bernard Williams apparently coined this expression for moral descriptions like "just," "courageous," "decent," etc., which both convey factual information about the person of whom they are said and evaluate the person's conduct or character from a moral perspective. Bernard Williams, Morality (Cambridge: C.U.P. 1972), see also Philippa Foot, Moral Beliefs, in her Virtues and Vices (Berkeley: California Univ Press 1978), at 110-31.
That means, in this context, that it conveys both factual information about a person's relationship with some movable property and an evaluation of that relationship. A multitude of cases illustrate this, by showing us how courts first marshal other descriptions of how someone came to have custody of a thing before concluding that the person possessed it.67

The point of saying certain concepts are “thick” is that their descriptive content cannot be disentangled entirely from their evaluative content. Thus, for example, if a person says another person is courageous, the descriptive use of “courageous” suggests a certain kind of evidence for the correctness of her statement. If it turns out that the person said to be courageous displayed no relevant character trait, e.g., was not willing to take chances in the interest of others or for the glory of some accomplishment, the statement that this person is courageous would just be wrong on the facts. But this factual component of the statement cannot be stripped of its overtones of commending the courage of the other person.68

Possession has the same dual function in the common law of property.69 It both conveys information about what has happened and applies a principle, based on that information, with legal consequences. A court may hesitate to say that someone who chased and maimed or killed a whale but did not manage to hold it fast with ropes has inferior rights to another who profited from the effort of the first and found the whale’s dead body in the ocean a day later. But the court's deliberation will be couched in language about which of the two whalers first took “possession” of the whale, and the first whaler's lack of custody is not always dispositive. The descriptive component of the concept of possession has thus been altered by the network of possessory rights. In Moby Dick, Melville takes pains to justify this alteration as just a matter of common sense to the whaling industry.70 But what the law does with the lay person's description of the facts is to invest them with normative implications. Similarly, one of the most striking respects in which the descriptive content of the legal notion of possession is changed by the

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67 Chen v. Rich, 8 F. 159 (D. Mass. 1881) (whaler's “possession” of a whale never actually reduced to the whaler's control); Hannah v. Peel, [1845] 1 B.R. 509 (1845) (fifer had first possession of found brooch despite landowner's possibly constructive possession of the premises on which the brooch was found); Keeble v. Hickeringill, 11 East 574, 103 Eng. Rep. 1127 (Q.B. 1707) (court avoided deciding whether landowner had possession of ducks lured to his property).

68 This example and its analysis are given in Foot, supra note 67, at 124.

69 Carol Rose, Possession as the Origin of Property, 52 U. Chi. L. Rev. 73, 77–78 (1985).

70 Herman Melville, Moby Dick, ch. 89 (1st ed. London 1851) ("Fast Fish and Loose Fish").
legal norms in which it functions is the deemed continuation of a person’s possession of something, once the facts have justified his or her right of possession, despite that person’s subsequent lack of custody of the thing possessed. If you gather valuable fertilizer from the public roads and then go home to supper before carting it away, you remain in possession of the fertilizer for a reasonable time.\textsuperscript{71} Whether the collector of the fertilizer possessed it at all, however, may depend on whether the act of collecting it made it more valuable.

The fact of possession does not involve a relationship among several human agents, but only a relationship between one human agent and the property in dispute. Possession is nevertheless an ideal type in priority disputes. In other closely related disputes, however, it functions in an almost purely descriptive fashion. When a person entrusts her watch to a jeweler for repair, possession of the watch is transferred from one to the other. Yet the possessory rights of the watch’s owner are not diminished, and an action for trespass to chattels is as appropriate if the jeweler refused to return the watch, as it would have been if the jeweler had stolen the watch from the customer’s handbag.\textsuperscript{72}

Long possession can give an “adverse” possessor of land superior rights to those of a holder of record title or a prior possessor. These rights are paramount to all others’, after the running of the statute for claims of trespass against the possessor.\textsuperscript{73} At common law, courts interpreted the statute of limitations on such claims as regulating not only the claims explicitly covered by the statute of limitations but also as regulating other claims based on alleged rights to the property, including claims for the rental value of the disputed land during the adverse possessor’s time there before the running of the statute.\textsuperscript{74} This gives rise to a puzzle. What are the rights of a prior titleholder of land against a trespasser who possessed the property non-adversely for the statutory period? The cases do not address this point.

\textsuperscript{71} Hadley v. Lockwood, 37 Conn. 500 (1871).
\textsuperscript{72} The common law describes the jeweler’s custody of the watch as a bailment and imposes on the jeweler a duty of care during the intended custodial period with strict liability for misdelivery or refusal to deliver the property to prior possessor. See Peer v. Roth Hotel Co., supra, note 35; Uniform Commercial Code § 2-403 (good title to entrusted property purchased in good faith for value from a merchant in the ordinary course of business).
\textsuperscript{73} A legal proceeding against a trespasser on land is often called an action in ejectment, but all understand that the underlying issue is one of trespass. Verjährung is the German term for the running of a statute of limitations, and § 214 BGB gives it many of the same legal consequences as the common law. One important difference, however, is that statutes of limitations in the United States and Britain did not originally provide that both legal and equitable claims were barred by the passage of a statutory limitations period. Equitable rights were and, in many US states, still are not subject to statutes of limitations with respect to debts and personal property.
\textsuperscript{74} Easting v. Burnet, 36 U.S. (11 Pet.) 41 (1837).
A non-adverse user of land who does not acquire the full protection due an adverse possessor is liable for the rental value of the property during the period of unperminted possession. This seems to imply that a non-adverse possessor for the full limitations period cannot be sued directly for these trespass damages but may be liable for them in equity in unrelated litigation with the landowner; the statute of limitations does not bar claims in equity, and an equity court can entertain claims between the parties before it, whether they arise from the same subject matter or not. This much, though beyond the case law, seems straightforward. But consider the following circumstances. A possessor occupies the land adversely but not long enough for the statute to run, and then in good faith transfers his interest in the land to another, who continues the occupancy until the statute would have run on their tacked periods of possession. If the second occupant’s acts do not rise to the level of adverse possession, is the first, who did possess the property adversely, liable for mesne rents?

The case law seems never to have answered our question. Adverse possessors pay no damages for trespass, once the limitations period has run, because courts interpret the statute of limitations as conferring a right that “[r]elates back” to the adverse possessor’s first entry on the land. To harmonize the relevant parts of the doctrine of adverse possession, however, the non-adverse possessor is clearly relieved of the obligation to pay trespass damages, because the trespass claim against her is time-barred. The prior adverse possessor, for whom the statutory limitations period had not run, must be treated as a trespasser unless the limitations period has run since this party’s departure from the property.

This excursion into the multivalent law of possession is relevant to methodological classification of interpretative techniques because it exhibits what Leenen calls type coercion (Typenzwang), as do many other interpretative puzzles in property law. Can the reasoning that resolves the puzzle concerning successive adverse and non-adverse possessors also be considered analogical? One might say that the adverse possessor who is subject to a claim for trespass damages is not sufficiently like other adverse possessors who either adversely possess land for the full limitations period or whose holding period tacks with that of another adverse possessor to win immunity from trespass damages for them both. But the non-immune party is a possessor and her possession is adverse, thus having all the same attributes as the immune possessor, apart from the awkwardness of the transfer to a non-

75 A co-tenant who out another co-tenant is never an adverse possessor for purposes of the statute of limitations and must pay the other the rental value of the property for the period of exclusive use. Holloway v. Holloway, 11 S.W. 233, 235 (Mo. 1889).
76 Leenen, supra note 37, § 1, Rdn. 44.
adverse possessor. Plainly, analogy does not guide us here. The type of the adverse possessor figures in property law as one of those ideal categories whose details are not interesting in themselves but serve merely to distinguish a relationship with other parties. When that relationship does not exist, the ideal type fails like the wrong key in a lock and becomes irrelevant to further analysis.

H. Conclusion

From our honored friend’s delicate engagement with the apparatus of systematic legal methodology, many lessons can be drawn that would benefit the enterprise of the common law. Such lessons may not take root quickly in common-law countries, but they would definitely be a salutary influence. As we have seen, argument from analogy has become the catch-all classification of legal interpretation for common lawyers, largely because reliance on precedent seems inevitably to base the transition from case to case on analogy, or the similarity of fact patterns, the similarity of evolving common-law rules, or the similarity of policy goals. A more subtle analysis of the primacy of analogy in those contexts in which it matters most would plainly reveal that other gap-filling approaches and type-based analysis are of equal importance. The argument of this article has been that forms of interpretation distinguishable from reasoning based on the analogy of fact patterns should be recognized as lively alternatives within the common law tradition. To do so might well improve the quality of interpretation even when precedent is our guide.
Rechtsgeschäft, Methodenlehre und darüber hinaus

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