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# Legal Reason: The Use of Analogy in Legal Argument

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## BOOK REVIEW

### REASONING BY ANALOGY

*Richard A. Posner*†

LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT. By *Lloyd L. Weinreb*.†† Cambridge University Press, 2005. Pp. 184. \$60.00.

*Legal Reason: The Use of Analogy in Legal Argument*, by Lloyd Weinreb, is a short, simply written book that hovers between two genres. One is the introduction to legal reasoning intended for novice law students. The other is jurisprudential speculation about the nature of legal reasoning, arguments, and justification. What joins them in Weinreb's mind is that he thinks on the one hand that reasoning by analogy is the essence of legal reasoning and so the most important thing that law students should be introduced to right off the bat, and on the other hand that other people who have written about reasoning by analogy, such as Scott Brewer,<sup>1</sup> Weinreb's principal antagonist, and myself,<sup>2</sup> have got it wrong and have to be refuted.

Weinreb's argument can be summarized briefly by reference to an old case called *Adams v. New Jersey Steamboat Co.*,<sup>3</sup> to which Weinreb, following Brewer,<sup>4</sup> returns again and again. The issue was whether a Hudson River steamboat operator owed a passenger who had occupied one of its staterooms the same very high duty of care that as courts had held in previous cases an innkeeper owes its guests, or the lower duty of care that as the court had held in another case a railroad owes passengers who sleep in open berths in its sleeping cars (as distinct from closed compartments). The court analogized the steamboat company to the innkeeper (it called the steamboat "a floating

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<sup>1</sup> See Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923 (1996).

<sup>2</sup> See, e.g., RICHARD A. POSNER, *OVERCOMING LAW* 518–22 (1995); RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 86–100 (1990). Among others whose views of reasoning by analogy Weinreb criticizes are Larry Alexander, Ronald Dworkin, Edward Levi, Cass Sunstein, and Peter Westen.

<sup>3</sup> 45 N.E. 369 (N.Y. 1896).

<sup>4</sup> See Brewer, *supra* note 1, at 935–36, 1003–07, 1013–16.

inn”<sup>5</sup>) rather than to the railroad, and held therefore that the steamboat company owed the higher duty of care to the plaintiff and so was liable for the theft of \$160 by an intruder who had pried open the locked window of the stateroom and stolen the money from the plaintiff’s clothing.<sup>6</sup> The jury found no negligence on the plaintiff’s part.<sup>7</sup>

The *Adams* case indeed illustrates what is conventionally termed “legal reasoning by analogy.” But what exactly is the mental operation that the term denotes? Is it “reasoning” at all, or merely rhetoric, perhaps even self-serving judicial rhetoric? And if it really is just rhetoric, then what is the essence of legal *reasoning*? Could it be policy analysis? Or would that be inconsistent with the concept of law? If not, why *do* judges prate about analogy so? These are the questions that I explore in this Review.

One answer to the question what is legal reasoning by analogy—the one Brewer embraces—is that a novel case incites a search for a rule that might cover it. The similarity between innkeepers and steamboat operators as providers of sleeping accommodations for travelers makes the rule that governs innkeepers a likely candidate for a rule to govern steamboat operators. But what is the innkeeper rule? Is it that a contract for sleeping accommodations includes an implicit guarantee of safety—that such a guarantee is one of the things the customer is paying for, and so he is excused from having to take any unusual precautions to secure his property (remember that Adams had locked the window of his stateroom)? But this rule, while it covers the steamboat case, must be too broad because it would require the railroad to extend the same high level of care to its sleeping-berth customers. The railroad case is better understood as an exception to the general rule. Because the sleeping berths are open to anyone who happens to be in the car, the railroad can’t protect each sleeper against all thefts of his property;<sup>8</sup> knowing this, the passenger implicitly agrees, as part of his contract with the railroad, to take some care to secure his property. The exception is inapplicable to the steamboat case because a stateroom—that is, a closed compartment—is just like a room in an inn so far as the proprietor’s ability to protect the customer’s property is concerned; and so the case is covered by the same rule that governs the innkeeper’s liability.

Alternatively, rather than speak of rule and exception, we could say that the three cases taken together instantiate the (narrow) rule—

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<sup>5</sup> 45 N.E. at 369.

<sup>6</sup> *See id.* at 369, 371.

<sup>7</sup> *See id.* at 369.

<sup>8</sup> *Id.* at 370 (“[I]t is quite obvious that the passenger has no right to expect, and in fact does not expect, the same degree of security from thieves while in an open berth in a car on a railroad as in a stateroom of a steamboat, securely locked, and otherwise guarded from intrusion.”).

more properly, a standard—that a business that provides sleeping accommodations to its customers must take as much care to protect them as is feasible. We could even say that there are two rules—one for inns and steamboats and closed-compartment railroad sleepers, and one for open-berth sleepers. All these approaches lead to the same result.

Weinreb rejects any rule-based analysis of *Adams* because he doesn't think there was a preexisting rule of which the result in the cases involving innkeepers was an instantiation and to which the result in open-berth railroad cases was an exception.<sup>9</sup> Now a legal rule may be inchoate, intuited rather than articulated, and vaguely bounded, because the judge has to decide a case even if he is unsure what the rule governing it is and even if he is reluctant to declare a new rule. But rather than strain to find a rule, maybe we should abandon rule-talk and ask simply why the innkeeper cases were decided as they were and why the open-berth railroad case was decided as it was. The answer is that customers expect providers of overnight accommodations to protect them securely from theft when it is feasible for them to do so, which it is in the innkeeper cases and likewise in the steamboat case, but not in the open-berth railroad case. So the steamboat case was correctly assimilated to the innkeeper cases.

Under this approach, to decide a novel case the court excavates the purposes behind or policies underlying whatever cases are cited to it as being relevant to the case at hand, and asks what decision would serve those purposes or policies. This is equivalent to asking what the latent rule of the innkeeper cases is and whether the purpose behind it would be served by extending the rule to the steamboat case, for the purpose of a rule is often the best guide to its scope. Inspection of cases may of course disclose conflicting purposes, requiring a further policy choice by the court. That was not a problem for the court in *Adams*. The decision in the railroad case could be fitted to the innkeeper cases as an exception to the rule; there was no tension between the cases once the animating policies were grasped.

The legal realist Max Radin noted a

common way in which judges arrive at their conclusion. The category into which to place the situation presented to them for judgment, does not leap into their minds at once. On the contrary, several categories struggle in their minds for the privilege of framing the situation before them. And since there is that struggle, how

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<sup>9</sup> See LLOYD L. WEINREB, *LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT* 111–12 (2005).

can they do otherwise than select the one that seems to them to lead to a desirable result.<sup>10</sup>

That is often the situation facing a judge, but not in *Adams*, for there was no need there to "choose between" the two rules, railroad and innkeeper. They could coexist happily. All that was required was drawing the boundary between them on the basis of the policies animating them, which were compatible. The steamboat case fell on the innkeeper side of the boundary.

Weinreb objects to purposive as well as rule approaches because they merge reasoning by analogy into policy analysis.<sup>11</sup> The purposive approach does so even more completely than the rule approach. The wording of a rule may make the rule's scope so clear and precise that the application of the rule to a new set of facts requires no consideration of the purpose behind the rule; analysis never dips below the semantic level. It may be possible to challenge the rule on the basis of policy—yet the rule may be so ingrained that such a challenge will be bound to fail. Or it may be that the rule is found in a statute that the court is bound by, willy-nilly, because the statute is not vulnerable to a constitutional challenge. If, however, there is no rule in the picture, the court perforce falls back on the purposes or policies found in cases or elsewhere.

Radin was thinking of situations in which the court has to go *beyond* the cases in order to decide; *Adams* illustrates the situation in which the court has to go *behind* the cases in order to decide. Radin's interest was in free-wheeling judicial policy analysis, which is problematic; *Adams* is unproblematic because the court was engaged there in the purely analytical exercise of identifying the policies found in previous cases. Such a judicial role is more passive, more modest, than Radin wished to emphasize, though the policies that the court unearths in the course of its analytical endeavor will often have been the active creation of earlier generations of judges.

This distinction, between untethered judicial reasoning and judicial reasoning based on policies expressed or implied in previous cases, does not interest Weinreb. He thinks that reasoning by analogy is its own kind of thing—that it does not require recourse to policy analysis or any other kind of systematic thinking, even the modest kind of policy analysis that consists of identifying and applying policies that figured in earlier cases. Endeavoring to place policy at arms' length, Weinreb notes that reasoning by analogy is pervasive in ordinary life. He gives such examples as the following: If your power lawnmower won't start, you might try letting it sit awhile and then try again

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<sup>10</sup> Max Radin, *The Theory of Judicial Decision: Or How Judges Think*, 11 A.B.A. J. 357, 359 (1925).

<sup>11</sup> See WEINREB, *supra* note 9, at 107–22.

to start it, by analogy to a procedure that often works if your car won't start.<sup>12</sup> However, you wouldn't kick it to make it start, as you might do if it were a donkey.<sup>13</sup> So in this example, lawnmower replaces steamboat, car replaces inn, and donkey replaces railroad. The difference, Weinreb insists, is that no one would think that in his homely illustration you were applying a rule or engaged in any sort of analysis other than reasoning by analogy understood as exercising an innate capacity to recognize relevant similarities.<sup>14</sup>

Actually the illustration is entirely consistent with a rule-based, purposive, or policy-saturated approach to the steamboat case. The rules, patent or latent, that you know and apply in the lawnmower case are, first, that internal-combustion engines start in a certain way, and, second, that inanimate objects cannot be hurt into doing something by being kicked. Since the lawnmower is an inanimate object powered by an internal-combustion engine, the first rule determines your response rather than the second. One *always* requires a general understanding of some sort in order to determine relevant similarities. In a legal case it is an understanding of rules, principles, doctrines, and policies. It is they that do the work in reasoning by analogy.

Reasoning by analogy as a mode of judicial expression is a surface phenomenon. It belongs not to legal thought, but to legal rhetoric. Weinreb has confused how judges think with how they talk. He had been correct when he had said, at the very outset, that his book would be "about the *arguments* that lawyers make in support of their clients and judges make in the course of their *opinions*."<sup>15</sup> That is, it would be a book about the rhetoric, not the substance, of the law. (The book's subtitle carries a similar implication.) These are very different things. Reasoning by analogy tends to obscure the policy grounds that determine the outcome of a case, because it directs the reader's attention to the cases that are being compared with each other rather than to the policy considerations that connect or separate the cases.

An example of mine that Weinreb quotes and criticizes concerns the judicial response to the question of what rule of property law should govern oil and natural gas, which being liquid and gaseous, respectively, do not have a fixed shape.<sup>16</sup> Analogizing to the rule of property law governing wild animals—the rule of capture, whereby a property right is not obtained until the animal is caught—courts concluded that oil and gas, since they move, like animals (though, unlike animals, not under their own power but purely as an effect of gravita-

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<sup>12</sup> *Id.* at 68–69.

<sup>13</sup> *Id.* at 70–71.

<sup>14</sup> *Id.* at 71–73.

<sup>15</sup> *Id.* at 1 (emphasis added).

<sup>16</sup> *Id.* at 117 (quoting POSNER, *OVERCOMING LAW*, *supra* note 2, at 519).

tional or other external force), should also be governed by the rule of capture. There is that similarity between wild animals on the one hand and oil and gas on the other, but it is not a relevant similarity, as the courts would have seen had they thought more carefully about the economic difference between the two types of property. A rule that would make the rabbits that stray onto your land become by virtue of that fact your property, so that if they stray off it and are shot you are entitled to their pelts, is not necessary to encourage investment in raising rabbits. By definition these are wild rabbits, not a product of investment, and so you're not deprived of the fruits of an investment when your neighbor shoots a rabbit that, having wandered onto your land, later wanders onto his. In contrast, oil and gas are extracted from the earth by expensive drilling equipment after costly exploratory efforts often involving the digging of many dry holes, the expense of which has to be recouped in the occasional lucky strike. We need rules that will optimize these investments—a consideration that has no counterpart in the wild-animal case. Under the rule of capture, someone who drills a well that taps into an underground pool of oil has an incentive to pump as much oil as fast as he can, since he has no claim to the pool as such and so any oil he fails to pump is likely to become the property of a competitor and thus make it more difficult for him to recoup his investment. As a result of this race to pump, the pool may be exhausted prematurely, with the result that heavier costs will have to be incurred in the future to discover and pump additional reserves. The applicable analogy is not to the property rules for wild animals but to the property rules for other extractable natural resources, such as coal. You are allowed to own an entire seam and remove coal from it at your leisure, rather than having to worry that anyone else can remove coal from the seam without compensating you.

Eventually the rule of capture for oil and gas was changed by legislation requiring the "unitization" of oil and gas fields, that is, that they be managed as if under single ownership. A single owner wouldn't worry that a competitor would pump oil from the same pool—the single owner by definition owns the entire pool. He can pump oil at whatever rate is most efficient, without worrying that by doing so he will be losing profits to competitors.

In the oil and gas case, as in all cases of reasoning by analogy, sound analysis requires attending to the policy considerations that align the case at hand with one or another line of precedents. Failure to do that was what led to the mistaken application of the rule of capture to oil and gas.

Weinreb both acknowledges and denies the hovering presence of policy in reasoning by analogy. He acknowledges it when he says that

a lawyer's "knowledge of the law" would tell "him that the similarities between [the inn cases and the steamboat case] relate to factors that commonly have a bearing on liability"<sup>17</sup> and when he says that "in light of the purpose of the Fourth Amendment, [electronic] eavesdropping [e.g., wiretapping] is analogous to a search and seizure, and the analogy is close enough to call for the same result."<sup>18</sup> It is "close enough" because the purpose or policy animating the Fourth Amendment, which prohibits unreasonable searches and seizures, is believed by the Supreme Court to be as strongly engaged by electronic eavesdropping as by a physical search. He acknowledges the point when he says that "the choice of which analogy to prefer is not like a flip of the coin. . . . [A] lawyer or judge relies on his knowledge and experience of the law";<sup>19</sup> that knowledge and experience centrally include knowledge of the policies that animate legal rules and doctrines. He acknowledges the point when he says that analogy depends on knowledge<sup>20</sup> and that the choice of which analogy to prefer "is informed also by a broad understanding of what is relevant to the sort of decision being made";<sup>21</sup> "what is relevant" is again the open-ended set of policies on which sensible judicial decisions are based. He even says that "within a legal order, the body of rules provides the criteria of relevance that distinguish a good analogy from a bad one,"<sup>22</sup> and, most explicitly, that a legal analogy is "subject to tests of consistency and coherence with rules of law that together indicate the relevance of particular facts to the issue in question."<sup>23</sup>

Yet denial that policy considerations drive the law by determining the choice of cases to treat as precedents governing the case at hand is implicit in his ruling idea that analogical reasoning in law is not a form of policy analysis. It is implicit in his saying that judges "are not to decide for themselves what the law is but are to seek it out, to discover and apply it as it is."<sup>24</sup> It is implicit when he says that the law must be "available to be known in advance by those who are entrusted with its application,"<sup>25</sup> that is, by the judges—a proposition that seems to forbid the judges to think in policy terms when faced with a novel case.

But more frequent in the book than either acknowledgment or denial of the role of policy in reasoning ostensibly by analogy is equiv-

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<sup>17</sup> *Id.* at 133.

<sup>18</sup> *Id.* at 58.

<sup>19</sup> *Id.* at 91.

<sup>20</sup> *Id.* at 130.

<sup>21</sup> *Id.* at 92.

<sup>22</sup> *Id.* at 105.

<sup>23</sup> *Id.* at 138.

<sup>24</sup> *Id.* at 148.

<sup>25</sup> *Id.* at 147.



ocation, as when he says, apropos of the oil and gas issue, that “[a]ll the talk in the world with engineers, ecologists, and even economists [to decide what rule of property law should govern oil and gas] is beside the point unless what they have to say is reflected in the law.”<sup>26</sup> The implication is that “what they have to say” might not be “reflected in the law.” Or it might—but Weinreb doesn’t tell the reader how to determine when scientific or social-scientific insights are admissible in law. It is not always. For example, many economists believe that some forms of sexual or age discrimination are economically efficient, but, in general, antidiscrimination statutes do not permit an efficiency defense. Even in the property area, certain policy-based arguments are out of bounds—for example, arguments in favor of indentured servitude. But efficiency considerations should be admissible to determine property rights in oil and gas. And so when Weinreb says that a judge “may not engage in social or economic engineering *at large*,”<sup>27</sup> we are desperate to know at what point he thinks social or economic engineering, implicitly permitted by him on a small scale, ceases to be legitimate. He equivocates further when he purports to distinguish “between an analogical argument that supports the application of a rule and the reasons for the rule that are then mustered in support of its application.”<sup>28</sup> There is no such thing as an “analogical argument” in any but a rhetorical sense; you need *reasons* to determine whether one case should be thought relevantly similar to another. Analogies are not reasons; reasons are what is necessary to determine whether a similarity shall be treated as a ground for action, an analogy guiding decision.

Legal thinking in novel cases—cases not ruled by conventional legal sources, such as clear statutory texts or unchallenged precedents rationally indistinguishable from the case at hand—clearly is driven by policy (at best—at worst by prejudice, temper, ignorance, or whim). But this undoubted fact about our courts tends to be obscured in the judicial opinion itself by the judges’ desire to exaggerate the distance between “legal” and “policy” analysis, between adjudication and legislation, and thus between law and politics, so that legal decisions will be more acceptable to the laity (more “legitimate”) by seeming to be the product of specialized analysis by a profession set apart, rather than, as they so often are, a product of common sense grappling with economic, social, and political issues presented by cases. It is naïve to expect any public document to be entirely candid, and this includes judicial opinions, which are elaborately rhetorical enterprises. We judges could be more candid than most of us are without sacrificing

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<sup>26</sup> *Id.* at 118.

<sup>27</sup> *Id.* at 97 (emphasis added).

<sup>28</sup> *Id.* at 96.

legitimacy. Greater judicial candor would make law easier for practitioners to understand and apply. Judges actually risk impairing their legitimacy by rhetorical excess, as they are busy doing by citing decisions of foreign courts—pure window-dressing,<sup>29</sup> but alarming to Americans who rebel against the idea of our judges taking their cues from foreign judges. But judicial candor is a topic for another day.

Weinreb thinks that what law schools teach is how to think like a lawyer in the sense of being able to reason by analogy. That assessment is radically incomplete. What law schools should and do teach is how to think like a policymaker or legislator—and thus how to understand, for example, what the economically correct rule is for property rights in oil and gas versus property rights in rabbits—and how to talk and write in the style of judicial opinions.

What one thinks judges do is related to what one thinks law is. Weinreb shrinks from talk of policy because he has a narrow understanding of “law.” When he says as he frequently does that judges shouldn’t go outside the law in deciding a case, this makes it seem that there’s a clear line between law and policy. There is a line, albeit not a clear one; the range of policy considerations that judges consider is, for a variety of reasons having to do with the institutional differences between courts and legislatures and the binding effect of precedents, at least on the courts below those in which the precedents were made, more limited than the range that legislatures consider.<sup>30</sup> About these differences, and about other considerations that might differentiate the role of policy in adjudication from its role in legislation, Weinreb is silent. He repeatedly invokes “law itself” or “law in itself” or “law within itself” or “the law as it is,”<sup>31</sup> and he even calls the law a “seamless web,”<sup>32</sup> but he doesn’t tell the reader how to figure out where the web ends and something else begins. He admits that there are certain “policies latent in [the law]”<sup>33</sup> but he does not indicate what they are or, as I have already noted, what policies are *not* available to judges. At times he suggests that “law” includes “ordinary common sense”<sup>34</sup> and even “moral evaluation”<sup>35</sup> à la Ronald Dworkin, whom elsewhere he disparages. These acknowledgments seem to imply a merger of law into practical reasoning at large, but he clearly is unwilling to go so far.

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<sup>29</sup> Richard Posner, *No Thanks, We Already Have Our Own Laws: The Court Should Never View a Foreign Legal Decision as a Precedent in Any Way*, LEGAL AFF., July–Aug. 2004, at 40.

<sup>30</sup> See, e.g., Frederick Schauer, *The Limited Domain of the Law*, 90 VA. L. REV. 1909, 1915, 1928–33, 1938–39 (2004).

<sup>31</sup> See, e.g., WEINREB, *supra* note 9, at 17, 94, 119.

<sup>32</sup> *Id.* at 102.

<sup>33</sup> *Id.* at 118 n.\*.

<sup>34</sup> *Id.* at 91–92.

<sup>35</sup> *Id.* at 144 n.\*.

Weinreb's basic misunderstanding may be that he thinks law a thing, and therefore something that has a perimeter, whereas in fact it is an activity. From the standpoint of the judge, which is the standpoint from which Weinreb discusses reasoning by analogy, it is the activity of deciding cases. The duty to decide is primary. The materials usable for decision include everything that the society recognizes as pertinent to a legal decision, and that certainly includes economic considerations in deciding on a regime of property rights for natural resources.

When those considerations are ignored, nonsense can ensue, as in the oil and gas cases, or sheer indeterminacy, as in a chain of cases that Weinreb discusses involving mechanical transmissions of copyrighted works.<sup>36</sup> The right of the owner of a copyright on a song or a drama or the like includes the right to "perform" it. In the earliest case that Weinreb discusses, a hotel received broadcasts of copyrighted songs and transmitted the broadcasts to the rooms in the hotel by wires connected to its receiving set.<sup>37</sup> The Supreme Court held in a wooden opinion (one of Justice Brandeis's least impressive performances) that since the hotel's receiving set did not amplify the sound waves from the radio station that broadcast the music but instead transformed them into electromagnetic waves, which were transmitted to the rooms through the wires and there reconstituted as sound waves, the transmission to the rooms was a performance no different from hiring an orchestra to perform copyrighted music and so required a license from the copyright holders.<sup>38</sup> The Court made no attempt to relate the physics of radio reception and transmission to the purpose of copyright protection.<sup>39</sup> It was an opinion that should give reasoning by analogy a bad name.

Many years later the Supreme Court confronted an "analogous" case, *Fortnightly Corp. v. United Artists Television, Inc.*,<sup>40</sup> and reached the opposite result. Cable television operators had obtained copyrighted programming for their subscribers by erecting antennas that, as in the earlier case, received programs broadcast over the air, though by television stations rather than by radio stations.<sup>41</sup> Cables connecting the antennas to the homes of the cable television subscribers transmitted the programs to those subscribers, just as the hotel in the earlier case

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<sup>36</sup> See *id.* at 46-53. The choice of copyright as one of only three areas of law to discuss in the book is curious, given the book's intended use as a primer on legal reasoning for beginning law students, since intellectual property is not usually studied in the first year of law school.

<sup>37</sup> *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191, 195 (1931).

<sup>38</sup> *Id.* at 199-201.

<sup>39</sup> See *id.* at 202.

<sup>40</sup> 392 U.S. 390 (1968).

<sup>41</sup> See *id.* at 392.

had distributed programs that it received over the air from radio stations to its customers by means of wire transmission.<sup>42</sup> Yet contrary to its earlier decision, the Court described what the cable television operators were doing as merely amplifying the broadcast signal, just as when a homeowner puts an antenna on his roof in order to receive signals from distant stations.<sup>43</sup>

To suppose that the cable television case can rationally be decided by determining whether cable television is more like a homeowner's putting up an antenna than it is like hiring an orchestra to perform copyrighted music is absurd. A rational resolution of the issue requires discerning the purpose of giving the owner of a copyrighted work the exclusive right to perform it. The purpose is to prevent the form of free riding that consists of waiting for someone to spend money creating a valuable expressive work and then preventing him from recouping his investment by copying the work and selling copies at a price below the price the creator of the work would have to charge to break even. The copier's break-even price is lower because he doesn't have to recover the cost of creating the work—he incurred no such cost and so his free riding is profitable.

In the early days of cable television, which was when the *Fortnightly* case was litigated, the primary purpose and effect of cable television were to provide television to communities that because of topography or remoteness from over-the-air stations could not receive clear broadcast signals. Because of hilly terrain, the people living in Fortnightly's service area could receive the signals of only two television stations.<sup>44</sup> Fortnightly brought them the signals of three other stations.<sup>45</sup> The cable operators were not depriving those stations of any of the advertising revenues that the stations would need in order to be able to pay license fees to the owners of the copyrights on the broadcast programs. On the contrary, they were augmenting those revenues by enlarging the audience for the distant stations, the ones that the cable subscribers could not have received over the air.<sup>46</sup> Nor had the cable operators stripped the advertising from the programs they transmitted and resold advertising time to other advertisers.<sup>47</sup> That would have amounted to appropriating the license fees of the owners of the copyrights on those programs and would thus have been the kind of free riding that the copyright law forbids.

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<sup>42</sup> See *id.*

<sup>43</sup> See *id.* at 399–400 & n.27.

<sup>44</sup> *Id.* at 391.

<sup>45</sup> *Id.* at 392.

<sup>46</sup> *Id.* at 391–93, 401 n.28.

<sup>47</sup> The significance of this point was noted in the later case of *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394, 405 & n.10 (1974).

So the *Fortnightly* decision made perfectly good sense, but no thanks to the analogy to the antenna on the roof of a private house. Analogy could not possibly do any work in such a case, moreover, because the case illustrates Radin's point about a court's having to make a choice between conflicting case categories: in *Fortnightly*, the antenna category versus the orchestral-performance category.<sup>48</sup> They could not coexist, as the inn and railroad cases could in *Adams*.

I have emphasized Weinreb's hostility to policy analysis, a hostility seemingly based on a failure to realize that reasoning by analogy has no traction unless considerations of policy are brought into play to determine whether a pair of cases shall be deemed analogous—whether, in other words, they share a *relevant* similarity. Yet he seems also to think that people like myself who are skeptical of reasoning by analogy viewed as its very own kind of thing are actually formalists—people who believe that law, to be worthy of the name, must adhere to deductive logic, in which a rule supplies the major premise and the facts of the case the minor premise and the decision is the conclusion that follows logically from the premises. He thinks that the most the law can aspire to is “human reasonableness.”<sup>49</sup> I agree; but what is “humanly reasonable” is conforming law to practical needs and interests, which in turn implies a willingness to bring policy considerations to bear in deciding how to resolve novel issues.

I mentioned the traveler cases (steamboat, inn, railroad) and the copyright cases. The third set of cases that Weinreb discusses is the sequence from the *Olmstead* case,<sup>50</sup> which held that wiretapping was not a search within the meaning of the Fourth Amendment, to the *Katz* case,<sup>51</sup> which held many years later that it was. The Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,”<sup>52</sup> and the Court in *Olmstead* based its ruling on the fact that a nontrespassory wiretap does not invade the person (as a physical search of him, or an arrest, would) or his house or his papers or his other physical property (his “effects”).<sup>53</sup> This was a narrow, literal interpretation of the Amendment. In the later case, the Court decided that what was important was that wiretapping is an invasion of conversational privacy.<sup>54</sup>

The choice between the two decisions depends on how you think constitutional provisions should be interpreted (strictly or loosely),

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<sup>48</sup> See Radin, *supra* note 10, at 359.

<sup>49</sup> WEINREB, *supra* note 9, at 161.

<sup>50</sup> *Olmstead v. United States*, 277 U.S. 438 (1928).

<sup>51</sup> *Katz v. United States*, 389 U.S. 347 (1967).

<sup>52</sup> U.S. CONST. amend. IV.

<sup>53</sup> See 277 U.S. at 464.

<sup>54</sup> See *Katz*, 389 U.S. at 351.

whether you like the idea of imputing to the Fourth Amendment a policy of protecting privacy rather than the more concrete interests actually listed in the constitutional text, and how you balance the interest in privacy against the interest in law enforcement, which is impeded if the police have to obtain a warrant in order to conduct wiretapping. They don't have to obtain a warrant to plant an informer in a nest of suspected criminals, even if the informer is "wired" to record any conversations he hears; and law enforcers would strenuously resist, as an impediment to effective enforcement, an extension of the requirement of a warrant to that case. Likewise, they would much prefer not to have to obtain a warrant to do a wiretap.

I cannot see what reasoning by analogy has to do with the choice between *Olmstead* and *Katz*. Weinreb thinks analogy important in the later case because the Court compared the telephone booth from which *Katz* made the call that was intercepted to a person's office, both being places in which there is an expectation of privacy.<sup>55</sup> But the analogy related to a peripheral issue in the case—whether, if wiretapping *is* a Fourth Amendment search, nevertheless there should be an exception if what is being tapped is the phone in a public phone booth rather than in a person's home or office. The principal issue in the *Katz* case was whether nontrespassory wiretapping is *ever* a Fourth Amendment search, and to that issue analogies were irrelevant and were not employed.<sup>56</sup>

What is really involved in reasoning by analogy, I think—and I think most English and American judges would agree, though not in these words—is a method of cautious, incremental judicial legislating.<sup>57</sup> It is cautious and incremental because judges have limited capabilities and legitimacy as legislators. The many gaps in the law, coupled with the judges' duty to decide cases whether or not there is a clear governing rule, force the judges to legislate. But unlike the members of real legislatures, judges have limited access to the kind of information that would enable them to lay down broad rules; moreover, they are not supposed to lay down rules that have the "feel" of legislation in point of breadth and (frequently) discontinuity with prior law because they do not have the full democratic legitimacy of a legislature. They tend therefore to rely on information that can be gleaned from their previous cases and to emphasize the continuity between those cases and the new one. By describing the decision in the latest case as the product of "analogy" to decisions in previous cases, they can often get away with not stating a rule at all, leaving it to

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<sup>55</sup> See WEINREB, *supra* note 9, at 58–59.

<sup>56</sup> See 389 U.S. at 352–53.

<sup>57</sup> See CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 42–45 (1999).

later judges or to academics to make explicit the rule that is implicit in or can explain the line of cases. The judges make law by feeling their way.

All that legal reasoning by analogy comes down to, then, is a certain caution in departing from existing rules. What actuates the departures is not analogy, but, as Holmes famously put it, "[t]he felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men."<sup>58</sup> For Weinreb, this is heresy, because it denies law's autonomy. He is the latest in a long series of distinguished legal thinkers (Chief Justice Coke springs to mind) to insist that law and legal reasoning are set apart from other modes of action and thought; that law is an autonomous discipline. In our society, at least, it is not.

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<sup>58</sup> OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (Mark DeWolfe Howe ed., Little, Brown & Co. 1963) (1881).