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Commentary on Plumer & Olson

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In Response to: Gilbert Plumer and Kenneth Olson's *What constitutes a formal analogy?*
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The primary goals of "What Constitutes a Formal Analogy?" are twofold. The first is to provide an analysis of formal analogy. The second is to argue that it would be useful to include questions about formal analogies on the Law School Admission Test (LSAT). This commentary will focus on the second of these goals; I will not be questioning the account given of how best to understand a formal analogy.

Kenneth Olson and Gilbert Plumer claim that there are two advantages to be gained or goals to be achieved by focussing on formal, as opposed to qualitative, analogies. First, they think it likely that questions focussing on formal analogy will be more defensible (in virtue of having one and only one correct answer) than questions making use of looser conceptions of analogy. Second, they hope that questions based on formal analogies will make the analogical reasoning questions on the LSAT (and GRE) less likely to be derided as mere "logic games" which are irrelevant to achieving success in law school (or graduate school). My concern is just this: attaining the first of the two goals may undermine the attainment of the second. In other words, constructing questions based on formal analogy in the way that Olson and Plumer (O&P) suggest may not be testing skills that are essential for success in analogical, *legal* reasoning. The preceding claim will be established by putting forward and analysing examples of such reasoning.

In arguing against a particular approach to interpreting antidiscrimination law, Kimberle Crenshaw offers an interesting analogical argument. She begins with a discussion of *DeGraffenreid v. General Motors*, in which five black women brought a discrimination case against General Motors. They argued that they were being discriminated against neither because they were black or nor because they were women, but because they were *black women*. The court reasoned that no antidiscrimination legislation by Congress contained the category of "black woman," and the illegality of discriminating against black women could not be inferred from the illegality of discriminating against blacks and the illegality of discriminating against women. Since General Motors had a record of hiring white women and black males, the court ruled in their favour. Crenshaw argued that the court's reasoning was flawed. She points out that "no case has been discovered in which a court denied a white male's reverse discrimination claims on similar grounds -- that is, that sex and race claims cannot be combined because Congress did not intend to protect compound classes" (Crenshaw 1998). We can reconstruct part of Crenshaw's argument in the following manner.

1. White men have filed discrimination cases.

2. In these cases, white men cannot argue that they are being discriminated against because they are white, since the companies have hired white women.

3. In these cases, white men cannot argue that they are being discriminated against because they are men, since the companies have hired black men.

4. In spite of the above, there are considerations which make it reasonable for the court not to question the legitimacy of filing compound discrimination cases, based on race *and* gender.

By parity of reasoning, it would seem reasonable to claim

1. Black women have filed discrimination cases.

2. In these cases, black women cannot argue that they are being discriminated against because they are black, since the companies have hired black men.

3. In these cases, black women cannot argue that they are being discriminated against because they are women, since the companies have hired white women.

4. In spite of the above, there are considerations which make it reasonable for the court not to question the legitimacy of filing compound discrimination cases, based on race *and* gender.

The idea is this: if the first argument is legitimate, then so is the second, other things being equal; if the second argument is bad, then perhaps the first is as well, other things being equal. This is very clever. Part of being able to generate an analogical argument with some force is to be able to find a comparison or *source* case (i) that the interlocutors in question can agree on (perhaps after some argumentation), and (ii) that has a degree of similarity to the disputed or *target* case that allows it to be used as evidence for a particular interpretation of the target case. To be sure, being able to carry out a mapping of the different parts of the two (alleged) analogues is an important part of being able to generate and defend such arguments. Black is being mapped to white, and women are being mapped to men. In other words, race is mapped to race, and sex to sex. Moreover, the considerations referred to in the fourth claim of each of the two cases presented above are likely to be very similar; otherwise, the analogy would fail. In much analogical legal argumentation, the purported mappings are straightforward. This brings me to my first concern with the examples used by O&P. They appear to be arguing that the ability to carry out mappings is a necessary condition of being able to engage in analogical reasoning, and since analogical reasoning is common in law, it would be useful to test students on their ability to carry out analogical mappings on the LSAT. The worry I have is with some of the mappings being tested for by questions like O&P's numbers 5 and 6. If we grant that it is essential to analogical reasoning that we be able to carry out mappings between analogues, it does not follow that testing for any kind of structure mapping ability will be useful in gauging the likelihood of a student succeeding in legal reasoning. This is a point that needs to be made in more detail.

In the examples used by O&P, many of the mappings are not straightforward. In their fifth example, we have to be able to map courts to computer models, court level to a period of one year, and increasing authority to temporal succession. These are highly abstract mappings. To answer question six correctly, we have to be able to contemplate mapping people to cars, and cars to colours. It seems perfectly plausible that a student could completely fail to carry out the mappings required by questions five and six, but still succeed in carrying out the mappings in the Crenshaw argument. If the LSAT is not to be derided for containing "logic games," and if we are going to use such tests to determine the ability of students to reason analogically, I think we should test the kinds of skills that are clearly at work in carrying out analogical, legal reasoning. The kinds of formal analogies proposed by Olson and Plumer turn on the ability to map very different sorts of things to one another, whereas legal reasoning does not, for the most part, turn

on the ability to do such things. Perhaps the reason that such abstract mappings are being tested is that there is actually a chance that many students will fail in discovering the mappings, whereas discovering the purported mappings in the Crenshaw argument is a trivial matter, so it may not be as useful for testing purposes. Still, if the mappings in the Crenshaw argument are more characteristic of the type of mappings carried out in analogical legal reasoning, then it not obvious why the LSAT should test for the more abstract mapping ability.

At this point, I want to make it clear that I am not saying that *justifying* a particular mapping is an easy thing to do. In fact, selecting a mapping that can be justified is often difficult, but what makes it difficult is not something that is being tested for in examples like (O&P's) numbers five and six. For example, *Myers v. United States* (1926) involved a postmaster relieved of his duties by the President, who did not seek the Senate's consent for dismissal. The applicable statute said the President could appoint or dismiss a postmaster with the Senate's consent. The ex-postmaster sued for his back pay, but the court ruled against him, finding that the requirement for the Senate's consent to the firing was unconstitutional. In *Humphrey's Executor v. United States* (1935), the issue was the Presidential firing, without the Senate's consent, of a member of the Federal Trade Commission. The defense argued that *Myers* set the precedent that the president may freely dismiss any official appointed by him with the consent of the Senate. Of course, there are other ways of interpreting Myers. This is often the way it is with legal rulings. A judgement is made about a case, but there are different ways of interpreting the ratio behind the judgement. The defense could be understood as interpreting *Myers* and *Humphrey* as follows.

1. With Senate approval, the president can appoint a postmaster.

2. The President can dismiss the postmaster without Senate approval.

1. With Senate approval, the President can appoint members to the Federal Trade Commission.

2. The President can dismiss members of the Federal Trade Commission without Senate approval.

Under such a reconstruction, "members of the Federal Trade Commission" gets mapped to "Postmaster". However, the Supreme Court (siding with the plaintiff) restricted the interpretation of *Myers* in a crucial manner, arguing that the President had the authority to dismiss a postmaster without the Senate's consent since that individual performs purely executive functions. This power of dismissal does not apply in *Humphrey* since the members of the Federal Trade Commission have rule-making and adjudicative functions to perform. If we interpret *Myers* in the manner of the Supreme Court, there is some reason for not accepting the mapping of "members of the Federal Trade Commission" to "Postmaster" and not accepting *Humphrey* as analogous to *Myers*. If we try to carry out the mapping on the Supreme Court's interpretation, it is far from obvious that it can be defended, as the following suggests.

1. With Senate approval, the President can appoint a postmaster.

2. The President can dismiss the postmaster without Senate approval because that individual is performing purely executive functions.

1. With Senate approval, the President can appoint members to the Federal Trade Commission.

2. The President can dismiss members of the Federal Trade Commission without Senate approval even though they have rule-making and adjudicative functions to perform.

It is often the case the courts do not lay out a detailed legal principle that underwrites a particular judgement about a case. As Robert Rodes and Howard Prospesel point out, this leads to a problem in legal reasoning that is similar to a problem encountered in scientific reasoning: just as evidence may underdetermine theory choice in science, judgements on legal cases may underdetermine the selection of principles on which those cases are decided (Rodes and Prospesel 1997, 335). For example, it could be argued that the principle underwriting the judgement in *Myers* is

P1 the President can dismiss the postmaster without the consent of Senate; or

P2 the President can dismiss without the consent of Senate anyone who was appointed by the President with the Senate's approval; or

P3 the President can dismiss without the consent of Senate anyone who was appointed by the President with the Senate's approval to a purely executive type position.

This, by no means, is intended to be an exhaustive list of the possible principles that may be claimed to be at work in *Myers*. If we opt for P2 as the ratio behind *Myers*, then there might be something to be said for the analogy the prosecution tried to defend. However, if P1 or P3 are selected as the ratio behind *Myers*, it is less obvious that the prosecution can make its case. Once again, it is a trivial matter to see what the (prosecution's) purported mapping is between *Myers* and *Humphrey*; the challenge, though, is to make the mapping stick (or to justify it) in the face of purported differences between the cases in question. Since there are a number of different principles that could be used to interpret Myers, and since the mapping of "members of the Federal Trade Commission" to "Postmaster" may only be defensible on some, but not all, of those principles, then the ability to defend or reject the purported analogy between *Myers* and *Humphrey* will depend on how well one can defend a particular interpretation of the source case (*Myers*, in this instance).

Of course, defending a particular interpretation of the source case often requires plenty of background knowledge of the law. For instance, in opting for something like P3, the Supreme Court is invoking the constitutional importance of checks and balances, not giving one branch of government too much power over the others. The postmaster is perceived as playing an executive role, and the members of the Federal Trade Commission are seen as playing a quasi-

legislative/judicial role. To give the chief executive (the President) sole power of dismissal over those in a quasi-legislative/judicial role would be to give too much power to the executive branch of government. Background considerations such as these are often what make analogical reasoning so difficult and complex.

The point I've been trying to stress is that it is often easy to grasp what the *purported* mapping is between two cases. What is often difficult about analogical reasoning in a legal context is selecting a source case that, under some defensible interpretation, can provide strong evidence for a particular conclusion in the target case, and this process sometimes requires the extensive use of background knowledge of the law. While analogical reasoning is an important part of the law, I am sceptical that questions like O&P's 5 and 6 are useful for testing the likelihood of students being successful at analogical *legal* reasoning. To be sure, there is a significant empirical dimension to the preceding claim. Still, if my analysis of what is difficult and important in analogical legal reasoning is correct, and if my claim that figuring out what the purported mappings are in real analogical legal reasoning is often easy (an empirical claim), then testing for the ability to engage in highly abstract mappings *may* not lead to the attainment of one of O&P's goals: making the LSAT a more respected way of testing for skills that are useful in legal reasoning.

The conclusion of the preceding paragraph is carefully guarded. It is possible that testing for the ability to engage in abstract mappings is useful as a gauge for predicting success in law school even if it is not useful as a gauge for predicting success in analogical legal reasoning. Perhaps there are areas of legal reasoning that do require the ability to reason in the rather abstract manner required to succeed in answering questions like 5 and 6, which may mean that such questions have a role to play on the LSAT. However, that is a case that needs to be made. The purpose of this commentary has been to question the view that testing for the ability to perform the kind of mappings required by questions 5 and 6 would prove useful in determining the likelihood of succeeding in analogical reasoning in law school and in legal practice. As we just saw, it does not follow from this (without further argument) that there is no point to including questions testing analogical reasoning ability on the LSAT or other tests. Moreover, it could turn out that questions that are different from numbers 5 and 6 could be useful in testing analogical reasoning skills.

References

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