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COMMON-LAW JUDICIAL REASONING AND ANALOGY

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Proponents of strict rule-based theories of judicial reasoning in common-law systems have offered a number of criticisms of analogical alternatives. I explain these criticisms and show that at best they apply equally well to rule-based theories. Further, I show how the analogical theories explain a feature of judicial common-law reasoning—the practice of distinguishing cases—that rule-based theories ignore. Finally, I show that reason-based, analogical theories of common-law judicial reasoning, such as those offered by John Horty and Grant Lamond, offer especially strong rejoinders to the rule-theorist objections and persuasive accounts of distinguishing.

I. INTRODUCTION

A major difference between common-law jurisdictions such as the United States and Britain and civil-law jurisdictions such as France and Germany is the role of past cases. In civil-law jurisdictions a judge is free to ignore the results of past cases in reaching her decision, while a common-law judge lacks this freedom. Common-law jurisdictions treat past cases as precedent, which means that in at least some instances a past case compels a particular result in a current case. Various theories have arisen in attempts to characterize precisely the influence of precedent and explain how judges reason with precedent.[1]

This paper focuses on a prominent class of such theories, namely, the "rule-based" theories favored by Fredrick Schauer, Larry Alexander, and Emily Sherwin.[2] These theorists characterize a particularly strong manner in which precedent could influence a reasoner, which they call "precedential constraint."[3] They argue that precedential constraint is essential to any

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1. Larry Alexander & Emily Sherwin, Demystifying Legal Reasoning (2008).

2. *See, e.g.*, *id.*; Frederick Schauer, Playing by the Rules: A Philosophical Examination of Rule-Based Decisions in Life and Law (1991); Larry Alexander, *Constrained by Precedent*, 63 S. Cal. L. Rev. 1 (1989).

3. Frederick Schauer, *Precedent*, *in* Routledge Companion to Philosophy of Law 123, 130 (2012).

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common-law/precedential system of reasoning.[4] Further, they argue that precedential constraint is incompatible with an analogical account of how judges reason with precedent.[5]

In this paper I argue that even if we accept the rule theorists' characterization of precedential constraint and accept that it is an essential feature of judicial reasoning, we can still explain this with an analogical theory of common-law reasoning. More specifically, I argue that analogical theories are no worse than rule-based ones when it comes to precedential constraint and are better when it comes to the judicial practice of distinguishing. Since rule theorists have alleged no other deficiency of analogical theories, we can tentatively conclude that analogical theories are superior because they are better than rule-based theories with respect to some judicial practices and no worse than rule-based theories with respect to other judicial practices.

II. PRECEDENT AND THEORIES OF COMMON-LAW JUDICIAL REASONING

In common-law systems,[6] precedent can influence judicial decisions in a number of ways. It can strengthen a judge's belief that the case should be decided one way. That is, a judge may (i) think that, ignoring past decisions, the plaintiff should prevail and (ii) ultimately decide for the plaintiff after this conviction is strengthened by reviewing past decisions. It can also determine how a judge decides a case that she would not otherwise know how to decide. For example, a judge may have no idea whether she should decide the case for one party rather than the other until she consults precedent. Additionally, precedent can constrain the reasons for an outcome in addition to the outcome itself. For example, a judge can (i) think that, ignoring past decisions, a case should be decided for one party on the basis of certain reasons and (ii) ultimately decide for that party but give different reasons because of the way a past case or cases were decided.

Finally, precedent can constrain a judge to reach a decision when she would otherwise rule to the contrary. For example, a judge can (i) think that, in absence of precedent, a case should be decided for one party and (ii) decide the case for the other party because of the way in which a previous case or cases were decided. A concrete example is helpful. Suppose the current case before the judge is a claim by Betty that Abel's adult bookstore is a nuisance. Further, suppose there is an earlier case holding that adult bookstores are not nuisances. If that earlier case has the force of precedent,

4. *Id.*

5. ALEXANDER & SHERWIN, DEMYSTIFYING, *supra* note 1, at 31–104; Schauer, *Precedent*, *supra* note 3; Frederick Schauer, *Why Precedent in Law (and Elsewhere) Is Not Totally (or Even Substantially) about Analogy*, 3 PERSP. ON PSYCHOL. SCI. 454 (2008), at 454–460.

6. Since I am interested only in theories of precedent, I am interested only in common-law systems. All further references to judicial reasoning refer only to common-law judicial reasoning, and likewise for references to judges, cases, and so on.

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then the court must decide in favor of Abel, though it would otherwise have decided in favor of Betty. In this case, the influence of precedent is rather strong: it overrules the judge's initial opinion that the case should be decided the other way.

This final form of precedential influence is the rule theorists' "precedential constraint."[7] That is, precedential constraint occurs only when precedent prevents a judge from deciding the case according to her own lights. The challenge of explaining precedential constraint is crucial for theories of judicial reasoning; the response to this problem determines the overall character of the theory.[8]

Before reviewing the types of theories of judicial reasoning, I should clarify the purpose of a philosophical theory of judicial reasoning, focusing only on reasoning with precedent and ignoring for now the obvious fact that even common-law judges also decide cases where no precedent applies. A philosophical theory of judicial reasoning falls on the descriptive side of the normative/descriptive divide (or the descriptive end of the normative/descriptive spectrum). The theory is not an account of how judges ought to reason, because that account might not explain any actual judicial behavior. One might think that judges should never reason using precedent or that they should never overrule or distinguish precedents. Yet a theory using those principles misses the mark, as it ignores too much of judicial practice.

Instead, a philosophical theory of judicial reasoning is an attempted explanation, at a particular level of description,[9] of the reasoning employed by common-law judges in deciding cases. However, discerning what should count as data to be explained by a theory of judicial reasoning is not straightforward. Unfortunately, a judge sometimes reaches a decision because he was bribed, or because he refuses to rule for minorities, or because he did not want a hearing to overlap with his golf game.[10] When constructing a theory, the theorist has to determine which of these activities count as genuine instances of judicial reasoning. In fact, thinking of activities as simply in or out of the data set is slightly naïve. More realistically, the theorist must determine the centrality or importance of the behaviors to the practice of

7. *See* ALEXANDER & SHERWIN, DEMYSTIFYING, *supra* note 1, at 31–104; Schauer, *Precedent*, *supra* note 3; (2012); Schauer, *Why Precedent*, *supra* note 5.

8. *See, e.g.*, ALEXANDER & SHERWIN, DEMYSTIFYING, *supra* note 1; Grant Lamond, *Precedent and Analogy in Legal Reasoning*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2008), *available at* http://plato.stanford.edu/archives/fall2008/entries/legal-reas-prec/.

9. This caveat is necessary to avoid confusion. A theory explaining the sequences of neural firings occurring when judges make decisions is clearly not a philosophical theory of judicial reasoning, despite explaining the same data. We are looking for an explanation in the language of cognitive or folk psychology, not neuroscience or chemistry.

10. Some in the legal-realist camp may argue that all judicial reasoning is in fact like this, i.e., all decisions are reached due to prejudice, or self-interest, or class interest, and so on. If that is right, then a theory of judicial reasoning takes on a different tone, as it becomes an account of what judges think they are doing in making decisions, or what they present themselves as doing, or maybe what they ought to do. I disagree, but it matters little here, where my purpose is to argue that one theory that realists reject is stronger than another that they also reject.

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judicial reasoning. Decisions due to governing precedent or the equities of the parties are more central to judicial reasoning than decisions due to bigotry and bribery, and final judgments due to bribery seem more central than scheduling orders determined by peak golfing hours and so on. One might plausibly think this prioritizing of the data is a normative enterprise, perhaps based on the behavior of idealized judges.

Further complicating matters, some theorists write of judges as "decision maker[s] operating under a *norm* of precedent."[11] I think it is accurate to characterize precedential constraint as a norm of judicial reasoning, but the goal of a theory of judicial reasoning is not to justify that norm but rather to explain what it is and how judges follow it. Whether these considerations show that a theory of judicial reasoning is ultimately normative is not terribly important for my purposes. The issue here is no different from what theorists in various sciences face. Linguistics provides an illustrative example. As Barbara Scholz and colleagues note:

> [E]very linguist accepts that some idealization away from the speech phenomena is necessary . . . [linguists] are almost always happy to idealize away from sporadic speech errors. . . . Notice, then, that . . . the results of a corpus search are generally filtered through the judgments of an investigator who decides which pieces of corpus data are to be taken at face value and which are just bad hits or irrelevant noise.[12]

Of course, not all idealizations are universally accepted, as we can see in the linguistic controversy regarding how thoroughgoing the competence/performance distinction is.[13]

However, in the domain of legal reasoning I think there is rough agreement that things like bribery and bigotry are low-priority data, and if we all roughly agree on what counts as central to judicial reasoning, then we can start comparing theories.[14] Of course, one need not (and probably ought not to) set strict boundaries at the outset, as trade-offs between the amount of data explained (explanatory power) and other theoretical virtues such as simplicity can be made during the development and refinement of a theory. In fact, as we see below, explanatory coverage is my reason for favoring analogical rather than rule-based theories.

We are now positioned to consider some theories of judicial reasoning. In particular, I want to examine two types of such theories: rule-based theories and analogical theories. Admittedly, differences abound between theories within each category, and many prominent theories[15] do not fit neatly into

11. Schauer, *Why Precedent*, *supra* note 5, at 458 (emphasis added).
12. Barbara C. Scholz, Francis J. Pelletier & Geoffrey K. Pullum, *Philosophy of Linguistics* §2.1, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2011), *available at* http://plato.stanford.edu/entries/linguistics/.
13. *Id.*, §2.
14. Forms of legal realism may be outliers; *see supra* note 10.
15. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE (1986).

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either category. Nonetheless, each type characterizes a substantial set of prominent theories.[16]

Rule-based theories explain judicial reasoning as the process of extracting rules from past cases and following those rules in current cases.[17] How the extraction process works varies among the individual theories,[18] but the reasonable ones claim that it depends on the intentions of the author(s) of the past opinions.[19] Once the rules are extracted, judicial reasoning is simply a matter of seeing which rule applies in the current case. For example, suppose there is a past case that says "in residentially zoned neighborhoods, adult bookstores constitute a nuisance," and no other past cases. In the case between Abel and Betty, all the judge must do is determine whether Abel's business is an adult bookstore and whether it is located in a residential neighborhood. If both those conditions are met, then she must follow the rule and hold that the bookstore is a nuisance. If either one is not met, then she is free to decide the case as she pleases.

On the rule-based view, precedential constraint occurs when "the decision maker feels constrained and compelled to make what she now believes to be the wrong decision."[20] This may not be the most intuitive way of putting the point, but the idea is this: as mentioned above, when a judge is constrained by a rule of precedent, she is deciding the case contrary to how she would decide it if there were no precedents. Further, adds the rule theorist, she is not deciding to apply the rule due to concerns for the consistency, or predictability, or integrity of the law, or any other concerns related to the value of maintaining a rule.[21] That is, it is not the case that she would decide for the plaintiff but ultimately decides for the defendant because doing so renders the law more consistent, or makes the results of legal proceedings more predictable, or has some other benefit in virtue of maintaining a rule. Concerns for predictability, consistency, and so on are reasons for implementing a system of precedential reasoning. They are not, on a rule theorist's view, reasons relied upon by a judge constrained by precedent. Rather, for such a judge the status of the rule as precedential preempts any reasons for or against applying the rule.[22]

16. On the rule-based side, *see* ALEXANDER & SHERWIN, DEMYSTIFYING, *supra* note 1; and SCHAUER, PLAYING BY THE RULES, *supra* note 2. On the analogical front, *see* Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923 (1996); Phoebe Ellsworth, *Legal Reasoning, in* THE CAMBRIDGE HANDBOOK OF THINKING AND REASONING 685 (Keith J. Holyoak & Robert G. Morris Jr. eds., 2005); and John Horty, *The Result Model of Precedent*, 10 LEGAL THEORY 19 (2004).

17. *See* ALEXANDER & SHERWIN, DEMYSTIFYING, *supra* note 1, at 31–64, 131–237; *see generally*, SCHAUER, PLAYING BY THE RULES, *supra* note 2.

18. *See* ALEXANDER & SHERWIN, DEMYSTIFYING, *supra* note 1, at 12 n.11, 21 n.38, for a comparison between Alexander and Sherwin's view on the extraction process and Schauer's.

19. *See* Larry Alexander & Saikrishna Prakash, *Is That English You're Speaking? Some Arguments for the Primacy of Intent in Interpretation*, 41 SAN DIEGO L. REV. 967 (2004).

20. Schauer, *Why Precedent*, *supra* note 5, at 458.

21. ALEXANDER & SHERWIN, DEMYSTIFYING, *supra* note 1, at 41.

22. Rule theorists have an argument for this claim, namely, if all judges follow precedent only when it is justified by the value of maintaining the rule, and all judges mutually know this,

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On the rule-based picture, the judge acting under precedential constraint applies the rule without thinking that doing so is justified by systematic concerns, since she does not consider those reasons at all.[23] According to this view, a precedent favoring one party is not merely one reason in that party's favor; it is dispositive—the judge must decide for that party. An analog is the constraint of price in decisions about purchases. Suppose I have $400 and I want to buy a suit. The Izod suit is $200, the Kenneth Cole suit is $300, and the Ralph Lauren is $500. Between the Izod and the Kenneth Cole, price is a consideration that favors the Izod, but it may be outweighed by other considerations, such as quality of fabric or fit, that favor the Kenneth Cole. However, between the Ralph Lauren and the other two, price is a constraint. I simply cannot afford the Ralph Lauren; no consideration in its favor can outweigh this. No matter how much better the Ralph Lauren is than the other two, I just cannot buy it.

Although explaining rule extraction[24] and rule following[25] is a subtle business, the rule-based theory is fairly straightforward. However, one supposed implication[26] of the theory is rather bold: there is no distinction between the practice of distinguishing previous cases and the practice of overruling them, despite the importance of this distinction to legal practitioners[27] and theorists[28] alike. As Alexander and Sherwin admit, "the rule model does not and cannot distinguish between overruling precedent and modifying or 'distinguishing' them."[29]

then the value of maintaining the rule approaches zero, because each judge knows that each rule can be disobeyed at any time and hence sees little value in maintaining such a rule. *See* ALEXANDER & SHERWIN, DEMYSTIFYING, *supra* note 1, at 41; SCHAUER, PLAYING BY THE RULES, *supra* note 2, at 190–196. Whether this argument is convincing is outside the scope of this piece.

23. Note that this is does not entail thinking that applying the rule is *not* justified by systematic reasons about the legal system. Suppose a judge has, as precedential constraint requires, judged that the reasons about the particular case favor not applying the rule. Further, she has not thought at all about systematic reasons favoring applying the rule but nonetheless applies the rule. Then we can say, as Schauer does, that she decided to apply the rule while believing that is the wrong decision. After all, she has recognized reasons for not applying the rule and has not recognized any reasons to the contrary.

24. *See* Alexander & Prakash, *supra* note 19; Daniel Dennett, *The Interpretation of Texts, People and Other Artifacts*, 50 PHIL. & PHENOMENOLOGICAL RES. 177 (1990).

25. *See* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (1953).

26. Alexander and Sherwin take this as an implication of a rule-based view. One might think that a rule-based theory could identify distinguishing as special, limited type of overruling that involved constraints on the content of the new rule. *See, e.g.*, JOSEPH RAZ, THE AUTHORITY OF LAW (1979), at 186–187. Alexander and Sherwin argue against this, claiming that the constraints involved would be illusory; for any rule that fails the constraints, a judge can formulate an equivalent one that meets the constraints. ALEXANDER & SHERWIN, DEMYSTIFYING, *supra* note 1, at 84–86. Whether the argument is convincing is outside the scope of this paper.

27. *See* THOMAS F. HOGAN, THE FEDERAL COURT SYSTEM: AN INTRODUCTION FOR JUDGES AND JUDICIAL ADMINISTRATORS IN OTHER COUNTRIES, 22–23 (2d ed. 2010), *available at* www.uscourts.gov/uscourts/FederalCourts/Publications/English.pdf, stating, "A basic feature of the common law is the doctrine of "precedent."

28. *See* SCHAUER, PLAYING BY THE RULES, *supra* note 2; Lamond, *Precedent and Analogy*, *supra* note 8; Steven Perry, *Two Models of Legal Principles*, 82 IOWA L. REV. 787 (1997).

29. ALEXANDER & SHERWIN, DEMYSTIFYING, *supra* note 1, at 114.

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A modification to the previous example illustrates the rule-based theory. Suppose that Abel's neighborhood had been zoned residential, but due to liberal zoning exemptions, its buildings are now 90 percent commercial. The judge decides to distinguish the current case, holding that "in a neighborhood zoned as residential but overwhelmingly populated with commercial buildings, an adult bookstore is not a nuisance." She is faced with an applicable rule and refuses to apply it, instead creating a new rule, namely, that if the building is an adult bookstore, the neighborhood is zoned residential, and the neighborhood is overwhelmingly populated with commercial buildings, then the bookstore is not a nuisance. If she had decided to overrule rather than distinguish the previous case by holding that, "in neighborhoods zoned as residential, adult bookstores are not a nuisance," then she would still have decided to make a new rule rather than follow the old one. For the rule theorist, the refusal to follow the old rule is all there is to both distinguishing and overruling. A judge who may refuse to follow the old rule by distinguishing is no more constrained than a judge who may refuse to follow the old rule by overruling it.

Effacing the distinction between distinguishing and overruling has dramatic consequences; for example, it renders illusory a critical distinction in U.S. federal and state court structure, namely, the distinction between appellate courts, which have the power to distinguish any precedent and to overrule precedent established by lower-level courts, and district courts, which may only distinguish precedent. If distinguishing is merely overruling, then trial courts are no more constrained by precedent than the highest appellate courts. This creates a deep divide between the theory and practice of judicial reasoning by putting a low priority on what appears to be an important distinction.[30]

In contrast, analogical theories try to accommodate the distinction between distinguishing and overruling. Analogical theories are a wide-ranging group, but common to all is the thought that the judge observes the facts of a past case, compares them to the current case, and then decides the current case based on the comparison.[31] The idea is that if the facts in the past case are relevantly similar to the current case, then the current case must be decided the same way as the past case. Precedential constraint occurs when the judge decides the cases the same way based on their similarity while thinking it is suboptimal to do so. Distinguishing occurs when the judge decides that a superficially similar past case is in fact not relevantly similar, that is, when the judge notices an important dissimilarity between

30. This criticism is not new. *See, e.g.*, Grant Lamond, *Do Precedents Create Rules?*, 11 LEGAL THEORY 1 (2005).

31. This follows ALEXANDER & SHERWIN, DEMYSTIFYING, *supra* note 1, at 64–65. Note that this categorizes a number of theories as "analogical" that do not intuitively seem analogical, such as Horty, *Result Model*, *supra* note 16; and RAZ, *supra* note 26. For Alexander and Sherwin, "analogical theories" are all theories that attempt to explain the practice of distinguishing, except for those that use Dworkinian legal principles. ALEXANDER & SHERWIN, DEMYSTIFYING, *supra* note 1, at 64–65, 88–89.

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the past case and the current one. Overruling occurs when the judge determines that the two cases are relevantly similar, but nevertheless decides the current case differently from the past one. The judge with the power to overrule can make what she thinks is the best decision.

The ability to differentiate distinguishing from overruling, which judges and other legal practitioners appear to treat as distinct processes, gives analogical theories an advantage over the rule theories. Even assuming that distinguishing is not essential to judicial reasoning, being able to explain it is still a virtue, albeit slight. However, rule theorists argue that this virtue is illusory because analogical reasoning cannot explain precedential constraint, which is essential to judicial reasoning.[32] Their arguments take two forms: (1) essentially a psychological argument that analogical reasoning cannot explain the mental state required for a judge acting under precedential constraint; (2) a more normative claim about the data to be explained, namely, that distinguishing cannot be part of a system of reasoning that involves precedential constraint and hence any theory that allows distinguishing should be rejected. In what follows I examine these arguments and show that they leave analogical theories no worse off than the rule-based theories. Since the analogical theories are also able to differentiate distinguishing from overruling, I conclude that we should prefer the analogical theories to the rule-based ones.

III. THE ALLEGED PSYCHOLOGICAL PROBLEM WITH JUDICIAL REASONING AS ANALOGICAL REASONING

The argument against analogical reasoning as judicial reasoning proceeds as follows. Analogical reasoning depends on finding similarities between the source case and a target case. One finds similarities between the two and then extrapolates known features of the source to the target. Let Betty versus Abel be our current (and hence target) case. If the source case involves an adult bookstore that is not a nuisance, then one extrapolates that the adult bookstore in the target, that is, Abel's store, is not a nuisance as well. One may also find a dissimilarity that prevents the extrapolation, for example, if Abel's bookstore holds loud concerts at night and the bookstore in the source case was quiet, then one might not extrapolate that Abel's loud bookstore is not a nuisance.

However, the story goes, there are infinitely many ways in which any one case is similar to any other case and also infinitely many ways in which they are dissimilar. On the one hand, we might have only one previous case,[33] which involved a male plaintiff and held that an adult bookstore is not a

32. *See* ALEXANDER & SHERWIN, DEMYSTIFYING, *supra* note 1, at 64–88; Schauer, *Why Precedent*, *supra* note 5.

33. The assumption of only one precedential case is unrealistic, but it helps make the critique clear.

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nuisance. Then the current judge could say that the adult bookstore is a similarity that requires the same result in the current case. On the other hand, the judge could find that the gender of the plaintiff is a dissimilarity that blocks extrapolating that Betty should prevail. The judge is not constrained because she will always be able to find some respect in which the current case differs from a previous case and use that to distinguish them. Thus it appears that analogical reasoning is incapable of explaining precedential constraint.

The straightforward reply to this argument, offered by legal theorists and psychologists alike, is to claim that not all the myriad similarities and differences between cases are relevant in analogical reasoning.[34] If they were, then analogical reasoning could never get off the ground. No proponent of judicial reasoning as analogical reasoning, or of analogical reasoning generally, thinks that the gender of the plaintiff is a relevant dissimilarity in the previous examples. What is needed is a similarity metric that determines the relevance and degree of similarity between features in the two cases.[35] In the above example, the similarity metric is what tells us that the gender of the plaintiff is irrelevant. It also tells us that (in the context of a nuisance action) an adult bookstore is more similar to an adult video store than to a children's bookstore.[36]

Fixing a similarity metric will allow us to be bound by analogical reasoning because it provides a basis for claiming that some cases are more or less similar than others. If we think of the degree of similarity in terms of numerals, then you can sum the degrees of similarity to get the total measure of the similarity between a target and the source.[37] Furthermore, we can impose a standard of sufficient similarity (SOSS) such that if the total measure of

34. *See* Brewer, *supra* note 16; Hee Seung Lee & Keith J. Holyoak, *Causal Models Guide Analogical Inference*, *in* PROCEEDINGS OF THE TWENTY-NINTH ANNUAL CONFERENCE OF THE COGNITIVE SCIENCE SOCIETY 1205 (D.S. McNamara & G. Trafton eds., 2007), for impositions of criteria for relevant similarities. Brewer takes relevance to follow from the pragmatic goals that a judge has in making a decision and the requirement of an analogy warranting rationale for treating the similarities as justifying the extrapolation. Lee and Holyoak, writing on analogical reasoning in general, likewise recognize that the question the reasoner is trying to answer by analogy will influence which "mappings"—pairs of similarities—are relevant.

35. You can collapse these two by assigning a similarity of degree zero to any pair of irrelevant features. More importantly, you can think of relevance as a matter of degree as well. Hence you could multiply the degree of similarity by the degree of relevance to get a measure of relevant similarity.

36. There could be one master metric that assigns a degree of similarity to a pair composed of a context and a pair of features or multiple metrics that assign a degree of similarity to pair of features with the choice among the metrics determined by context. The two are equivalent for my purposes.

37. This follows the strategies found in the psychological literature on analogy. *See* Keith J. Holyoak, *Analogy*, *in* THE CAMBRIDGE HANDBOOK OF THINKING AND REASONING 117, 134–135 (Keith J. Holyoak & Robert G. Morris Jr. eds., 2005), which ranks mappings between a target and a single or multiple sources by how many constraints, such as similarity, structure, and purpose, the mapping satisfies. *See also* Brian Falkenhainer, et al., *The Structure-Mapping Engine: Algorithm and Examples*, 41 ARTIFICIAL INTELLIGENCE 1 (1989), which uses a structural mapping engine that ranks relations such as "cause(x,y)" and "occupy(x,y)" and then favors mappings that include correspondences between higher-order rankings.

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similarity between a source and a target is above this standard and there is no other source with an equal or higher total measure of similarity, then the reasoner must extrapolate from the source. That is, the reasoner must extrapolate from a source if and only if it is the most similar of all the sources that are sufficiently similar to the target.

For example, consider again the case of Betty and Abel, and let the only possible precedent be a case with a male plaintiff, a case holding that an adult bookstore is not a nuisance. Suppose the similarity metric deems the gender of the plaintiff irrelevant. Further, suppose this past case is above the SOSS with respect to Betty's case. It follows that the judge has to extrapolate that Abel's bookstore is not a nuisance. Hence the judge is bound to rule against Betty[38] even if she thinks that all adult bookstores should be considered nuisances. She is thus constrained to rule contrary to how she would rule if the past cases did not have the force of precedent.

IV. SCHAUER'S RESPONSE

At this point, the two major critics[39] of analogical reasoning offer similar but distinct responses. Schauer claims that analogical reasoning can act only as a "friend" but never as a "foe."[40] The idea is that something must guide our choice of a similarity metric,[41] and there are only three pertinent situations in which an analogical reasoner may find himself.

Situation 1: Analogy as a Friend

The reasoner has already made a decision and simply searches for a metric that justifies this decision. For example, a president may think it is best to invade Iraq and then try to convince the public that invasion is the right decision by analogizing Iraq to Germany in the 1930s.[42] The role of analogy here is post hoc, paralleling the role of most moral reasoning, if we follow Jonathan Haidt.[43] It is a friend to the decision already made.

38. She may rule for Betty only if she overrules the past precedent, makes a mistake, or intentionally deviates from common-law practice.

39. *See* ALEXANDER & SHERWIN, DEMYSTIFYING, *supra* note 1, at 64–88; Schauer, *Why Precedent*, *supra* note 5.

40. *See* Schauer, *Why Precedent*, *supra* note 5.

41. Schauer puts it in terms of a choice of a source, but in the context of this paper I think the critique is best understood as dealing with the choice of the metric. *See id.* In the legal context, there is only a finite number of potential sources because there is only a finite number of prior cases in the jurisdiction. Further, most of these cases will be immediately excluded as irrelevant by the metric; e.g., a felony murder case is not going to be relevant to Betty's nuisance claim.

42. This example is based on one found in Holyoak, *supra* note 37, at 125–127.

43. *See* Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814 (2001), which argues that most moral reasoning is a post hoc justification of intuitions.

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Situation 2: Analogy as a Problem Solver

The reasoner has not yet made a decision and uses analogical reasoning to make one. The question that the reasoner is trying to resolve helps to guide the selection of the metric.[44] For example, a president might be trying to decide whether to invade Iraq. Since he is trying to decide whether one country should invade another, he is guided to a metric that makes similarities in army size relevant and similarities in average rainfall irrelevant. He then constructs analogies between Iraq and 1930s' Germany and 1960s' Vietnam. He finds the latter analogy compelling and becomes convinced that he should not invade Iraq.

Situation 3: Analogy as a Foe

The reasoner has already decided on one course of action, but analogical reasoning causes him to take a contrary course of action. For example, a president is initially convinced he should not invade Iraq but nonetheless decides to invade Iraq because of its similarity to 1930s' Germany. Schauer denies that this situation ever occurs, because the decision for one course of action will cause the selection of a metric favorable to that course of action. Since precedential constraint can occur only in situation 3, it follows that analogical reasoning cannot explain precedential constraint.

To scrutinize Schauer's response we need to look at the psychology underlying precedential constraint. For rule theorists, as discussed above, the judge acting under precedential constraint makes "what she now believes to be the wrong decision."[45] Despite thinking the decision is wrong, the judge intentionally decides to follow the precedent. Making sense of this seemingly paradoxical[46] state of mind leads Schauer as well as Alexander and Sherwin to suggest that precedential reasoning involves a sort of self-deception.[47] I do not wish to take a stand on this issue. I think psychologists are much better equipped for that task.[48] Rather, I want to consider how the analogy theorist can reply even if he accepts this bit of the rule theorists' speculative psychology.

It is easiest to think of this rule theorists' psychological theory in terms of a split mind. One part of the reasoner's mind thinks that A is the best course of action in circumstance C, while another part of it thinks that C

44. "Selection" is perspicuous here, but I do not want to suggest that the selection of a similarity metric is a consciously directed process. It is not as if the reasoner must have a bunch of metrics in mind and then thinks, "I pick that one."

45. Schauer, *Why Precedent*, *supra* note 5, at 458.

46. It is an instance of acrasia but likely not of weakness of the will. *See* Richard Holton, *Intention and Weakness of Will*, 96 J. PHIL. 241 (1999) (addressing the distinction between acrasia and weakness of the will).

47. ALEXANDER & SHERWIN, DEMYSTIFYING, *supra* note 1, at 18; Schauer, *Why Precedent*, *supra* note 5, at 459–460.

48. So does Schauer, *Why Precedent*, *supra* note 5, at 459–460.

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falls within the scope of a rule that prescribes a non-A course of action. The reasoner is constrained by precedent when he decides to follow that rule without changing the other part of his mind.

Unfortunately for Schauer, a similar theory is available to the analogical theorist. One part of the reasoner's mind thinks that A is the best course of action. Another part reasons analogically; it selects a similarity metric guided by the question of what to decide in C. It finds a source analog that rises above the standard of sufficient similarity and thus accepts the extrapolation from that source. The extrapolation recommends a non-A course of action. The reasoner is constrained by precedent when he decides to follow the extrapolation without changing the other part of his mind.

Still, Schauer may object that bias in selection of the similarity metric renders analogy incapable of grounding precedential constraint. The reasoner's judgment that A is the best course of action will, according to the objection, unavoidably cause the reasoner to select a metric that supports an A course of action. In terms of the split mind psychology, the objection is that the part of the reasoner's mind that performs the analogical reasoning cannot be insulated from the part that judges A to be the best option.

The reply to this criticism is to point out that (i) we have no reason to think that the selection of similarity metrics is unavoidably biased in this way, and (ii) the same problem arises for rule theories. After all, if the part of the mind that performs analogical reasoning cannot be insulated from the part that thinks A is the best course of action, then why should we think that the part performing rule extraction and application can be so insulated? There is no reason to think that rule-based reasoning is uniquely insulated from beliefs about the best course of action.

One might object that the process of rule extraction has a safeguard against bias insofar as the meaning of a rule is determined by facts such as the intentions of those who declared the rule. There are two ways this objection could run. First, it could depend on there being a uniquely correct meaning for the rule. The objection is then that the lack of a uniquely correct similarity metric makes the choice of metrics more susceptible to bias. Yet no one has ruled out an objectively correct similarity metric for which analogical reasoning searches. I do not argue for that here, but it is a live option and it puts analogical reasoning on par with the rule theorist.

Further, even if there is no uniquely correct similarity metric, the process of choosing a metric is not thereby made more vulnerable to bias. It does not seem that whether there is a uniquely correct similarity metric has in itself any effect on susceptibility to bias. Consider a manager with a bias against women who is deciding which employee to promote. Suppose there are two employees eligible for promotion, one man and one woman. The woman is the more effective employee and hence ought to be promoted, but the manager's bias favors the man. Now suppose that there are four employees, two men and two women. Suppose that the two women are equally effective and each is more effective than either man, so promoting either woman

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would be proper. Does anyone think that the manager is now less likely to act with bias to promote a man?[49]

The second way to take the objection is that it depends on treating the extraction of a rule as a search for a fact, namely, the intentions of the past judge. The objection holds that such a process is more impartial than the process of selecting a similarity metric. But it seems we can treat the selection of a similarity metric as a search for a fact, namely, the fact that the cases are relevantly similar (or dissimilar). I do not see any reason to reject such facts. They may be difficult to characterize (perhaps depending on intersubjective agreement within a community), but facts about the past judge's intentions faces similar difficulties. Admittedly, it is harder to be biased when the evidence is manifest. If facts about the past judge's intentions were clear and conspicuous, then rule extraction would be relatively unbiased. However, facts about those intentions are notoriously difficult to discern. Hence even this extraction process faces the same difficulties as the choice of similarity metric.

V. ALEXANDER AND SHERWIN'S RESPONSE

Alexander and Sherwin offer a different response to the analogical theorist who wishes to use a similarity metric.[50] Rather than claiming that a similarity metric cannot ground precedential reasoning, they claim that the similarity metric makes the reasoning nonanalogical. Alexander and Sherwin argue as follows:

> Analogical decision making based on factual similarity between cases is either intuitive or deductive. If the process of identifying important similarities is intuitive, the precedent case does not constrain the outcome of the new case in any predictable or even detectable way [i.e., it is not a form of reasoning at all]. If the process is deductive, the rules or principles that govern similarity, rather than the outcome of the precedent case, determine the result of the new case.[51]

In terms of a similarity metric, the argument is that either (i) the metric is intuitive and hence incapable of underlying a reasoning process, or (ii) the metric is composed of (or determined by) rules/principles and the reasoning is not genuinely analogical, since these principles and not the outcome of the past case constrain the judge. Further, they argue that these principles must be either principles of morality or legal rules extracted from

49. Of course, if anything goes, and there is no distinction between good and bad metrics, then the choice of metric is arbitrary. But this is not Schauer's objection, since there is no need to worry about bias if a decision is arbitrary.
50. ALEXANDER & SHERWIN, DEMYSTIFYING, *supra* note 1, at 68–88.
51. *Id.* at 81.

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past cases.[52] Hence, what might seem like analogical reasoning is reduced to either general moral reasoning or rule-based reasoning.

Let us begin with (ii). Suppose our metric says that in nuisance actions, adult bookstores and adult video stores are significantly similar. How did we arrive at this metric? If we deduced it from the principle that both adult bookstores and adult video stores are nuisances. then the principle is sufficient to determine the result, and analogy adds nothing.[53] That seems to be the kind of principle Alexander and Sherwin have in mind. However, a metric could be deduced from principles that are not sufficient to determine the result of the case. For example, we can deduce that adult bookstores and adult video stores are importantly similar for nuisance from the principles "presenting the same danger to neighboring children is a similarity relevant to nuisance actions" and "adult bookstores and adult video stores present the same danger to neighboring children." Yet these principles do not by themselves determine the result in the case because they do not tell us whether adult bookstores or adult video stores are nuisances. Even assuming no further relevant similarities, these principles would allow a judge to conclude only that adult bookstores and adult video stores must be treated alike in nuisance actions. The result in the past case determines whether this means that both are or are not nuisances.

It is not clear why Alexander and Sherwin think these nondeterminative principles are illegitimate. If we combine these nondeterminative principles with the results in the past case, we get determinative rules, which look just like the rules favored by rule theorists. Additionally, it seems plausible that we do reason our way to nondeterminative principles. For example, moral reasoning[54] can lead us to principles such as "the gender of the victim is not relevant to how the murderer should be punished." I think the real dispute here is how judges acquire the rule: on the analogical picture, you get principles of similarity and then combine them with the result to get the determinative rule, while on the rule theory, you extract the determinative rule wholesale, without making any judgments about similarity. However, as I explain below, it is unlikely that extraction of rules could be done without any similarity judgments.

Now let us consider (i), Alexander and Sherwin's claim that intuitive processes are incapable of underlying genuine reasoning. They justify this by appeal to Haidt's characterization of a reasoning process as "slow and effortful . . . intentional and controllable . . . consciously accessible and viewable."[55]

52. They argue that a third option, a Dworkinian extraction of the principles that best cohere with the past decisions, will not yield genuine constraint because any weighing of the principles is permissible and any result can be reached with the right weighing. I disagree, but that is outside my project here.

53. *Id.* at 170–171.

54. A fully fleshed-out analogical theory has to specify whether the principles are derived from moral reasoning or past cases or some other source, but nothing about analogy compels selecting one of these source rather than another.

55. *Id.* at 10 n.3, quoting Haidt, *supra* note 43, at 818.

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Yet they have no problem with analogical reasoning if it is merely rapid rule following.[56] They seem to think rapid rule following is not genuinely intuitive. However, such a distinction cannot be drawn using Haidt's characterizations, since rapid rule following certainly is not "slow and effortful."[57]

Strangely, Alexander and Sherwin think it is acceptable for an intuitive judgment of similarity to "spark" moral reasoning about which principles justify that intuitive judgment, because this reasoning is just moral reasoning, not a distinctly analogical form of reasoning.[58] For this to be plausible, the force of the intuitive "spark" cannot be too strong, lest the moral reasoning end up serving as a mere post hoc justification—the rationalist dog wagged by the analogical tail. However, even if the intuitive judgment (the spark) is easily defeasible, it could still significantly influence the reasoning process. For example, the intuitive judgment could make salient certain features of the case that remain at the fore of the judge's mind even after he rejects the judgment. Hence the conclusions of sparked moral reasoning regarding a case may differ significantly from the conclusions one would get from spark-free moral reasoning about that same case. Perhaps sparked moral reasoning should be considered an independent, analogical form of reasoning rather than a subspecies of moral reasoning.

Still, we must consider why Alexander and Sherwin claim that the judgment of similarity cannot be purely or primarily intuitive. They argue that the process will fail to be reasoning at all and, per Haidt's definitions, they are correct. The question then becomes: Why should we think reasoning ought to conform to the definitions put forth by Haidt? It is argued that Haidt's demarcation of reasoning and emotion is inadequate in general,[59] but we need only concern ourselves with its relation to judicial reasoning. Alexander and Sherwin assert:

> Members of a community choose an authority to translate values they recognize as reasons for action into particular decisions or rules when their own judgments conflict. . . . [I]t is expected that the process of translation will be capable, at least in principle, of articulation and justification. Otherwise, the choice of an authority is no different than a flip of a coin. This leads to the normative point: judicial decision making, as an exercise of authority, ought to . . . entail more than blind, untested, untestable intuition.[60]

If judicial reasoning is based on purely intuitive judgments of similarity, then authority becomes a mere coin flip, unjustifiable and unresponsive to

56. ALEXANDER & SHERWIN, DEMYSTIFYING, *supra* note 1, at 72. *See* Steven R. Quartz, *Reason, Emotion, and Decision-Making: Risk and Reward Computation with Feeling*, 13 TRENDS IN COGNITIVE SCI. 209 (2009), for a selection of the psychological literature suggesting that this is how some intuitive processes seem to work.

57. Haidt, *supra* note 43, at 818.

58. ALEXANDER & SHERWIN, DEMYSTIFYING, *supra* note 1, at 73–74.

59. *See* Cordelia Fine, *Is the Emotional Dog Wagging Its Rational Tail, or Chasing It?*, 9 PHIL. EXPLORATIONS 83 (2006).

60. ALEXANDER & SHERWIN, DEMYSTIFYING, *supra* note 1, at 75–76.

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any societal values. As Alexander and Sherwin point out, their response is no longer psychological but (slightly) normative.[61] They claim that a theory of judicial reasoning need only explain decisions that reflect the values recognized by the community and that purely intuitive judgments cannot explain that data.[62]

We could respond by claiming that judgments reflecting those values simply do not occur, banishing Alexander and Sherwin's theory to the realm of the purely normative. However, that claim seems empirically implausible, and I think a better response is available, namely, that Alexander and Sherwin seem to be conflating being unarticulated with being unarticulable. Of course, one making an intuitive judgment is not articulating a similarity metric or set of principles to himself; he is not ticking off items on a mental checklist or walking through a deduction from first principles. But this does not mean there is no articulable process at work. Easy examples abound in literature on implicit bias,[63] such as managers who do not articulate, and would reject if articulated, a principle discriminating against Muslim employees but still systematically judge Muslims unfit for promotion.[64] We can articulate the process underlying the managers' decisions, and although in this instance the process clearly lacks justification, it does not lack justification *in principle*.

One might worry that once we articulate the analogical process, we have reduced it to rules. However, every form of reasoning goes from a set, P, of premises or evidence to a conclusion, C. Hence any form of reasoning could be articulated by a rule such as "from P, infer C." Yet we not are all rule theorists. As long as the process is not articulated in terms of indefeasible (strict), outcome-determinative rules extracted entirely from individual past cases, it is not a "rule-based theory" in Alexander and Sherwin's sense of the phrase.[65]

Still, suppose we grant Alexander and Sherwin that the intuitions of similarity depend on an unarticulable process. Must we then conclude, as Alexander and Sherwin do,[66] that analogical reasoning is arbitrary and incapable of implementing social values? No. We could understand legal similarity as a cultivated or learned intuition, a matter of knowing how rather than knowing that. Just as Derek Jeter did not track the position of a flyball at the age of five but now does so intuitively, one can learn to intuit

61. *Id.* at 74.
62. *Id.* at 74–76.
63. *See* Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4 (1995), for the seminal work. The National Center for State Courts offers a summary of current research. *See Helping Courts Address Implicit Bias: Frequently Asked Questions*, NATIONAL CENTER FOR STATE COURTS (2012), http://www.ncsc.org/~/media/Files/PDF/Topics/Gender and Racial Fairness/Implicit Bias FAQs rev.pdf.
64. *See* Dan-Olof Rooth, *Automatic Associations and Discrimination in Hiring: Real World Evidence*, 17 LAB. ECON. 523 (2010).
65. ALEXANDER & SHERWIN, DEMYSTIFYING, *supra* note 1, at 75–76.
66. *Id.*

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the appropriate similarity metric in legal contexts.[67] Just as the values of Jeter's previous coaches influence his current catching technique, so the values of the society in which the aspiring lawyer was trained influence his current reasoning. This does not license the use of any particular sort of metric. There may be no single correct catching technique, but there are certainly incorrect ways of doing it. If I try to catch the ball with my teeth rather than the glove, then I am doing something wrong. Likewise, there may be no one "real" metric out in the ether to which we aspire, but the consensus among those experienced in judicial reasoning rules out metrics that do things such as making similarities in plaintiffs' names relevant.[68]

Further, we can ask whether the rule-based theory offered by Alexander and Sherwin meets their own lofty standards. Recall that according to their view, precedential reasoning depends on extracting rules from past opinions and then deciding to follow such a rule despite thinking it leads to suboptimal results. A problem arises when we ask how the rules are to be extracted and interpreted. If the previous case says "bookstores are not nuisances," should we understand "bookstores" to include adult bookstores? Thanks to Goodman[69] and Kripke,[70] more devious interpretations loom: Should we interpret "bookstores" to mean stores that sold books before 2011 and stores that sell horses thereafter? In response to these concerns, Alexander and Sherwin argue that "the conclusion to draw—and that is almost universally drawn, though by differing routes—is that . . . [language interpretation] and rules are matters of *knowing how* rather than *knowing that*."[71]

Regardless of whether this response is adequate, it shows that the rule theorists are subject to the same criticism they level against analogical theorists. For Alexander and Sherwin, extracting a rule bottoms out in irreducible knowing how, which supposedly dooms any intuitive account of analogical reasoning. If language interpretation and rules are purely matters of

67. I am assuming, contrary to fact, that the process underlying tracking a flyball is unarticulable. *See* Michael K. McBeth & Dennis M. Shaffer, *Baseball Outfielders Maintain a Linear Optical Trajectory When Tracking Uncatchable Fly Balls*, 28 J. Experimental Psychol.: Hum. Perception & Performance 335 (2002).

68. This is not to suggest there is no single right method to catch a baseball or a single correct metric. The argument is unchanged as long as some methods and metrics are ruled out.

69. *See* Nelson Goodman, Fact, Fiction, and Forecast (4th ed. 1983), at 74.

70. *See* Saul Kripke, Wittgenstein on Rules and Private Language: An Elementary Exposition (1982).

71. Alexander & Sherwin, Demystifying, *supra* note 1, at 161. I think this conclusion is neither correct nor universally drawn, but that is beside the point. *See* Allan F. Gibbard, Meaning and Normativity (2012); Ted Sider, Writing the Book of the World (2011), at 21–44; and David K. Lewis, *New Work for a Theory of Universals*, 61 *Austl. J. Phil.* 343 (1983), for more convincing responses. Should Alexander and Sherwin reverse course and adopt one of these approaches that I favor, their argument against analogy would be made more consistent, as rule extraction would not bottom out in knowing how. Still, their argument would not be convincing. I argue *supra* in Section V that even purely intuitive analogy can still meet the normative requirements posited by Alexander and Sherwin. Moreover, the supposition that analogy must be understood as knowing how is granted only for the sake of argument. I think it can be characterized using knowing that. *See* the references at *supra* notes 34 and 37.

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knowing how, then they are just as capable (or incapable) of articulation and justification as other abilities of pure knowing how, including (supposedly) the ability to identify important similarities. If Alexander and Sherwin's criticism succeeds in defeating analogical accounts, then it defeats the rule-based accounts as well.

Even without considering Kripkenstein-like concerns about language, a serious difficulty with Alexander and Sherwin's view remains. Discussing the interpretation of legal rules, they claim quite plausibly that "exemplars, definitions, and referents ultimately are interrelated and cannot be neatly opposed."[72] An exemplar is useless without some sort of similarity metric to determine which objects it is relevantly similar to. Further, relevant similarity plays a critical role in the standard theory of interpretation of subjunctive conditionals. Following Lewis[73] and Stalnaker,[74] the truth value of a subjunctive conditional is determined by the truth of the consequent in the possible world (or worlds, for Lewis) that both satisfies the antecedent of the conditional and is most relevantly similar to the actual world. To determine which world (or worlds, for Lewis) this is requires a similarity metric of the sort rejected by Alexander and Sherwin.[75] Thus even rule extraction depends in part on judgments of relevant similarity.

Hence the psychologically based objections to judicial reasoning as analogical reasoning all fail to show that an analogical theorist is worse off than the rule theorists raising the objections. I end this section on a cautionary note: this section contains a great deal of speculation and stipulation and very little empirical evidence regarding the mental states required for precedential constraint. A theorist can stipulate that precedential constraint requires any mental states she wishes, but if no actual judicial behavior meets these requirements, she has designed a theory unfit for our (explanatory) purposes. I try here to show that one can maintain an analogical theory while accepting most of the speculative psychology offered by the rule theorists. Whether these speculations are accurate is a question for psychologists, not dilettantes like me. In the next section I take up a more normative criticism of analogical theories that a philosopher is better suited to address.

72. ALEXANDER & SHERWIN, DEMYSTIFYING, *supra* note 1, at 149.
73. DAVID K. LEWIS, COUNTERFACTUALS (1973).
74. ROBERT C. STALNAKER, CONTEXT AND CONTENT (1999).
75. In fact, the notion of "relevance" that Alexander and Sherwin find so troubling with respect to analogical reasoning lies at the heart of pragmatics, from the seminal work of Grice to contemporary accounts such as Roberts's that treats relevance to the question under discussion as an important constraint on interpretation; *see* H. Paul Grice, *Logic and Conversation*, *in* THE LOGIC OF GRAMMAR 64 (Donald Davidson & Gilbert Harman eds., 1975); Craige Roberts, *Information Structure in Discourse: Towards an Integrated Formal Theory of Pragmatics*, 49 OHIO ST. U. WORKING PAPERS IN LINGUISTICS 91 (1996); Craige Roberts, *Solving for Interpretation* (2011), *available at* http://www.ling.ohio-state.edu/~croberts/Solving_for_interpretation.Oslo.paper.pdf. This should not come as a surprise. From the lofty philosophical heights of various paradoxes of meaning to more mundane issues of anaphora resolution, language interpretation faces the same difficulty as analogical reasoning: a host of meanings (for language) or mappings (for analogy) is possible, and we need to (and often do) pick just one.

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VI. DISTINGUISHING AS PART OF JUDICIAL REASONING

In addition to the critiques dismissed above, analogical theories of judicial reasoning are attacked as part of broader arguments against all theories that attempt to account for the practice of distinguishing, whether or not those theories depend on judgments of similarity. This broader argument is as follows:

(P1) Distinguishing is incompatible with precedential constraint. That is, a consistent theory can account for precedential constraint or distinguishing, but not both.
(P2) Any consistent theory of judicial reasoning is better than any inconsistent one.
(P3) Precedential constraint is a more important aspect of judicial reasoning than distinguishing.
(P4) Theories of judicial reasoning that explain the more important aspects of judicial reasoning are better than theories that fail to explain those aspects.
(C1) Any consistent theory that explains precedential constraint is better than any theory that accounts for distinguishing, because such a theory is either inconsistent or fails to explain precedential constraint.

The argument is valid, so only the truth of the premises remains open to objection. I am willing to grant (P2) and (P4) for the sake of argument. The most controversial premises are (P1) and (P3).

Regarding (P3), distinguishing is in some sense dependent on precedential constraint, as there is no need to distinguish without a norm of deference to past cases. Yet it is unclear how that justifies treating distinguishing as less important for judicial reasoning. One might think it is as important as precedential reasoning itself. Further, one might agree that distinguishing is less important than precedential constraint but maintain that it is still essential to judicial reasoning. If one accepts that position, then the conclusion of the argument is skeptical: judicial reasoning is incapable of being adequately theorized.

(P1) is supposedly supported by the following argument:[76]
(P5) If a judge has the power to distinguish cases, then she may distinguish cases on the basis of any factual difference.
(P6) Between any two cases there is at least one factual difference.[77]
(C1) Hence a judge with the power to distinguish may distinguish any case from any other case.
(P7) If a judge may distinguish a current case from all past cases, then she is not under precedential constraint with respect to the current case.
(C2) Hence, if judge has the power to distinguish, then she is not under precedential constraint with respect to any case. That is, she is not constrained by precedent at all.

76. ALEXANDER & SHERWIN, DEMYSTIFYING, *supra* note 1, at 80–87.
77. Usually this premise is replaced by the stronger premise that between any two cases there are infinitely many factual differences. *See* Schauer, *Why Precedent*, *supra* note 5. I use the weaker claim because it is all that validity requires.

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The argument is valid, and the only controversial premise seems to be P5. Does the practice of distinguishing allow any factual difference to be used to distinguish cases? I think not. We rarely, if ever, see cases distinguished based on the first name of the plaintiff or the day of the week on which the suit was filed. If we did see such a case, we would suspect that something disingenuous was afoot. A judge who distinguishes a case because the plaintiff is named "Tom" and not "John" seems no more engaged in judicial reasoning than one who decides a case in favor of one party because of a bribe.

Unfortunately, explaining what makes a factual distinction legally relevant is no easy task. For example, a norm that permits distinguishing a past case only when the court's new rule justifies the result in the previous case[78] is not sufficient, because any new rule either covering the current case with an exception clause for the previous case or covering the previous case with an exception clause for the current case is permitted.[79] There are, of course, other proposed (and possibly successful) explanations, a complete survey of which is beyond my remit. Instead, I want to focus on one possible explanation that relates to analogical theories.

There is an obvious parallel between the search for relevant similarities discussed above and the difficulty of trying to determine which facts can distinguish cases. The facts we are looking for are simply the absence of a relevant similarity or the presence of a relevant dissimilarity. If the sale of pornography is a relevant similarity in nuisance actions, then the fact that the current case involves a children's bookstore is grounds for distinguishing the current case from a past precedent involving an adult bookstore, even if that past case seemed to contain a rule about bookstores of all types. If the argument of the previous sections is sound, then similarity metrics may be able to explain distinguishing without permitting any factual difference to distinguish two cases.

A more convincing response is available if we shift from theories dealing with relevant factual similarities, a technical term from cognitive psychology, to talking about reasons, an everyday concept with which we are more familiar.[80] However, I must note that I use "reason" in a fairly thin sense in that a reason is just a fact that favors one party or the other in a two-party controversy.[81] I think this sense is familiar to nonspecialists, but it is more

78. RAZ, *supra* note 26, at 186–188.

79. ALEXANDER & SHERWIN, DEMYSTIFYING, *supra* note 1, at 85–87.

80. One might suspect that relevant similarities are just the same as reasons, in which case we are just shifting to a more familiar vocabulary. Others might suspect that the shift to reasons is more substantial. Either way, both types of theories are "analogical," according to the definition adopted *supra* at Section II from Alexander and Sherwin. Hence what follows is an example of analogical response to the criticism.

81. *See* Kevin D. Ashley, *Reasoning with Cases and Hypotheticals in HYPO*, 34 INT'L J. MAN-MACHINE STUD. 753 (1991); John F. Horty, *Rules and Reasons in the Theory of Precedent*, 17 LEGAL THEORY 1 (2011); Lamond, *Do Precedents*, *supra* note 30.

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controversial among philosophers. A sketch of a reason-based theory of judicial reasoning follows.[82]

Consider again Betty's case against Abel and his adult bookstore. Suppose the neighborhood contains a number of day-care centers. The large number of small children who could wander into the bookstore and accidentally see pornography is a reason in Betty's favor. Suppose Abel operates his bookstore only at night, when the day-care centers are closed. This is a reason in Abel's favor. Precedential cases tell us the relative weight of reasons in favor of one party compared to the reasons in favor of the other party. We can label reasons for the plaintiff "Rp1, Rp2, Rp3 . . ." and reasons for the defendant "Rd1, Rd2, Rd3. . . ." In a precedential case ruling for the plaintiff involving only Rp1, Rp2, Rp3, Rd1, Rd2, we can understand a precedential "rule" to be that Rp1, Rp2, and Rp3 require ruling for the plaintiff.[83] The theory also stores the information that Rd1 and Rd2 are insufficient to defeat this rule. Thus, if another case arises with only those five reasons, it must be decided in favor of the plaintiff. Further, if another case arises involving a superset of the reasons for the plaintiff and a subset of the reasons for the defendant, that is, involving at least Rp1, Rp2, and Rp3 and at most Rd1 and Rd2, then the case must be decided in favor of the plaintiff. For example, a case involving only Rp1, Rp2, Rp3, and Rd2 must be decided in favor of the plaintiff.

In this framework, only *reasons* can distinguish cases. Hence the argument against distinguishing looks a bit different. Let us call any reason present in the current case but not present in the past cases a novel reason. Adjusting the relevant premises, P5 and P6, in the most natural way yields:

(P5′) If a judge has the power to distinguish cases, then she may distinguish cases on the basis of any novel reason.
(P6′) Between any two cases there is at least one novel reason.

Yet (P5′) is clearly false, because just any novel reason cannot justify distinguishing the cases. The novel reason must support the party that is going to win the current case. For example if the precedent held for the defendant, but the current judge distinguished it and held for the plaintiff, then the judge must have found a novel reason in favor of the plaintiff. The properly modified premises take this into account:

(P5″) If a judge has the power to distinguish cases, then she may distinguish the current case based on any novel reason in favor of the party she wants to prevail.

82. This sketch is a simplified version of the accounts of Horty and Lamond. *See* Horty, *Rules and Reasons*, *supra* note 81; Lamond, *Do Precedents*, *supra* note 30.
83. Horty's more recent work, Horty, *Rules and Reasons*, *supra* note 81, allows the extraction of rules that do not involve all the reasons for the prevailing party, *contra* Horty, *Results Model*, *supra* note 16. This distinction is not relevant for this sketch.

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(P6″) Between any two cases there is at least one novel reason in favor of the party that the judge wants to prevail.

The justification for (P6″) is that if the judge thinks the precedential case is wrongly decided for the plaintiff, then any factual difference between it and the current case is a reason in favor of the defendant (and vice versa). Alexander and Sherwin write, "[if the current judge] believes that the precedent judge's reasoning was wrong . . . then the reason generated by the new fact . . . will always be 'stronger' than the reason for the precedent outcome, from [the judge's] point of view."[84]

However, it is implausible that facts can be so easily converted into reasons. If a female plaintiff wrongly prevailed in a past case, then the fact that Abel, the defendant in the current case, is a man is not a reason in his favor. Indeed, an attempt to distinguish on those grounds strikes us as disingenuous—"*that* cannot be the *real* reason you ruled for Abel," we want to say.

More generally, this criticism mirrors the failed criticism of analogical reasoning. The alleged problem for analogical reasoning was that the judge could find any of the multifarious dissimilarities relevant if she wanted to decide contrary to precedent. Here, the alleged problem is that any of these dissimilarities are reasons permitting the judge to rule contrary to precedent. However, given our reason-based account, we can offer an even stronger response than the general one provided in Sections III to IV. Instead of giving a split-mind response,[85] we could follow T.M. Scanlon[86] and claim that the perception of reasons generates desires rather than vice versa. With the identification of reasons as the first stage of practical reasoning, concerns that later stages will influence this identification are ill founded. A more plausible variant of this theory is available, because we are dealing with the influence of a *judgment* rather than a *desire*. While the claim that every desire is preceded by an identification of reasons may be counterintuitive, the claim that every judgment is preceded by an identification of reasons is less so. It seems plausible to assume that making a judgment involves a comparison of the reasons in favor of each option. Thus, if one has a judgment that the case should be decided for the plaintiff in absence of precedential constraint, then the judge must already have (or at least think she already has) identified all the reasons in favor of each side.[87] This means the identification of the factors in the case precedes and hence is

84. ALEXANDER & SHERWIN, DEMYSTIFYING, *supra* note 1, at 83.
85. *See supra* at Section V.
86. *See* THOMAS M. SCANLON, WHAT WE OWE EACH OTHER (1998); Steven Arkonovich, *Defending Desire: Scanlon's Anti-Humeanism*, 63 PHILOSOPHY AND PHENOMENOLOGICAL RESEARCH 499, 499–519 (2001).
87. Perhaps one considers only the "most relevant" reasons in some sense—there may be hundreds of reasons at issue in when I decide what pants to wear, but a decision must be made before I am late for work. Still, the point here remains: the identification of relevant reasons precedes judgment.

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not influenced by the judgment about how the case should be decided in absence of precedent.

Admittedly, this reply works only if we hold the reasoner's set of reasons static. If the reasoner is able to revise the set of reasons after making a judgment, then it is possible for the judgment to cause the reasoner to revise the set of reasons by taking any (or nearly any) new fact as a reason in favor of the judgment.[88] Revising the set of reasons in this way means that a distinction is always available to prevent a judge from deciding the case contrary to her lights. Although it seems plausible that reasoners *sometimes* engage in post hoc revisions of what they take to be the reasons in favor of a conclusion,[89] this merely shows that it is possible for reasoning to go astray. I know of no account of legal reasoning, rule-based or otherwise, that is immune from that criticism. it is plausible that even general moral reasoning is post hoc at times,[90] and it would be naïve to think that interpreters of rules do not sometimes reinterpret rules in light of the decision they want to reach. The rule theorist must show that these post hoc revisions of the set of reasons are guaranteed to occur or at least are more likely than the parallel revisions in rule meaning.

The final worry regarding the reason-based account concerns the characterization of reasons. Suppose we have a past case involving a 305-pound pet lion, the keeping of which was held to be a nuisance. Suppose the current case is exactly the same, except it involves a 300-pound lion. In the past case, the weight of the lion was clearly a reason in favor of holding that it is a nuisance. But how should this reason be characterized? If we characterize it as the lion's being 305 pounds, then this factor is not present in the current case, and the judge could distinguish it. If we characterize it as the lion's being over 250 pounds, then this factor is present in the current case, and the past case controls the result. If we characterize it as the lion's being very large, then this factor is arguably present in the current case, and the past case controls the outcome.

This is a very difficult problem, and I have only a sketch of an answer. We ought to look at how the opinion in the past case characterized the size of the lion. It is the reasons found in the opinion that matter for precedent. If the opinion never says the lion is 305 pounds, instead only discussing a "very large lion," then the lion's being 305 pounds cannot be a reason from the precedent case, even if the lion was in fact 305 pounds. This obviates some difficulties but not all of them. The past opinion might say that the

88. Note that this involves the judge genuinely taking the novel fact to be a reason, and the worry is that this will inevitably happen if she finds the precedent unfavorable. A more devious post hoc strategy may be employed by the judge, wherein she uses the novel fact to distinguish the cases despite not thinking the fact is actually a reason for the party she favors. Similar sorts of deception are available under a rule-theorist picture, wherein the judge employs disingenuous semantic claims. Neither I nor the rule theorists are interested in giving an account of these sorts of reasoning.

89. *See* Haidt, *supra* note 43, indicating that using reason to create post hoc justifications for an intuited conclusion is fairly common.

90. *See id.*

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lion was 305 pounds, but this of course implies that the lion was over 250 pounds. Should we understand that implication as a reason against the lion's owner? I am inclined to say no, but the matter requires a much more thorough investigation. Further, the past opinion may say that the lion was 305 pounds and also characterize it as a "very large lion" or spend time discussing "the more-than-250-pound animal." Somehow we must decide how to characterize the reason (or reasons) involved.

As is the case with the most difficult of the previous objections,[91] my strategy is to show that this problem is not unique to the criticized theory. A rule theory not only has to deal with difficulties in ascertaining the meaning of words in an opinion;[92] it also must deal with difficulties in determining which of those words compose the rule. For example, it must determine whether implications are part of the rule, whether the rule from the aforementioned case is one regarding lions over 250 pounds, or 300-pound lions, or large lions. Whatever addresses these difficulties for the rule theorist should address them for the reason-based theorist as well.

VII. CONCLUSION

The rule theorists have pressed a number of pointed objections upon analogical theories, namely, analogical theories cannot explain the psychological states required for precedential constraint; analogy either is not a distinct form of reasoning or is arbitrary and incapable of justification; analogical theories are incompatible with precedential constraint because they permit distinguishing. I try to refute these criticisms here by showing that they are ultimately at least as damning for rule theories as they are for analogical ones. The refutation is especially convincing when we consider reason-based analogical accounts.

Some will likely find this comparative strategy unsatisfying, as it does not actually solve the problems that arise for analogical theories. However, I think the subtlety and complexity of the topic demand a cautious approach. Only those who are foolish or dogmatic think their preferred theory of legal reasoning faces no difficulties. The other options are either to remain skeptical until a perfect theory comes along, or to try to work with the best theory one can find. The former requires the patience of Job, the latter requires comparisons. With some luck, the results of the comparisons may even move us closer to the perfect theory.

For now we can conclude that analogical theories are at least as well off as the rule theories with respect to the defects alleged by the rule theorists. Further, they have the virtue of differentiating the process of distinguishing from that of overruling. Thus analogical theories are superior to rule theories, in particular the reason-based analogical accounts.

91. *Supra* at Section VI.
92. Discussed *supra* at Section VI.

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