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Legal Change Through Precedent: An Empirical Study

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Abstract

When does the law change in a system of precedents? The answer depends on how precedent is to be understood. There are three influential models, which are based on the ideas of rules, reasons, and analogies. We argue that these three theories make different assumptions about how the law changes in reaction to novel cases that do not overrule precedent. According to a version of the rule-based approach, the law changes if and only if a new case in a line of precedents reaches a different outcome; whereas, under the reason-based approach, the law changes with every new legal case, in proportion to the number of new features added to the doctrine by each case, regardless of outcome; and, finally, under the analogy-based approach, the law established by the precedent may change with every new case, in direct or inverse proportion to the differences found between cases, depending on the outcome. Although discussion about the nature of precedents often takes a normative perspective, in this paper we tackle it from an empirical perspective: How do people perceive legal change through precedent? Findings support the rule- and, to a very limited extent, the analogy-based approaches. The reason-based approach found no empirical support. We hypothesise that this reflects a conservative tendency to restrict legal change in precedents and to perceive it as non-incremental, thereby enhancing simplicity. Naturally, theorists may argue that the folk idea of when the law changes in a system of precedent is wrong. We suggest that legal theories should address a possible lack of a minimum descriptive requirement and that there are reasons of transparency and publicity to favour legal concepts that are closer to folk concepts.

Keywords: *precedent; legal change; stare decisis; experimental jurisprudence; empirical legal studies; judicial reasoning; analogical reasoning; rule; reason; analogy*

1. Introduction

There seems to be little room for controversy with regard to the issue of when legislation changes. In general, we simply know that law is 'different from what it used to be' when novel legislation is enacted by the Parliament to replace old regulations—and normally it is expressly stated that the new piece revokes past legislation on the topic. But legislation is not the only source of law there is. Courts also develop the law. This is the core idea of establishing precedents. But are we as sure of when the law changes in a system of precedents as we are in the case of legislation? The continued use of precedent naturally gives rise to novel scenarios that test its boundaries. Deciding a current case based on a

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not-exactly-alike precedent raises questions about whether and how case law changes through its use. How does case law evolve in response to novelty?

The answer depends on how precedent is understood; legal philosophers debate this issue. There are three influential models, which are based on the ideas of rules, reasons, and analogy. When facing a new case, a court is normally thought of as having three available options: It can either follow the precedent; distinguish the precedent; or, if it has the powers to do so, overrule the precedent. Although overruling is an important decision within a doctrine of precedent, this paper is concerned with how case law develops *in response to* new cases. Overruling is a corrective power, available only in very limited situations and to certain courts, used to address mistakes—whether of law, justice, or other broad values or consequences. As such, it reflects concerns of correctness rather than a process of adapting to new facts raised in subsequent cases. For this reason, overruling affects case law similarly across different accounts of precedent, and thus falls outside the scope of this paper. Decisions that follow a precedent or distinguish the current case from a precedent, however, may impact the law based on novelties in different ways, depending on the account of precedent adopted (rule-based, reason-based, or analogy-based)—or so we will argue.

We claim different conceptual structures for legal change for each of the approaches to precedent as novel cases are decided. The varying theoretical possibilities raise the empirical question of how people actually perceive legal change through precedents. Precedent-based reasoning is common in everyday life—but how do laypeople perceive the use of precedents for resolving legal cases? When arguing from precedents in ordinary contexts, people must somehow address the transitions to maintain an understanding of what precedents stand for as subsequent cases arise with novelties. The perception of the use of precedents in ordinary contexts may also influence their perception in legal ones. Which model of precedent—rules, reasons, or analogies—best aligns with folk intuition? We conducted experiments to examine which model of precedent best captures how ordinary people perceive legal change through precedents, in the context of courts' decisions to follow or distinguish them. Empirical data, we contend, is crucial for advancing the debate around precedents. Since people are subject to the law, it is desirable that they be able to grasp its developments. This consideration may ground a normative argument against non-endorsed views, particularly on grounds of publicity and transparency. In addition, our findings may place a burden of justification on those who advance a conceptual theory of social practice that diverges from actual practice. Legal theories should either satisfy a minimal descriptive requirement or explicitly acknowledge the lack thereof. Determining where this justificatory burden lies requires empirical evidence.

2. Precedent and Legal Change

The main conceptual claim underlying the empirical study presented in this paper is that whether—and how—case law changes through decisions to follow or

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distinguish precedent depends on the concept of precedent one adopts. What causes change, and how it occurs, depends on the nature of what is being changed in the first place. We consider three influential ideas of precedent—rule-based, reason-based, and analogy-based.

The following sections provide an overview of these accounts of precedent, with a focus on legal change that might take place from a decision to follow and also from a decision to distinguish the precedent. The aim is not to provide a comprehensive survey of the literature on approaches to precedent in all its developments, but rather to highlight what is necessary to generate falsifiable hypotheses about legal change through precedent—hypotheses that will be tested in the empirical study we present.

2.1 The Decision to Follow the Precedent

Consider the following '*Shoplifting*' case (C_1):

> Alex shoplifted food from Walmart. They were vulnerable, poor, and had not eaten that day. They had never shoplifted before and only took ordinary groceries, such as rice and eggs. The case went to court, where it was decided that the defendant should *not* be convicted because they stole out of necessity to feed themselves.

Now, suppose that the following case (C_2) is brought to court after C_1 is ruled:

> Sam went to a local convenience store and shoplifted food. They were vulnerable and poor, and did not have a meal that day. They had shoplifted once before. They stole ordinary groceries, such as milk and bread. The court ruled according to the precedent C_1.

C_1 and C_2 are not identical—as no two cases ever are. C_1 is a case of a crime committed by a first-time offender, whereas in C_2 the defendant was a repeat offender. For this reason, one might think of the felony in C_2 as worse than the one in C_1—repeating a felony carries greater blameworthiness. Despite the difference, suppose that the court in C_2 decided to follow the precedent C_1—as described in the vignette. The court concludes that the precedent controls the present case. What does following precedent C_1 in case C_2 mean to the development of the law established by that precedent?

The rule-based approach.

A precedent is to be understood as laying down rules to be applied in subsequent cases.[1] The rule is to be found in the *ratio decidendi* of a

1. See Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 1979); Frederick Schauer, "Precedent" (1987) 39:3 Stan L Rev 571. Alexander and Sherwin adopt a version of the rule-based approach—which we will call a 'strict rule-based approach'—that differs from Raz and Schauer with regard to the admissibility of distinguishing as a separate concept from overruling: see Larry Alexander, "Precedent: The What, the Why, and the How" in Timothy Endicott, Hafsteinn Dan Kristjánsson & Sebastian Lewis, eds, *Philosophical*

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case.[2] So, the development of the law should occur through the development of these rules.

The *ratio* of C_1 is indicated in this passage: "The defendant should not be convicted, because they stole food out of necessity to feed themselves."[3] Thus, it is the element of "necessity" (f_1) that forms part of the *ratio*, as determined by the court. The case can also be thought of as formed by other elements, such as: "never shoplifted before" (f_2); and "ordinary groceries" (f_3)—but f_1 is the one chosen by the court to feature the *ratio*. In that scenario, the rule established by C_1 could be represented as:

$R_1 =$ If $\{f_1\}$, then S
where
R is the *rule*
and
S is the solution given to the case (acquittal).

Element f_1 is also present in case C_2, as is element f_3, since the groceries stolen in C_2 (milk and bread) were also ordinary. The cases differ with respect to the defendant's criminal history: In C_1, it is non-existent (f_2), whereas in C_2, there is one prior conviction ($\sim f_2$). Nevertheless, f_1 is present in both cases, and it is this element that forms part of the antecedent of the rule established by the precedent case.

As the court in C_2 decided to *follow* the precedent, we should note that the ruling in C_2 does not change the rule established by the precedent at all: After the decision in the new case, the law still is that *If* $\{f_1\}$*, then S*. Even though other features are present in cases C_1 and C_2 ($f_2, \sim f_2, f_3$), they are not incorporated into the law in a decision to follow the precedent that keeps the *ratio* the same. This reflects a central feature of the rule-based approach as surveyed here: Only features that are explicitly part of the *ratio* are treated as part of the law for present purposes. On this understanding, decisions that merely follow a precedent are taken not to affect the state of the law, insofar as they leave the *ratio* unchanged.[4]

Foundations of Precedent (Oxford University Press, 2023) 11; Emily Sherwin, "Do Precedents Constrain Reasoning?" in Endicott, Kristjánsson & Lewis, *ibid*, 158. This will be outlined in the following section: see the text accompanying *infra* note 12. For the decision to follow, all these scholars hold similar views.

2. "[*Ratio*] It is a ruling 'on a point on which a ruling was necessary to her/his justification (or one of her/his alternative justifications) of the decision in the case'." Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford University Press, 2005) at 156.
3. This is a simplification, as it is not the focus of the argument. However, much has been written on the difficulties of identifying the *ratio decidendi* of a case, and many tests have been proposed for this purpose. For an introduction, see Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge University Press, 2008). For reasons why the indeterminacy of the *ratio* is mitigated in practice, see John Gardner, "Some Types of Law" in *Law as a Leap of Faith: Essays on Law in General* (Oxford University Press, 2012) 54 at 78.
4. For an argument that a rule-based account of precedential constraint should extend beyond the *ratio* and attribute doctrinal consequences to decisions that merely follow precedent, see John F Horty, "Rules and Reasons in the Theory of Precedent" (2011) 17:1 Leg Theory 1 at 13-14. The narrower perspective adopted here is a methodological choice, intended to preserve an important conceptual contrast between rule- and reason-based accounts for the purposes of the present analysis. See *infra* note 8.

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The reason-based approach.

Instead of understanding precedents as creating rules in their *rationes*, this approach proposes that precedents should be understood as decisions on the balance of reasons.[5] Later courts or judges must decide in consistency with the authoritative treatment that the earlier court gave to the facts of the precedent, as these were reported.

In this line of thought, the law established by the precedent is developed—or changed—whenever there is a shift in the balance of reasons set by the precedent. This alteration does not necessarily need to tip the balance in the opposite direction for a development in the law to occur—which is exactly what happens in the following scenario.

When precedent C_1 is set, it is established that:

$R_1 =$
$\{f_1\}$ provides a sufficient reason for S
where
$f_1 =$ necessity.

At the same time, the decision's *ratio decidendi* is also seen as establishing that:

$\{f_2, f_3\}$ do not provide sufficient grounds to defeat $\{f_1\}$
where
$f_2 =$ never shoplifted before;
$f_3 =$ ordinary groceries.

This *ratio* represents the balance of reasons provided by the features of the case (f_1, f_2, f_3).[6] Where the facts of a later case fall under the *ratio* of C_1, i.e., where feature $\{f_1\}$ is present, the court must either follow or distinguish C_1—assuming there is no power to overrule. Subsequent cases should require a rebalance of reasons, as no two cases are identical. So when C_2 $\{f_1, \sim f_2, f_3\}$ is brought to court, and the court decides to follow the precedent (as we have established in the previous section), it does so because it accepts that $\{f_1\}$ provides sufficient reason for S; it accepts that $\{f_3\}$ does not provide sufficient grounds to defeat S, and, reevaluating the balance of reasons in the context of C_2, decides that $\{\sim f_2\}$—the new feature in C_2—also does not offer sufficient reasons to defeat S, either on its own or in conjunction with f_3. When the later court in C_2 follows the precedent C_1, it

5. The reason-based account has been developed primarily by Grant Lamond: see e.g. Grant Lamond, "Do Precedents Create Rules?" (2005) 11:1 Leg Theory 1; Grant Lamond, "Revisiting the Reasons Account of Precedent" in Mark McBride & James E Penner, eds, *New Essays on the Nature of Legal Reasoning* (Hart, 2022) 113 [Lamond, "Revisiting the Reasons"]. Lamond frames his reasons-based approach in contrast to the rule-based view: "Instead of understanding precedents as creating rules in their *rationes*, I proposed that precedents should be understood instead as decisions on the balance of reasons." Lamond, "Revisiting the Reasons", *ibid* at 114 [emphasis added].

6. 'Features' are "the general types of facts," according to Lamond. Lamond, "Revisiting the Reasons", *supra* note 5 at 129.

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further elaborates the legal doctrine based on C_1, so that the doctrine can now be stated as:

D_1 $\{C_1, C_2\}$ =
$\{f_1\}$ offers sufficient reason for S;
and
$\{f_2, \sim f_2, f_3\}$ do not defeat $\{f_1\}$,
where
f_1 = necessity;
f_2 = never shoplifted before;
$\sim f_2$ = shoplifted before;
f_3 = ordinary groceries.

So, now it is established that $\{\sim f_2\}$ does not defeat $\{f_1\}$, which is a new development. Future courts are bound by that. From now on, judges must accept that the defendant's prior shoplifting does not provide any reason that could defeat the reason for acquittal (namely, that the defendant shoplifted out of necessity to eat). A judge dealing with a subsequent case where both $\{f_1\}$ and $\{\sim f_2\}$ are present—and where no new grounds for distinguishing the case are identified—may personally think it is unfair to find someone not guilty if they are a repeat offender. Despite their opinion, the later judge is bound by doctrine D_1, and should not condemn the defendant because of the authority of the balance of reasons established by the line of precedent (C_1 and C_2).[7]

In the reason-based approach, then, the decision to follow a precedent (and not only the decisions to distinguish the current case from the precedent, as in the rule-based approach) changes the law.[8] It does so by adding to the doctrine

7. We use the expression 'line of precedent' here and throughout this paper to refer to the chronological sequence of cases decided in relation to a single precedent—whether by following or distinguishing it.

8. This distinction between the approaches hinges on the interpretation that the precedential constraint is limited to the *ratio*, with all other elements treated as *dicta*. In the rule-based approach, the *ratio* is nothing more than the rule of the precedent. This means that what binds in the rule-based approach is only the rule extracted from the *ratio*. This can ultimately lead to a situation where a court, thinking of precedent as rule, in a third case (C3) considers distinguishing the original precedent (C1) based on a factual element that was already present in C2 but was not used to distinguish it—since the decision in C2 was to follow. The party in C3 interested in the outcome of C2 will likely argue that the same distinguishing move was available in C2 but was not used, and will urge the current court to behave consistently. In our view, this is a legitimate argument grounded in the values of coherence and equality in judicial decisions. However, in the rule-based approach, such an argument is not strictly based on *precedential* constraint, which applies only to the *ratio*—and that *ratio* did not change in C2. The law that undergoes a change that is considered by this paper is the law established *by the precedent*, and that is, for the rule-approach, the rule laid down in the precedent. This interpretation is important for clarifying a distinctive feature of the reason-based approach. The reason-based approach arguably imposes greater precedential constraint by internalizing the 'prohibitions' against distinguishing within the theory of precedent itself (by identifying features that do not defeat the outcome to the *ratio*), rather than relying on external appeals to coherence or equality to prevent C3 from being distinguished based on an element that was already present in C2 but had been rejected as a ground for distinguishing. This is not directly relevant to the empirical study we present here, since none of the vignettes involved a series of three cases addressing the issue mentioned. However, it is important to clarify that the conceptual framework we adopt assumes this distinction between the rule- and reason-based approaches—although some authors have argued

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features that do not defeat the sufficient reason for the decision. This acknowledges that no two cases are ever exactly the same, even if they should receive the same treatment under the law. Thus, regardless of whether the defendant is a first-time or repeat offender, acquittal is warranted if the theft was committed out of necessity to obtain food.

Moreover, the law may change in more radical or more subtle ways as a result of a decision to follow a precedent. Suppose that there were other features in C_2 that are not present in C_1—$\{f_4, f_5 \ldots\}$. By deciding to follow C_1 in this new case, the court authoritatively established that all these new features do not defeat *S*, making future judges bound to accept it. The doctrine would then be:

D_2 $\{C_1, C_2\}$ =
$\{f_1\}$ offers sufficient reason for *S*;
and
$\{f_2, \sim f_2, f_3, f_4, f_5 \ldots\}$ do not provide reasons defeating *S*.

And we can say that the law after the adoption of D_2 has changed more in reaction to the new case C_2 than after the adoption of D_1, because more features were added to the doctrine. In terms of degree, this means less discretion to judge subsequent cases under the doctrine D_2 than under D_1.[9]

The analogy-based approach.

If two cases are similar in the relevant ways and there is no relevant difference—meaning they are legally the same—then there should be an

for their equivalence: see e.g. John Horty, "Constraint and Freedom in the Common Law" (2015) 15:25 Philosophers' Imprint 1; Mark McBride, "No Reasons" in Mark McBride & James E Penner, eds, *New Essays on the Nature of Legal Reasoning* (Hart, 2022) 99.

9. One might argue that it is implausible for every new factual element to automatically fall within the scope of a precedent. Courts often treat certain facts as background details, which may suggest they have 'no precedential force'. However, we argue that, in doing so, a court is still making a judgment about the weight of the reasons that might arise from that feature relative to others. If the same feature arises in a subsequent case, the earlier court's assessment of the weight of its potential reasons carry authority. Correcting what is later viewed as a mistaken evaluation of that weight would typically require overruling, which shows that there is precedential force at play. That said, if a feature is too peripheral to the case's relevant description—say, for instance, that the crime in the precedent occurred on a Tuesday—it is unlikely to play a meaningful role in future decisions. This is partly because the current case may not involve the peripheral feature but might still be treated by the court as governed by the precedent, and partly because, even if that peripheral feature is present (e.g., the crime also occurred on a Tuesday), it is unlikely to substantially affect the court's reasoning. The point is this: If a court were to revisit the precedent to assess the significance of the 'Tuesday' feature, it would be bound by whatever weight the earlier court assigned to it—even if that weight is minimal or zero. The earlier court did not examine the reasons that might arise from that feature; it treated it as a background detail—and that, in itself, carries meaning for the current court. Lamond does not explicitly address features that are marginal to the description of a case and might plausibly be regarded as having low or no weight on the balance of reasons. His examples tend to involve features that could reasonably be seen as playing a significant role in the case description, even if they are ultimately neutral to the outcome. We have followed this pattern in designing the experimental vignettes. See Lamond, "Do Precedents Create Rules?", *supra* note 5; Lamond, "Revisiting the Reasons", *supra* note 5.

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additional similarity: The decision in the current case should match the decision in the previous case. When comparing two cases, there are invariably both similarities and differences. The analogy-based approach to precedent relies on charting these to guide legal reasoning. Within such a framework, legal change occurs either when a difference is overlooked or deemed irrelevant in a decision to follow.

Mapping similarities and differences is an influential method of drawing an analogy.[10] When C_2 is brought to court, the analogy with C_1 might lead us to this mapping:[11]

C_1 and C_2:
Walmart <-> local convenience store;
rice, eggs <-> bread, milk;

a shoplifted *b* to eat.
~~*x* shoplifted from *y*, a small business.~~

This simple version of a mapping between the cases involves two levels of similarities: surface similarities (Walmart <-> local convenience store; rice, eggs <-> bread, milk) and structure similarities (in '*a* shoplifts *b* to eat', *a* is a slot that can be filled by elements of both cases, *Alex* and *Sam*, as can slot *b* be filled by *rice, eggs* and *milk, bread*). The surface level deals with direct similarities. The structure level involves mapping relations, and relations are predicates that have more than one slot. Here, there is also a structural difference: Slots *x* and *y* can be filled by elements from C_2 (*Sam* and *local convenience store)*, but not by elements from C_1, as Walmart is not a small business like the local convenience store. Thus, any two cases can be viewed as both similar *and* dissimilar at the surface and structural levels—even C_1 and C_2. Let us assume that the court assesses that the similarities mapped between the cases are relevant and the difference found is irrelevant.[12] The court concludes that the cases are analogous—and issues a decision to follow the precedent.

When the court decides to follow a precedent in a current case, the differences between the cases are incorporated into the law. All the novelties brought up by

10. See e.g. Katharina Stevens, "Reasoning by Precedent—Between Rules and Analogies" (2018) 24:3 Leg Theory 216 [Stevens, "Reasoning by Precedent"]. Stevens draws on Holyoak and Thagard's influential multi-constraint model from cognitive science: see Keith James Holyoak & Paul Thagard, *Mental Leaps: Analogy in Creative Thought* (MIT Press, 1995). According to this model, successful analogical reasoning depends on identifying correspondences across surface, structure, and purpose levels. Sherwin also discusses it, while analysing the argument from Stevens: "Stevens's mapping method begins with common facts ('surface similarities'), then maps relations among these facts as well as 'higher order' relations among relations." Sherwin, *supra* note 1 at 164. Here, the mapping will be presented in a simplified manner, sufficient to highlight the structure of the argument as distinct from the other approaches.

11. Analogies typically consider the specific facts of cases, rather than their generalisations. For this reason, we will not use f_1, f_2, and f_3 in this section, but will instead refer to the facts in their most specific form.

12. This is an analysis of the purpose constraint in the mapping model discussed by Stevens which we will not elaborate on here. See Stevens, "Reasoning by Precedent", *supra* note 10.

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C_2 are now part of the law, as they broaden the scope of the factual categories of the precedent. In following precedent C_1 in the current case C_2, the court establishes, among other things, that Walmart is analogous to a local convenience store, and the relational difference—that C_1 involves a big supermarket chain whereas C_2 involves a small local business—is incorporated into the law. One might argue that a large supermarket chain differs from a local business, as the former has more resources—including the ability to withstand the impact of shoplifting. However, any such distinctions are ultimately absorbed, as the decision to follow the precedent causes the notion of a large supermarket chain to expand, encompassing that of a local business as well. The same applies to categories like rice and eggs, from C_1, which somehow expand to include items such as milk and bread, stolen in C_2.

All other differences between cases follow a similar pattern, leading to just such an expansion effect: By determining that the cases are analogous, the judge establishes that the defendant's prior shoplifting history (as in C_2) must be incorporated into the analogy with C_1, a case where the defendant had never shoplifted before. This means that, moving forward, more cases than initially expected—before C_2—might be resolved based on C_1. Since C_2 has been incorporated into the law (a case of a second-time offender), even cases involving multiple-time offenders could potentially be resolved by C_1 in the future, if the current court considers a second-time offender analogous to a multiple-time offender—an analogy that would have been more difficult if the precedent had been established solely based on the categories of C_1, where the defendant had no prior shoplifting history. Thus, following precedents has the effect of expanding the reach of factual categories of the precedent, opening up more possibilities for analogy. When the precedent is followed, the factual categories of the current case are henceforth considered analogous to those of the precedent.

2.2 The Decision to Distinguish the Current Case from the Precedent

Imagine that a third case (C_3) arises after C_2 as follows:

> Tom went to a Tesco store and shoplifted food. They were vulnerable and poor, and did not have a meal that day. They frequently shoplift. They stole luxury groceries, such as truffles and wine. The choice of items was driven by a dare, a challenge, or a bet.

The court in C_3 may think that *S*—acquittal—is somehow unfair. If the current court believes that, even though in both situations the defendants were under necessity, the selection of specific types of items—luxury groceries (e.g., truffles, wine) maliciously chosen by the defendant as part of a dare, challenge, or bet—makes the case significantly different from C_1—where ordinary groceries (e.g., bread, milk) were stolen—it may distinguish the present case from the precedent and is then free to decide ~*S*. Does distinguishing a case such as C_3 from the precedent C_1 modify the law established by that precedent—and if so, how?

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The rule-based approach.

By distinguishing, the court refuses to follow C_1, even though it applies to the case.[13] In order to make it inapplicable and thereafter be able to avoid it, the court alters the rule established by the precedent. The alteration is based on the element that grounds distinguishing: C_1 is a case where ordinary groceries were stolen (f_3), whereas in C_3, luxury groceries were stolen ($\sim f_3$). In that scenario, the law changes because the *ratio* of the precedent becomes:

$R_2 =$ If $\{f_1, f_3\}$, then S,
instead of
$R_1 =$ If $\{f_1\}$, then S.

The resulting rule from distinguishing is the original rule, supplemented by an additional condition in its predicate (f_3), which—despite the modification—still justifies the outcome S reached in the precedent case C_1.[14] By doing so, the court declines to follow the precedent in the present case. R_2 substitutes R_1, which means that, from now on, cases are under the control of R_2, and not R_1, which ceases to exist in the legal system.[15]

Hence, distinguishing is a way to change the law via a system of precedent. But note that such decisions should impact the law only to the extent that the condition added to the antecedent of the rule alters it. Other novelties in the current case should not result in a legal change. In other words, only the element of the case that justifies distinguishing should modify the law. Suppose that there are additional features in C_3 that are not present in C_1—for example, f_4, f_5, etc. By deciding to distinguish C_1 in this new case based on the fact that in C_3 the luxury

13. See Raz, *supra* note 1; Schauer, *supra* note 1. Alexander and Sherwin both adopt a 'strict rule-based' view, treating distinguishing as conceptually equivalent to overruling. Alexander states: "Precedent rules cannot therefore be 'distinguished'. They can only be followed or overruled, either in whole or in part." Alexander, *supra* note 1 at 14. Sherwin adds: "It also follows that 'distinguishing' rules is not a legitimate practice." Sherwin, *supra* note 1 at 160. That is not the view we adopt here. Instead, we follow a rule-based approach—drawing on Raz and Schauer—in which distinguishing plays a legitimate role under certain conditions. Adopting a 'defeasible' rule-based model, as proposed by Raz and Schauer, is important for the empirical study we conducted. Participants were explicitly told, in different vignettes, that the decisions in the current cases either followed or distinguished the precedent based on a novelty in the current case. We treat distinguishing as a key mechanism of legal change grounded in factual novelties. Moreover, for the sake of conceptual parallelism, a rule-based approach that incorporates distinguishing is more appropriately compared with reason-based and analogy-based approaches, which typically recognise the legitimacy of distinguishing within their frameworks.

14. According to Raz, these are the two conditions for distinguishing: "(1) The modified rule must be the rule laid down in the precedent restricted by the addition of a further condition for its application. (2) The modified rule must be such as to justify the order made in the precedent." Raz, *supra* note 1 at 186. "Since 'distinguishing' means changing the rule which is being distinguished, the power to distinguish is a power to develop the law even when deciding regulated cases and even by courts which have no power to overrule" (*ibid* at 185).

15. One could argue that $\sim f_3$ is not really new in C3, given that f_3 was in C1, and therefore $\sim f_3$ was implicitly discussed by the authority of the precedent. It could be argued that the implicit discussion of $\sim f_3$ makes distinguishing based on $\sim f_3$ inadmissible. As we see it, though, the fact that the defendant stole luxury groceries in C3 makes the case different from C1 (where ordinary groceries were stolen) and that allows distinguishing under Raz's formal conditions.

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groceries were stolen ($\sim f_3$), the only change we would observe in the law is that the *ratio* would still become:

R_2 = If $\{f_1, f_3\}$, then S,
instead of
R_1 = If $\{f_1\}$, then S.

Other differences between cases that are not considered grounds for distinguishing (f_4, f_5, etc.) do not alter the law; differences between cases that are not relevant to distinguishing do not make the law change further.

The reason-based approach.

For the court to distinguish the precedent, it must present a difference in the facts of the cases that the court assesses as *defeating* the reason considered sufficient for the outcome by the *ratio* established in C_1. The difference must either "(a) provide[] a type of defeating consideration different from that provided by" $\{f_2, \sim f_2, f_3\}$—considering the doctrine D_1 (made of C_1 and C_2); or "(b) provide[] a better defeating consideration of the same type as" $\{f_2, \sim f_2, f_3\}$.[16]

Suppose that the court in C_3 believes that there is a difference between the facts of the cases that grounds a different outcome—the defendant chose to steal luxury groceries ($\sim f_3$), which provides a different type of defeating consideration than $\{f_2, \sim f_2, f_3\}$. This new feature, $\sim f_3$, presents a reason that the court assesses as defeating the reason provided by the *ratio* 'luxury groceries were chosen on a dare', which may give rise to the presumption that the defendant's purpose was to cause significant harm to the business. Therefore, the court decides to condemn the defendant. As with C_2, the decision in C_3 alters the law, albeit in a different way:

D_3 $\{C_1, C_2, C_3\}$ =
$\{f_1, f_3\}$ are sufficient reasons for S,
and
$\{f_2, \sim f_2\}$ do not provide grounds defeating $\{f_1, f_3\}$
where
f_1 = necessity;
f_2 = never shoplifted before;
$\sim f_2$ = shoplifted before;
f_3 = ordinary groceries.

Once D_3 is established, S—the acquittal—becomes the appropriate solution in cases where the defendant was not only in a situation of necessity, but also where the stolen groceries were of an ordinary nature. The conditions are cumulative. This means that the court, by distinguishing the precedent, avoids the acquittal outcome for the present and every subsequent case where the defendant shoplifts luxury groceries, making room for the decision $\sim S$.

16. Lamond, "Revisiting the Reasons", *supra* note 5 at 118.

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Note that the law could have changed even further in C_3. The court might think that $\sim f_3$ alone does not provide reason enough to defeat *S*. From the precedent C_2 it knows and must accept that $\sim f_2$ alone also does not offer grounds defeating the justification for *S*. The court does believe, though, that $\sim f_3$ *in conjunction with* $\sim f_2$ provides reason to defeat the conclusion of the precedent C_1. At the same time, suppose that there were other features in C_3 that are not present in C_1 and in C_2—$f_4, f_5 \ldots$ which are taken by the court as not providing sufficient reason to defeat $\sim f_3$ *in conjunction with* $\sim f_2$. In that case, the law would change to:

D_4 $\{C_1, C_2, C_3\}$ =
$\{f_1\}$ & $\sim\{\sim f_2, \sim f_3\}$ is a sufficient reason for *S*,
$\{ f_4, f_5 \ldots \}$ do not provide reasons defeating $\{f_1\}$ & $\sim\{\sim f_2, \sim f_3\}$.
where
f_1 = necessity;
$\sim f_2$ = shoplifted before;
$\sim f_3$ = luxury groceries.

Thus, the law can change with a decision to distinguish beyond the feature that grounds distinguishing.

The analogy-based approach.

We may say that C_1 and C_3 are not analogous because the mapping process is interrupted by differences, such as:

C_1 and C_3:
rice, eggs ≠ truffles, wine;
a'*s* sole goal was eating *b* ≠ *a*'*s* goal was to eat *b*, but *a* also sought to fulfil a dare by stealing *b*.

When cases are deemed not analogous, the law established by the precedent case changes. Distinguishing the current case from the precedent narrows the scope of factual categories, limiting the potential for analogy in future cases. If the judge identifies a relevant difference between case C_1 and case C_3—such as the distinction between 'rice, eggs' and 'truffles, wine'—they might conclude that these two categories are not analogous. Before this decision, one might have assumed that these categories *were* analogous—after all, they are all types of food. However, the decision establishes that, despite the apparent similarity between the cases, they are actually different. This redefinition restricts the scope of the factual category 'rice, eggs', preventing its extension to cases where 'truffles, wine' were stolen. Thus, with the decision to distinguish, the factual scope of the precedent—or more precisely, its potential for future analogies—shrinks. It becomes established that, although the cases appear similar because they concern shoplifting of groceries, this is not enough for the analogy. In distinguishing, the law evolves by defining boundaries around what is *not* analogous, effectively reshaping the legal scope of factual categories for potential analogies.

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However, this dynamic seems to diminish as cases become increasingly different. When cases that are not too different receive different outcomes, more lines are drawn to separate what appears similar but is, according to the current decision, actually different. The greater the relevant differences between cases, the less one can argue that the law has changed, because a too different target case will narrow the precedent's factual scope in less impactful ways than a less different target case. This is because a current case that apparently shares more of its framework with the precedent will narrow its scope more substantially than a case that shares less. Note that the shrinking effect is more impactful between cases involving 'rice, eggs' and 'truffles, wine' than would be between cases involving 'rice, eggs' and, say, 'trains, boats', because 'rice, eggs' and 'trains, boats' have less of a common framework to be shrunk. It establishes more to say that 'rice, eggs' are not analogous to 'truffles, wine' than to claim that 'rice, eggs' and 'trains, boats' are not analogous. As cases become less and less analogous, it becomes clearer that different laws should govern them. In such scenarios, the line drawn to restrict the scope of a factual category to potential analogies becomes less impactful or less helpful. The less analogous the cases are, the less meaningful it is to claim that distinguishing the current case has shifted the law, as there is less of a shared framework to narrow and fewer boundaries to establish for potential analogies. If cases become too different, we might conclude that they simply do not relate and do not intervene in one another.[17] Although this scenario—where the distinguished precedent and the current case are so different that the current case does not change the law of the precedent at all—is rather implausible (after all, why would a judge or court consider such a different previous case in a current one?), it shows the tendency for the degree of change in the law to diminish as the differences between cases grow when distinguishing is in order.

17. As one of the reviewers' comments highlights, one could distinguish between whether legal rules are expressed in defeasible conditionals and whether the inference from rules to holdings is itself non-monotonic. The reader may notice that we have retained the syntactic conventions typically used in the literature we draw on when addressing distinguishing and defeasibility across all accounts of precedent. For example, we do not refer to rules when discussing the analogy-based approach, since its proponents reject the intermediation of rules: see Stevens, "Reasoning by Precedent", *supra* note 10; Dan Hunter, "Reason is Too Large: Analogy and Precedent in Law" (2001) 50:4 Emory LJ 1197. With adjustments, defeasibility could, in principle, be analyzed across all three models using a unified syntax. On this point, see the literature on non-monotonic logics in law, particularly Horty's priority-based semantics and Prakken's argumentation frameworks: see John F Horty, "Nonmonotonic Foundations for Deontic Logic" in Donald Nute, ed, *Defeasible Deontic Logic* (Springer, 1997) 17; Henry Prakken, *Logical Tools for Modelling Legal Argument: A Study of Defeasible Reasoning in Law* (Kluwer Academic, 1997); Henry Prakken, "Relating Protocols for Dynamic Dispute with Logics for Defeasible Argumentation" (2001) 127:1 Synthese 187. A full mapping of the precedent models we discuss onto these frameworks would be a valuable extension, helping to clarify whether all the models of precedent address the same sort of defeasibility, but it lies beyond the scope of this empirical study.

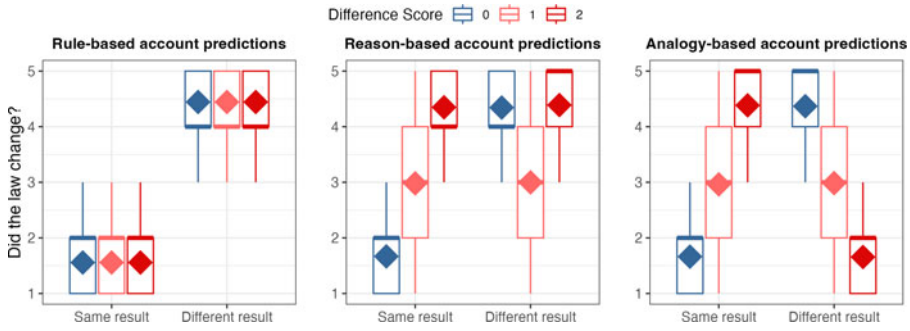
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2.3. Summary and Comparison of Legal Change Across the Accounts

When cases receive the same outcome, the law does not change according to the rule-based account. Whereas, in that context, according to the reason- and analogy-based accounts, the law does change—in direct proportion to the number of new features introduced by each new case (on the former account), or in proportion to the number of differences between cases (on the latter account).

When cases receive different outcomes (due to distinguishing—overruling is set aside in this discussion), the law changes according to the rule-based approach, but only to the extent of the element that is added as a condition of application of the rule. In the reason-based approach, in such a scenario, the law changes in direct proportion to the number of new features in the current case—so, the more differences between cases, the more the law changes. On the other hand, in the analogy-based approach, the law changes in inverse proportion to the differences found between cases—that is, the more differences between cases, the less the law (in terms of the rejected precedent) changes. Figure 1 summarises the predictions generated by the three approaches.

Figure 1. Predictions for legal change across models of reasoning by precedent.



Note that when the outcomes differ despite the cases being the same (difference score 0), it constitutes overruling, resulting in a change in the law across all models.

3. Experimental Study

To test which—if any—of the models best explains ordinary perception of changes in the law, we have designed an experiment where participants were presented with two subsequent court rulings. The first case always established an explicit *ratio* (e.g., "the court decided that the consumer WAS entitled to damages, because the company implicitly took the duty to ensure security by hiring security staff to attract consumers") based on a fixed feature that was also present in the second case (e.g., hiring security staff). The cases would either be identical

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or there would be one or two different features (e.g., parking was free in the first case, but charged in the second). Participants were then told about the second case's decision, which would either be to follow (because of the fixed feature, e.g., hiring security staff) or to distinguish the precedent (because of a different feature described, e.g., free *versus* charged parking service). After reading both cases, participants were told that:

> Two friends familiar with both cases disagree about them. Casey thinks that the law established in the first case was left unaltered after the second case. Jamie disagrees, saying that the law established in the first case was changed in the second case.

Finally, we asked participants with whom they agreed more, with 5 options ranging from "I agree more with Casey" to "I agree more with Jamie", including a midpoint labeled "No preference".

In order to test the three models described above, we have independently manipulated two different variables: difference score and outcome. First, we manipulated the degree to which the two cases were similar or dissimilar, by randomly varying whether each of two additional features (e.g., whether the parking lot was walled or an open area and whether the parking lot was free or charged) were present or absent in a given case. This meant that some cases had both of these features in common (leading to a difference score of 0), other cases had just one feature in common (leading to a difference score of 1), while others still had no extra features in common (difference score of 2). 'Difference score' is the term we use to refer to the number of factual differences between the descriptions of two cases in our vignettes—ranging from 0 to 2. This is intentionally a general term, meant to capture factual differences regardless of the model of precedent adopted.[18] Second, we manipulated whether the second case produced the same outcome as the first case (e.g., "the court decided that the consumer WAS entitled to damages because, as established by the previous case, the company implicitly took the duty to ensure security by hiring security staff to attract consumers") or a different outcome (e.g., "the court decided that the consumer was NOT entitled to damages, because, although the company implicitly took the duty to ensure security by hiring security staff to attract consumers, the new case is significantly different").

18. One could rightly point out that the analogy-based account provides a more detailed framework for understanding differences than our simplified notion of a 'difference score' can capture. Under such an approach, a difference score may reflect either a surface-level or a relational difference, without distinction (e.g., a vignette in which the factual difference was that ordinary groceries were stolen vs. luxury groceries; one where the parking service was free vs. charged; or one where the product containing a foreign body was ingested vs. not ingested by the consumer). However, it is important to note that participants were not asked to assess the type of difference (e.g., surface or structural), their relevance in the case, or the consequences of identifying them. The vignettes were designed with the decision of the court already explicit—either the current case followed the precedent despite the differences, or it distinguished the precedent because of them. Our primary interest was in testing how participants perceived potential changes in the law that such decisions might have brought about, once the relevance of the differences—whether surface-level or structural—had already been assessed and the result had already been yielded. This is why the use of a composite score does not distort the findings.

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Our study follows a 2 (target: order 1, order 2) x 2 (relevant feature 1: present, absent) x 2 (relevant feature 2: present, absent) x 2 (last case outcome: same, different) x 5 (scenario: Donoghue, Parking Lot, Food Theft, Debtor, Car Crash) mixed design, where each participant responded to the five different scenarios in a random order, with target, both relevant features, and last case outcome varying randomly for each trial.[19]

4. Methods

A gender-balanced sample of 250 participants, based either in the US or the UK, was recruited using *Prolific*.[20] After excluding eight responses which failed our preregistered attention check, we were left with a sample of 242 participants who completed our study (120 males, 121 females, one non-binary, mean of age = 41.5).[21]

5. Results

For further analysis of the method and results, see Appendix. Following the preregistered analysis plan, we built a linear mixed-effects model of perceived change in the law with 'case order' (an arbitrary factor encoding which of two possible conducts was described as the paradigm case), 'difference score', and 'target case outcome', as well as all 2- and 3-way interactions between them as fixed effects, while accounting for random effects of participant and scenario. An ANOVA test based on this model revealed statistically significant main effects of target case outcome ($F_{(1,\ 1181)} = 509.32$, $p < .001$) and the interaction between

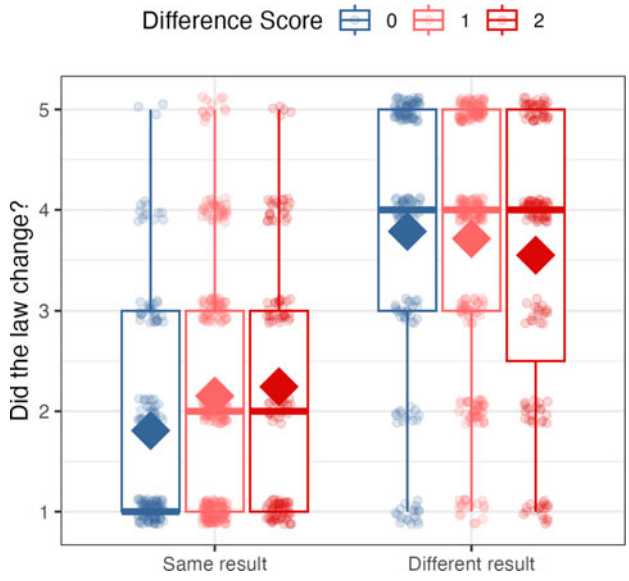
19. We previously conducted a pilot study using a 2 (act description) × 2 (relevant feature 1: present, absent) × 2 (relevant feature 2: present, absent) × 2 (last case outcome: same, different) × 3 (scenario: Donoghue, Parking Lot, Food Theft) design. In this study, each participant responded to the three different scenarios in a random order, with the target, both relevant features, and last case outcome varying randomly across trials. The pilot revealed effects of difference score and outcome that varied from one scenario to the other depending on case description. In some scenarios and case descriptions, the results favored the predictions of the analogy model, while in others, they favored the predictions of the precedents-as-reasons model. Upon closer inspection, case description created a confound with offense seriousness that may have interfered with the main manipulations. For instance, in the Food Theft scenario, one act description depicted a crime taking place in a supermarket while the other depicted it as taking place in a convenience store. Presumably, participants might have perceived the former crime as a less serious offense than the latter due to the marginal effects of the theft over the victim. In turn, this could have interfered with our observed results, explaining the unexpected effects of act description over our dependent variable. We addressed this issue for the main reported study by describing two different supermarkets and revising the other vignettes to make sure that similar issues did not arise elsewhere. For the study reported in the main text, we checked whether judgments that the decision made by the court was correct varied between conditions and found a single significant difference for the "Debt" scenario ($B = 0.31$, $t = 2.53$, $p_{\text{kenward-roger}} = .011$; all other $|Bs| < 0.24$, all other $p_{\text{kenward-roger}} > .05$). All data and analysis scripts for the pilot study are available alongside those for the main study: see *infra* note 21.

20. See *Prolific*, online: www.prolific.com

21. For stimuli, anonymized data, and analysis scripts of this study, see "Rules, reasons, and analogies in precedents" (last updated 6 August 2025), online: *OSF (Open Science Framework)* osf.io/f6ywq/overview?view_only=c27255066bba40c1aa8d0118c8a2029a

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Figure 2. Boxplot with overlaid and jittered observations.



target case outcome and difference score ($F_{(1,\ 1186)} = 11.99, p < .001$). No significant effects were found for case order ($F_{(1,\ 1183)} = 0.46, p = .496$); difference score ($F_{(1,\ 1185)} = 1.38,\ p = .241$); or their interaction ($F_{(1,\ 1191)} = 1.38,\ p = .241$). Similarly, there were no significant interactions between case order and target case outcome ($F_{(1,\ 1170)} = 0.02,\ p = .898$) or the three-way interaction between case order, difference score, and target case outcome ($F_{(1,\ 1179)} = 3.50,\ p = .062$). A post-hoc power analysis was conducted using the SIMR package,[22] based on 5000 simulations, and revealed that the model was adequately powered to detect the observed main effect of target case outcome (96.28% power [95.72%, 96.79%]), but severely underpowered to detect the observed interaction between outcome and difference score (10.88% power [10.03%, 11.78%]).

To decompose the detected interaction, we inspected the simple slopes of difference score separately across outcome conditions: Difference scores had a positive effect over the perception that the law has changed when the result recommended by the paradigm case is followed in the target case ($B = 0.23$, $t = 3.26, p = .001$). However, for situations in which the paradigm and target case were decided differently, difference scores led to non-significantly *lower* perception that the law has changed, as predicted by the analogy model ($B = -0.12$, $t = -1.69, p = .091$). These effects are depicted in Figure 2.

In Figure 2, boxes are bound at the first and third quartiles, with a strong line denoting the median. Diamonds represent the means. Participants agree more with the statement that the law has changed when the target case's result is

22. See Peter Green & Catriona J MacLeod "SIMR: An R package for power analysis of generalised linear mixed models by simulation" (2016) 7:4 Methods in Ecology & Evolution 493.

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different from the paradigm. The degree to which cases differ is associated with a perception that the law has changed when the result is the same, but the relationship reverses when the result changes from the target to the paradigm case.

Still in accordance with the pre-registered analysis plan, we encoded, in a separate column, the predictions of each theory as summarised in Figure 1, according to the following scheme:

a) The *precedents-as-rules* theory predicts that there will be no change when the result is the same (i.e., complete disagreement with the statement that the law has changed, coded as 1), but definitive change when the result differs (i.e., complete agreement with the same statement, coded as 5);
b) the *precedents-as-reasons* theory predicts that changes in law will be proportionate to the changes between the two different cases, such that equal cases entail that the law is the same (i.e., 1), one factual difference entails a degree of legal change (i.e., 3), and two factual differences entail that the law has definitely changed (i.e., 5), with the exception of overruling cases, where there are no significant factual differences, but opposite results, where the law has clearly changed according to all models;
c) the *precedent-as-analogies* theory makes the same predictions as the precedents-as-reasons theory when results are the same, but the opposite prediction when the results are different, such that when dissimilar cases are judged differently, there is no legal change (i.e., 1) and factual similarities with the differently-decided paradigm case lead to progressive higher degrees of legal change (i.e., 3, 5).

Adding the predictions of each theory as case-level predictors in a mixed effects linear model of perceived legal change with random effects for case and participant revealed support for the precedents-as-rules theory ($F_{(1,\ 1195)} = 380.82$, $p < .001$) and for the precedents-as-analogies theory ($F_{(1,\ 1196)} = 5.97$, $p = .015$), but no support for the precedent-as-reasons theory ($F_{(1,\ 1199)} = 0.27$, $p = .60$). The predictions of the precedents-as-rules theory explain approximately 24% (partial $\eta^2 = .24$, 95% CI [.20, .28]) of the observed variance, compared with roughly 0.5% (partial $\eta^2 = .005$, 95% CI [.00, .02]) for those of the precedents-as-analogies theory.

Although we pre-registered a linear model, our dependent variable was in a five-point ordinal scale. To model judgments of whether the law had changed as an ordinal variable, we fitted a cumulative link mixed model using the Laplace approximation with a logit link function and flexible thresholds (i.e., independently estimated cut-points) from the "ordinal" regression model package,[23] with the same specification as in the pre-registered model: fixed effects for order, target case outcome, difference score, and all two- and three-way interactions between them while accounting for random effects of participant and case. The significance pattern is roughly the same as for the pre-registered linear mixed effects model: We

23. See Rune Haubo Bojesen Christensen, "Package 'ordinal': Regression Models for Ordinal Data", version 2023.12-4.1 (2023), current version available online: *ordinal: Regression Models for Ordinal Data*, cran.r-project.org/web/packages/ordinal/index.html

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found significant main effects of target case outcome ($\chi^2(1) = 318.63, p < .001$), a target case outcome * difference score interaction ($\chi^2(1) = 12.23, p < .001$), and no other significant effects (all other $\chi^2(1) < 3.9$, all $ps > .05$)—the three-way interaction between order, target case outcome, and difference score was marginally non-significant ($\chi^2(1) = 3.84, p = .0502$).

6. Discussion

The results provide empirical support for the version of the rule-based approach discussed here and offer very limited backing for the analogy-based approach.[24] In contrast, the reason-based approach to precedent did not resonate with our participants. What about legal change within the rule-based approach—unlike the reason- and analogy-based alternatives—might align more with laypeople's intuitions and fit within a common understanding of precedent? Furthermore, do our findings carry normative repercussions?

6.1 On an Explanatory Hypothesis

These results invite reflection on why the rule-based approach, as opposed to the analogy- and reason-based approaches, resonates with lay intuitions and aligns with the ordinary concept of precedent. Disregarding changes in the 'following precedent' scenarios and overlooking difference scores as drivers of change in the 'distinguishing' scenario could be interpreted in several ways. Here, we would like to discuss one explanatory hypothesis for the results: a tendency toward simplicity.

Despite their differences, the least-supported approaches—analogy and reason—share the characteristic of viewing a system of precedent as cumulative: The more cases are decided by courts and judges, whether by following or distinguishing a precedent, the more we learn about the law on that specific topic, as a more detailed account of the doctrine is developed. In these approaches, legal changes take the original position into account and elaborate on the doctrine further with each new legal case. It seems difficult to talk about the *one* relevant precedent in the reason and analogy-based approaches; instead, there is a line of precedent that, over time, refines what is considered similar or dissimilar, or adjusts the balance of reasons.

Consider a *Parking* scenario. The precedent C_1 was established in a case of robbery in a private parking lot, where security staff was present; the area was enclosed with access control, and a service fee was charged. The court ruled that, by providing security staff, the provider implicitly assumed the duty to ensure security and, therefore, should be held liable. Precedent C_1 was followed in C_2, where the crime occurred in a supermarket car park that was protected by security staff, where parking was charged, but located in an open area. C_3 then arose and the court decided to distinguish it from the precedent C_1. In C_3, the

24. See caveats mentioned in *supra* note 8.

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robbery occurred in the McDonald's car park, where there was security staff. As in C_2, but unlike in C_1, the parking area was open and lacked access control; however, in this case, unlike the others, the parking service was free, and on this basis, the court decided to distinguish the precedent.

In the analogy-based approach, this sequence might be represented in a simplified way (considering only direct similarities and differences) as follows:

C_1 =
private parking lot.

$\{C_1, C_2\}$ =
private parking lot <-> supermarket's car park;
walled area <-> open area for parking.

$\{C_1, C_2, C_3\}$ =
private parking lot <-> supermarket's car park <-> McDonald's car park;
walled parking area <-> open parking area;
but charged parking service ≠ free parking service.

In contrast, the reason-based approach represents the same sequence in the following manner:

C_1 $\{f_1, f_2, f_3\}$
where
f_1= presence of security staff;
f_2 = walled area;
f_3 = charged service.
Ratio $\{C_1\}$ =
$\{f_1\}$ offers sufficient reason for S;
and
$\{f_2, f_3\}$ do not provide grounds defeating $\{f_1\}$;

C_2 $\{f_1, \sim f_2, f_3\}$
f_1= presence of security staff;
$\sim f_2$ = open area;
f_3 = charged service.
Doctrine $\{C_1, C_2\}$ =
$\{f_1\}$ offers sufficient reason for S;
and
$\{f_2, \sim f_2, f_3\}$ do not provide grounds defeating $\{f_1\}$;

C_3 $\{f_1, \sim f_2, \sim f_3\}$
f_1= presence of security staff;
$\sim f_2$ = open area;
$\sim f_3$ = free service.
Doctrine $\{C_1, C_2, C_3\}$=
$\{f_1, f_3\}$ offer sufficient reason for S;
and
$\{f_2, \sim f_2\}$ do not provide grounds defeating $\{f_1, f_3\}$.

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If a decision is made in C_2 to follow precedent C_1, the analogy-based approach leads us to understand that a private, enclosed parking lot is considered analogous to an open supermarket car park for the purpose of attributing civil liability to the provider—the fact that in the second case the parking service was secondary to the defendant's main activity is incorporated into the law that establishes liability. In the reason-based approach, we also learn that liability exists regardless of whether the establishment was walled or open, meaning that this aspect of physical structure can no longer be used to argue for exemption from liability in future cases.

When the court decides to distinguish the precedent in C_3, the law is further elaborated: Free parking service at McDonald's is not considered analogous to a charged parking service in a private parking facility or supermarket, according to the analogy-based approach. In the reason-based approach, distinguishing C_3 from the precedent C_1 changes the law to establish that the combination of security staff in the parking lot and the fact that the parking service was charged provides a sufficient reason for liability. This sequence (C_1, C_2, C_3) demonstrates that, in these approaches to precedent, the law may change in every case, meaning that the entire line of precedent is important for determining what the law currently is.

Things are different in the rule-based approach as defined in this paper. According to the view, there would only be change if a new case leads to a different outcome. Decisions to follow a precedent would leave the law unchanged, making difference scores irrelevant. In contrast, decisions to distinguish the current case from the precedent would affect the law, but only to the extent that the condition added to the antecedent of the rule modifies it. Other novelties in the current case would not constitute legal change and, again, difference scores would not be relevant. That is, only the new feature of the case that justifies distinguishing would alter the law. This ensures stability in the formulation of law set by a precedent. In this account, it makes much more sense to point to the *one* precedent that established the ruling currently in force. And although that one relevant precedent may be in a line of others in historical terms, if we only wish to know how the law treats a certain situation now, we can probably dismiss decisions that were distinguished or overruled by the precedent currently in force. The same can be said of subsequent decisions that followed it. In the rule approach, new developments either replace the old law—in the exceptional cases of distinguishing (and also overruling)—or have no impact whatsoever. Consider the *Parking* scenario once more, now according to the rule-based approach:

(C_1) R= If $\{f_1\}$, then S
(C_2) R= If $\{f_1\}$, then S
(C_3) R' = If $\{f_1, f_3\}$, then S
where
f_1= presence of security staff;
f_3 = charged service.

Identifying what the law is appears considerably more straightforward under a rule-based approach than under its alternatives. The relative simplicity of the

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rule-based view, together with the persistence of the original formulation of the precedent's *ratio* and the corresponding limits on legal change, stands in sharp contrast to reason- and analogy-based accounts. On the rule-based approach, legal change is tracked by a simple criterion: If the outcome remains the same, the law remains the same; if the outcome changes, the law changes. As a result, tracking legal change is comparatively easy, and participants need not look beyond the most basic contrast between the two cases to determine whether the law has changed.

By contrast, on reason- and analogy-based approaches, new applications of precedent continually contribute to what the law is, such that the law is in a state of ongoing, incremental modification. Legal change on these views is more subtle and cumulative, and correspondingly harder to track. Of course, the incremental character of these approaches may offer advantages from certain normative perspectives. The point here is not to assess those advantages, but rather to highlight a feature of the rule-based approach—its relative simplicity and ease of application—that may help explain why participants tended to favor it.

In sum, the rule-based approach is structurally conservative: It preserves the original formulation of the law so long as new cases yield the same outcome, and it localizes change to the feature that grounds distinguishing when outcomes diverge. By contrast, on reason-based and analogy-based approaches, legal change extends more broadly, incorporating additional reasons or mapped similarities introduced by each new case. The fact that the rule-based approach best fits participants' responses in our study suggests that its conservative and simplifying structure may resonate with ordinary judgments about precedent, helping to explain its apparent appeal.[25]

6.2 On the Burden of Justification

We now turn to some normative implications of the lack of support for the reason-based approach. The discrepancy between the predictions of the reason-based approach—and, to some extent, the analogy-based approach—to precedent and the perspectives of laypeople in our study warrants closer examination. This issue, of course, cannot be fully addressed here, but we would like to briefly consider it from two distinct angles: a) the normative framework of the approaches, especially the reason-based approach, fails to meet a minimum descriptive

25. Our hypothesis—that simplicity might drive the accuracy of the rule-based approach in participants' perception of legal change—is grounded in the structural characteristic of the rule-based model: It is non-incremental (in the sense that it disregards changes in decisions to follow and ignores difference scores in decisions to distinguish), making the current law simpler to formulate than under reason- or analogy-based approaches. Several economic theories of precedent—which model legal change as a function of incentives, adjustment costs, and expected benefits—provide explanations as to why and how legal change occurs: see e.g. Lewis A Kornhauser, "An Economic Perspective on Stare Decisis" (1989) 65:1 Chicago-Kent L Rev 63; William M Landes & Richard A Posner, "Legal Precedent: A Theoretical and Empirical Analysis" (1976) 19:2 JL & Econ 249; Paul H Rubin, "Why is the Common Law Efficient?" (1977) 6:1 J Leg Stud 51.

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requirement; and b) the non-supported approaches hold the burden to argue against costs in publicity and transparency.

The first perspective prompts us to consider methodological issues. Of course, the proponents of the reason-based approach, if arguing from a normative standpoint, may not be unduly troubled by empirical evidence that the folk do not currently employ their model. Similarly so for those defending the limitedly supported analogy-based approach. What is desirable for a system of precedents to be and what a system of precedents actually is from the perspective of laypeople are two different questions. While that observation holds true, especially in matters of common practice, there appears to be a fundamental need for a normative theory to meet a minimum descriptive standard.[26] Arguing from precedents is a core part of the law in most legal systems—and in many of them it has been so for centuries. But the matter goes further than the boundaries of the legal field. Precedent-based reasoning is commonplace in everyday life; even children, like lawyers, frequently use past decisions to influence current outcomes, whether with parents, teachers or other authorities.[27] The phrase 'setting a dangerous precedent' highlights a widespread recognition of this argumentative practice, both within and beyond legal contexts.

While arguing from precedent is a common practice, our study has revealed a discrepancy between the predictions of—especially—the reason-based account and the perspectives of laypeople. This raises the question: To what extent is the reason-based approach arguing normatively about an existing practice, or setting an idealized framework different to what we ordinarily call 'precedent'? If the theory is based on precedents, and not on something that does not yet exist as a practice, there should be a minimum descriptive requirement to be met so the theory can get off the ground. Or the theorists' departure from the idea entrenched in the intuition of the folk should demand a supplementary account of the

26. Similarly, the methodological choices in a descriptive theory inherently carry normative implications. These are Hart's words about his own methodological choices: "It [Hartian legal theory] wouldn't be morally evaluative. It's evaluative in a sense, but any theory that tries to define or explain a complex activity would have to select some items out of it as important enough to be focused upon. I mean, if I'm watching a game, if I'm describing the game as a game, I won't pick out in order to describe the game the size of the players, because it doesn't throw light on any major question. Whereas I will pick out that they are not only struggling to get hold of the ball, but if they put it in a certain place then that counts as a point towards winning. So it's evaluative in a sense that you pick out features of the complex activity, not because it justifies it morally, but because these would be relevant to among other questions what moral questions you ask." David Sugarman, "Hart Interviewed: H.L.A. Hart in Conversation with David Sugarman" (2005) 32:2 JL & Soc'y 267 at 288. Just as a descriptive theory requires a minimum evaluative perspective, the other way around also seems to be the case. There seems to be a mutual dependency: Descriptive theories need some evaluative perspective to guide what is described, and evaluative theories need descriptive information on which to base their judgments.

27. "Reliance on precedent is part of life in general. The law's lack of an exclusive claim on precedential reasoning suggests that we should dig beneath the use of precedent in this or even any legal system. . . . And having abstracted the analysis by looking at precedent outside of the law, we may then be able to glimpse a different picture of the use of precedent *in* law, and of what it means to 'do law,' to operate in a specifically legal form." Schauer, *supra* note 1 at 572 [emphasis in original].

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difficulty of laypeople in understanding precedents the way they should, as a way to address explicitly the lack of that minimum descriptive requirement.

But it is important to note that some defenders of the reason-based approach do *not* seem to be arguing from a strictly normative perspective. Lamond criticises the rule-based approach for, among other reasons, not aligning with the way common lawyers think.[28] This is an empirical claim that has yet to be fully investigated in order to be proven true or false. However, the fact that the critique is based on an empirical argument highlights the importance Lamond places on meeting a descriptive requirement. Our study does not specifically target common lawyers. In that regard, it does not shed direct light on Lamond's hypothesis, which ought to be done by future studies. But it does demonstrate that, in general, it is the reason-based approach that fails to meet a descriptive requirement, whereas the rule-based approach does meet it.

Some might insist that, if anyone's perception matters at all, it is that of legal theorists or common lawyers, rather than that of laypeople, when it comes to how a system of precedents is viewed. While future work should investigate legal experts' perception, we nonetheless consider the empirical data collected from laypeople to be an important component of a normative argument against the unsupported approaches, based on grounds of publicity and transparency. People are subject to the law. It is desirable that they have an adequate understanding of how the law develops in order to know where they stand. If the mechanics through which legal change occurs are mysterious or obscure to ordinary people—as seems to be the case with precedents under the reason-based approach—this might be seen as problematic. Arguing for the extension of this problem, however, requires further normative analysis: Publicity and transparency are often in a trade-off with other values or considerations, such as due process, efficiency, and the institutional functioning of the judiciary. So, there are reasons—defeasible, certainly—but reasons nonetheless to prefer legal concepts that are closer to folk concepts. This means that the fact that a theory reflects the common ground in the way legal changes occur poses an advantage.

Naturally, theorists are free to argue that the folk concept is wrong. From a normative perspective, there might be reasons why the reason- and analogy-based approaches are better when it comes to the matter of legal changes in a system of precedents. Theorists remain at liberty to argue that the cost that we perceive—in publicity and transparency—is outweighed by the achievement of some alternative theoretical virtues—and, indeed, we are inclined to align with this perspective in a normative discussion, since the reason-based approach offers advantages related to its incremental character. With the results of the study at hand, we

28. According to Lamond, one main reason for resisting the assimilation of the reason-based account to the rule-based account is that "this [the rule-based account] is not the way in which common lawyers understand common law doctrine." Lamond, "Revisiting the Reasons", *supra* note 5 at 122.

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simply know where the burden to argue in spite of the intuition of the folk is allocated.

Nonetheless, these results are preliminary and exploratory in nature. The study has important limitations. Participants were laypeople from the USA and UK, both common law countries where precedent plays an important role not only in legal practice, but also in folk legal beliefs. Confirmatory research should survey people from diverse cultural backgrounds, including civil law countries where precedents play a less prominent role in developing the law, and should also focus on people with legal training to check whether the results generalize to that population. It is also important to note that the tendency toward a rule-based approach in legal change may be exaggerated by the relative ease of comparing outcomes to features. Since outcomes represent straightforward information, participants may have focused their attention on them while neglecting the difference scores. Future research could explore this possibility by presenting features and outcomes in an equally salient, tabulated format. Another restriction has to do with how the vignettes are designed, since real life cases do not have as neatly arranged features as the cases presented to participants in this study. Finally, our post-hoc power analysis revealed that the sample size was too small to detect a moderate-sized interaction. This means that, even in laboratory settings, several of our variables might play off each other in subtle ways that we were not able to capture. Future work should employ larger samples in order to deliver a more fine-grained picture of lay views on legal change in the context of adjudication.

7. Conclusion

Precedent has been of interest to legal philosophers and legal theorists for a long time. However, there is little agreement among those who have theorized about its nature. At a broad level, three conflicting accounts have emerged from this philosophical debate based on the ideas of rules, reasons, and analogy. No uncontroversial account of precedent exists and the discussion is ongoing. One interesting and underexplored aspect of the debate concerns legal change: How does case law change in reaction to novel cases? Leaving the armchair, we conducted an empirical study on the topic and found support for the rule-based approach, and very limited backing for the analogy-based approach. The predictions of the reason-based approach to precedents were not vindicated among laypeople in our study. Although the limitations pointed out above should be kept in mind, these findings represent an important first step toward understanding people's use of precedents and intuition about legal change. The results might reveal a tendency to view a system of precedents in a simplified, intelligible, and non-incremental way. This should be an important consideration when making design decisions for such a system (e.g., how a doctrine of precedent is quoted, or how to write a case brief). We have also argued for a burden of justification on theories that, despite addressing common practices, fail to meet a minimum descriptive

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standard. Considering people as subjects of the law, we further contend that there are reasons—related to publicity and transparency—to favor legal concepts that align more closely with folk understandings.

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Appendix

The statistical model chosen for the pre-registered analysis reported in the main text can be criticized for a number of different reasons. In this appendix, we address two possible sources of criticism: 1) that alternate specifications of the random or fixed effects structures, such as the inclusion or exclusion of predictors, could lead to different findings; and 2) that the fact that the model specification included random intercepts for case and participant, but no random slopes, could significantly impact our results.

This appendix reports the outcome of several alternative models which largely support the same results observed in the main analysis, showing them to be robust to a number of choices that were made at the pre-registration step. All of the code required to replicate the analyses reported here is available in the online supplementary materials: see *supra* note 21.

A.1. Alternative fixed-effects structures

The two statistically significant effects explored in this paper were the main effects of target case outcome and the target case outcome * difference score interaction. As a first set of robustness checks, we fitted alternative specifications of the model. The main effects of target case outcome remain significant if we drop the fixed effect term for order and their accompanying interactions ($F_{(1,\ 1186)} = 510.02$, $p < .001$) and if, instead of dropping order, we add case as a fixed effect term (as opposed to a random effect), allowing it to interact with all other fixed effects ($F_{(1,\ 1152)} = 506.73$, $p < .001$). The same is true for the two-way interaction between target case outcome and difference score, which is significant if we drop the fixed effect term for order ($F_{(1,\ 1190)} = 11.53$, $p < .001$) and if, instead of dropping this fixed effect, we add case as a fixed effect in the manner specified above ($F_{(1,\ 1156)} = 9.67$, $p = .002$). For full results, see the online supplementary materials, *supra* note 21.

Our study also included exploratory questions about how each of the manipulated features impacted their judgments, as well as a question asking participants to rate their level of agreement with the outcome in each of the two cases. These variables could plausibly account for some or all of the variance associated with our two effects of interest. While a model including fixed effects of each of these additional predictors did improve model fit ($AIC_{\text{pre-registered model}} = 3979.62$, $AIC_{\text{full model}} = 3951.50$, $\chi^2 = 40.11$, $p < .001$), it once more revealed significant main effects of target case outcome ($F_{(1,\ 1177)} = 424.44$, $p < .001$) and of the target case outcome * difference score interaction ($F_{(1,\ 1179)} = 8.17$, $p = .004$), as well as of the perceived importance of the first manipulated feature ($F_{(1,\ 1179)} = 4.40$, $p = .036$) and of perceiving both the precedent ($F_{(1,\ 821)} = 6.86$, $p = .009$) and the target case ($F_{(1,\ 1180)} = 16.69$, $p < .001$) as correctly decided. Thus, while the additional exploratory questions help explain the variance in perceived legal change, target case outcome and its interaction with difference score retain their explanatory power in this more encompassing model.

A different exploratory model focused instead on the perceived difference in the quality of decision-making in the precedent versus the target case. To explore this, we computed an evaluative change score by subtracting ratings that the

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precedent case was correctly decided from ratings that the target case was correctly decided. This meant that evaluative change scores would be positive when the target case is seen as improving the law and negative when it is seen as deteriorating the law. We then added evaluative change as a fixed effect in substitution of order in our pre-registered specification. This model once more reveals significant main effects of target case outcome ($F_{(1,\ 1186)} = 500.67$, $p < .001$) and significant effects of the target case outcome * difference score interaction ($F_{(1,\ 1187)} = 11.19$, $p = .001$), and no other significant effects (all other Fs < 1.66, all $ps > .19$).

One final exploration with alternative predictors leveraged the repeated-measures nature of our design. Since participants engaged in five different trials, it could be that their performance in later trials was significantly different than that in early trials. Moreover, this could plausibly interact with our manipulations—making, for instance, target case outcome more relevant for earlier trials than for later trials. We are grateful to an anonymous reviewer for this suggestion. To test it, we added 'trial number' as a predictor in the pre-registered model specification, allowing it to interact with all other fixed effects. Once more, there were statistically significant effects of target case outcome ($F_{(1,\ 1172)} = 514.69$, $p < .001$) and of the target case outcome * difference score interaction ($F_{(1,\ 1176)} = 11.26$, $p < .001$). While there were significant main effects of trial number ($F_{(1,\ 953)} = 9.72$, $p = .002$) reflecting a small tendency of participants to perceive greater change in later trials, trial number did not interact with any other fixed effects in our model (all Fs < 2.4, all ps > 0.12).

A.2. Random slopes

Another way to model our results would be to allow random slopes for some of our manipulated variables. For instance: It seems plausible that different people would respond differently to the magnitude of difference between different cases. On this alternative specification, the main effect of target case outcome ($F_{(1,\ 1180)} = 499.95$, $p < .001$) and the target case outcome * difference score interaction ($F_{(1,\ 1087)} = 11.27$, $p < .001$) remains significant. Moreover, comparing this model to the pre-registered one reveals comparatively similar goodness of fit ($AIC_{\text{pre-registered model}} = 3979.62$, $AIC_{\text{random slopes difference}} = 3981.19$, $\chi^2 = 2.42$, $p = 0.298$). Alternatively, we could also add random slopes for target case outcome on top of the previous specification. This improves model fit compared to the previous model ($AIC_{\text{random slopes difference}} = 3981.19$, $AIC_{\text{random slopes difference and target case outcome}} = 3940.41$, $p < .001$). Once more, the only two significant effects here are of target case outcome ($F_{(1,\ 239)} = 306.67$, $p < .001$) and of the target case outcome * difference score interaction ($F_{(1,\ 1031)} = 16.01$, $p < .001$).

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