Legal Theory, **24** (2018), 216–254.
© Cambridge University Press 2018 0361-6843/18
doi:10.1017/S1352325218000113

REASONING BY PRECEDENT—BETWEEN RULES AND ANALOGIES

Katharina Stevens*
University of Lethbridge

ABSTRACT
This paper investigates the process of reasoning through which a judge determines whether a precedent-case gives her a binding reason to follow in her present-case. I review the objections that have been raised against the two main accounts of reasoning by precedent: the rule-account and the analogy-account. I argue that both accounts can be made viable by amending them to meet the objections. Nonetheless, I believe that there is an argument for preferring accounts that integrate analogical reasoning: any account of reasoning by precedent that is descriptively minimally adequate will leave some room for judicial discretion. Discretion should be used under consideration of the best legally relevant arguments for and against a decision. Integrating analogical reasoning helps the judge to bring to her own attention the strongest case for following. Analogical reasoning also eases the recognition of possible reasons for distinguishing. Thereby, it facilitates a more balanced decision-making process.

I. INTRODUCTION

In common law systems, large areas of the law are developed according to the doctrine of precedent. Precedents are past cases that can provide judges with binding, authoritative reasons to decide their present-case according to the precedent-decision by following that decision. In this paper, I will investigate the process of *reasoning* through which a judge determines whether the existence of a *specific* precedent gives her a binding authoritative reason to follow in her present-case.[1] While there are many accounts of reasoning by precedent, two importantly different approaches can be identified within the literature. According to the first approach, reasoning by precedent is a form of rule-application. A judge identifies a rule that the

* For help and support I thank Wil Waluchow, Matthew Grellette, Maggie O'Brien, Jeremy Waldron, Luís Duarte d'Almeida, Stefan Sciaraffa, Fábio Shecaira, Karl Laderoute, Candice Delmas and my two anonymous reviewers. I also thank NYU Law School for the Dworkin-Balzan fellowship that supported the work on the manuscript.

1. I will not discuss persuasive precedent or overruling.

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precedent-opinion either sets up or refers to. Then she determines whether the present-case falls under it.[2] The second approach depicts reasoning by precedent as a form of analogical reasoning. The judge compares the precedent and the present-case. If they are legally the same, then the precedent-decision must be followed. The cases are legally the same when they are legally relevantly similar and have no legally relevant differences.[3]

Both approaches have been subjected to strong criticism. The rule-approach has been criticized as being unable to account for the practice of distinguishing and for making the unjustifiable assumption that opinions reliably provide enough information to extract determinative rules.[4] The analogy-approach has been criticized because it seems to be unable to explain how precedents constrain judicial decision-making.[5] Taken at face value, these criticisms make it appear as if neither approach could be successful—or that if one is, then only as the lesser of two evils.[6] This situation is problematic, given that reasoning by precedent is the basis on which much law is developed and on which many cases are decided.

Unlike the critics, I believe that *both* approaches are viable in principle because they can be amended to meet the objections. Once amended, both approaches can accommodate the practice of distinguishing and account for the constraining effects of precedents. In fact, I think that viable versions of the rule-approach have already been proposed. The main contribution of this paper will be to develop an amended version of the

2. The most adamant defenders of the rule-approach and critics of the analogy-approach are Larry Alexander and Emily Sherwin (*e.g.*, Larry Alexander, *Constrained by Precedent*, 63 S. Cal. L. Rev. 3 (1989); Larry Alexander & Emily Sherwin, Demystifying Legal Reasoning (2008)) and the later Schauer (*especially* Frederick Schauer, *Why Precedent in Law (and Elsewhere) Is Not Totally (or Even Substantially) About Analogy*, 3 Persp. Psychol. Sci. 454 (2008); *but also* Frederick Schauer, Thinking Like a Lawyer (2009)).

3. *See, e.g.*, Edward Levi, An Introduction to Legal Reasoning (1949); Gerald J. Postema, *A Similibus ad Simila: Analogical Thinking in the Law*, *in* Common Law Theory 102–133 (Douglas E. Edin ed., 2007); Adam Rigoni, *Common-Law Judicial Reasoning and Analogy*, 20 Legal Theory 133 (2014); Lloyd Weinreb, Legal Reason: The Use of Analogy in Legal Argument (2005); Dan Hunter, *Reason Is Too Large: Analogy and Precedent in Law*, 50 Emory L.J. 1197 (2001).

4. Grant Lamond has most prominently criticized the rule-approach for its problems with distinguishing. *See* Grant Lamond, *Do Precedents Create Rules?*, 11 Legal Theory 1 (2005). Others have followed him, *e.g.*, Rigoni, *supra* note 3. The American Legal Realists brought special attention to the problems with deriving rules from opinions (for an overview, *see, e.g.*, Brian Leiter, *American Legal Realism*, *in* The Blackwell Guide to the Philosophy of Law and Legal Theory 50–67 (Martin P. Golding & William A. Edmundson eds., 2005)). Others who have drawn attention to these problems are, *e.g.*, Rigoni, *supra* note 3; Schauer, *supra* note 2, at ch. 9; and Kent Greenawalt, Statutory and Common Law Interpretation (2013), at ch. 8.

5. *See especially* Schauer, *supra* note 2, and Alexander & Sherwin, *supra* note 2, at 70.

6. For example, Rigoni argues that the rule-approach does *worse* than the analogy-approach with respect to distinguishing and *at best as well* with respect to the constraining function of precedent. Rigoni, *supra* note 3. Alexander and Sherwin develop a rule-approach that, they admit, cannot account for distinguishing—but claim that this is a small price to pay given that the alternative cannot show that precedent is constraining. Alexander & Sherwin, *supra* note 2, at 114.

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analogy-approach. I will argue for preferring accounts of reasoning by precedent that at least integrate analogical reasoning. My argument relies on the insight that any account that is descriptively adequate will leave some well-specified room for judicial discretion. However, discretion should not mean simply following one's preconceived judgments or biases. Rather, it should be used with consideration of the best legally relevant arguments for and against a decision. I argue that integrating analogical reasoning makes it easier for the judge to focus on the case for following that will appear strongest to her. In addition, analogical reasoning facilitates the recognition of possible reasons for distinguishing. Thereby, integrating analogical reasoning into reasoning by precedent allows for a more balanced decision-making process.

A. Underlying Assumptions

This paper is concerned with the method of reasoning by which a judge can come to a justified conclusion about whether a specific precedent provides her with a binding authoritative reason to follow in her present-case. I will adopt a roughly Razian account of authoritative reasons: if a precedent provides an authoritative reason to follow in a present-case, then this reason is both content independent and protected.[7] The reason is content independent because it is a reason to follow just in virtue of the fact that precedents are valid legal sources and that this particular precedent stands in the right legal relationship to this particular present-case.[8] In addition, the reason provided by the precedent is protected because the existence of the precedent provides the judge with a second-order reason that excludes certain reasons against following from consideration.[9] I will say that if a precedent gives a judge an *authoritative* reason to decide her present-case according to the precedent-decision then that means that the precedent has to be either followed or distinguished. A judge can distinguish based on a reason against following the precedent if that reason is not excluded.[10] If no nonexcluded reason can be found, then the precedent gives the judge a *binding* authoritative reason to follow.

For the purposes of this paper, I will also make several important assumptions about what a good theory of reasoning by precedent should deliver. First, I want to ensure that I can plausibly claim to describe the legal practice of reasoning by precedent, and not some other hypothetical form of reasoning that involves past cases. Therefore, I will assume that an adequate

7. *See, e.g.*, JOSEPH RAZ, THE MORALITY OF FREEDOM (1986).

8. *Compare id.* at 35ff.

9. *Compare id.* at 38ff. It is important that the group of excluded reasons can be big or small—as long as some group of otherwise relevant reasons is excluded from consideration, the authoritative reason is protected.

10. The usual way to describe distinguishing is by saying that a judge may distinguish based on a *difference* between precedent-case and present-case. However, this formulation favors the analogy-approach. Therefore, I choose a neutral formulation.

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account must be able to meet some minimal descriptive requirements. The account should be able to integrate important aspects like *following* and *distinguishing* as central features of reasoning by precedent.[11] In addition it should also integrate the central place of precedent-*opinions* and *rationes decidendi* in the practice of reasoning by precedent, and it should be sensitive to the ways opinions and *rationes* are usually formulated.

Second, I am not interested in providing an account that describes how judges actually come to their decisions in the real world. Empirical work is better suited for this task.[12] Rather, I will attempt to show that there are both a rule-approach and an analogy-approach of reasoning by precedent that fulfill minimal descriptive requirements and that *also* fulfill the normative requirement that reasoning according to these approaches can reliably lead to justified decisions.

On first sight, this might be a strange goal to have. After all, making decisions by precedent is interesting exactly where it leads to *bad* decisions. Precedent must be followed even if the precedent-case was wrongly decided, so sometimes, reasoning by precedent should lead to some regrettable outcomes.[13] In fact, authors who defend the doctrine of binding precedent usually do not deny that it will lead to the repetition of some bad decisions and thereby to the making of some bad law. Instead, they argue that adhering to the doctrine of precedent realizes values like efficiency as well as rule-of-law values like predictability and stability.[14] At the same time, it allows enough room for the correction of mistakes and for sensitivity to new developments and unforeseen situations so that little bad law survives for long while good law gets built up.[15] This is the famous idea that the common law "works itself pure."[16] I will assume that if the use of the doctrine of binding precedent is justified, then that is because it produces a balance between stability and flexibility in the development of the law, and that such a balance would in fact justify adopting the doctrine of binding precedent. Therefore, a single decision according to precedent, for my purposes, will count as justified if it has been reached by a process of reasoning that will realize this balance if followed in general. What would a method of reasoning have to look like to do this?

11. This assumption is not shared by all theorists. Alexander and Sherwin give up on descriptive accuracy in favor of what they perceive to be a normatively better account when they advocate eliminating distinguishing. Alexander & Sherwin, *supra* note 2, at 114.

12. *See, e.g.*, David Klein & Gregory Mitchell, The Psychology of Judicial Decision Making (2010).

13. *See* Schauer, *supra* note 2, at 7, for a discussion of this peculiarity of precedent.

14. *See, e.g.*, Frederick Schauer, *Precedent*, 39 Stanford L. Rev. 571 (1987) for an overview of the values that can only be realized through reasoning by precedent if precedents are constraining.

15. Emily Sherwin and Larry Alexander cite this idea of a balance attainable through precedent but reject its possibility. Alexander & Sherwin, *supra* note 2, at 66. I am more optimistic.

16. Omychund v. Barker, 26. Eng. Rep. 15, 23 (Ch. 1744). Dworkin introduces this saying in the following way: "Sentimental lawyers cherish an old trope: they say that law works itself pure." Ronald Dworkin, Law's Empire (1986), at 400ff.

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Take rule-of-law values like predictability and stability. These values are based on the idea that people should be able to use precedents to foresee how they will be treated in courts and order their lives accordingly.[17] Therefore, precedents should allow people to generate reliable expectations about what will happen to them in later cases. This is only possible if the method of reasoning by precedent leads to decisions that will usually not disappoint these expectations—at least if they are reasonable.[18] To realize these values, reasoning by precedent must work so that precedents have a *constraining effect* on the present-decision. For example, this entails that the precedent and the present-decision need to be consistent with each other. However, given that cases have a potentially unlimited number of aspects, theoretically any two decisions could be made consistent.[19] Therefore, something more is required so that precedent-constraint can produce reliable expectations. One such thing would be, for example, that where the opinion of a precedent-case explicitly treats a set of aspects[20] as the reason for reaching the precedent-decision, these aspects must be treated as reasons for reaching the equivalent decision in the present-case.[21]

17. Importantly, the kind of predictability that is demanded here is predictability *based on promulgated legal sources*. Theoretically, judicial decisions could be predictable even without publishing any precedent-opinion, and without the doctrine of binding precedent, if only the personality of the judges was well enough known. But that would not be predictability as a rule-of-law value because it would require those who predict to accept that it is the judges (and their personalities) who do the ruling, not the law. *See* Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 13 (2012).

18. *Id.* at 10.

19. Two decisions will be inconsistent with one another if they amount to treating *the same* situation *differently*. But because of the unlimited number of aspects (including the time and the place of the situation), no two situations *are ever* the same, strictly speaking. So any combination of decisions can be made consistent with each other, if the decision-maker is willing to treat *any* aspect of the situations as relevant for the decision. For example, a cruel parent might point out that her decision to reward one child for cleaning her room is not inconsistent with her decision to punish the other for cleaning her room because one of her children has a missing tooth, *so it's different*.

20. I am here deliberately choosing the vague term "aspect" of a case, which is meant to approximately denote some property/circumstance of, or relation within the case—something the case can be said or has been said to have. That a case has an aspect can be expressed either through precise categorical terms or through vague allusions, and what the aspect is that such a term or allusion refers to might not be clear to the speaker/writer and/or the hearer/reader. If I describe a situation and note "She had a weird *je ne sais quoi*," then I have successfully denoted an aspect. Any situation, case, or object has uncountable aspects.

21. As I see it, a reasoning method in which precedents have a constraining effect at the very least must give the existence of the precedent a role in the reasoning process such that it influences its outcome. This might be the case because the conclusion about how to decide the present-case under consideration is different than it would have been if the precedent had not existed. It is also the case if the conclusion is the same but the reasons on which it has been reached are different because the precedent-case excludes reasons that would have otherwise counted and adds reasons that would otherwise have not existed. An adequate account of reasoning by precedent should be able to portray it as such a constraining method. I prefer this description of precedent-constraint to Schauer's formulation according to which a precedent is constraining only if it can make a judge *change her mind* about how to decide a present-case, SCHAUER, *supra* note 2, at 7, which Rigoni interprets as a psychological requirement, Rigoni, *supra* note 3, at 140. No method of reasoning can force anyone to change their

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Values like efficiency also call for the constraining effect of precedents. The doctrine of precedent furthers efficiency if it reduces, over time, the amount of cases that courts have to decide on the basis of a full deliberation of all applicable first-order reasons. This can only happen if precedents (at least partially) determine the decisions in some later cases. However, the constraining power of precedent cannot be absolute in reasoning by precedent. If the common law is supposed to "work itself pure," then there must be room for change—for correcting mistakes and for reacting sensitively to new developments and unforeseen situations. To create this room, reasoning by precedent has to work so that judges retain some flexibility to take reasons other than the precedent into account to some limited degree. Accordingly, an account of reasoning by precedent that reliably leads to justified decisions should give constraining effect to precedents while also allowing judges some limited amount of discretion.

B. Argument-Schemes and Critical Questions

I will assume that reasoning—at least conscious reasoning—can be represented in the form of arguments, understood as premise-conclusion structures. An argument is different from a reason in that an argument *purports* to present a reason for the conclusion but may fail to do so. I will assume that when a conclusion has been reached through reasoning, then that conclusion is justified by an argument if the argument presents a reason for accepting the conclusion and if there are no open objections against the argument. In argumentation theory, this understanding has led to the introduction of *argument-schemes* as tools for representing the conditions under which types of arguments justify their conclusions. Such schemes model the premise-conclusion structure of the kind of argument they represent and combine these with a set of *critical questions*. The critical questions are meant to pick out the types of objections that are most often successfully leveled against this type of argument. A *good* argument of the type that the argument-scheme picks out must be able to withstand these objections.[22] Here is one very simple (imprecise) example of an argument-scheme/critical question combination for arguments from expert opinion:

minds: if I am set on believing that the moon is made of green cheese, then the best reasons cannot *make* me change my mind. Alternatively, one might interpret Schauer's requirement as demanding more than that the precedent-case must influence the decision-making process. He might be demanding that the precedent must have *decisive influence*, at least in some possible cases. But I think that is the case whenever the existence of the precedent-case changes the collection of reasons that support the decision: adding or subtracting a reason *always* has the potential to have decisive influence in some cases—those in which it changes the balance of reasons for and reasons against. (We cannot interpret having "decisive influence" as providing a reason that replaces all other reasons. In this case, Schauer's definition of "constraint" would makes nonsense of the practice of distinguishing. For more on this, see the discussion of Lamond's arguments in Section III.A.)

22. For an introduction to the account of argument-schemes that informs this paper, *see, e.g.*, Douglas Walton, Argumentation Schemes for Presumptive Reasoning (1996).

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Argument
S says that x
S is an expert in area P
Therefore: x

Questions
Does x belong to area P?
Is S trustworthy?
Do other experts in area P agree with S?

In this paper, I will use argument-schemes and critical questions to represent the different ways reasoning by precedent can be understood. I have chosen this mode of representation because it is an intuitive, convenient, and concise way to show how a certain theory about a type of reasoning portrays the structure of this reasoning. For reasoning by precedent, the scheme-plus-questions structure is especially helpful because a judge who is trying to determine whether the existence of a precedent provides her with a binding authoritative reason for following it has to take into account both considerations for and against following it. Argument-schemes paired with critical questions are a good way to portray such back-and-forth processes, representing the possible reasons for their conclusion through the scheme and the possible reasons against it through the critical questions. Using argument-schemes also enables me to portray precisely which part of a theory of reasoning by precedent is attacked by an objection against the theory and how the theory has been amended to deal with the objection. If the argument-scheme and critical questions are chosen well, then an argument set up according to the scheme and for which the critical questions can be answered satisfactorily justifies its conclusion. A correct theory of reasoning by precedent should translate into an argument-scheme that does this for arguments by precedent. If an argument-scheme is chosen poorly, on the other hand, then either the premises or the critical questions must be changed.[23] Throughout, I will show how amending theories of reasoning by precedent in response to objections results in changed argument-schemes.

II. TWO ACCOUNTS OF REASONING BY PRECEDENT

I discuss two of the most prominent approaches to reasoning by precedent: according to the rule-approach, a precedent provides a judge with a binding authoritative reason to follow in those cases that fall under the rule set out in the precedent's *ratio*. According to the analogy-approach, a precedent provides a judge with a binding authoritative reason to follow in

23. For example, it might be argued that even if *some* other experts agree with S, this is by far not enough to justify accepting that x. Therefore, the third critical question in our example is too lax, and should be replaced by this one: "Do the majority of other trustworthy experts in area P agree with S?"

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those cases that are the same as the precedent-case in all legally relevant respects. I am interested in describing the two approaches as theories of how *reasoning* by precedent works. I will therefore classify theories of reasoning by precedent as being a rule- or analogy-approach depending on the *structure* of reasoning that they claim underlies reasoning by precedent. I will treat those theories as rule-approaches that describe reasoning by precedent as a process in which a judge *first* determines a rule from the precedent-case *alone* and *then* applies it to the present-case.[24] She reasons with each case independently and connects the two through the rule. I will treat those theories as analogy-approaches that describe reasoning by precedent as a process in which a judge reasons with *both* cases at the same time, finding similarities and differences between them. I hope that the paper, especially in Section IV, will show that this distinction between the approaches is important and meaningful.[25]

At first sight, the rule-approach of reasoning by precedent seems far more attractive, especially considering the need to show how precedent can *constrain*. On a straightforward understanding of the rule-approach, judges should reason in roughly the same way as they reason with statutes. The only difference is that instead of reading the statute and determining

24. Following other theorists, I will treat rules as taking the form of a conditional. The antecedent of the conditional lists categories of properties a case needs to have for it to fall under the rule. The consequent states what must be done when the rule applies. *Compare, e.g.*, Frederick Schauer, Playing by the Rules (1991), at 23ff.

25. This way of distinguishing between the two accounts results in my grouping the approaches of, *e.g.*, Alexander & Sherwin, *supra* note 2, together with the approaches of Lamond, *supra* note 4; Horty and Bench-Capon (John Horty, *Rules and Reasons in the Theory of Precedent*, 17 Legal Theory 1 (2011); John Horty & Trevor J. M. Bench-Capon, *A Factor-Based Definition of Precedent Constraint*, 20 Artificial Intelligence & L. 181 (2012)); and Adam Rigoni, *An Improved Factor Based Approach to Precedential Constraint*, 23 Artificial Intelligence & L. 133 (2015). This happens because I count any approach as a rule-approach that works by first establishing rules (whether they are strict or defeasible) and then uses these rules to determine the decision in the precedent-case. It is important to point out that the authors of these approaches disagree in important ways. Alexander and Sherwin would likely reject the idea that Lamond, Horty, and Bench-Capon formulate rule-approaches, and Lamond calls his account a "reasons" account, a name taken up later by Horty and Bench-Capon. The difference is that Lamond, Horty, and Bench-Capon base their approaches on the idea that precedents authoritatively determine the relative strength of reasons (factors) based on which cases are decided, including the reasons (factors) that spoke against the precedent-decision but were not strong enough. However, as I will discuss below, the distinction between these two groups consists, in great part, of the kind of rule they employ. In Lamond, Horty, and Bench-Capon's accounts, the combination of factors that justified the precedent-decision form the antecedent of a *defeasible* rule, the precedent rule. Nonetheless, this distinction should not be underestimated. Alexander and Sherwin want strict rules, while Lamond and Horty claim that precedent only sets up highly defeasible rules and assigns relative weights to all the reasons of the precedent-case. Below, I will sketch how Alexander and Sherwin's strict rule-approach becomes first Horty and Lamond's defeasible rule-approach and then something even more flexible when amendments are made to deal with the two main objections commonly leveled against rule-approaches. The use of argument-schemes should make it easy to see how, despite important differences, all these accounts are related because they all include the extraction and then employment of a rule that mediates between two cases. This is structurally very different from the analogy-approach, according to which the two cases interact directly in the process of reasoning.

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its meaning, judges interpret the precedent-opinion to determine the precedent's *ratio* and with it the legal rule that is contained in the precedent. A version of this straightforward interpretation of the rule-approach has been defended by Alexander and Sherwin.[26] They argue that in reasoning by precedent, the judge first determines the precedent rule (and has to do so correctly; the charge that the interpretation has failed is a serious objection). This rule is what they call a *serious* rule, one that determines all cases that fall under its antecedent.[27] Therefore, whether a case should be decided by following the decision made in the precedent can be determined by testing the validity of a deductive *modus ponens* with the precedent-rule in the major premise and the description of the case in the minor premise.[28] This view of reasoning by precedent can be represented with the following argument-scheme:

Argument
The opinion of precedent A can be interpreted as providing a legal rule a of the form (If a case B has properties n1, n2, -> decision Y should be reached.)
Therefore, if a case B has properties n1, n2 -> decision Y should be reached.

If a case B has properties n1, n2 -> decision Y should be reached.
Case B1 has properties n1, n2.
Therefore, decision Y should be reached.

Questions
Is the best interpretation of the opinion of precedent-case A that it provides rule a?

Is the legal syllogism of the form *modus ponens* that uses rule a in the major premise and case B in the minor premise deductively valid?

Does case B have properties n1, n2?

This account has the advantage of portraying the role of the precedent as clearly constraining judicial reasoning. Once a rule is identified, it can serve as the major premise of a deductive *modus ponens*. It is a mere formality to determine whether a *modus ponens* is valid or not. No exercise of judicial discretion seems necessary.

Now to the analogy-approach: at first sight, it seems much less attractive. According to the analogy-approach, a judge must follow the precedent-decision if the precedent-case and the present-case are legally the same. She evaluates legal sameness by determining whether the similarity between

26. ALEXANDER & SHERWIN, *supra* note 2.
27. *Id.* at 11.
28. This is what Neil MacCormick calls a "legal syllogism," though he would allow for the syllogism to be defeasible. NEIL MACCORMICK, RHETORIC AND THE RULE OF LAW (2009), at ch. 4.

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the cases is legally relevant and whether there are any legally relevant differences. The corresponding argument-scheme might look like this: [29]

Argument
Precedent-case A and present-case B are similar.
Therefore, precedent-case A and present-case B are legally the same.[30]

Whenever a present-case B is legally the same as a precedent-case A, A must be followed in B.
Precedent-case A and present-case B are legally the same.
Therefore, A must be followed in B.

Questions
Are A and B similar in a legally relevant way?
Are there no legally relevant differences between A and B?

I should point out that the second part of the argument is deductive, and its major premise simply summarizes the analogy-approach's reading of the doctrine of precedent. What needs careful attention is the first part of the argument. The worry is that it will always be true that a precedent-case and a present-case are similar in some respects and different in others. Whether or not an argument like this justifies its conclusion depends entirely on whether the similarity or differences between A and B are legally relevant. However, as Alexander and Sherwin point out, there is still a need for a viable method for distinguishing relevant from irrelevant similarities in the jurisprudence-literature.[31] As a result, judges might have no choice but to

29. Weinreb, *supra* note 3, seems to be defending such an approach.
30. An even more simple representation of this scheme would have been:

Argument
Precedent-case A and present-case B are similar.
Therefore, A must be followed in B.

However, this representation would have obscured the role that the doctrine of precedent plays in this reasoning. As the precedent itself does not contain an authoritative rule, the authoritative direction for action must come from somewhere else. It comes from the authoritative doctrine of precedent according to which legal sameness (not mere factual similarity) requires same legal treatment.

31. Alexander & Sherwin, *supra* note 2, at 68ff. Many analogy-approaches do not provide a viable answer to this. Scott Brewer claims that he is offering an analogy-approach but uses the justifiability of a derived rule to account for relevance. Scott Brewer, Exemplary Reasoning: Semantics, Pragmatics and the Rational Force of Legal Argument by Analogy (1996). Edward Levi, in his classic book *An Introduction to Legal Reasoning*, endorses an analogy-approach but his project does not require him to explain how it works any further than by saying: "The determination of similarity or difference is the function of each judge." Levi, *supra* note 3, at 2. Lloyd Weinreb claims that the recognition of important similarity might feel like some kind of mystical "intuition," but it is actually the employment of past experience. However, Weinreb does not explain why we should think that intuitions arise only from experiences with legal reasons instead of a judge's first-order moral and political reasons or, even worse, her biases and moods. Weinreb, *supra* note 3. Earlier in his career, Frederick

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decide for themselves what they *want* to treat as legally relevant. The necessary import of other reasons might then overwhelm the reasoning process to the point where the existence of the precedent makes little difference, leaving the judge rather unconstrained. This seems a good reason to reject the analogy-approach and prefer the rule-approach.

Because the rule-approach initially appears so much more attractive than the analogy-account, it is important to show why and how the constraint that precedent can provide under the rule-approach is limited before attempting to repair the analogy-approach. The straightforward version of the rule-approach has been subjected to strong criticisms because it has trouble meeting the minimal descriptive requirements set out above. It is possible to amend the rule-approach so that it can deal with its problems. Indeed, rule-approaches that include the necessary amendments have already been proposed in the literature. The next section, then, is not meant to develop a new rule-approach. Instead, it illustrates how the rule-approach, as it changes to deal with its objections, is less and less able to present precedent as strongly constraining. This will provide me with the basis for showing that the analogy-approach I develop is just as constraining as a functioning rule-approach. It will also showcase the structural similarity of the different theories that I classify as rule-approaches, ultimately highlighting the difference between rule- and analogy-approaches.

III. AMENDMENTS TO THE RULE-APPROACH

The straightforward version of the rule-approach, exemplified by Alexander and Sherwin, commits us to the idea that precedents, like statutes, must be interpreted to identify *rules*, and these rules fully determine every case that falls under their antecedent.

A. The Trouble with Distinguishing

According to Lamond, this position cannot be squared with the role of *distinguishing* in the practice of reasoning by precedent.[32] The problem lies in the *kind* of rule the straightforward version of the rule-approach presupposes. If a rule is supposed to fully determine every case that falls under its antecedent, then the inference between premises and conclusion in the employed legal syllogism needs to be certainty preserving (in that it warrants us to be as sure of the conclusion as we are of the premises) and monotonic (it does not lose any strength if additional premises are added

Schauer explored the idea to use socially and otherwise established categories to explain how the overall relevance of the similarity between two cases can be determined. *E.g.*, Schauer, *supra* note 14. However, he abandoned this idea and adopted a rule-approach because our language provides such a wealth in categories that it is possible to find a category for almost any two objects. SCHAUER, *supra* note 2.

32. *See* Lamond, *supra* note 4.

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to the argument). The strength of the argument should not change if we move from argument (a) to argument (b).

(a)
If a case x has properties n1, n2 -> decision Y should be reached.
Case B1 has properties n1, n2
Therefore, decision Y should be reached.

(b)
If a case x has properties n1, n2 -> decision Y should be reached.
Case B1 has properties n1, n2
Case B has property n5
Therefore, decision Y should be reached.

But, as Lamond points out, this is exactly what happens with precedent. The practice of *distinguishing* allows judges *not* to reach decision Y on the basis that the present-case has further property n5—if n5 is not also present in the precedent-case.[33] Consider the case of distinguishing in *MacDonald v. Ortho Pharmaceutical Corp.*[34] Carole MacDonald suffered a stroke caused by her taking Ortho-Novum birth control pills. Ortho had not provided a specific warning of strokes, and MacDonald sued under "Failure to Warn Doctrine." The court acknowledged that the case fell under a narrow exception to the general duty to warn. This exception had been set out in the *Restatement (Second) of Torts* in a canonical, rule-like formulation and subsequently adopted by courts.[35] It stated that a manufacturer has no duty to warn a consumer if warnings have been given to a responsible intermediary. Cases adopting this rule had determined that prescribing and treating physicians were responsible intermediaries. However, even though the court agreed that the case fulfilled the conditions set out in the rule-like formulation, it distinguished because of an additional property of the case: unlike other medication, where doctors are the main decision-makers, patients usually make the decision to take birth control pills relatively autonomously.

Lamond argues that it is indeed an authoritative reason for following if a present-case exhibits the properties listed in the *ratio* of a precedent-case, but it is not necessarily a *binding* reason.[36] To be a binding reason, it must be an authoritative reason that excludes *all* other reasons, except maybe for specifically listed exceptions.[37] Judges would need to have the

33. *See id.* at 9.
34. MacDonald v. Ortho Pharmaceutical Corp., 475 N.E.2d 65 (1985).
35. Restatement (Second) of Torts §388 cmt. n (1965).
36. Lamond, *supra* note 4, at 15–16.
37. *Id.* at 7–8. Lamond acknowledges that there is the option of adding exceptions and thereby effectively changing the rule. He dismisses this by pointing out that there does not seem to be any additional burden of justification for doing this—judges distinguish as easily as they follow. Changing an existing rule should incur a higher burden of justification. Of course, theoretically, we could deal with this issue by simply striving to list *all* the exceptions to the rule in the rule right away. However, this would make rule formulation forbiddingly hard, especially rule formulation based on just one case. Most likely, it would result in such

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duty to follow precedent *whenever* their present-case falls under the antecedent of the precedent-rule. But instead, judges have the duty to *either follow or distinguish*. A legal syllogism that uses a rule formulated from a precedent's *ratio* cannot be certainty preserving. Even if a present-case exhibits the properties listed in the rule, and the interpretation of the precedent is correct, the application of the rule's consequent might not follow.

For this reason, Lamond proposes to think of precedents differently. Instead of excluding *all* other reasons from consideration, a precedent only excludes those that were already present in the precedent-case.[38] A reason not to follow the precedent based on the property n5 would be excluded *only* if n5 was already present in the precedent-case. Otherwise, the judge must take the reason into account and can distinguish on its basis.[39] Lamond's argument shows that interpreting the precedent's opinion to extract a rule and determining whether the resulting legal syllogism is valid is not enough. To determine that a precedent gives a *binding* authoritative reason to follow, the judge must make sure that there are no nonexcluded reasons against following based on additional properties of the present-case.

It is possible to amend the rule-approach to accommodate Lamond's criticism. This is so because Lamond is interested in the *kinds of reasons* precedents provide and aims at showing that they are not the same as those provided by statutes. By contrast, this paper is concerned with the kind of *reasoning* judges can employ to recognize those reasons. Lamond allows for opinions to provide a *ratio* in the form of a conditional. He points out that this conditional cannot be used like a statute because a precedent can be distinguished based on unenumerated reasons. To incorporate this criticism, the rule-approach can make use of a *defeasible modus ponens*. The concept of a defeasible *modus ponens* comes from the flourishing project of developing nonmonotonic logics—logics that are equipped to deal with premise-conclusion relations that are less than certainty preserving but that, given that the premises are true, still establish a presumption in favor of the conclusion.[40] This presumption can be defeated if other

long and complex rules that simply reading the rule would take as much time as making the decision without the rule. In addition, it is seriously questionable whether this would lead to *any* good rules, given how susceptible the human mind is to cognitive biases. (For a discussion of the trappings of rule-making based on cases *see* Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 893 (2006)). For a summary of the objections to trying to list all exceptions to a rule in the rule, *see* Rigoni, *supra* note 25, at 134–135.

38. Lamond, *supra* note 4, at 16.

39. *Id.* at 19.

40. For an overview of nonmonotonic logics, *see, e.g.*, G. Aldo Antonelli, *Non-monotonic Logic*, *in* THE STANFORD ENCYCLOPEDIA (2012), http://plato.stanford.edu/archives/win2012/entries/logic-nonmonotonic/. John L. Pollock is famous for having given the idea of defeasible reasoning a firm place in epistemology. JOHN L. POLLOCK, KNOWLEDGE AND JUSTIFICATION (1974). Douglas Walton brought the idea into argumentation theory and, on its basis, developed his theory of argument-schemes. WALTON, *supra* note 22. Rigoni, *supra* note 25, provides arguments for

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reasons enter the consideration. Authors like Horty (with Bench-Capon) and Rigoni have developed approaches to reasoning by precedent that use defeasible rules and a nonmonotonic logic based on Lamond's insights.[41] In their (amended) rule-approach of reasoning by precedent, the reasons capable of defeating the presumption for following are ones against following based on aspects that the present-case has but that the precedent-case did not have. It should be clear that amending the rule-approach in this way means reading the "rule" that the precedent establishes as an extremely defeasible rule that is much closer to a rule of thumb (though it excludes some reasons from considerations) than some proponents of rule-approaches would like.[42] The argument-scheme below illustrates the change that results from moving from Alexander and Sherwin's strict approach to Lamond's, Horty's, Bench-Capon's, and Rigoni's defeasible model:

Argument
The opinion of precedent A can be interpreted as providing a legal rule a of the form (If a case B has properties n1, n2 -> (presumably) decision Y should be reached.)
Therefore, if a case B has properties n1, n2 -> (presumably) decision Y should be reached.

If a case B has properties n1, n2-> (presumably) decision Y should be reached.
Case B1 has properties n1, n2.
(Presumably), therefore, decision Y should be reached.

Questions
Is the best interpretation of the opinion of precedent-case A that it provides rule a?

Is the legal syllogism of the form *modus ponens* that uses rule a in the major premise and case B in the minor premise deductively valid?

choosing a nonmonotonic logic over a monotonic logic when formalizing reasoning by precedent.

41. Horty, *supra* note 25; Horty & Bench-Capon, *supra* note 25; Rigoni, *supra* note 25. Based on Lamond's ideas, Horty and Horty and Bench-Capon develop a method for classifying the aspects of a precedent-case into reasons for and against the precedent-decision and assigning them weights. The reasons (factors) for the decision make up the antecedents of the rules; the reasons (factors) against are those that will later be excluded. A complex ordering relation for reasons is added based on which precedent-constraint is explained. Rigoni, *supra* note 25, develops this account even further.

I believe that many rule theorists who are not as strict as Alexander and Sherwin will likely be willing to accept Lamond's, Horty's, Bench-Capon's, and Rigoni's account as an advancement and sophistication of their own accounts. Joseph Raz's account, for example, seems to be open to such a development. *See, e.g.*, Joseph Raz, The Authority of Law (1979), at ch. 10.

42. Statutory rules, correctly understood, are probably defeasible too—after all, common law judges tend to re-interpret them when they would lead to absurd outcomes or when two statutes seem to conflict. But I think Lamond's point still stands; precedents are *much more* defeasible than statutes.

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Is there any reason that defeats the presumption for reaching decision Y based on a property of the present-case B that the precedent-case A did not have?

Does case B have properties n1, n2?

According to one reading of the amended rule-approach, the additional critical question imports an element of the analogy-approach. Under this reading, the question requires judges to determine whether any of the differences between the precedent-case and the present-case are legally relevant. Once the rule has been extracted from the precedent-case, carried over to the present-case, and applied there, the judge still has to bring both cases together in order to reason about their differences.

There is another possible reading of the amended rule-approach, according to which no direct comparison between the cases is necessary. According to this reading, interpreting the precedent-opinion would involve cataloging the properties that cannot serve as a basis for distinguishing because they are present in the precedent-case. If a judge wanted to distinguish based on some property of the present-case, she would have to consult this list to determine whether her reason for distinguishing was excluded.[43] This would preserve the purity of the rule-approach, avoiding all direct contact between the two cases. I do not want to claim that Horty and Bench-Capon think this is actually how reasoning by precedent works, but I think that their account makes it plausible that it could work this way at least theoretically.[44] Nonetheless, I am not sure that this actually happens in practice. In the next section, I will discuss the difficulties of determining a *ratio* that is exact enough to serve as the major premise in a *modus ponens*, defeasible or not. I think these difficulties would be even greater in an attempt of making a list of properties as suggested above.

B. The Trouble with Opinions

So far, I have been talking about the interpretation of judicial opinions as if it is a simple task to derive a *ratio* from an opinion and make a rule from it. Sometimes, this might be the case. *MacDonald v. Ortho Pharmaceutical Corp* made use of a formulation provided in the American *Restatement (Second) of Torts*. In the United States, restatements are written with the aim of summarizing the common law in canonical formulations. The results are paragraphs that look almost like statutes.

However, it turns out that retrieving a rule from an opinion comes with its own set of difficulties.[45] A rule lists a number of relatively clearly circumscribed categories in its antecedent that a case has to fall under in order for the rule to apply. Statutes usually come in a canonical formulation

43. Some paragraphs of U.S. Restatements of the common law seem to contain something like such lists—*see, e.g.*, RESTATEMENT (SECOND) OF TORTS §402A. cmt. n (1965).

44. Horty, *supra* note 25; Horty & Bench-Capon, *supra* note 25.

45. This is not meant to diminish the difficulty of interpreting statutes.

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meant to designate these categories clearly. Opinions document the arguments that the precedent judge used to justify her decision in the precedent-case. They often do not use canonical formulations of rules, and where the categories are unclear later judges might need to employ first-order reasoning to interpret the opinion.[46]

Opinions might fail to give well-described categories for the aspects of the precedent-case meant to be singled out as its legally important factors.[47] As members of the American Legal Realism movement have pointed out, categories come at certain levels of abstraction, and for the application of a rule it is important which level of abstraction this is.[48] But the precedent judge might not have determined how broad the categories should be under which the factors of her case fall.[49] Sometimes, the category is unclear because the court simply neglects to give one. At other times, a court might expressedly consider itself unable to give clear categories. Take, for example, *Dillon v. Legg*, in which the court decided that a defendant who negligently killed a child with his car can be held liable for the mother's emotional trauma, *if* the defendant could foresee the emotional trauma. Here, the court declares that it "cannot now predetermine the defendant's obligation in every situation by a fixed category; no immutable rule can establish the extent of that obligation for every circumstance in the future."[50] Instead it gives deliberately vague guidelines, one of which is that the victim and the emotional sufferer must have a close relationship. The opinion specifies that it is the aspect that the mother was closely related to the child that was important here, but what kind of close relation are we talking about? Must it be a blood relation? Or could best friends fall under this category? Given that the relationship between mother and child is about as close as it can be, any following case with a relationship between the victim and the emotional sufferer faced the question of whether the category extends far enough.[51] When opinions are unclear

46. The difficulties in interpreting opinions have been discussed often and at length. Neil Duxbury, The Nature and Authority of Precedent (2008), at ch. 3, gives an overview over all the problems with interpreting opinions and describes in detail the discussion about the determination of the *ratio decidendi* that took place in the 1930s to 1960s. Today, theorists of both camps—for and against rule-approaches—take this problem seriously. Examples are Schauer, *supra* note 2, at ch. 9, and Rigoni, *supra* note 3. In Horty's, Bench-Capon's, and Rigoni's (2015) approaches, these difficulties are bracketed by the authors, who begin their theorizing only after the aspects of the case are categorized and determined as belonging to the rule's antecedent or the list of defeated reasons. Horty, *supra* note 25, at 5; Horty & Bench-Capon, *supra* note 25, at 186; Rigoni, *supra* note 25, at 146.

47. Or the judge might not have decided whether a reason she considered while deciding her case was necessary to justify her conclusion, blurring the lines between *ratio* and *dicta*. This difficulty is discussed at length in Greenawalt, *supra* note 4, at ch. 8.

48. *See, e.g.*, Julius Stone, *The Ratio of the Ratio Decidendi*, 22 Mod. L. Rev. 597 (1959).

49. I argue elsewhere that this is not necessarily a failing on the side of the precedent court. Katharina Stevens, *Setting Precedents Without Making Norms?* (forthcoming).

50. Dillon v. Legg, 441 P. 2d 912 (1968).

51. How difficult this would be was remarked upon, for example, by Judge Burke in the dissent to the same case.

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in this way, the present judge needs to fill out the missing information to get a usable rule. How she resolves this issue will have important consequences. Take the question of whether *Dillon v. Legg* applies only to relations of blood: if the judge decides that it does, then she has an authoritative reason to follow wherever there is a blood relation, but none where there is not.

There is then a sense in which unclear opinions do not really *provide* rules.[52] Instead, they provide a sometimes confusing collection of partial rules and hints for their completion. Sometimes there are fully formulated and explained categories. But sometimes, there are only some categories, and then some hints toward other categories, and some aspects that might or might not be necessary to consider.

On this basis, Adam Rigoni argues that the rule-approach cannot show that precedents are as constraining as it might appear after all.[53] Some theorists, like Alexander and Sherwin, bite the bullet and claim that precedents with vague opinions do not constrain at all.[54] But this seems to be a dissatisfying and problematic conclusion. For if a precedent can only be binding if its opinion provides a specific rule with explicitly circumscribed categories, then a considerable number of cases could not be sources of binding reasons. Of course, this is exactly what Leiter calls the "core claim" of American Legal Realism—that the law is indeterminate and that judges decide cases more on the basis of their perception of the facts than on the basis of legal reasons.[55] I think that this pessimistic conclusion about precedent-constraint is probably unavoidable if we adopt an understanding according to which a precedent only constrains if its existence fully determines the decision of the judge. In this case, my paper simply shows that precedent *comes equally close* to being constraining in the rule-approach and in the analogy-approach. However, I adopt an understanding according to which judicial decision-making is constrained by a precedent if its existence either excludes reasons that the judge would otherwise have taken into consideration or adds reasons into the judge's considerations that would otherwise not have existed. Constraint comes in degrees.[56]

If we accept this more permissive understanding, then we can adopt a solution proposed by Shecaira and amend the rule-approach of reasoning by precedent again so that it reflects the inclusion of first-order reasoning on the level of determining the precedent-rule.[57] Faced with a

52. Or even sets of well-defined factors that could be used in the kind of defeasible rule–based reasoning that Horty, *supra* note 25, describes.

53. *See* Rigoni, *supra* note 3, at 149.

54. ALEXANDER & SHERWIN, *supra* note 2, at 40ff.

55. Leiter, *supra* note 4. *See also, e.g.*, KARL LLEWELYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY (1960), at chs. 2–4; JEROME FRANK, LAW AND THE MODERN MIND (1949), at ch. 14.

56. *See supra* note 21 for a justification of this understanding of constraint.

57. *See* Fabio Shecaira, *Analogical Arguments in Ethics and Law: A Defence of Deductivism*, 33 INFORMAL LOGIC 406 (2013). It might also be possible to see something of Ronald Dworkin in this account (DWORKIN, *supra* note 16, at ch. 7). It is important to note that this move will not only alienate strict rule theorists like Alexander and Sherwin. Choosing the rule that a

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precedent-opinion that does not provide a rule, the judge chooses one among those rules that are supported by the information given in the opinion. She does so according to first-order reasons about which of these rules is the best one—legally and/or morally. Of course, it is important to say that when she does this, she must make sure that the rule she chooses is not in conflict with any of the surrounding law. Still, this changes the source and strength of the precedent-constraint rather dramatically. If the opinion does not readily provide a rule, then this constraint comes from the content available in the precedent-opinion that restricts the rules between which the judge can choose.[58] This change can be represented in the argument-scheme as follows:

Argument
From a normative point of view, the best legal rule that is also consistent with the information provided in the opinion of precedent A is the rule a (If a case x has properties n1, n2-> (presumably) decision Y should be reached).[59]
Therefore, if a case B has properties n1, n2 -> (presumably) decision Y should be reached.

If a case B has properties n1, n2 -> (presumably) decision Y should be reached.
Case B1 has properties n1, n2.
(Presumably), therefore, decision Y should be reached.

Questions
Is rule a the best choice among those legal rules consistent with the information in the opinion of precedent A, when taking into account the applicable normative considerations?

precedent represents in this way will be seen as a blatant act of judicial discretion by most exclusive positivists, as for example Raz. *See, e.g.*, Raz's defense of hard positivism in Joseph Raz, *Authority, Law and Morality*, 68 The Monist 295 (1985). Therefore, authors who would have accepted the idea of integrating defeasible rules might not be on board anymore when first-order reasons are used to determine the content of the defeasible rule. This move, to them, might simply amount to the admittance that precedent is not constraining at all and that the American Legal Realists were right. I disagree, but I think it is important to realize how far the constraining effect of precedent gets reduced by this change.

58. The judge's ability to pick a rule might be further constrained by principles associated with precedent-interpretation. There are, for example, principles about what should count as *dicta* in an opinion, and what may be included in a precedent rule, or how narrow precedent rules should be. I will not discuss these principles here. I think that even with them in place, allowing judges to choose rules by mixing their own first-order reasons in with the reasons provided in the opinion means reducing the precedent-constraint considerably, depending on how vague the opinion is. And then there is, of course, the American Legal Realist argument that these principles really do not constrain anything because for every principle pointing in one direction, you can find one pointing in the other. *See, e.g.*, Karl Llewelyn, *Remarks on the Theory of Appellate Decision and the Rules and Canons About How Statutes Are to Be Construed*, 3 Vand. L. Rev. 395 (1950).

59. Notice that if the opinion of precedent A provides enough information so that only one rule is consistent with it, then rule a is the best choice simply in virtue of being the only choice.

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Is the chosen rule consistent with the law as it is already established outside of the precedent?

Is the legal syllogism of the form *modus ponens* that uses rule a in the major premise and case B in the minor premise deductively valid?

Is there any reason that defeats the presumption for reaching decision Y based on a property of the present-case B that the precedent-case A did not have?

Does case B have properties n1, n2?

We are now at the point where we can ask what is left of the rule-approach's attractiveness. To recall, the argument was that according to the *certainty-preserving, strict* version of the rule-approach, precedents have a strong constraining effect on judicial decision-making. They provide judges with rules that can be used in certainty-preserving legal syllogisms, thereby relieving them of the need to engage in first-order normative reasoning. However, the two amendments that made the rule-approach consistent with the actual practice of reasoning by precedent imported first-order reasoning back in at two places.

First, the judge might employ first-order reasoning to determine whether the rule she identified was indeed the most preferable one among those consistent with the information provided in the opinion. Second, the judge employs first-order reasoning to determine whether there was a property that the present-case has and the precedent-case did not, and whether this property was a relevant reason against following.

The double-amended rule-approach includes first-order normative reasoning as an important feature of reasoning by precedent. I do not think that, as a result, precedents appear as completely unconstraining. After all, judges must choose rules that include all the information the opinion *does* provide, and that are not precluded by the law outside the precedent. Further, reasons against following based on aspects present in the precedent-case are excluded. It seems that the amended view now achieves some balance between constraint and freedom. However, I hope to have shown that among the rule-approaches currently on the market, those that can survive the objections are also the ones that depict precedents as providing a moderate amount of constraint. It is now worthwhile to inquire how well the analogy-approach of reasoning by precedent does in comparison.

IV. AMENDING THE ANALOGY-APPROACH

I now turn to the analogy-approach of reasoning by precedent. To recall, according to the analogy-approach, the precedent-case and the present-case are compared directly to determine whether the judge has a binding authoritative reason to follow. This happens when the two cases are legally

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the same, i.e., if they are similar in a legally relevant way and do not have legally relevant differences. The first part of the argument, in the argument-scheme below, can therefore be read as an argument from analogy, with the analogy as the premise and the claim that precedent and present-case are legally the same as the conclusion. This is the crucial part of the argument. The second part is deductively valid and simply uses a summary of the analogy-approach's interpretation of the doctrine of precedent as the major premise:

Argument
Precedent-case A and present-case B are similar.
Therefore, precedent-case A and present-case B are legally the same.

Whenever a present-case B is legally the same as a precedent-case A, A must be followed in B.
Precedent-case A and present-case B are legally the same.
Therefore, A must be followed in B.

Questions
Are A and B similar in a legally relevant way?
Are there no legally relevant differences between A and B?

The analogy-approach has no trouble accounting for the practice of distinguishing because it already incorporates the question for relevant differences. The lack of specific rules in opinions poses no problem because rules play no role in the analogy-approach. However, just like the rule-approach, the analogy-approach has been subjected to strong criticism. The objection that is most often leveled against it is that it is not able to explain how the precedent-case constrains the judge. Any precedent-case can be seen as both similar and different to any present-case. Unless some way to determine the relevance of similarities can be found, it seems arbitrary whether to call two cases similar or different. This leads to the objections from Sherwin and Alexander as well as Schauer.[60]

I believe that the analogy-approach of reasoning by precedent can be amended so that it explains the constraining force of precedent just as well as the amended rule-approach. Doing so is the main project of this paper. Moreover, I will identify some advantages that the amended analogy-approach has over the (pure) rule-approach and that have received little attention so far. But in order to do so, I have to describe how analogical comparison between two cases might work. This is especially important because some authors deny the existence of analogical reasoning altogether. Posner, for example, claimed that the term really just denotes "an unstable class of disparate reasoning methods" consisting of some weak

60. *See supra* note 2.

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inductions, some deductions and some sudden bursts of inspiration.[61] Alexander and Sherwin claim that analogical reasoning is really just either hidden deductive reasoning or a better name for intuition.[62] The best way to show that they are wrong is to explain the structure of analogical reasoning, which is very different from both deduction and induction. I will here follow the multi-constraint theory as it was developed by Holyoak and Thagard.[63] Even though this well-established theory has existed for a long time in the cognitive sciences, I cannot assume that every reader is familiar with it, and the success of my amendment depends heavily on it. I will therefore give a short overview.

A. Analogical Mapping

Analogies consist of the comparison of two analogs, a target-analog about which something is said and a source-analog that is used to say it. Imagine, for example, that I was to claim that *Dillon v. Legg* should be followed if an accident was not witnessed by the mother of the victim, but instead a kindergarten teacher. I might justify this by saying "kindergarten teachers are like mothers." In this example, "kindergarten teachers" is the target while "mothers" is the source. In an analogy-approach of reasoning by precedent, the precedent-case serves as the source-analog, while the present-case serves as the target-analog.

In everyday life, we seem to make confident judgments about degrees of similarity as well as the appropriateness of source-analogs. According to the multi-constraint theory of analogy, we make these evaluations based on how successfully we can perform an *analogical mapping* between the two objects. The topic of analogical mapping is very complex, and I will provide a simplified overview here—just enough to develop my line of reasoning. Basically, analogical mapping consists in the establishing of a set of systematic correspondences between the source and the target.[64] For example, the analogy "kindergarten teachers are like mothers" might lead you to this mapping:

Source		Target
Mothers	<->	Kindergarten teachers
Love their children	<->	Love their wards

61. RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE (1993), at 86ff. *See also* Richard Posner, *Reasoning by Analogy*, 91 CORNELL L. REV. 761 (2006).

62. ALEXANDER & SHERWIN, *supra* note 2, at 68ff.

63. Proposed, *e.g.*, in Keith J. Holyoak & Paul Thagard, *Analogical Mapping by Constraint Satisfaction*, 13 COGNITIVE SCI. 295 (1989). The by now classic, easily accessible introduction and summary of their theory is KEITH J. HOLYOAK & PAUL THAGARD, MENTAL LEAPS: ANALOGY IN CREATIVE THOUGHT (1995). Dedre Genter has developed an only slightly different model—*see, e.g.*, Dedre Genter, *Structure Mapping, A Theoretical Framework for Analogy*, 7 COGNITIVE SCI. 155 (1983). The multi-constraint model and models like it are still the basis for research on analogy. *See, e.g.*, an overview by Keith J. Holyoak, *Analogy and Relational Reasoning, in* THE OXFORD HANDBOOK OF THINKING AND REASONING 234–259 (Keith J. Holyoak & R. G. Morrison eds., 2012).

64. Holyoak & Thagard, *supra* note 63, at 296; HOLYOAK & THAGARD, *supra* note 63, at 26.

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Of course, we could simply *claim* correspondences between anything. For example, instead of mapping "love their wards" onto "love their children," we could just *declare* the correspondence between "love their children" and "being a professional." However, according to the multi-constraint theory, we feel the pull of several different constraints when we perform analogical mappings. The success of the mapping can be determined by how successfully we can adhere to these constraints. First, we consider mappings more successful if the corresponding aspects share *surface similarities*. Surface similarities are for example perceptive similarities in color or shape or semantic similarities in the kinds of concepts we use when we think about the analogs.[65] Second, we tend to adhere to *structural-constraints*.[66] Above, we mapped attributes, but relations can also be mapped. For example, we could try to say that kindergarten teachers are like mothers by mapping the relation that mothers *care for* their children onto kindergarten teachers.

Source		Target
x care for y	<->	x care for y
Mothers	<->	Kindergarten teachers
Children	<->	Wards

In the proposition "Mothers care for their children," call "mothers" and "their children" the *fillers* of the *slots* of the relation "x care for y."[67] Then it becomes apparent that mapping a relation also involves mapping its fillers.[68] Constraints apply here. In the example, the two relations are mapped because of their surface similarity. But the kindergarten teacher/mother and children/ward correspondences are established because they each fill the same slots: x stands for both mother and kindergarten teacher and y stands for both children and wards. A mapping of a relation is more successful if it is *one to one*, that is, if every element in the source corresponds to one unique element in the target.[69] Given that the slots of "x cares for y" are filled by two different fillers in "Mothers care for their children," it would be a weakness of the mapping if this was not so in the target. If you tried to map "Mothers care for their children" onto kindergarten teachers, and kindergarten teachers only cared for themselves, then your mapping (x care for x) would not be successful. Instead of a similarity, you would have found a difference.

A further constraint becomes apparent when we think about mapping higher-order relations, that is, relations of relations.[70] For example, we

65. Holyoak & Thagard, *supra* note 63, at 26/37f.
66. *Id.* at 29ff.
67. *Id.* at 25. *See also* Holyoak & Thagard, *supra* note 63, at 299ff.
68. Holyoak & Thagard, *supra* note 63, at 27ff.
69. *Id.* at 29.
70. *Id.* at 28f.

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could try to map the relation that mothers care for their children *because* they love them onto kindergarten teachers.

Source		Target
a causes b	<->	a causes b
x feels love for y	<->	x feels love for y
x cares for y	<->	x cares for y
Mothers	<->	Kindergarten teachers
Children	<->	Wards

Again, we have to map the fillers to map the higher-order relations. Here, the mapping is better if the fillers are mapped *consistently*.[71] This means that whenever a relation is mapped, the fillers are also mapped. In the example, your mapping will be more successful if your observations of kindergarten teachers and their wards allow you to always map "wards" onto "children," in all relations where "children" serves as a filler.

In his paper "Reason Is Too Large," Dan Hunter presents evidence that judges engage in analogical mapping under both the surface-constraint and the two structural-constraints when they decide cases.[72] The surface- and structural-constraints explain how similarities and differences between two cases become apparent: the more successfully a judge maps aspects that are part of her precedent-case onto her present-case while adhering to the constraints, the more confidently the resulting correspondence can be called a similarity. Failure points to a difference.

However, these constraints do not explain why precedent could be constraining for judicial decision-making. The question remains which similarities and which differences are relevant. If you think about the analogy between kindergarten teachers and mothers, you will easily see that depending on what you pick among the many features that mothers possess, some mappings will be successful while others will fail. So there are similarities and differences. Which ones are relevant? Posed like this, that is a silly question. It cannot be answered without more information. Relevance is a relational concept—something is relevant with respect to some goal, task, or question; nothing is *just* relevant.[73]

Not surprisingly, cognitive scientists have found that when we perform analogical mappings, we adhere to a further kind of constraint—a purpose-constraint.[74] Usually, we are not *just* presented with analogies. Analogies are drawn for some purpose, for example to solve a problem or to argue for a

71. *Id.* at 29.

72. Hunter, *supra* note 3, at 1217ff./1222ff.

73. For an influential and by now classic account of relevance, *see* DAN SPERBER & DEIRDRE WILSON, RELEVANCE: COMMUNICATION AND COGNITION (1986).

74. *See* HOLYOAK & THAGARD, *supra* note 63, at 35ff.; Keith Holyoak, *The Pragmatics of Analogical Transfer*, *in* THE PSYCHOLOGY OF LEARNING AND MOTIVATION 59–87 (G. H. Bower ed., 1985), at 70ff; Holyoak & Thagard, *supra* note 63, at 297.

https://doi.org/10.1017/S1352325218000113 Published online by Cambridge University Press

claim. If this is the case, analogical *mapping* is performed as a basis for analogical *reasoning*—to draw an *inference* about the target-analog.

Analogical inferences are made through a process called "copy and substitution."[75] Assume we have established a consistent correspondence between mothers/kindergarten teachers and children/wards. We know that it is true that "mothers love their children." Do kindergarten teachers love their wards? We might try to get an answer through our analogy to mothers. We copy over the relation, substitute the fillers with kindergarten teacher equivalents and come to the assumption that "kindergarten teachers love their wards." Now, this inference is not certainty preserving.[76] Even if we are entirely certain that mothers love their children, the mere performance of a copy and substitution does not warrant any certainty about the relationship of kindergarten teachers and their wards.

But that does not mean that the claim "kindergarten teachers love their wards" cannot be supported by the mapping between kindergarten teachers and mothers. There are inferential connections between our knowledge that "mothers love their children" and other things we know about mothers and children. For example, we might know that there is a causal connection between the fact that mothers love their children and the fact that mothers protect/feed/play with their children: performing all these actions is causally (though not necessarily) connected to making the love grow. That gives us guidance for what to look for in kindergarten teachers.[77] If we can successfully find correspondences to these aspects in kindergarten teachers while adhering to the surface- and structural-constraints, then the resulting mapping gives some support to the inference that "kindergarten teachers love their wards." The more successful mappings we can perform with respect to aspects about mothers that stand in inferential relations to the aspect that mothers love their children, the better supported the analogical inference becomes.[78] The purpose to answer the question whether kindergarten teachers love their wards has led us to concentrate on *specific* mappings between kindergarten teachers and mothers. The similarities and differences revealed through *these* mappings are the relevant ones.

B. Analogical Arguments and the Purpose-Constraint

In his paper, Dan Hunter expresses his belief that the purpose-constraint guides judges to pick those precedents that will allow them to make their

75. Holyoak & Thagard, *supra* note 63, at 30ff. *See also* Holyoak, *supra* note 63, at 249f.

76. Holyoak & Thagard, *supra* note 63, at 30.

77. *See id.* at 35ff.; Holyoak & Thagard, *supra* note 63, at 303ff.

78. Of course, this does not yet answer the question how well supported the inference must be for us to accept it. In analogical reasoning in general, this depends on the context in which we perform the mapping. Are we interested in the question whether we should allow kindergarten teachers to say goodbye to their wards once they have been fired? Or are we interested in the question whether kindergarten teachers should be able to sue for custody? Or are we interested in the question whether kindergarten teachers are likely to suffer intense emotional trauma when they witness the accidental death of their wards?

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preferred decisions in their present-cases. He points out that this conclusion would work well with the observations made by American Legal Realists, who claim that judges are guided more by their inclinations of which outcomes would be just than by legal reasons.[79] This interpretation is in line with Frederick Schauer's criticism of the analogy-approach. Schauer believes that cognitive theory about analogical mapping shows that analogical reasoning cannot be constrained. Like Hunter, he thinks that the purpose-constraint guides judges to choose those source-analogs that allow them to make their independently favored decisions.[80] I agree that analogical reasoning can give self-serving judges the option to wilfully determine how they would like to decide a case and then reject precedents because they cannot map their preferred decision onto the precedent-decision. However, I do not think that any method of reasoning could prevent such self-serving judges from rationalizing their favored decisions. This includes reasoning according the rule-approach, which makes rationalization possible because it necessitates the interpretation of opinions. The more interesting question is what analogical reasoning can do for judges who are honestly trying to evaluate the considerations both for and against following a specific precedent. Such judges do not try to find the right precedent for an argument that supports a conclusion they like. Rather, they try to determine whether a specific precedent can serve in a successful argument for a conclusion they might or might not like. In other words: they do not get to choose either source-analog or conclusion, but instead must evaluate whether a given source-analog can successfully support a given conclusion about a given target-analog. I will show that for judges in this position, the purpose-constraint of analogical reasoning is the key to understanding how precedents can exert constraint in the analogy-approach of reasoning by precedent.

Above, I said that the argument-scheme for the analogy-approach of reasoning by precedent contains an analogical argument in which the analogy supports the conclusion that the two cases are legally the same.[81] The inference to this conclusion is what a judge needs to evaluate to determine whether the precedent needs to be followed. The question becomes: Does the analogy with the precedent as the source-analog and the present-case as the target-analog support the conclusion that the two cases are legally the same? To answer the question, the judge needs to determine how strong the analogy is *if showing that the two cases are legally the same is*

79. Hunter, *supra* note 3, at 1224ff. This is also what Frederick Schauer believes in *Why Precedent in Law (and Elsewhere) Is Not Totally (or Even Substantially) About Analogy*, *supra* note 2.

80. *See* Schauer, *Why Precedent in Law (and Elsewhere) Is Not Totally (or Even Substantially) About Analogy*, *supra* note 2.

81. The account of arguments by analogy I will now give is in harmony with (though not entirely the same as) the account provided by Andre Juthe, *Argument by Analogy*, 19 ARGUMENTATION 1 (2005).

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its purpose. We can illustrate the judge's situation by thinking about a reasoner who is confronted with an argument by analogy supporting a conclusion that she needs to either accept or reject based on the argument. Through the presentation of the conclusion, the argument shows the purpose for which its analogy was drawn. The reasoner must evaluate whether the analogy can fulfill this purpose.[82] Take this example:

> "Kindergarten teachers are like mothers."
> Therefore, the well-being of their wards is of extreme importance to their emotional well-being."

The premise of an argument is meant to support its conclusion. Therefore, this analogy clearly has the purpose to support a copy and substitution that results in the claim that "the well-being of their wards is of extreme importance to the emotional well-being of kindergarten teachers." To understand the argument (a necessary step for evaluating it), we need to see how the mapping between kindergarten teachers and mothers could support the substitution.

This purpose-constraint guides the mapping in two ways. First, it guides a mapping from the claim that is supposed to be supported about kindergarten teachers to its best correspondence in mothers. We perform the mapping and get "the well-being of their children is of extreme importance to the emotional well-being of mothers."

Second, it guides attempted mappings between kindergarten teachers and mothers for all those aspects of mothers that we consider to be inferentially connected to the aspect that the well-being of their children is of extreme emotional importance to their own well-being. One sign for this might be that mothers show strong signs of stress and depression when their children are not well. The purpose-constraint guides us to try a mapping of this aspect onto kindergarten teachers. We might observe kindergarten teachers and realize that they have more fights with their partners at home when their wards are not well. The success of this mapping will be measured in how well the surface- and structural-constraints can be observed. The more successful mappings can be performed, the better the support for the "copy and substitute" that the argument suggests. These are similarities that are *relevant* for the argument. To understand the argument, we search for as many relevant successful mappings as possible to see how strong the support of the argument for its conclusion is. The

82. In other words, instead of taking the role of an arguer who tries to find an argument that will show that her conclusion is acceptable, the judge takes the role of an argument evaluator who tries to determine whether an argument succeeds at supporting a conclusion not chosen by her but given in the argument. I have argued for this interpretation of judges as interlocutors at length elsewhere. Katharina Stevens, *The Constraining Force of Analogies and the Role of the Judge, in* Unpacking Normativity: Conceptual, Normative and Descriptive Issues (Kenneth Einar Himma, Miodrag Jovanovic & Bojan Spaic eds., forthcoming 2018).

https://doi.org/10.1017/S1352325218000113 Published online by Cambridge University Press

conclusion of an argument guides the mapping by giving the analogy a purpose.[83]

In reasoning by precedent according to the analogy-approach, the conclusion of the analogical argument is simply that the two cases are similar in the legally relevant ways and that there is no relevant difference (that they are legally the same). How can this provide much guidance?[84]

To answer this question, I should point out that the analogy-approach has more shortcomings than just the problem of explaining precedent-constraint. Just like the straightforward rule-approach did not adequately reflect the practice of distinguishing, the original analogy-approach makes no reference to the important role that the *precedent-opinion* and the *ratio* play. But an adequate account of reasoning by precedent should take this role seriously for at least two reasons: first, not integrating opinions and *rationes decidendi* makes the account less than descriptively adequate. Second, the arguments presented in the precedent-opinion are likely to give rise to expectations about how later cases will be treated—expectations that go further than those that could be generated by the decision on its own. If the doctrine of precedent is supposed to realize rule-of-law values, then the method of reasoning by precedent should lead to decisions that usually do not disappoint these expectations, at least where they are reasonable.

How can opinions and *rationes* be integrated into an account of reasoning by precedent that is based on analogical mapping? I will develop the suggestion that they play a role as *authoritative descriptions* of the source-analog, that is, the precedent. Thereby, they also give the precedent its constraining force.

C. Precedent-Opinions as Authoritatively Described Source-Analogs

When she is reasoning according to the analogy-approach, the present judge finds herself in a position where she is trying to evaluate an argument by analogy, all parts of which—the source, target, and conclusion—have been given to her in the form of the precedent-case, the present-case, and the decision in the precedent. The present judge informs herself about the precedent-case by reading the opinion. It contains a detailed

83. It might now be possible to understand why authors like POSNER, *supra* note 61, and ALEXANDER & SHERWIN, *supra* note 2, thought that analogical reasoning is nothing else than inductive or deductive reasoning. Once the mapping has been accomplished, it is possible to simply choose a category for each single mapping that contains both mapped aspects and make a rule. Once the rule has been formulated, both deductive and inductive arguments can be constructed. But to say that such a reconstruction is possible after the analogical mapping is not the same as saying that the analogical mapping never happened.

84. Once this conclusion is established, a further step combines it with the authoritative doctrine of precedent according to which legal sameness requires same treatment and leads to the conclusion that the present-case must be decided according to the precedent's decision. *See supra* note 30.

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description of the precedent-case that gives special emphasis to those aspects that the precedent judge wanted to present as crucial for her decision. Here, the precedent judge presents the official reasons for her decision. That means that the precedent is not like most other source-analogs. For one thing, through the opinion's description, the precedent judge provides the present judge with an indication of how the precedent-case appeared from her point of view (or at least from the point of view she wanted to document). She rhetorically highlights those aspects that she thought important, for example by mentioning them often or by giving them an important place in one of her arguments. Sometimes, she also orders them into clear categories. At other times, the category they belong to will not be clear, as when the fact that it was the *mother* who witnessed the death of her child in *Dillon v. Legg* is vaguely specified as a *close relationship*.[85] Other facts will be omitted or mentioned in passing and never be picked up again, receiving little attention, making it clear that the precedent judge did not think them important. Still others will be highlighted as the basis for possible but rejected counter-considerations.

However, that a precedent-opinion emphasizes some of the precedent-case's aspects is not all. There are many arguments by analogy that do this, because by emphasizing certain aspects in the source-analog it is possible to direct the audience's attention to them and raise the probability that they will attempt to map them. For example, imagine we had a mutual friend who was a kindergarten teacher, and I was simply trying to convince you that we should take seriously the emotional harm she might suffer when her ward gets hurt:

> "When mothers witness any kind of harm to their children, they become stressed and pick many fights."
> Kindergarten teachers are like mothers.
> Therefore, the well-being of their wards is of extreme importance to the emotional well-being of kindergarten teachers."

If we think about opinions, it turns out that they make for source-analog that are quite different from other kinds of source-analogs: they do not just describe the source-analog, their description is *authoritative*.[86]

First, a vigilant audience member presented with the sad-kindergarten-teacher argument might legitimately criticize the characterization of the source-analog. They might claim that some mothers are callous and care little about the well-being of their children. This would be a possible (though not plausible) objection to the argument. Not so with precedent-opinions. In the opinion, the precedent judge describes the facts of the case *authoritatively*; those facts *make up* the precedent-case, even if it turns out that the

85. Dillon v. Legg, 441 P.2d 912 (1968).
86. This is also pointed out, for example, by Horty, *supra* note 63, at 28.

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real-life situation of the case did not contain them after all.[87] Also, if a judge writes that an aspect belongs into a certain category (whether this category is specific or not) then it is an aspect of the precedent-case that it has an aspect that falls under this category. Thus, the opinion authoritatively determines the aspects of the precedent-as-source-analog.

Second, an audience member of the sad-kindergarten-teacher argument might criticize it by denying the inferential connections that are implied by the description of the source-analog. For example, they might object that mothers usually get blamed when their children come to harm, and that is what stresses them and causes the fights. So even if kindergarten teachers show similar behaviors, that is no reason to think that their emotional well-being depends (directly) on the well-being of their wards—they simply do not like to be yelled at. This, too, is not possible with precedent-opinions. Opinions also authoritatively determine which of the precedent-case's aspects are legally relevant for the precedent-decision. They do so because they contain a description of the argumentative structure that, according to the precedent judge, presents the reasons based on which the decision was made.

Now, it is generally acknowledged that judges make bad decisions, and that these bad decisions still constrain. Levenbook has translated this into the claim that not every precedent-decision is justifiable, but even unjustifiable decisions are authoritative. Judges make mistakes. They might think that an aspect of a precedent-case presents a reason for a decision when it really does not. It might then be that the decision was unjustifiable when the judge made it. With this understanding of reasons, it is not plausible to say that a present-case has to be decided by following a precedent-case if the reasons that justified the precedent-decision also apply to it.[88] But while it might be true that a specific precedent-opinion fails to present *reasons* that together justify the precedent-decision, it most often does present *arguments* (albeit possibly bad ones). Arguments *purport* to present reasons for a conclusion but may well fail to do so. These arguments cite some aspects rather than others as being the grounds of the decision. By writing the opinion, the judge *marks* these aspects as relevant for her decision. And because our judge operates in a common law system, her marking them as relevant is also authoritative. We can say that she has put a mark of authority

87. Take for example the famous case of MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916). The facts as described in the opinion written by Justice Cardozo included that the wheel of a car manufactured by Buick Motor Company broke because the wheel was defective, something that could have been discovered by a reasonable inspection. However, it has been pointed out that in fact there was good reason to believe that the wheel might have broken for other reasons. *See* Jr. Henderson, *MacPherson v. Buick Motor Company: Simplifying the Facts While Reshaping the Law*, *in* TORTS STORIES (Robert L. Rabin & Stephen D. Sugarman eds., 2003). But even if it did, that does not change that the case answers a question involving the issue of who has a duty of care for *defective products*.

88. Levenbook puts great emphasis on this point. *See* Barbara Baum Levenbook, *The Meaning of a Precedent*, 6 LEGAL THEORY 185, 191 (2000).

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on them so that from now on, the aspects that *she* presented as reasons for her decision are now *legally* relevant, relevant by judicial authority.[89] The same goes for those aspects the judge describes as bases for arguments *against* her decision and that she considered outweighed or defeated by the arguments in its favor. As Lamond points out, considerations based on these aspects are now *authoritatively determined* as too weak to outweigh the arguments for the decision. There are therefore two critical questions that are helpful for evaluating normal arguments by analogy but excluded in precedents: the question whether the source-analog is correctly described and the question whether the properties that the description of the source-analog presents as relevant are actually relevant.[90]

These authoritative determinations significantly affect the purpose-constraint of the analogical argument in reasoning by precedent. I already pointed out that the present judge is evaluating an argument with the conclusion that the two cases are the same in the *legally relevant ways*. The purpose-constraint with respect to this argument therefore requires that the legally relevant aspects in the source-analog, i.e., the precedent-case, are mapped. And those are the ones that have been authoritatively determined as such in the precedent-opinion. So the purpose-constraint in reasoning by precedent guides attempted mappings from these aspects to the present-case. The success of these mappings is judged according to the other two constraints. If corresponding aspects can be found, the judge has found a similarity that is legally relevant. It is legally relevant because it contains, as one correspondent, an aspect that was authoritatively marked as legally relevant by the precedent judge. The question of which similarities are legally relevant can therefore be answered in the amended analogy-approach of reasoning by precedent.

Now, if the judge is honestly interested in determining whether the precedent gives her a reason to follow, she will try to pick out those correspondents that make for the best mappings because that will allow her to see the strongest case for following she can understand. Overall, the attempt to evaluate the analogical argument by precedent then leads the judge to perform the most successful mapping of precedent-case and present-case that she can accomplish.

The *ratio* plays an important role here, however well described it is. Those aspects that can be identified as belonging to the *ratio*, for example because they are presented as an integral part of the argument, are most important for the success of the mapping. For these aspects, the judge *must* be able to find a successful correspondence in the present-case according to the

89. This is, I think, one of the core ideas of Lamond, *supra* note 4.

90. I believe that talking of *critical questions* that are excluded from consideration in reasoning by precedent is another, possibly illustrative way of expressing Lamond's insight that later judges have to treat precedents as correctly decided: whether the precedent judge got the description or evaluation of the precedent-case right is simply not to be questioned because there are no usable objections to be had in that direction.

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surface- and structural-constraints. The opinion's determinations are authoritative; therefore, the way it characterizes the precedent's aspects will determine whether these constraints can be met, even if these characterizations are vague. Take for example the close-relationship aspect in *Dillon v. Legg*. Here, the surface-constraint applies for the relation: both parts of the correspondence must fall into the category "close relationship." The structural-constraints apply for the fillers of the relation throughout the cases.

If no mapping can be accomplished with respect to a part of the *ratio* then the argument for legal sameness fails: the cases are not similar in the legally relevant ways. Otherwise, the mapping was successful. Then the two cases are similar in a legally relevant way and the existence of the precedent is an authoritative reason for following. Of course, it is not necessarily a binding reason—distinguishing is possible, just as it was with the rule-approach.

Notice that the opinion does not need to provide a rule to guide the mapping in this way. Neither does the judge need to determine such a rule by filling in where information is missing in a vague opinion. Rather, the judge uses whatever information is provided as guidelines for her own mappings. She simply chooses those aspects of the present-case that to her seem to enable the most successful mappings for the aspects in the precedent-case. This is not meant to deny that analogical reasoning by precedent imports first-order reasoning. Where the opinion is vague, the judge's own first-order reasoning helps her determine whether she considers some mapping successful. For example, the specification "close relation" might lead her to recognize that the *best* mapping for the aspect "mother" available in the present-case is the aspect "kindergarten teacher." She will have to decide whether she thinks that "kindergarten teacher" and "mother" are similar enough to count. For this she will have to consider all the ways in which the mapping succeeds (aspects referring to emotions can be mapped) and fails (aspects referring to biology cannot be mapped).

With respect to the vague parts of opinions, the analogy-approach imports first-order reasoning, just like the rule-approach. However, where the opinion *does* give a definite category, the analogy-approach excludes discretion, just like the rule-approach. This is so because when a definite category is provided, there is a successful mapping whenever an aspect in the present-case falls under this category simply because the surface-constraint is maximally satisfied. Here, the opinion has made clear that it is *falling under this category* that is relevant. Therefore, the opinion provides the judge with exactly as much or as little guidance when she reasons analogically as it does when she tries to determine a rule.

Remember also that a judge who is reasoning according to the rule-approach must make sure that a rule she chooses fits with the surrounding law. In the same vein, a judge cannot claim that a mapping is successful or unsuccessful if there are parts of the surrounding law that forbid treating

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the respective aspects in precedent and present-case as the same or as different (as for example an anti-discrimination law might).

By integrating opinions and *rationes* into the analogy-approach of reasoning by precedent in this way we have hit two birds with one stone: the analogy-approach is now descriptively more satisfying than it was before it was amended. Furthermore, the analogy-approach is now able to explain how precedents serve to constrain judicial decision-making. The authoritative determination of the precedent-case in the opinion is what constrains the judge. Unlike arguers, who can choose their description of the source-analog to influence whether the mapping will succeed, the present judge must take the description of her source-analog from the precedent judge. The opinion determines which aspects of the precedent-case must be mapped successfully for the whole mapping of the two cases to be successful.

To represent the importance of opinion and *ratio*, the argument-scheme for the analogy-approach of reasoning by precedent must be amended in the following way:

Argument
Precedent-case A, as it is presented in the precedent-opinion, and present-case B are similar.
Therefore, precedent-case A and present-case B are legally the same.

Whenever a present-case B is legally the same as a precedent-case A, A must be followed in B.
Precedent-case A and present-case B are legally the same.
Therefore, A must be followed in B.

Questions
Are A and B similar in a legally relevant way?

Can a successful mapping be made to an aspect of the present-case for every aspect of the precedent-case that the opinion highlights enough to indicate that it is part of the *ratio* in the opinion?

Does the surrounding law allow present-case and precedent-case to be mapped successfully?

Are there no legally relevant differences between A and B?

V. RULE-APPROACH AND ANALOGY-APPROACH IN COMPARISON

The two accounts now look much more similar than before they were amended. In their original form, they each were the target of very different

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but equally important objections: the rule-approach was said to be descriptively unappealing because it did not integrate distinguishing or the fact that opinions regularly do not provide precise rules. The analogy-approach was criticized as unable to explain precedent-constraint. In addition, it did not reflect the importance of opinions and *rationes*. The amended accounts answer these objections. They also both show reasoning by precedent as involving a degree of discretion for the judge—a space where her own first-order reasoning plays a role. This discretion is restricted, in each account, by the information given in the opinion and the surrounding law. It seems that with respect to these measurements of success, both accounts should be judged to do equally well. But can that really be?

I think it is not preposterous to say it can. In everyday life, we often and proficiently engage in both analogical mapping *and* in identifying and applying rules. It may well be that some judges reason by precedent one way, and others the other way, or that the same judge uses one way of reasoning for one case and another for another case. I think it is also possible that the same judge uses both processes to decide one and the same case. One version of such a mixed approach might be that a judge first performs an analogical mapping between precedent-case and present-case. After that, she formulates a rule that would fit both cases, before evaluating it and proceeding on the basis of this evaluation.[91] I think that any of these possibilities—reasoning according to a pure-rule-approach, a pure-analogy-approach, or some mixture between them—could be used to make a decision through reasoning by precedent. Descriptively, it is most likely that they are all used sometimes. Normatively, this result also seems to be acceptable. After all, each of these modes of reasoning affords a precedent-case the power to constrain judicial decisions.

It might now seem that the difference between the amended analogy-approach and the amended rule-approach is so small that it might be negligible. How is the amended analogy-approach different from an approach like Lamond's, Horty's, Bench-Capon's, and Rigoni's (mixed with Shecaira's suggestion to allow judges to choose the best defeasible rule among those consistent with the precedent-opinion)? Is it really just that in analogical reasoning, the present-case's relevant aspects are picked out in the process of mapping, while in rule-based reasoning they are picked out in the process of trying to fit it under the rule? Actually, there is more to the distinction between the two approaches.

Remember the difference between the basic structures of the two approaches. The rule-approach's basic structure is to pick out categorized aspects for the antecedent of a rule from the precedent that *then* are applied to the present-case. The analogy-approach's basic structure is the interaction of the two cases in the mind of the reasoner through the mapping. In the next section, I will spell out two ways in which this translates

91. This is, I think, what Scott Brewer had in mind in BREWER, *supra* note 31.

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into important differences between the effects that reasoning with the analogy-approach and reasoning with the rule-approach have on the reasoner, and I will try to argue that these differences make for advantages of the analogy-approach.

They are advantages because, as should have become evident, it is not possible to exclude first-order reasoning from reasoning by precedent while staying descriptively accurate. This does not mean that precedent-constraint is illusory or unimportant. The clearer and more specific the *ratio* of an opinion, the more constrained the judge is. However, it *does* mean that where judges employ first-order reasoning, we should be anxious to make sure that their ultimate decisions are based on as many relevant considerations as possible. I say this because it is much easier to give in to one's own biases and prejudgments if one has not even considered the other side.[92] A good decision is based on the arguments on both sides that are most convincing to the reasoner. Therefore, it is an advantage for an approach to reasoning by precedent if it encourages a more balanced use of first-order reasoning. I argue that analogical reasoning can help judges to make sure that they pay attention to ways of understanding precedent and present-case that are different from their first, intuitive impressions of the cases. It can do so because of how it differs from rule-based reasoning.

A. The First Difference and Advantage: Possible Futures

Arguments by analogy are used not only because of their justificatory power, but also because of their *rhetorical strength*. Analogies are rhetorically effective because they encourage those who are trying to understand them to restructure their understanding of the analogs in a way that makes them appear more similar.[93] The mere attempt to understand an analogy lends some plausibility to the analogy in the eyes of the reasoner. Why this is so can most easily be explained by using the rhetorical concept of *presence*.[94]

There are many aspects to any subject matter. For example, there are many things that one can say about kindergarten teachers. Nonetheless, if I ask you to think of kindergarten teachers, there will be some things that come to your mind more readily than others. You might first think of the fact that kindergarten teachers take care of children. Whatever

92. Evidence that the attempt to come up with arguments against one's own initial position leads to debiasing and more balanced judgment can for example be found in Frank Zenker, *Know They Biases! Bringing Argumentative Virtue to the Classroom*, *in* Ossa Conference Archive (2013), at 191.

93. *See, e.g.*, Holyoak & Thagard, *supra* note 63, at 101. The claim that source and target interact in the mind of the reasoner, forming new understandings, has also been made about metaphors (which are closely related to analogies) by Max Black, Models and Metaphors (1962), at ch. 3.

94. For discussions of presence, *see, e.g.*, Chaim Perelman & Lucy Olbrechts-Tyteca, The New Rhetoric (1969), at 116ff.; Chaim Perelman, The Realm of Rhetoric (1982), at 35ff.; Christopher Tindale, The Philosophy of Argument and Audience Reception (2015), ch. 10.

https://doi.org/10.1017/S1352325218000113 Published online by Cambridge University Press

comes into your head first, that is what has most *presence* in your mind. The aspects of kindergarten teachers that have the most presence in your mind will greatly influence your impression of what a kind of person a kindergarten teacher is—a loving caretaker, a professional, a chronically underpaid and likely exploited worker. It is easier for you to reason with those aspects of a subject matter that have a lot of presence in your mind than with aspects that, for you, float in the background. Therefore, it is easier for you to understand and accept an argument whose premises play upon those aspects that are already present to you. When you perform an analogical mapping to understand the sad-kindergarten-teacher argument, this (temporarily) influences the presence that certain aspects of mothers and kindergarten teachers have in your mind: you pay attention to those aspects that you are guided to map according to the purpose-constraint. As a result, you come to think of kindergarten teachers and mothers differently. The ways in which they are relevantly similar for the argument step into the foreground. The argument by analogy has led you to *construct* kindergarten teachers as being similar to mothers with respect to their emotional reactions to the well-being of the young people in their care. You concentrate on those reactions rather than, for example, the fact that kindergarten teachers are paid to do their job. Kindergarten teachers and mothers now have a similarity you might have never paid attention to before. That is why arguments by analogy are such persuasive rhetorical tools. *They make you want to understand them and understanding them makes you construct an understanding of the target and source as similar that also incorporates the conclusion as plausible.*[95] When you evaluate such an argument, you also evaluate the adequacy of the understanding of the analogs that this argument encourages you to adopt. The trick is that this understanding has been constructed by you under the purpose-constraint, and therefore it is an understanding that is plausible to you.

There are some important differences between normal reasoning by analogy and analogical reasoning by precedent. What stays the same, however, is the rhetorical effect that the attempt to map the two cases together has on the judge's understanding of them. In analogical reasoning by precedent, the present judge can use this effect to construct and evaluate an understanding of the present-case that makes it as plausible as possible that it is similar to the precedent-case in a legally relevant way. This allows her to see the most persuasive version of how the present-case must be

95. Lilian Bermejo-Luque formulates this point especially beautifully: "For example, in conveying that time is money, we convey an idea of time being as money in some relevant sense; a sense that, on the other hand, has not been made explicit. What we convey is not mere information, but rather a cognitive proposal of seeing time as money in a certain way, i.e., the way in which the comparison is relevant. As far as the addressee fully understands the analogy . . ., she is thinking of time as money . . .. This is why understanding an analogy is, in the end, falling, at least a bit, under its rhetorical spell." Lilian Bermejo-Luque, *A Unitary Schema for Arguments by Analogy*, 32 INFORMAL LOGIC 1, 8 (2012).

https://doi.org/10.1017/S1352325218000113 Published online by Cambridge University Press

understood *if* she decided to follow. By trying to understand how the two cases could be mapped together, she constructs the view of the present-case that is most likely to convince her that the present-case is like the precedent-case, simply because this view is the outcome of her attempt to fulfill the purpose-constraint and therefore gives presence to the successful mappings between the cases.

Interestingly, this process of considering how the two cases could be similar also shows her how the *precedent-case* must be understood if the mapping were to be considered successful. The judge is constrained in her understanding of the precedent-case by the way the opinion describes it. But where the opinion is vague, her attempt to map the two cases together will lead her to construct an understanding of the precedent-case so that it fits the present-case. Take a case in which the best correspondence for the "close relationship" in *Dillon v. Legg* is the relationship between a kindergarten teacher and her ward. Then the mapping can be considered successful only if "close relationship" is interpreted widely, and not limited to blood relations. So, if the judge says that *Dillon v. Legg* needs to be followed in the present-case, then she needs to commit to reading "close relationship" as a category at least that broad. The vaguer the precedent-opinion, the stronger this effect will be because it will apply to many aspects of the precedent-case. By performing an analogical mapping between the two cases, the judge comes to see *both* the precedent-case and the present-case *in the way they must be understood* if she decided to follow. She also sees which understanding of both cases she must reject if she decides not to follow the past case. If this understanding is importantly different from how she understood either case at first sight, these differences will attract her attention. If she recognizes that following in a present-case would necessitate a change in the way she understands the precedent, then she also recognizes that her decision either way will influence what that precedent will stand for in the future. The mapping of precedent-case and present-case might be consistent with the precedent-opinion and the surrounding law. She now sees that, for example, the viewpoint of the party who brought up the precedent is not absurd, that there is a way to see the precedent as applicable. Then the fact that it does justice to the present-case will weigh in as an argument for changing her understanding of the precedent. She might conclude that the two cases are relevantly similar, even though the present-case is *not* relevantly similar to the precedent-case as *the judge originally understood it*. Without the mapping, she might not have become aware of this.

Analogical mapping brings to the attention of the judge ways to understand the precedent that she might not have thought of had she not tried to achieve the best possible mapping with the present-case. The rhetorical force of analogies therefore generates an advantage, allowing her to make a more balanced decision based on more considerations. This benefit might not be available if the judge reasons according to the rule-

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approach. Here she chooses a rule by considering the precedent alone and how she believes it can best be understood as good law. She might not even think of other ways to understand the precedent that would lead to a different decision. She concentrates on the precedent-case and the normative reasons that she thinks are relevant for determining the rule connected to it. Only when the rule has been chosen does the present-case enter the picture, and by then the question how the precedent should be understood is closed. The analogy-approach draws the judge's attention to how her decision to follow or to reject following might influence the development of the common law.

B. The Second Difference and Advantage: Distinguishing and Relevant Differences

So far, I have not spent much time discussing the reasoning involved in deciding whether to distinguish. I mentioned that a *completely pure* rule-approach would require the judge to make a list of categories containing all the properties of the precedent-case that are the basis for excluded reasons against the precedent-decision. The present-case could then be distinguished only based on reasons that cite properties that are *not* on that list. This reading of the rule-approach would be consistent with what Lamond says about distinguishing, namely, that any reason based on a fact already present in the precedent-case is excluded from consideration when it comes to distinguishing. However, it should be easy to see that the analogy-approach can also accommodate this because it only allows distinguishing based on relevant *differences* between precedent and present-case.

All this is about what *cannot* be a reason for distinguishing. But what *is* a reason for distinguishing? This is an important question because the injustice done by wrongly following a past case is just as great as the injustice done by wrongly distinguishing a present-case. As Rigoni points out, there are always some differences between two cases, but these differences can only warrant distinguishing if the difference-constituting fact provides a *reason against the decision that would result from following*.[96] A whole paper could be written on the question when the decision to distinguish could be considered justified in the analogy-approach, but space permits me only to say very little. What might be obvious is that when the judge first hears the present-case, it will have certain aspects that she notices as pertinent or that the lawyer of one of the parties points out as pertinent. Any one of these aspects that is not included in the mapping of the two cases warrants special attention. If it is a basis for reasons against following the precedent-decision, then it is a possible ground for distinguishing. This is why it would make little sense for a judge to analogically map *only* those aspects of the precedent-case onto the present-case that the opinion clearly marks as part of the *ratio*. *All* aspects of the present-case that can be successfully

96. Rigoni, *supra* note 3, at 153.

https://doi.org/10.1017/S1352325218000113 Published online by Cambridge University Press

included in the mapping are similarities between present-case and precedent-case that are relevant *at least* insofar as all the successfully mapped aspects cannot be the basis for relevant differences.

Further, analogical mapping can bring attention to relevant differences that might not be initially obvious. Cognitive scientists have found that it is easier to see differences between analogs that have an overall common structure than between ones whose structures had not been mapped.[97] This makes sense from a rhetorical point of view, because the process of mapping makes the mapped aspects more present to the reasoner, making it easier to include them in further reasoning. By influencing how present aspects are, the process of analogical mapping leads not only to the recognition of similarities, but also to that of differences. In one sense, this was already implied by what I said earlier: the purpose-constraint might lead to the attempted mapping of a fact that is clearly part of the *ratio* and this mapping might fail. However, there is a further way in which mapping may help with the recognition of differences—this time relevant differences that lead to distinguishing. Take again the example of *MacDonald v. Ortho Pharmaceutical Corp.*[98] The reader will remember that the opinion gave a clear rule-like formulation: the duty to warn the consumer does not apply if a competent intermediary has been informed of the risk. The court cited the case of *McEwen v. Ortho Pharmaceutical Corp.*, according to which both prescribing and treating physicians count as such intermediaries.[99] This could have been the end of the decision.

However, according to the analogy-approach, even a rule-like formulation is used as guidance for a mapping, instead of just for an application of the categories. And a more detailed mapping between the physician in *MacDonald* and the physician in *McEwen* reveals the relevant difference between the two cases. In *McEwen*, the court treated both prescribing and treating physicians as competent intermediaries. As one reason, it mentioned that the treating doctor could see how the patient would react to medication over the long term and determine whether the patient should stop taking the medication. The court decided to distinguish in *MacDonald*. It did so because the patient decides relatively autonomously when to take birth control. It is plausible that the attempt to map a birth-control patient-doctor relationship onto the relationship between patient and doctor as described in *McEwen* could have made this difference apparent.

The mapping was successful when it came to the *category* that the court had made out (there must be a physician who is warned), so there was a relevant similarity simply because the surface-constraint was maximally satisfied. But the mapping also gave presence to the role of the physicians

97. Dedre Genter & Arthur B. Markman, *Structural Alignment in Comparison: No Difference Without Similarity*, 5 PSYCHOL. SCI. 152 (1994). *See also* Holyoak, *supra* note 63, at 246.

98. MacDonald v. Ortho Pharmaceutical Corp., 475 N.E.2d 65 (1985).

99. McEwen v. Ortho Pharm. Corp., 528 P.2d 522 (1974).

https://doi.org/10.1017/S1352325218000113 Published online by Cambridge University Press

and thereby to the difference between these aspects in the two cases. Of course the fact that a user of birth-control pills is more autonomous than users of other prescription drugs could have been noticed by a judge who was reasoning according to the rule-approach. I do not mean to claim that there are grounds for distinguishing that can *only* be noticed through analogical mapping. I claim is that analogical mapping is more promising when it comes to *drawing attention* to differences that lie beneath relevant similarities and can justify distinguishing. The success of a mapping is judged by the degree to which it fulfills the *structural-constraint*s as well as the surface-constraint. Determining whether the structural-constraints can be fulfilled requires the judge to go into detail to see whether the relations of the mapped attribute can also be mapped, and their fillers, and so on. Such detail is not required in the rule-approach. According to the rule-approach, the judge constructs a category and determines whether this category can be applied to the present-case. If it can, then that is a success.

VI. CONCLUSION

Both the rule-approach and the analogy-approach of reasoning by precedent can be amended to deal with the objections most prominent in the literature. Then they become serviceable for describing the process of reasoning by which a judge determines whether the existence of a precedent constitutes a binding authoritative reason to follow in a present-case. Contrary to what other authors have claimed, the capacity to account for the practice of distinguishing or the phenomenon of precedent-constraint is not what will decide between the two accounts. However, I do believe that integrating analogical mapping into reasoning by precedent brings with it important advantages that are lost in reasoning according to the pure rule-approach. Specifically, analogical mapping has the benefit of guiding the attention of the judge to the most plausible ways in which she can understand the precedent so that it applies to the present-case. It can also bring attention to differences between the cases that might lie beneath relevant similarities. This makes it easier for the judge to arrive at a more balanced judgment.

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