REASONING BY PRECEDENT

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Lay Abstract: This thesis describes reasoning by precedent in the common law. I discuss two important approaches to how reasoning by precedent works, rule-based theories and analogy-based theories. I reject rule-based theories as untenable. I describe the main problem analogy-based theories face: To show that precedents can constrain judicial reasoning so that judges cannot decide cases according to their own normative commitments. I use insights from psychological research into analogical reasoning and from argumentation theory to develop a new analogy-based account. I suggest that judges should be seen as interlocutors evaluating an argument by precedent. This argument contains an analogy between precedent case and present case, and a rule stating that the precedent decision needs to be followed if precedent case and present case are legally the same. The judge needs to first understand the analogy under the application of the *principle of charity*, and then evaluate it using critical questions.

Abstract: This thesis develops a novel account of judicial common-law reasoning by precedent. If a new case is relevantly similar to a precedent case, judges are generally bound to follow the decision made in the precedent case. Important differences between cases can justify deciding the new case differently. The literature offers two main approaches to reasoning by precedent. According to rule-based-approaches, every case is decided by either following an existing rule or establishing a new one. I show that rule-based approaches are untenable. Analogy-based approaches claim that similarities and differences between two cases are determined through reasoning by analogy. These approaches are problematic because some similarity or difference can always be found between two cases. Accounts suggested so far cannot explain how precedents can provide significant guidance to judges. My dissertation salvages analogy-based approaches by supplementing them with insights from argumentation theory. Analogies contain a figurative part that is used to make someone see the analogy's literal part in a new way. An arguer can manipulate her interlocutor's perception of the literal part through the way she describes the figurative part by rhetorically drawing attention to those similarities that she considers relevant. Arguments by analogy use this to convince interlocutors of conclusions about the literal part. I propose to see judges in the role of interlocutors, evaluating arguments by precedent. The opinion that documents the precedent case from the point of view of the former judge is the figurative part of an analogy. The literal part is the new case. They form an analogical argument for repeating the precedent decision. The judge evaluates the argument by considering a number of critical questions. If all the critical questions can be answered, the precedent is applicable and must be followed. Otherwise, the precedent is either not applicable or has to be distinguished.

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Chapter 1 – Introductory Considerations

1.1 Precedent

Precedent, and with it reasoning by precedent, lies at the heart of the common law. Of course, common law reasoning contains much more than just reasoning by precedent; moral reasoning, reasoning to the best explanation and means-end-reasoning are just some examples. On the other hand, reasoning by precedent is not restricted to the common law. Most parents, teachers and bosses know the uncomfortable pressure of being told that they need to make a certain decision just because the same decision was made in a similar context before. Still, for many people it is true that if they think of the common law, they think of precedent, and if they think of precedent, they think of the common law. Reasoning by precedent, that seems to be the general impression, is the most important part in the motor that slowly moves the common law forward.

Being such an important part of the common law, precedent has been of interest to legal philosophers and legal theorists for a long time. This interest has produced an almost unbelievable amount of contributions and discussions, some concentrated specifically on aspects of precedent in the common law, some interested in the way this form of reasoning works overall. In spite or maybe because of this, there is little agreement among those theorizing about precedent. No uncontroversial account of reasoning by precedent exists and the discussion is ongoing. This thesis is written to provide a better understanding of reasoning by precedent in the common law than has been accomplished so far. Its goal is to gather the helpful and important insights into reasoning by precedent that the literature in jurisprudence has to offer, combine them with ideas and concepts developed in the areas of argumentation theory and rhetoric and form from both a theory of reasoning by precedent that is satisfying for philosophers and helpful for those who use legal reasoning by precedent to do their jobs.

However, before I can enter this discussion, I will first have to clarify exactly what kind of theory about what kind of object I am setting out to propose. After all, if one wants to give a useful answer, it is best to have a clear question in mind. This introductory chapter will clarify the question the answer to which will be found in the following chapters.

1.2 The Object of Inquiry

There are several distinct ways in which I could deal with precedent in the common law. One possibility, for example, would be to research and describe the cognitive processes that contribute to the behaviour of judges when they make decisions using precedent. Such an empirical, psychological account would certainly be interesting and useful. We can find the kinds of insights it might provide in works like *The Psychology of Judicial Decision Making*, a collection of essays describing how judges think and behave from a psychological perspective.[1]

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[1] David Klein and Gregory Mitchell (2010), *The Psychology of Judicial Decision Making*.

A very different approach would be to identify the ultimate moral, political or social goals for which reasoning by precedent could justifiably be used in the common law. These goals could then be the basis for developing instructions on how one *should* reason by precedent, i.e. what counts as *good* reasoning by precedent, or how reasoning by precedent *should* look like. Larry Alexander's arguments in "Constrained by Precedent" appear to be the outcome of such an approach: he uses the degree of normative appeal reasoning by precedent *would have* depending on how it is described in order to justify his own choice of such a description.[2]

Another option would be to accept the most popular and widely accepted ways in which reasoning by precedent is commonly described and to argue whether a practice that corresponds to these theories is (or would be) justified or not. Emily Sherwin provides such a defense of reasoning by precedent (which she considers to be at least related to reasoning by analogy) in "A Defense of Analogical Reasoning in Law".[3]

In this text, I am not planning to do any of these things, though I will take the results of these kinds of inquiries into account. Instead, I wish to develop a theory of reasoning by precedent as an *existing practice of justificatory reasoning*. The decision to treat precedent in this and not in one of the other ways has certain consequences which deserve to be explored at least briefly. It is also necessary to explain what I mean when I say "an existing practice of justificatory reasoning".

On the one hand, I wish to develop a theory of an *existing practice*. This means I wish to describe something that actually already exists, something people already habitually do, learn to do and are better or worse at. As such, this theory will have to live up to certain standards. Reasoning by precedent already exists in the world, and the practice of using it is not a practice I am inventing here. The people engaged in it have already theorized about what they are doing, they have developed certain categories and stages to describe their actions. For example, certain ways of decision making fall under the category "distinguishing", others fall under "following" and others still under "overruling".[4] Like any theory about an existing human practice, I will have to account for at least the most important and least controversial elements the participants in this practice count as belonging to it, and I will have to account for the way they describe these elements. If it should turn out that my theory describes some elements differently than the participants of the practice do themselves, then the least I will have to be able to do it to explain this difference – I will have to explain why the participants in the practice misunderstand what they themselves are doing. If the theory I will develop throughout this text cannot do this, then it will not be a theory of reasoning by precedent as an existing human practice. Instead, it will be something else. This something else might be useful somehow, but it will not be what I set out to provide. In the next section of this chapter, I will give a summary of how the practice of reasoning by precedent in the context of the common law is generally understood. The theory that I will propose has to

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[2] Larry Alexander (1989), "Constrained By Precedent".
[3] Emily Sherwin (1999), "A Defense of Analogical Reasoning in the Law".
[4] I will shortly talk about the established meaning of these terms in chapter 1.3.

be able to account for the aspects and characteristics of reasoning by precedent described there.

On the other hand, I want to describe this existing human practice as a practice of *justificatory reasoning*. Here, I do not use the word "reasoning" in its purely descriptive, psychological sense. That is, I do not mean the mental process by which certain people make the transition from one thought to another thought. Whenever I think of lavender, I immediately think of the summer of my seventh birthday. These kinds of transitions are not what I am interested in here. I added the word "justificatory" on purpose to show that the kind of reasoning I am interested in is that which justifies the move from the affirmation of one statement – a premise – to the affirmation of another – a conclusion. This is something different than processes through which humans reliably reach certain conclusions. These processes can be divided into those the conclusions of which can, in the end, count as justified and those for which this is not true. A practice of justificatory reasoning is a practice whose processes produce conclusions that are justified.

Of course, it is possible that the existing practice of reasoning by precedent is not a practice of justificatory reasoning at all. It is possible that all those people who engage in reasoning by precedent, thinking they thereby come to justified conclusions, are really kidding themselves. It is possible that the process involved in reasoning by precedent is flawed when it comes to its justificatory value, so flawed that reasoning by precedent really does not justify its conclusions at all. If this were the case, then the enterprise to describe reasoning by precedent as an existing human practice of justificatory reasoning would be doomed from the start. There simply would be no existing human practice of reasoning by precedent that was also one of justificatory reasoning. Some philosophers are worried that exactly this might be the case.[5] I am more optimistic. I will set sail, hoping that the earth is round, even though people tell me that it is flat and I might fall over the rim. In the fourth section of this introductory chapter, I will discuss the consequences of wanting to describe reasoning by precedent as a kind of justificatory reasoning. As it will turn out, these consequences are that my theory will have to fulfill further conditions, in addition to the condition of being able to incorporate all those elements of reasoning by precedent that it is commonly believed to have. But before I turn to these additional conditions, let us take a look at how the existing practice of reasoning by precedent in the common law is generally thought of.

1.3 Reasoning by Precedent as an Existing Practice
In common law systems, judges have the authority and the task to decide cases. This means that they regularly have to resolve normative problems concerning the behaviour of other people. Modern common law systems usually have the feature that some, but not all law is generated by statutes enacted by legislatures. Therefore judges are not always guided by statutes when they make their decisions. To a certain extent, they have the capacity to follow their own judgement of what is just, fair or right when they are

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[5] Such worries have been voiced in the context of the movement of American Legal Realism. For a summarizing description of the claims made in this movement, see Brian Leiter (2005), *American Legal Realism.*

performing their duty.[6] However, judges are not only restricted by statutes. When deciding cases, they are also expected to take the past decisions of other judges into account. Most importantly they are expected to follow precedent: They have to repeat the earlier decisions they or other judges working in courts as high or higher than their own have made when dealing with cases that are the same as the case at hand in all relevant respects.[7] This restraint has two consequences: First, judges only very seldom actually decide cases simply according to what they think is right. Second, by deciding cases judges contribute to the development of a different kind of law than the law of statutes, the common law.[8] In summary, judges have the authority to decide cases and participate in the slow development of the law. However, they are subject to the restraints of precedent: they have to decide cases in a manner consistent with earlier decisions.

If a case that was decided earlier is so similar to the case at hand that it can be called legally the same, and if the case was decided by the right kind of court (not, for example, by a court in a different country) then it is a binding precedent that has to be followed.[9] That a case is binding means that it is legally the same as the present case, and that the judge deciding the present case has to decide it in the same way as the precedent case was decided. This does not mean that they merely have to take the past decision into account when they reason about the present case. If the case at hand and the precedent case are legally the same and the precedent case had been decided in a certain way, then judges have to treat this as a conclusive reason for deciding the case at hand in the same way. It does not matter whether they think that this is the best decision possible.[10] Grant Lamond aptly reformulates this point by saying that judges have to treat past cases as having been decided correctly.[11] Of course, no two cases are ever really "the same". Even the most similar cases will at least differ with respect to such details as time, space, and individual involved. In the legal context, we can distinguish two different kinds of similarities and differences – legally relevant similarities and differences, and legally irrelevant similarities and differences. Two cases are legally similar if they have legally relevant similarities. However, no matter how legally similar two cases might be, a precedent case might still be *merely* similar to a present case. This could be because it has been decided in a different area of the law, and is therefore not authoritative for the

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[6]See Frederick Schauer (2009), *Thinking Like a Lawyer,* p.103f.

[7]Both Grant Lamond and Frederick Schauer have pointed out that there is an important difference between precedent cases and analogous cases. I will deal with this difference later. (See: Frederick Schauer (2009), *Thinking Like A Lawyer*, 85ff. and Grant Lamond (2006), "Precedent and Analogy in Legal Reasoning".

[8]Frederick Schauer (2009), *Thinking Like A Lawyer,* p.103ff.

[9]See, e.g. Grant Lamond (2006), "Precedent and Analogy in Legal Reasoning". This does not mean that the cases are identical in every respect (this could never happen if simply because they engage the court at different points in time).

[10]See Frederick Schauer (2009), *Thinking Like a Lawyer*, p. 37f.

[11]Grant Lamond (2005), "Do Precedents Create Rules?", p. 3. Deciding the same case in two different ways would mean that at least one of the decisions was wrong. Therefore one can infer that a judge who decides a present case different than a precedent case even though she recognizes that the two are legally the same implies that the past case was wrongly decided. The doctrine of precedent forbids this – the judge has to treat past cases as correctly decided and therefore she needs to decide the present case the same way as the precedent case.

present case. Or the past judge's decision was really about a category of cases that does not encompass the present case (it was about dogs, and this case is about humans). Then the two cases are not legally the same. In addition to being legally similar to the present case, a past case also needs to have been decided by the right kind of court, one with an authoritative relationship to the present court. Further, two cases might have legally relevant differences in addition to their legally relevant similarities. This means that two cases are only legally the same if, in addition to having legally relevant similarities, they have *no* legally relevant differences. If such legally relevant differences exist, the present judge might still want to decide in the same way as the precedent case was decided. But she would not, then, *follow* the precedent case. Instead, she would *extend* it. She would not be under any obligation to come to the same decision as the one in the precedent case, no matter how similar the two cases were. Other than in the case of following, the judge is under no duty to take the legally relevant similarity of the cases as a reason to decide in the same way: She is free to decide differently simply because she does not think that the precedent case was decided correctly. However, if a precedent case is legally the same as a present case, then it is binding. The judge *has* to follow and it does not matter whether she likes the way the precedent case was decided or not.[12]

A precedent case contains three important parts: They are the facts of the case, the decision, and the reasoning that led to the decision. Usually, a judge informing herself about a case will find it documented in an opinion written by the judge or group of judges who made the decision.[13] The reasoning documented in the opinion is commonly thought to be divided into the *ratio decidendi* and the *obiter dicta*. The *ratio decidendi* can be described roughly as the rationale for the way the case was decided.[14] It is not completely clear how the *ratio* is determined or who actually determines it. Depending on their underlying theory of precedent, legal theorists differ in how they identify the *ratio decidendi*. Some consider it to be all the vital facts of the case plus its outcome[15], others think it is the rule the court used in order to come to its decision[16], etc. In addition, it is not uncommon that even with the most careful interpretation, an exact determination of one clear *ratio* is impossible. As Neil Duxbury points out, there are many different factors that can make it hard to determine the *ratio* – for example that the judges were not unanimous in their decision or that it is not clear which parts of the documented reasons were actually conclusive. If the *ratio* must, or even simply can be interpreted, it becomes debatable whether it is the subsequent court or the deciding court who determines its exact content.[17] What is clear is that the *ratio decidendi* is considered to be that part of the precedent that is binding on later courts. The *obiter dicta* consists of the rest of what the court wrote into its opinion. This includes, for example, long justifications, references

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[12] See Grant Lamond (2006), "Precedent and Analogy in Legal Reasoning".
[13] See: Frederick Schauer (2009), *Thinking Like A Lawyer*, p. 171.
[14] See Grant Lamond (2006), "Precedent and Analogy in Legal Reasoning".
[15] See, e.g. Arthur L. Goodhart, (1959) "Determining the Ratio Decidendi of a Case".
[16] See, e.g. Frederick Schauer (2009), *Thinking Like A Lawyer*, p. 41.
[17] For a very detailed, through discussion of the difficulties surrounding the concepts of ratio decidendi and *obiter dictum*, see: Neil Duxbury (2008), *The Nature and Authority of Precedent*, 67ff.

to important principles, but also just general thoughts that seemed important at the time. In short, everything that is not considered binding on the later courts.

There are two main ways in which judges can justify not following precedent. [18]

The first and by far most common way is by *distinguishing* cases. Above, I explained that a precedent case is only binding on a present case if it is legally the same as the present case, that is, if it has legally relevant similarities to the present case and no legally relevant differences. A judge may decide a case different from the way an otherwise authoritative and legally similar former case was decided if she can point to a legally relevant difference between the cases that justifies the different decision.[19] Of course what a legally relevant similarity is and what a legally relevant difference is are important questions to ask about reasoning by precedent. One of the main tasks this thesis has to complete is offer a satisfying answer to these questions.

A second way a judge can justify deciding a case differently than a precedent case is by *overruling* the former case. If a judge finds that a former case (decided by a court not higher than her own) was decided in a way that following it now would lead to truly, horribly detrimental consequences, she might overrule it even if the two cases are legally the same. That means, she might reject the earlier ruling and decide the case differently, even though she cannot find an important difference between the cases. However, in order to do this, she has to argue that treating the decision made in the prior case as binding on later courts would be a horrible mistake and would bear deeply bad consequences. It is not enough for her to think that the former case could have been decided better.[20] Judges usually have a presumption against overruling and do so only very reluctantly. Given that one standard justification for the doctrine of precedent is that it renders the law consistent and predictable, this makes sense: If overruling became the norm, consistency and predictability would suffer.[21]

This work will deal only with a part of the reasoning judges perform when dealing with precedent: It will attempt to describe how judges reason in order to decide whether a precedent is binding on them – that is, whether it is legally the same as a present case and needs to be followed. It is important to re-iterate what this includes. A precedent case is legally the same as a present case, and therefore binding, only if a) it is authoritative with respect to the present case, that is if it has been decided by a court that stands in the right relationship to the court deciding the present case, b) it has legally relevant similarities to

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[18] Occasionally, judges do not formally distinguish cases, but instead declare that the *ratio* of a case has to be read as narrower than it had been assumed earlier, and that therefore they do not need to follow the precedent. Here, the judge strictly speaking avoids following the precedent by re-interpreting the precedent case. The case would have been considered legally similar as the present case under the old interpretation, but under the new interpretation, it is not legally similar any more. This is an interesting move, but I will not discuss it further in this thesis because understanding it would lead us too deep into a philosophy of the interpretation of opinions, diverting us from our actual topic. See, e.g. Grant Lamond (2005), "Do Precedents Create Rules?", p.13.

[19] See, e.g. Grant Lamond (2006), "Precedent and Analogy in Legal Reasoning" and Frederick Schauer (2009), *Thinking Like A Lawyer,* p. 57 ff.

[20] Frederick Schauer (2009), *Thinking Like A Lawyer,* p. 59 f.

[21] See, e.g. Frederick Schauer (2009), *Thinking Like A Lawyer*, p. 60 and Neil Duxbury (2008), *The Nature and Authority of Precedent*, p. 116ff.

the present case, that is if the two cases are legally similar and c) it does not have any legally relevant differences to the present case, that is if the judge cannot find a legally relevant difference that justifies distinguishing.

Judges also reason with precedents when they decide whether to extend non-binding past cases. However, I will not call what they are doing under those circumstances reasoning *by* precedent, but rather reasoning *with* precedents. Reasoning by *and* reasoning with precedent both fall under the larger umbrella of common law reasoning. This thesis concentrates on reasoning *by* precedent. I am not sure whether to say that the reasoning a judge engages in when she decides whether or not to overrule should be included under reasoning by precedent. However, because it includes deliberations about the normative merit of the precedent decision rather than deliberations about the relationship between precedent and present case, it will not be in the focus of this thesis either.[22]

1.4 Reasoning by Precedent as a Practice of Justificatory Reasoning
In the last section, I summarized a number of the aspects that reasoning by precedent in the law is commonly believed to have. These are elements that the actors engaged in the practice of reasoning by precedent habitually refer to when they are engaged in reasoning by precedent, and when they talk about it. The theory I will develop should include these aspects in its account. To the extent that it fails to do so, it will fail at giving a description of legal reasoning by precedent as an *existing* practice – even if it should succeed in determining how reasoning by precedent *should* look like.

Apart from aspects like distinguishing, following, writing opinions etc., there are some further characteristics a theory of reasoning by precedent in the common law should be able to account for if it wants to explain it as a practice of *justificatory reasoning*: It should be able to explain reasoning by precedent in such a way that it can count as justificatory reasoning, i.e. in such a way that decisions reached by reasoning by precedent fulfill the minimal conditions under which we are likely willing to say that they are *reasoned* or *justified* decisions. This section will explore what these further characteristics are.

We can make a note of two things:
In order for a decision or conclusion to count as having been reached through a kind of justificatory reasoning process, reaching it has to be a) influenced by such reasoning, that is, it cannot be reached arbitrarily and b) be more or less justified as a result of such reasoning.

a) Reasoning by precedent is set out to enable people (especially judges and lawyers) to reason for or against the conclusion that they should act in a certain way. This

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[22] It should be remarked that the way I have here used terms like "binding" "similar" "same" etc. is not the way *all* legal theorists and legal philosophers use these terms. Fred Schauer, for example, uses the word "binding" to describe a precedent case that is both legally similar and authoritative with respect to a present case, but that still can be distinguished. (see, e.g., Frederick Schauer (1987), "Precedent") Because there is no commonly accepted way these terms are used, I chose a specific way in which to use my vocabulary. The majority of legal theorists agree that the elements and relations I described here exist and are important in the practice of legal reasoning by precedent. The differences are mainly between how certain terms – like "binding" – are used.

implies that engaging in reasoning by precedent has to have some effect on the outcome of their decision-making. And this means that if I came to conclude my description by claiming that people engaged in reasoning by precedent make their decisions completely arbitrarily, then I would have either failed to describe reasoning by precedent - or succeeded in showing that it does not exist. The famous caricature of legal realism, according to which a common law judge's decision depends on what she had for breakfast rather than on what decisions have been made in the past, is either describing the psychological reality of judicial decision-making instead of reasoning by precedent, or is claiming that there is no such reasoning.[23]

b) People who engage in reasoning (by precedent) are not only supposed to come to a non-arbitrary decision – they are supposed to come to a non-arbitrary, *justified* decision. Justificatory reasoning is different than, for example, free association. Free association might lead me to some kind of decision. And, at least in some way, we might say that this decision was not entirely arbitrary. My psychological make-up determined where my thoughts would be led if I engaged in free association, and so my engaging in free association influenced the decision I came to. However, my process of free association is not able to distinguish the decision I have come to as *justified*. Normally, we think that a conclusion is justified if the process through which it was reached makes it plausible that the conclusion is correct – if it is a factual conclusion that it is true and if it is a normative conclusion that it is good. This is not something that free association can do. However, we assume that this is something reasoning can do.

Now, what does it mean to say that a conclusion is good in the normative sense? One of the easiest ways to explain this is to say that it means that a good conclusion leads an actor to make the best decision available to her in some situation according to some goal. For example, imagine Susi. Susi has been planning her friend Amy's surprise birthday party for this evening. Now Amy asks Susi what Susi is going to do this evening. Susi can choose to tell Amy the truth, to lie, or to tell her it is none of her business. Let us further assume that Susi's goal here is to be a good friend to Amy. Susi must now reason about whether or not she should lie, tell the truth or refuse to answer. According to the explanation above we assume that her reasoning will lead her to a good conclusion if, on the basis of this conclusion, Susi decides to choose that option which allows her to be a good friend in this specific situation better than the other two options. Presumably, she will lie in order to preserve the surprise of the birthday party without making Amy feel rejected by her refusal to answer.

However, it is not self-evident that the process of reasoning by precedent leads people to conclusions that are good in the sense above. Indeed, it has been remarked that reasoning by precedent does not reliably produce good conclusions of this kind. Frederik Schauer pays close attention to this problem, for example when he explains why he considers reasoning by precedent and other forms of legal reasoning *odd*:

"[T] his special oddness is that every one of the dominant characteristics of legal reasoning and legal argument can be seen as a route toward reaching a decision

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[23] That is, if I understand this caricature correctly as claiming that common-law judicial decision making is arbitrary.

other than the best all-things-considered decision for the matter at hand. .(…) [M]aking a decision just because the same decision has been made before— following precedent—gets interesting primarily when we would otherwise have made a different decision. The parent who gives the younger child the same privileges at the same age as an older child feels the pull of precedent only when he or she otherwise thinks there is a good reason for treating the two differently, and so being constrained by precedent is again a path away from what had otherwise seemed to be the right decision."[24]

In other words, reasoning by precedent seems to make a difference exactly when it does *not* seem to lead to good conclusions in the sense that Susi's reasoning lead to a good conclusion. The parent has to treat her younger child the same as her older child in some situation even though she thinks that in *that* situation it would be better to treat the younger child differently with respect to some goal. (Perhaps the older child was allowed to go out until 12pm when she was 15 years old, and so the parent feels she needs to let the younger child stay out that long too, now that she is 15, but she believes the older child was much more responsible at 15 than the younger child and therefore, with the goal of safety in mind, it would be better *not* to let the younger child stay out that long yet). According to this understanding of good conclusions, it does not seem to be the case that reasoning by precedent leads to justified conclusions because it reliably leads to good conclusions – in this case the best decisions that could be made, all things considered, in the specific case at hand.

Still, many authors seem to think that judges who make decisions by using reasoning by precedent have made decisions based on justified conclusions. However, the reasons these authors offer hardly ever concentrate on the plausibility with which a decision made using reasoning by precedent is a good decision in the sense above. Instead, they try to justify reasoning by precedent as a whole practice, implying that the specific decision arrived at by the use of reasoning by precedent is justified because the use of reasoning by precedent as a practice is justified. Or in other words: These authors seem to think that the decisions made using reasoning by precedent are correct because using reasoning by precedent is justified, not that reasoning by precedent is justified because the decisions made using it are correct in the sense above.[25]

This implies that there is another sense in which a conclusion can be good. In this sense, a conclusion is good if it leads to a decision that belongs to a practice that is generally better than other available practices. Imagine Susi is still working under the goal to be a good friend to Amy. But she also knows herself as being easily confused and overall a bad reasoner under pressure. Therefore, the practice of making decisions about how to be a good friend on the go is just not available. She needs to decide on a practice

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[24] Frederick Schauer (2009), *Thinking Like A Lawyer*, p. 7. He also discusses this problem in Frederick Schauer (2008), "Why Precedent in Law (and Elsewhere) Is Not Totally (or Even Substantially) about Analogy", p. 4 and in Frederick Schauer (1987), "Precedent".

[25] I do not want to commit myself, here, on the questions whether these authors are correct – that would require extensive normative argumentation that I am not prepared to engage in because it would lead me too far afield.

that she can always follow when it comes to being a good friend. As part of this practice, she decides to determine that lying is always wrong. Whenever she is faced with a situation in which she needs to decide whether or not to lie, she will reason under the assumption that it is true that lying is never the right thing to do. Therefore, when Amy asks her about the birthday party, she does not lie to her but instead picks one of the other options. If we assume that over the entire length of Susi's friendship with Amy, Susi will reach her goal of being a good friend better if she accepts that lying is always wrong, then we can say that her conclusion not to lie to Amy with respect to her birthday party was good in another sense than the one above: It was good because it was part of a practice that was overall the best available, not because it led to the best possible decision in this *specific* situation. Her conclusion was justified because it was consistent with an overall justified practice.

   If it is true that reasoning by precedent will not produce good conclusions in the first sense, then the only way to show that reasoning by precedent is a practice of justificatory reasoning is to show that it will produce conclusions that are good in the second sense: Conclusion that are justified because they are consistent with an overall justified practice. This practice is the practice of judges to engage in reasoning by precedent in order to determine how to decide their cases.

   There must, then, be some characteristic reasoning by precedent has that makes it justifiable as a whole (and, by extension, that makes conclusions reached through it justified). Taking a look at the justifications commonly offered for engaging in the practice of reasoning by precedent might tell us what the characteristic of reasoning by precedent is that leads legal theorists to believe that it engenders justified decisions. I will not evaluate these justifications here. Rather, the goal of the following survey of arguments is to determine the characteristic of reasoning by precedent which makes it justifiable in the eyes of its defenders.

   The first thing that stands out is how many arguments there are justifying the use of precedent by pointing to its ability to constrain judges in their decision-making because it forces them to consider and repeat the decisions of other judges. This constraint is usually thought to have the effect that judges, because they have to consider precedents, are prevented from deciding cases according to their own moral or political views. In other words: People who stand before a judge who is constrained by precedent are being judged according to the law, not judged according to the judge's idiosyncratic view of what is right and wrong. Schauer has collected a number of these arguments, all of which, according to him, focus on the value of stability.[26] Variations of them also appear in the justifications of precedents as other authors offer them.[27]

   Among them is the argument from fairness, according to which it is fair or just to treat like cases alike and wrong to be inconsistent. Legal officials, so the argument, should decide similar cases similarly across the board in order to achieve the ideal of a just legal system.[28] But this is not likely if they are able to decide according to their own,

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[26] Frederick Schauer (1987), "Precedent", p. 21.
[27] See, e.g. Larry Alexander (1989), "Constrained by Precedent"; and Neil Duxbury (2008), *The Nature and Authority of Precedent,* Chapter 5: "Why Follow Precedent?".
[28] Frederick Schauer (1987), "Precedent", p. 16.

possibly widely varying reasons. Reasoning by precedent helps because it restricts judges' decision making so that they have to follow the decisions other judges have made in similar cases.

Another argument Schauer discusses is the argument from predictability, according to which it should be possible for the subjects of the law to predict whether their conduct will bring them into conflict with it. Again, reasoning by precedent helps because of the particular kind of restraint it exerts: If judges reason by precedent, their decisions about cases similar to earlier cases will be similar to the decisions earlier judges made, and therefore more predictable.[29]

The argument from decision-making efficiency goes a slightly different route. Again, it makes use of the restraint reasoning by precedent puts on the decision-making of judges: Instead of having to weigh all possibly applicable reasons, a time and resource-consuming undertaking, judges can rely on the decisions made by others, and so make their decisions more efficiently.[30]

Emily Sherwin adds further arguments for the practice of reasoning by precedent. She argues that the reliance on past decisions will counteract cognitive biases which usually play a big role in open-ended reasoning. [31] As an example she offers the bias of putting too much weight on salient, currently present factors at the expense of more abstract considerations or merely possible complications. If judges have to study and rely on past decisions, they will have a better overview of the things that can factor in cases similar to the ones they are deciding, leading them to more balanced decisions.[32] Additionally, she points out that if the law gets developed through a practice of reasoning by precedent, the resulting structures are the outcome of the collaborative effort of many judges over time – of their joined intellectual forces, so to say.[33]

Again, these arguments rely on the idea that reasoning by precedent restricts the deliberation of judges by tying them to the decisions of other judges. But in the second argument we can see another factor playing an important role: Sherwin speaks about the *development* of the law, and of the collaborative efforts of judges. If the law develops, then the decisions of judges cannot be completely predetermined – there has to be some wiggle room to allow for changes to take place. New considerations and factors must be able to enter the law for it to develop. Therefore, Sherwin's argument also relies on the idea that there is room for the single judge to contribute something when she makes her decision.

This different characteristic of reasoning by precedent also carries weight in another argument that Sherwin offers. She writes: "When judges reason from and attempt to conform to a body of existing decisions, their own decisions and the rules they announce are likely to be modest. Accordingly, law will develop and change in an incremental manner."[34] Again, the emphasis lies on the restricting effect of precedent, but

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[29] Frederick Schauer (1987), "Precedent", p. 17
[30] Frederick Schauer (1987), "Precedent", p. 18.
[31] Emily Sherwin (1999), "A Defence of Analogical Reasoning in Law".
[32] Emily Sherwin (1999), "A Defence of Analogical Reasoning in Law", p. 1191.
[33] Emily Sherwin (1999), "A Defense of Analogical Reasoning in the Law", p. 1186.
[34] Emily Sherwin, "A Defense of Analogical Reasoning in the Law", p. 1193.

it is also clear that judges are doing more than calculating the results that follow mechanically from past decisions – they make their own decisions, though with a modest mindset. Precedent, according to the picture this argument paints, prevents judges from making decisions only based on their own ideas of right and wrong. Nonetheless, it allows that, to a modest degree, judges interlace concepts, ideas and considerations into their decisions that are not already present in the precedent opinion.

In texts defending a common-law theory of constitutional interpretation – a theory that advocates treating constitutional questions by taking earlier decisions into account as precedents - reasoning by precedent is defended with reference to similar characteristics. Wil Waluchow, for example, criticises the idea of using general legislation to determine the exact meaning of enacted statutes (here constitutional rights) by pointing out that the legislature has to use a "blunt instrument" when making decisions – they have to engage in abstract and general reasoning and are not exposed to the intricate and sometimes strange factors that play a role in real-life circumstances and cases. Judges, on the other hand, deal with real cases. If, through a long series of decisions relying on each other, a rule or principle emerges, it has been developed through considerations taking all kinds of factors into account, factors that a legislator engaged in abstract thinking might not have thought of.[35]

In addition, common-law constitutionalists, like for example David Strauss, tend to believe in the common-law system and in reasoning by precedent because it facilitates a slow "evolution" of the law.[36] They argue for the common law because it provides both stability – and with it predictability, fairness and all the other values the arguments relying on restraint mentioned – and the flexibility to keep up with the progress made in our scientific and ethical understanding. Strauss, for example, gives a lengthy analysis of the cases dealing with racial segregation before *Brown* vs. *Board of Education* and shows that the landmark decision was well prepared by more modest decisions for a strengthening of racial equality.[37] Waluchow and Strauss advocate the use of reasoning by precedent for constitutional interpretation because of how they believe it works in the common-law in general, even when less than constitutional rights are at stake. Like Sherwin, they base their arguments on two characteristics they assume reasoning by precedent has: that it restricts judges to take into account and repeat the earlier decisions of other judges, and that it leaves them enough room to facilitate small changes which lead to an evolutionary development of the law. On the one hand, judges cannot just decide cases according to their own sense of what would be right, just, or appropriate. On the other hand, they are in a position to integrate, into their decisions, new ideas and factors that they recognize have become important in the context in which their specific case is presented to them.

I am not going to evaluate the arguments I have discussed here, for it was not the goal of this short excursus to determine whether a common-law system based on reasoning by precedent is a justifiable system, or even the best system. However, in order

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[35] Wil Waluchow (2005), "Constitutions as Living Trees: An Idiot Defends", p. 577.
[36] David A. Strauss (2010), *The Living Constitution*, p. 35.
[37] David A. Strauss (2010), *The Living Constitution*, p. 77 ff.

to describe reasoning by precedent as a reasoning practice, I will have to proceed under the assumption that the practice of reasoning by precedent is justified (and that it therefore produces justified conclusions). The most likely way in which this assumption, in turn, is justified, is by the highly popular arguments collected above. These arguments all rely on a certain trait their authors attribute to reasoning by precedent: that it provides judges who decide cases with a well balanced mix of restriction and freedom. Reasoning by precedent's best shot at being justified as a practice, and therefore at producing good, justified conclusions, is therefore that it realizes what Hart asked of the law in general: to be both stable and flexible.[38] On the one hand, it prevents judges from making decisions according to their own idiosyncratic views. On the other hand, it allows them to take into account factors and ideas they realize have become important in the relevant context – and thereby to tentatively integrate them into the law.

This is it, then, the collection of attributes and characteristics the theory of reasoning by precedent developed in this text is set out to explain. In order to describe reasoning by precedent as an existing practice of justificatory reasoning, I will have to offer a coherent account of reasoning by precedent as possessing two sets of characteristics. On the one hand, I will have to be able to account for elements that are obviously central to the practice and the way the people engaged in it understand it: Following and distinguishing precedent, opinions, overruling, etc. On the other hand, I should present them in such a way that it becomes understandable why those who advocate reasoning by precedent in the law believe it to be justifiable. In other words, I will have to account for one more attribute reasoning of precedent is thought to have: that it provides a becoming balance of restraint and freedom to the reasoner engaged in it – that it guides her to a conclusion consistent with the decisions reached by others, but not in so strict a manner that she cannot let other considerations weigh in.

1.5 A Short Overview of What is to Come

The goal is set – but how will the reader know whether it has been reached? Like almost all philosophical texts, this one too cannot provide a definitive proof, nor can it end the discussion about the best way to understand reasoning by precedent. Instead, it will offer one understanding of reasoning by precedent as well as arguments to support it. As it is with every philosophical contribution, only later discussion will show how well it holds up to scrutiny.

In the following chapters, I will survey a number of approaches to reasoning by precedent that have been proposed so far and then offer a new understanding based both on the existing insights from jurisprudence and on the ideas and concepts developed in argumentation theory and rhetoric.

In the second chapter, I will analyse and discuss two main approaches to reasoning by precedent that can be identified in the literature: Rule-based accounts and analogy- or similarity-based accounts. According to rule-based accounts, every case is decided by either following an existing rule or establishing a new one. These accounts seem to be effective in restricting judicial reasoning because the precedential rule can

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[38] H.L.A. Hart (1961), *The Concept of Law*, p. 130.

serve as the major premise in a deductive modus ponens, guaranteeing certain outcomes for cases falling under it. However, I will argue that these accounts are untenable. First, they cannot adequately account for the practice of distinguishing, i.e. deciding a present case differently than an applicable precedent was decided because of important differences between the cases. Second, they mistakenly presuppose that precedential opinions provide enough information to determine fully formulated conditions under which the rules apply. However, if these two descriptive shortcomings are repaired, it leaves rule-accounts unable to explain the restrictive effect of precedents.

By contrast, analogy- or similarity-based approaches claim that judges determine whether a precedent has to be distinguished or followed based on relevant similarities and differences between precedent case and new case. However, some similarity or difference can always be found between two cases. Therefore, analogy-based accounts have a hard time explaining how precedents can restrict judicial-decision making enough to keep judges from simply deciding cases according to their own idiosyncratic views of what is right and wrong. An appropriate analogy-account therefore would have to show how the relevance of a similarity or difference has to be determined in order to show that judges are restricted in their decision-making by the precedent. I will argue that unfortunately, so far no account has succeeded in doing so. The account offered in this text is an attempt at solving this problem and salvaging the analogy-based approach.

The third chapter will begin by proposing a change in perspective on the kind of reasoning judges are engaged in when they reason by precedent. Instead of seeing them as arguers who develop arguments for their own decisions, I will propose to understand them as interlocutors, evaluating arguments by precedent. The judge, deciding whether a precedent case is similar, authoritative and binding with respect to her present case, approaches the combination of precedent opinion, present case and precedent decision as an argument similar to arguments by analogy. This argument presents precedent case and present case as similar and, on the basis of this similarity, proposes that they should be treated as legally the same and that therefore the present case needs to be decided in the same way as the precedent case. The judge who reasons about whether or not the precedent case is indeed binding, needs to fulfill the two tasks ordinarily expected of any interlocutor who considers an argument in order to decide whether or not she should accepts its conclusion: First, she needs to understand the argument under the employment of the principle of charity in order to gain access to any *reason* the argument can offer her for accepting the conclusion. Then she needs to evaluate the argument in order to determine whether this reason is strong enough to ultimately support its conclusion. The remainder of the third chapter is dedicated to the first of these two tasks: Understanding the argument from precedent under application of the principle of charity.

The argument from precedent claims that the precedent case should be followed based on the similarity between present case and precedent case. Therefore, the judge is only able to understand this argument if she manages to see the present case and the precedent case as similar – that is, if she understands the analogy between present and precedent case. According to the available research on analogical reasoning, analogies are not so much based on already recognized similarities between the two analogues, but rather initiate a process in which the person trying to understand the analogy re-structures

her understanding of one analogue so that it fits her understanding of the other analogue, thereby creating similarities between the analogues herself. I propose that judges, when they try to understand why the precedent case *could* be considered similar to (and possibly even binding on) the present case, go through such a process of analogical reasoning. Thereby they gain an understanding of their present case that presents it as similar to the precedent case in a way that is as plausible to the judge as possible because it is the outcome of their own reasoning process. Once they have this understanding, they are able to see *why* the argument from precedent provides a reason for deciding the present case by following the precedent case. Having understood how the argument by precedent can indeed give a reason for accepting its conclusion, the judge is now ready to move on to evaluating this argument.

The fourth chapter of this thesis will be dedicated to exploring how a judge can evaluate an argument by precedent in such a way that she will, at the end, be justified in her decision to either accept the argument and follow the precedent, or reject it. I will introduce and explain the role *argument schemes* and *critical questions* play in the evaluation of arguments that are not based on deductive inferences. An *argument scheme* models the structure of everyday arguments by presenting them in an abstract form. The scheme specifies the form of the premises and conclusion that are typically part of the type of argument it models.[39] *Critical questions* are those questions an interlocutor can ask in order to determine whether an argument of a certain type suffers from flaws that arguments of this type usually or often have. If all critical questions that are associated with an argument scheme can be answered with respect to an argument falling under this scheme, then an interlocutor can be considered justified in adopting the argument's conclusion.

I will suggest that a judge can come to a justified evaluation of an argument by precedent by considering a number of critical questions. I will suggest a number of critical questions that should be associated with the argument scheme for argument by precedent and justify my choice. I will also explain the consideration that should go along with each critical question.

In the conclusion, I will argue that the account of reasoning by precedent as I have provided it in the third and forth chapter is successful in presenting reasoning by precedent as an existing practice of justificatory reasoning. I will show that the account can encompass those aspects of reasoning by precedent that are widely considered important by those who are engaged in reasoning by precedent, like for example distinguishing, following etc. I will also show that my account can explain why judges who reason by precedent are both free enough to provide the common law with flexibility and restraint enough by precedent to make the common law relatively stable and predictable.

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[39] See Douglas Walton and Christopher Reed (2003), *Diagramming, Argumentation Schemes and Critical Questions*, p. 197.

2 Chapter 2. – Stability vs. Flexibility, A Search for Balance

In the introductory chapter I explained what a theory of the practice of reasoning by precedent, understood as a practice of justificatory reasoning, has to do in order to be a good theory of this practice. I claimed that in addition to including all the aspects of the practice that are widely recognized as being important, it also has to show how reasoning by precedent can provide a balance between freedom and constraint, flexibility and stability. It is not hard to see that this makes things difficult. Freedom and constraint are not what one would call complementary values. Indeed, it seems that the more freedom I have, the less constrained I am, and the more I am constrained, the less free. And if the freedom judges are provided with is responsible for the flexibility judges have and the constraint judges are under is responsible for the stability, then it seems that flexibility and stability, too, are not exactly in harmony with one another. It looks as if I will have to show that reasoning by precedent keeps a balance as fragile as that of a tight-rope-artist on a windy day.

Not surprisingly, one of the main concerns that theorists who deal with precedents have is that one of these two values might get lost because the other is endorsed too enthusiastically. In particular, the concern that precedents might fail to provide judges with enough constraint has been a driving factor in the recent debates about how reasoning by precedent works. The accounts developed so far can be situated on a scale, with two main factions on the more or less extreme ends. On one of these ends, we find rule-based accounts of precedent, on the other analogy- or similarity-based accounts. I will discuss them in turn, paying special attention to the way they deal with the requirement to keep the balance between flexibility and stability.

2.1 Rule-based accounts of precedent

Rule-based accounts make the claim that every decision regarding some present case either establishes a new rule or follows a rule that was created when an earlier case (the precedent case) was decided. Loosely following Frederick Schauer's definition of rules, a rule consists of a generalized, factual predicate (containing those categories the case or situation must fall under so that the rule applies) and a consequent (containing that which must be done, may be done or must be abstained from if the rule applies).[40] Rules are entrenched, i.e. they give reason for compliance in virtue of their existence, not only because of their background-justifications.[41]

According to rule-based accounts of precedent, precedents determine a set of generalized categories – the factual predicate – under which the factual aspects of other cases do or do not fall. The factual predicate is contained in the *ratio decidendi* of the precedent case. The decision made in the precedent case determines the consequent of the rule: If a new case falls under the *ratio decidendi* of the precedent case, then the decision made in the precedent case also determines the new case; the equivalent decision has to be made. Extreme rule-based accounts present reasoning by precedent as reasoning

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[40] Frederick Schauer (1991), *Playing By The Rules,* p.23ff.
[41] Frederick Schauer (1991), *Playing By The Rules*, p. 23 and p. 47.

through deductive syllogisms of the type *modus ponens* (A->B, A, Therefore: B).[42] The kind of rule that the precedent establishes has to function as the major premise in form of a conditional, the new case as the minor premise that either does or does not fit the antecedent of the major premise, and the decision follows deductively. The rules precedents establish according to rule-accounts are not principles or rules of thumb, they are conditionals from which certain outcomes follow.[43]

In rule-based accounts of precedent the past case plays a disproportionally bigger role than the present case when it comes to determining the decision to be made in the present case. After all, whether the decision of the past case will be repeated in the present case is determined by a rule contained in the *ratio* and the decision of the past case. The decision to be made in the present mostly (or entirely) depends on the past. Therefore, it seems that rule-based accounts of precedent will have little problem accounting for the virtue of stability: How much more could a judge possibly be constrained than if she has to decide her cases, through deductive reasoning, according to rules laid down when past cases were decided?[44]

2.1.1 Extreme Stability - Sherwin and Alexander's Rule-Based Account

Indeed, the most radical rule-based account, Alexander and Sherwin's account of reasoning by precedent as they present it in *Demystifying Legal Reasoning,* seems to be almost entirely motivated by a concern for stability. To some extent, Alexander and Sherwin adopt a method of forming their account similar to the one I have suggested in the introduction. They argue for their understanding of precedent by showing that according to their account, reasoning by precedent has the characteristics necessary to justify the use of reasoning by precedent for judicial decision-making. However, more than any other modern account, Alexander and Sherwin concentrate on precedent's ability to provide stability.[45] Flexibility, or the ability to develop the law in an incremental, evolutionary manner, does not factor into their considerations in any major form.[46] Their main concern is for precedents to determine the decisions made by later judges. And for Alexander and Sherwin, precedents do this by providing rules that can be used for deductive reasoning.

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[42] I could say that, according to these rule-based accounts, every precedent provides a rule fit to be used in MacCormick's so-called *legal syllogism*: Neil MacCormick (2005), *Rhetoric and The Rule Of Law*, Chapter 3

[43] Alexander and Sherwin, the authors of the first rule-based account I will be discussing, do indeed claim directly that legal reasoning is in reality merely a combination of deductive reasoning and – if a rule that can take the place of the major premise is not attainable – normal moral reasoning. (Larry Alexander and Emily Sherwin (2008), *Demystifying Legal Reasoning*, p. 64).

[44] Frederick Schauer, in his book *Playing By The Rules*, shows that the main advantage of rules is their ability to provide stability. (Frederick Schauer (1991), *Playing By The Rules*, p. 155ff).

[45] Alexander and Sherwin's main argument against other account of reasoning by precedent, as we will see shortly, is that under those forms precedents do not constrain the decisions of judges adequately, always leaving it open to them to decide the way they would prefer morally.

[46] Indeed, they do not seem to think that such a thing as flexibility is possible. After all, they reject both reasoning methods, reasoning by analogy and reasoning by legal principle, that are usually seen as the source of flexibility in the law. (see Larry Alexander and Emily Sherwin (2008), *Demystifying Legal Reasoning,* p. 67 ff and p. 88ff.).

Alexander and Sherwin claim that common-law judges make decisions either by applying rules laid down in a precedent decisions or, if such a rule is not available, through unconstrained natural and moral reasoning.[47] Rules found in precedents are treated as "serious rules." That means that they are to be applied and followed without any deliberation about their merits or background justifications.[48] Every decision a judge makes is either entirely unconstrained by the law, or entirely determined by it.

To clarify, imagine this variation of Frederick Schauer's famous scenario: you work at a restaurant and witness your boss kicking out a dog, under the directive that you shall do as he just did in the future. [49] Your boss has thereby set a precedent for you to follow (though not in the law). A few days later, someone enters the restaurant with a bird in a cage. You wonder what to do. According to Alexander and Sherwin, there are two possibilities. Either your boss has given you a description of the incident with the dog and his decision to kick the dog out that includes a rule you can apply to your current situation, telling you exactly whether you need to kick the bird out or not – or you have to reason about this situation all by yourself, the precedent your boss set being of no help to you.

Alexander and Sherwin are well aware that the identification of the rule laid down in a precedent (the *ratio decidendi)* can be hard because judges do not usually present readily formulated rules in their opinions. Therefore, they allow for the existence of rules provided implicitly in the text of judicial opinions. Identifying a rule through interpretation is acceptable, but only as long as it is possible to determine its content from the text without engaging in first order reasoning about the justification for its existence. In other words: the exact content of the rule has to be determinable only from the verbal cues the text gives.[50] The rule identified through interpretation has to be general enough to serve in a variety of cases, and it must be determinative, that is, it must be able to fulfill the role of a major premise in a deductive *modus ponens*. In addition, it must have been (at least indirectly) posited by the judge deciding the case. This means that the judge who sets the precedent must have intended to follow the rule when she decided the case. If no such rule is being provided in the opinion, the case cannot function as a precedent for a new case, and the judge has to decide the new case according to her own moral and political reasoning. Applied to the dog-case, your boss must have intended to follow a determinative, general rule such as: "If a dog enters the restaurant, then it shall be kicked out" or "If an animal enters the restaurant, then it shall be kicked out." In addition, the content of this rule must have been clear from what your boss told you – either because he directly formulated it, or because his wording made it so clear what rule he had in mind that you did not need to include any justificatory considerations in your interpreting of what he said. For example, he might have said "I kicked the dog out because it was a dog entering the restaurant. Do the same in future."

These strict conditions for the existence of a precedent rule are due to the importance Alexander and Sherwin place on the ability of precedents to constrain later

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[47] Larry Alexander and Emily Sherwin (2008), *Demystifying Legal Reasoning,* p.40.
[48] Larry Alexander and Emily Sherwin (2008), *Demystifying Legal Reasoning,* p.41.
[49] Frederick Schauer (1991), *Playing By The Rules*, e.g. p. 25.
[50] Larry Alexander and Emily Sherwin (2008), *Demystifying Legal Reasoning,* p. 52.

decisions. If a judge had to engage in first order moral reasoning to determine the content of a rule, or if the rule had not been intended by the judge who wrote the opinion in the earlier case, the present judge would effectively create the rule herself, and could therefore not be constrained by it.[51] For similar reasons, Alexander and Sherwin also reject the idea that precedents could guide judges' decisions through reasoning by analogy or principles.[52]

All this creates the impression that, according to Alexander and Sherwin, a precedent can only constrain a decision if it strictly determines it, leaving no room for the present judge to exert any influence. In keeping with this, Alexander and Sherwin reject the distinction between distinguishing and overruling as illusory. This is so because distinguishing, as it is usually understood, consists of a change of the rule. But to change the rule means to change the validity of at least some of the instances of *modus ponens* in which the rule could theoretically serve as a major premise. According to Alexander and Sherwin, if a present judge applies a rule even marginally different from the rule set down in a precedent, she has thereby created a new rule.

To illustrate, consider the following. "Dogs have to be thrown out of the restaurant" is a rule that delivers the following major premise for a deductive *modus ponens*: "For every x, if x is a dog in a restaurant, then x has to be thrown out of the restaurant." The result would be that, for anything that was classified as a dog, deductive reasoning gives the result that it has to be thrown out of the restaurant. If such a rule were to be distinguished, for example, by adding the exception "unless it is a seeing eye dog", the resulting major premise would now be "For every x, if x is a dog in a restaurant <u>and if x is not a seeing-eye dog</u>, then x has to be thrown out of the restaurant." This is a new premise, and so, Alexander and Sherwin suggest, a new rule. Now, replacing an old rule with a new one is the same as overruling. Therefore, every change of a rule amounts to an overruling of said rule. The amount of change in cases judges like to claim have been "distinguished" is simply smaller than if judges "overrule".[53]

This shows that while Alexander and Sherwin are careful to make their account of reasoning by precedent consistent with those normative characteristics of precedent they consider important, they do not put as much weight on integrating the surface phenomena

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[51] Larry Alexander and Emily Sherwin (2008), *Demystifying Legal Reasoning,* p.56.

[52] They worry that both analogies and legal principles cannot really constrain the decisions of judges because they are too malleable. Reasoning by analogy relies on the identification of important similarities. Given that similarities and differences can be identified between any two cases, judges are able to manipulate analogies into reasons for any decision they like, simply by selecting, as important, similarities or differences that serve their interests (Larry Alexander and Emily Sherwin (2008), *Demystifying Legal Reasoning*, p.70). Legal principles, on the other hand, are generalized normative statements that exist in a legal system if they are consistent with an unspecified majority of the decisions made in past cases. However, because legal principles do not dictate outcomes, but instead have a certain weight. (Ibid. p. 89) Because of this, and because they do not have to fit *all* past decisions (some can be ruled out as mistaken) (Ibid. p. 93) and can be re-formulated so as to contain exceptions (Ibid. p. 96), judges are again able to manipulate legal principles so that they favour any outcome they like.

[53] " […] the rule model does not and cannot distinguish between overruling precedent rules and modifying or "distinguishing" them." (Larry Alexander and Emily Sherwin (2008), *Demystifying Legal Reasoning,* p. 114).

of the actual practice of reasoning by precedent, or the way reasoners themselves understand what they are doing. They are well aware that their rejection of the difference between distinguishing and overruling and their claim that precedents either determine decisions completely or not at all does not fit well with the way judges behave and perceive their own practice.[54] However, their understanding of what it means for a precedent to be constraining and their concentration on the value of stability do not allow them to take these behaviours and beliefs at face value. Instead, they re-interpret them as behaviours that – luckily, but without the judges intending to do so – ameliorate a problem they recognize to be a consequence of their understanding of reasoning by precedent: Judges might make bad rules.

Alexander and Sherwin's account of reasoning by precedent does not create any inherent restrictions on the ability of judges to create serious rules. A judge could, when dealing with a case, announce a rule as broad or narrow as she pleases. In other words, the rule model of precedent succeeds in constraining the judge who *applies* a precedent almost entirely (leaving only the option to overrule). But because Alexander and Sherwin do not allow for distinguishing, a judge who decides a precedent by creating a new rule has thereby determined all cases that fall under this rule, however broad it may be. This leaves judges who believe that an exception would be appropriate only the choice to overrule and create an entirely new rule. Therefore Alexander and Sherwin's account puts a lot of unconstrained influence into the hands of the judge *creating* the precedent-rule.

Unsurprisingly, Alexander and Sherwin are worried that judges might not be in the best position to be rule-makers and that they might tend to make "bad" rules.[55] There are two ways in which Alexander and Sherwin react to this problem. On the one hand, they add that a judge deciding a present case should only consider a precedent-rule binding if this rule has been accepted by other judges over time. This way, they believe, several minds have considered the goodness of the rule before it becomes binding. It is the last judge who applied the rule before it became authoritative who counts as the rule's author and whose intentions determine the rule's meaning.[56] On the other hand, they claim that the practice of judges to "reason by analogy" and to "distinguish rather than overrule" as well as their practice of creating rules only ever broad enough to cover the case at hand are restrictions that mitigate the possibly bad consequences of rule-making by judges.[57] Alexander and Sherwin do not believe that analogies can actually provide any guidance when it comes to deciding cases, and, as we have seen, they believe that any case of "distinguishing" is actually a case of overruling. However, if judges believe that

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[54] Larry Alexander and Emily Sherwin (2008), *Demystifying Legal Reasoning,* p. 106.

[55] Larry Alexander and Emily Sherwin (2008), *Demystifying Legal Reasoning,* p. 108 ff.

[56] "The authority of the original judge is incomplete because that judge alone cannot establish a binding precedent rule: the endorsement of subsequent judges is necessary to place the rule in force. This suggests that the subsequent judges who accept a precedent rule are its authors. The meaning intended by subsequent judges cannot be the meaning of the rule because that meaning has not yet been accepted over time. Nor, for that matter, can the original judge's intended meaning be the meaning of the rule, because that meaning has not met the test of acceptance. It appears, therefore, that no effective precedent rule exists until a further round of acceptance occurs, with all endorsers concurring in the meaning of the rule as posited by some prior judge." (Larry Alexander and Emily Sherwin (2008), *Demystifying Legal Reasoning*, p.58).

[57] Larry Alexander and Emily Sherwin (2008), *Demystifying Legal Reasoning,* p.51.

they should let themselves be guided by analogous cases when they decide cases anew, they will read many other cases in the relevant area of law. Thereby they will reduce the influence of cognitive biases, as for example the bias inherent in giving disproportionate importance to events just experienced.[58] And if judges "distinguish" rather than overrule and construct narrow rules, they will change the law as it exists only a little rather than a lot, and thereby avoid influencing too many decisions negatively.

I have spent a lot of space discussing Alexander and Sherwin's account of reasoning by precedent because it represents an extreme. Indeed, it is questionable whether it is still justified to give the form of reasoning they describe its own name. There is virtually no difference between this version of reasoning by precedent and normal deductive reasoning that uses rules as major premises, especially because it eliminates even the possibility of distinguishing. Alexander and Sherwin's account of reasoning by precedent therefore marks the place where reasoning by precedent collapses into deductive reasoning from rules. Fittingly, they claim that they are "demystifying" legal reasoning by breaking it down into either unrestricted natural and moral reasoning or the deductive application of rules.[59]

Still, in order to justify their account of precedent, Alexander and Sherwin face a heavy burden. They must somehow persuade us that their account is correct, despite the fact that it implies that judges' beliefs about what they are doing when they reason by precedent are actually wrong. Their account renders many activities regularly performed in the context of reasoning by precedent either senseless or acceptable for reasons entirely different from those the judges themselves embrace. Alexander and Sherwin explain the differences between their account and the self-perception of those who reason by precedent by claiming that these people deceive themselves. They might believe they are distinguishing, and that distinguishing is an activity qualitatively different from overruling, but really they are overruling modestly, replacing one rule with another while trying to keep the two rules as similar as possible. That is, of course, a possibility. But given that other accounts exist that successfully integrate more of what judges do, and believe they are doing, when they reason from precedent, Alexander and Sherwin must somehow justify why their account should be preferred to these alternatives.

Such a justification could be achieved in two different ways. Either, Alexander and Sherwin can claim that their account is normatively so much more attractive than other accounts that the apparent descriptive disadvantages can be discounted. Or they have to be right in their assumption that there cannot be any functioning account of reasoning by precedent that includes the activity of distinguishing.

At first sight, the normative advantages of Alexander and Sherwin's account weigh heavy. If precedents do indeed provide rules fit for deductive reasoning, then judges who apply precedents are fully constrained, which makes their decisions both consistent and predictable. However, as a result it becomes questionable how the choice to establish a common-law legal system rather than a civil-law system can be justified. Why should law-making power be given over to the judges, if democratically legitimate

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[58] Larry Alexander and Emily Sherwin (2008), *Demystifying Legal Reasoning,* p. 125.
[59] Larry Alexander and Emily Sherwin (2008), *Demystifying Legal Reasoning*, p. 64.

legislators could just as easily make all the laws that need creating, like they do in civil-law countries?[60] After all, whether a rule is made by a judge or a legislator in itself makes no difference as to how restrictive it will be.

One common argument for utilizing reasoning by precedent in order to make law rests on the practice of distinguishing:[61] Legislators have to make rather abstract or general laws far removed from the actual situations that these laws will eventually govern. But life is unpredictable, and it is almost impossible to foresee all the situations that might warrant exceptions or need to be treated differently. By contrast, the law that comes into existence through reasoning by precedent is developed slowly through the accumulation of many decisions. What any one decision implies for other decisions is revised constantly through the practice of distinguishing by the minds of many different individual judges, and in response to a vast array of different cases and situations. These judges make use of the flexibility reasoning by precedent affords them. The resulting law is the outcome of a group effort and an answer to the many ways a situation can play out. Such law is therefore more likely to govern situations well and less likely to produce bad results. This explains why it might sometimes be justified not to place the power to make law in the hands of legislators. Of course, this argument works only if judge-made-law is law made by *many* judges, not if it is law made by one judge. If every single judge, through one single decision, can bring a legal rule into existence, there is not much reason to assume that this rule will be thought out better law than if a legislator had done the same.[62]

This argument rests on the assumption that reasoning by precedent provides judges with flexibility through the possibility of distinguishing. But by over-emphasising the value of stability, Alexander and Sherwin have given up on the value of flexibility. This leaves them without any means of explaining why developing law through precedent, rather than letting the legislature do all the work, might be an acceptable practice. Therefore it seems that their rule based account is not as normatively attractive as it might seem on first sight after all.

Nevertheless, perhaps Alexander and Sherwin's account should be accepted after all because it is simply the only one that can present reasoning by precedent as in any way restrictive on judges. Alexander and Sherwin claim that any account, other than a strict rule-based account that rules out distinguishing, will allow judges to decide cases however they want, using "reasoning by precedent" as a façade behind which they can hide their actual behaviour and motivations. They believe that the flexibility the practice of distinguishing provides is in reality complete freedom. This is so because, while it is

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[60] I do not mean to claim that the decisions judges make in civil law countries have no influence on the later decisions of other judges. That would be patently false. But in civil law countries, precedents do not have the status of being binding, but are always only persuasive. Therefore, in civil law countries, precedents cannot establish rules of the kind Alexander and Sherwin are advocating, so-called "serious" rules.

[61] We have already seen this argument, as it is used by Waluchow, in the introduction. (Wil Waluchow (2005), "Constitutions as Living Trees: An Idiot Defends", p. 577).

[62] Even if we take Alexander and Sherwin's inclusion of analogy and distinguishing as mitigating factors into account, this does not change. For there is no reason to assume that the single legislator will not concern themselves with studying some of the situations her future law might apply to.

expected of judges that they will overrule only in extreme cases, distinguishing is just as available an option as following the precedent. If Alexander and Sherwin are correct, and distinguishing amounts to the complete replacement of a rule with another just like overruling does, then "distinguishing" simply allows judges to replace rules whenever they want in order to reach the decisions they favour. So even though their account looks descriptively unattractive and normatively unappealing, Alexander and Sherwin would argue, it is really the only account that can present reasoning by precedent as anything else but a rhetorical move used to cover up completely unrestrained decision-making. This argument cannot be answered without an account that shows reasoning by precedent as capable of being both flexible *and* restrictive, and that can account for the practice of distinguishing. It is to the development of such an account that I will turn in chapters three and four. If my attempt proves successful, Alexander and Sherwin's argument from the impossibility of such an account will have been refuted automatically.

2.1.2 Can Rules be Distinguished? Attempting to Include Distinguishing into Rule-Based Accounts

As we have seen, a significant descriptive shortcoming of Alexander and Sherwin's account is their inability to integrate the practice of distinguishing into their understanding of reasoning by precedent. According to the common understanding of this practice, distinguishing is importantly different from overruling. Distinguishing is part of the normal process of using the law as it has been established through precedents to come to decisions in new, significantly different cases. Overruling, on the other hand, means breaking with the law where it stands and beginning anew somewhere else. Adding the seeing-eye-dog-exception to your bosses rule amounts to distinguishing the precedent he set. But replacing the rule with one that allowed all dogs in the restaurant would be to overrule it. That the extreme rule-account of Alexander and Sherwin rejects this difference and declares that all distinguishing is really overruling is a reason to look for a different account, one that can integrate distinguishing.

On the other hand, rule based accounts of reasoning by precedent are very attractive, especially ones that present rules as fulfilling the role of the major premise in a deductive *modus ponens* argument. Not only is it the case, as has been mentioned several times before, that accounts like these seem to have little problem accounting for the constraint on their reasoning precedents are supposed to provide judges. In addition, it is very easy to understand how reasoning by deductive *modus ponens* functions. The idea of a rule-based account of precedent is therefore doubly attractive: it promises a theory that can account for the ability of precedents to constrain decisions *and* it is relatively simple. So perhaps we would do well to explore whether it is possible simply to *integrate* a theory of distinguishing into Alexander and Sherwin's account, leaving the rest of their theory more or less intact. Can we not preserve the strengths of their account, and, at the same time, achieve the flexibility that is missing from it by adding the practice of distinguishing? That seems to be a sure road to an account of precedent that will fulfill all the requirements laid out in the first chapter.

How could something like this be accomplished? A distinction would have to be made between distinguishing and overruling that allows integrating distinguishing into

the normal application of the law while overruling retains its status as an exceptional break with the law. Such a distinction could, for example, follow Raz'ss description of distinguishing, taking it out of the context of Raz'ss very different account of precedent and transplanting it into a rule-account similar to Alexander and Sherwin's.[63] Following Raz'ss distinction between overruling and distinguishing, such a rule-account would describe overruling as a replacement of the entire rule with a new one. Distinguishing, on the other hand, would allow for changing the antecedent part of the conditional the rule provides, but only by adding further conditions. If, for example, a judge wanted to distinguish a rule (A + B + C -> X) that was established by a precedent, she would be allowed to add any condition (D) to the antecedent of the rule (A + B + C +D ->X), but she would not be allowed, for example, to take one of the conditions (A, B, C) out of the antecedent.[64] In other words, while overruling could replace the entire rule with a new one, a rule account of reasoning by precedent that included distinguishing would allow for establishing new conditions for the application of the rule to it at the moment of its application.[65] Such an account would be able to justify that distinguishing, unlike overruling, could be accepted as a regular way in which judges deal with the law. Distinguishing would appear as an act of amending a rule, while overruling would involve doing away with it completely.

However, as it turns out, Alexander and Sherwin did not simply make a bad decision when they excluded the distinction between overruling and distinguishing from their account.[66] As an argument by Grant Lamond shows, any rule-based account that allows for distinguishing as an equally valid alternative to following a precedent cannot maintain its central claim: That precedents provide reasoners with rules fit to be used in a deductive *modus ponens* argument.

2.1.2 The Problem of Distinguishing
The incorporation of the practice of distinguishing into the kind of rule-based account of precedent as it is suggested by Sherwin and Alexander leads to an incoherence that makes it hard to explain why one should hold onto the idea that precedents establish rules.

Following Schauer's influential account of the usefulness of rules, rules are supposed to guide decision-makers without them having to ponder the possible underlying justifications and reasons for deciding one or the other way. Instead, all decision-makers have to do is decide whether the rule applies – that is, whether the situation fulfills the conditions laid out in the factual predicate of the rule. If it does, then that which is specified in the consequent of the rule has to be done. [67] Alexander and Sherwin's rule-account of precedent promises to offer exactly this advantage to judges

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[63] For Raz'ss account of distinguishing, see Joseph Raz (1979), *The Authority of Law*, Chapter 10. Raz account of reasoning by precedent as it is presented there is rather short and seems to me to be very similar to what Grant Lamond suggests in (Grant Lamond (2005), "Do Precedents Create Rules?").

[64] This follows loosely Raz'ss suggestions in (Joseph Raz (1979), *The Authority of Law,* p. 186).

[65] Raz adds the condition that the added exception has to create a set of conditions which still *justify* the precedent decision and not merely *allow* for it. (Raz (1979), *The Authority of Law*, p. 186/187).

[66] Indeed, they are cited as having admitted a necessary consequence of any rule-based account (Adam Rigoni (2014), "Common-Law Judicial Reasoning and Analogy", p. 138).

[67] Schauer (1991), *Playing By The Rules*, p. 145ff.

who apply precedent. On their account, we do not need to consider the moral or political reason for deciding a case one or the other way – instead we can simply see whether the rule established in the precedent applies.

In contrast with other, stricter rule-theorists, Schauer does allow for exceptions to rules, even for decision-makers to sometimes consider underlying reasons in spite of the rules, if these underlying reasons are especially easily accessible to the decision maker, and unusually weighty.[68] However, that decision-makers might break or revise rules if they are confronted with especially conspicuous and weighty underlying reasons fits better with the practice of overruling than with that of distinguishing. As Grant Lamond points out, when courts reason by precedent they do not seem to reserve the possibility of distinguishing only for exceptionally weighty reasons.[69] There is no serious presumption against distinguishing. Rather, the practice seems to suggest that courts behave as if it is their duty to *either* follow *or* distinguish precedents, not as if it is their duty to follow precedent unless they have especially important reasons to distinguish.[70]

Based on this observation, Lamond formulates an argument against the claim that precedents might create rules in Sherwin and Alexander's sense. Rules provide a set of conditions that, if fulfilled, provide sufficient reason to adhere to the rule's consequent. If there are circumstances that allow for non-application of the rule, i.e., that allow for exceptions, then these are usually enumerated in the rule.[71] All circumstances that might give rise to reasons against following the rule, but that are not clearly listed, are usually to be disregarded.[72] If your boss gives you a rule about dogs in restaurants, he will say: "If there is a dog in the restaurant, kick it out, unless it is a seeing eye dog." Nothing that is not on the list counts against adhering to the rule – under normal circumstances you may not allow the dog to stay because it is, for example, especially well-behaved. Lamond agrees that, like rules, precedents provide a list of conditions that, if fulfilled, give reason to adhere to a consequent; to repeat the decision made in the precedent case.[73] But in another, very important respect precedents are not like rules. Rather, they work exactly the other way round. Precedents do not provide a short list of exceptions. They do not specify when it is acceptable to decide differently than the past decision, even though the conditions that provide reasons for repeating the decision apply. Instead, their opinions contain something else in addition to the reasons that speak for the decision – factors that might be turned into reasons speaking against the decision, but that were, in the precedent case, not sufficient. In other words, they provide a limited list of possible grounds for making exceptions and mark them as ruled out.[74] If your boss sets a precedent instead of giving you a rule, he might say "If there is a dog in the restaurant, kick it out, unless there is a good reason not to. I know you though: cuteness does not count as a good reason!"

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[68] Schauer (1991), *Playing By The Rules,*p. 89f. Schauer cites Raz here.

[69] Grant Lamond (2005), "Do Precedents Create Rules?", p. 9.

[70] Grant Lamond (2005), "Do Precedents Create Rules?", p.3.

[71] Grant Lamond (2005), "Do Precedents Create Rules?",p.7/8.

[72] Lamond recognizes that new exceptions are sometimes added to rules, but points out that there are presumptions against doing so. (See Grant Lamond (2005), "Do Precedents Create Rules?", p. 11).

[73] Grant Lamond (2005), "Do Precedents Create Rules?",p.15/16.

[74] Grant Lamond (2005), "Do Precedents Create Rules?",p. 16 ff.

The difference could not be more important. Rules provide a list of exceptions, and there is (usually a strong) presumption against adding any new exceptions. Precedents, on the other hand, provide a list of non-exceptions, and everything not mentioned can be grounds for exceptions. Lamond takes care to emphasize that for this reason, precedents do not provide conditions under which a certain decision must be made. Rather, they provide conditions under which a certain decision must be made *within a certain context*.[75] This context is that no grounds for exception apply except for those explicitly ruled out by the precedent. If you cannot come up with a good reason why the dog might be allowed to stay, you have to kick it out.

The result of this argument is devastating for supporters of rule-accounts that want to use rules as major premises in deductive reasoning. If they deny that distinguishing is a legitimate and important aspect of reasoning by precedent, their accounts become descriptively extremely unattractive. But if they include distinguishing, their rule-accounts collapse. If rules are open such that exceptions can be added at the moment of their application, then they cannot support the straight forward deductive reasoning that relieves judges from considering anything more than whether the present case fulfills the conditions explicated in the rules' antecedent part. The attempt to integrate distinguishing into a rule-account à la Alexander and Sherwin fails because it is impossible to preserve the main advantage of this account: the possibility of explaining reasoning by precedent as deductive reasoning employing *modus ponens.*

Having so effectively criticised this kind of rule-account of precedent, Lamond bases his own account directly on the grounds of his criticism. To Lamond, precedents provide a certain kind of reason.[76] The *ratio* of a precedent provides the facts that, if they are encountered again in the same context, provide a sufficient reason to repeat the decision made in the precedent case.[77] The rest of the opinion provides information about those facts that together form the context of the case. They cannot be cited as reasons for distinguishing because they had been considered and were not sufficient for a different decision in the precedent case.[78] However, if the context of a present case is different from that of a precedent case, even if all the conditions cited in the ratio are fulfilled, then the judge can distinguish. She merely has to cite at least one factor not excluded from consideration by the precedent's opinion. This factor serves as the reason for deciding differently.[79]

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[75] Grant Lamond (2005) , "Do Precedents Create Rules?", p. 18.

[76] Grant Lamond (2005), "Do Precedents Create Rules?", p. 4.

[77] Grant Lamond (2005), "Do Precedents Create Rules?", p. 15.

[78] Grant Lamond (2005), "Do Precedents Create Rules?", p.16.

[79] Grant Lamond (2005), "Do Precedents Create Rules?, p.19. Lamond claims that his account is a reason-based account of reasoning by precedent, not a rule-based account. However, his account of precedent could reasonably be believed to be extremely close to what Joseph Raz might have had in mind with his very short account of reasoning by precedent in *The Authority of Law*. Raz does not claim that all kinds of rules exclude the consideration of *all* justificatory reasons outside the rules. Some rules only exclude certain reasons, or certain kinds of reasons. Accordingly, Alexander and Sherwin would have advocated a kind of rule-account with maximally exclusionary rules, and Lamond (and possibly Raz) a rule-account with partially exclusionary rules. However, elaborating on this thought would take us too far afield and would

2.1.3 The Factual Predicate and Levels of Generalization

Lamond's account is able to escape the difficulty of explaining how distinguishing can be integrated into an account of precedent without giving up all connections between precedents and rules. And even though Lamond calls his account of reasoning by precedent a reason-based account, it can be counted among the accounts that link reasoning by precedent with reasoning by rules. Lamond's account amounts to the idea that precedents are like rules in that they provide a factual predicate. The difference is that while rules recognize only a very limited number of exceptions (sometimes none at all), precedents provide only a limited number of reasons that *cannot* warrant an exception. Reasoning by precedent is still understood according to the model of reasoning with rules: the precedent delivers a set of conditions under which other cases may fall. The application of a precedent involves deciding whether a present case does indeed fulfill these conditions. Lamond just adds a second step. Alexander and Sherwin, of course, claim that a judge decides whether a precedent falls under the conditions specified in the factual predicate, and that is it. By contrast, Lamond claims that after this has been decided, the judge has to take the further step of finding out whether there are grounds for an exception to be found in the present case. While Lamond rejects the idea that precedent-generated rules settle all cases that fall under their factual predicate, he seems to keep the idea that precedents do *provide* such a factual predicate for the application of the precedent.

However, long before Lamond formulated his criticism of rule-based accounts, another equally forceful criticism had been provided. Often, the opinions found in precedents do not provide readily generalized categories that can serve as factual predicates. They do not sort the facts they cite as reasons for the decisions into neat boxes, making clear which type they are a token of. Similarly, your boss might have described the incident with the dog to you as follows: "There was this Miniature Schnauzer brought into the restaurant, barking and sniffing and leaving fur everywhere as these creatures do, so I kicked him out. Do the same thing in the future." Here, it is not entirely clear what kinds of things will fall under the rule: Miniature Schnauzers? Dogs? All things that bark? Make loud noises? What the factual predicate of any rule your boss might have provided you with is, is not at all clear. All supporters of rule and rule-like accounts will be vulnerable to this criticism because he depends on the availability of readily available factual categories in the *ratio* as well as in the rest of the opinion.

Even Alexander and Sherwin, in the midst of formulating their radical rule-based account of precedent, admit that not every opinion provides its *ratio* as a neatly formulated rule. For this reason, they allow for the *ratio* to be determined through interpretation.[80] But determining the *ratio decidendi* of a case can be hard for several reasons. As I have already mentioned in the introduction, the *ratio* might not be clear because the opinion contains several lines of reasoning justifying the decision, making it unclear which line is the conclusive one, and therefore what should be included in the one

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not further the arguments presented here to a degree sufficient to justify such an excursion. (Raz (1979), *The Authority of Law,* Chapter 10).

[80] Larry Alexander and Emily Sherwin (2008), *Demystifying Legal Reasoning,* p.52.

ratio of the case. Is it the barkiness of the dog that your boss took as the reason to kick it out? It's leaving fur everywhere? Or were those just exclamations, and the fact that it was a dog alone was enough to motivate your bosses decision? Or the case might have been decided not by one, but by several judges who were in agreement about the decision, but not about the reasons for the decision – maybe your boss wanted to kick the dog out because of its barkiness, and his wife agreed because the dog's fur might cause allergic reactions in guests.[81] All this can cause problems. Most important, however, is that the reasons documented in the opinion might not be clear in respect to the level of generality at which they are supposed to apply in order to justify the decision. That your boss used the terms "Miniature Schnauzer" and "creature" leaves it unclear what group of objects are to be kicked out: Miniature Schnauzers, dogs, pets, animals, noise-makers? It might not be possible to determine from the text of an opinion alone what the conditions are that make up the factual predicate. The opinion might mention certain aspects of the case that were part of the basis of the decision without specifying which category these aspects belong to for the purpose of the decision. Julius Stone gave the possibly most famous formulation of the problem:[82]

> "What is more, each of these "facts" is usually itself capable of being stated at various levels of generality, all of which embrace "the fact" in question in the precedent decision, but each of which may yield a different result in the different fact-situation of a later case."[83]

The problem that opinions might, but do not necessarily, provide the facts that were taken to be the reasons for the decisions, on the levels of generality or as members of the categories in which they served as such reasons, decreases the plausibility of the idea that every single precedent might provide a rule or factual predicate. Through their factual predicates, rules are supposed to provide a set of generalized categories. Reasoning by rules works by determining whether a situation or case falls under those categories, and, if it does, by concluding that therefore the rule applies and the consequent of the rule needs to be carried out. But if the factual predicate cannot be discerned from the text of the opinion, then it might become necessary to take further considerations into account in order to come to a factual predicate. You might have to think about what would be a good *justification* for kicking the dog out, and use that justification to decide about the bird in the cage. But what a good justification is to you might not be a good justification to your boss. If you do this, you are letting your own normative commitments decide what the precedent meant, the consequence being that it is you who decides about the bird according to your own ideas about what should and should not be allowed in a restaurant. In short, the precedent can no longer determine, the decision you should make. Not only do precedents allow for distinguishing, causing all kinds of further considerations to weigh in on the decisions for later cases. They also often fail to provide

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[81] Neil Duxbury (2008), *The Nature and Authority of Precedent*, 67ff.
[82] Cited in H.K. Luecke (1989), "Ratio Decidendi: Adjudicative Rational and Source of Law", p 8. , and in Neil Duxbury (2008), *The Nature and Authority of Precedent,* p. 86.
[83] Julius Stone (1959), "The Ratio of the Ratio Decidendi", p. 608.

the generalized categories that make up a factual predicate, allowing further considerations to weigh in here, too.

2.2.3 Stability

Of course, it would be possible to react to the problem that opinions do not always provide factual predicates by simply accepting the risks described above and amending the rule-account once more. In addition to allowing for distinguishing, a rule-account might also stray from Sherwin and Alexander's specification that the factual predicate of the rule provided by a precedent must be identifiable from the text alone, without recourse to any moral or political reasoning. Such an account would allow judges to use a broad range of justificatory reasoning in order to interpret the content of the opinion and arrive at a formulation of its *ratio* and the factual predicate provided by it. However, two considerations make it doubtful that such an account could actually be successful. First, it is doubtful whether it would still be justified to say that a precedent *provides* a rule if it only contains the description of specific facts and the present judge herself determines how these facts are to be generalized. It seems that in this case, it would be more appropriate to say that the present judge determines a rule under the restriction that the rule has to fit the facts of the precedent case. But even if this could still count as a real rule-account of precedent, such an account of reasoning by precedent would run into serious problems accounting for the constraint precedents are supposed to provide. Once again, it is the judge in the instant case who ends up deciding on her own grounds whether or not to follow the precedent.

So far, I have pointed out two problems that made it necessary to adjust the rule-account provided by Alexander and Sherwin: the existence of distinguishing as an accepted alternative to following a precedent, and the fact that opinions do not provide factual predicates in the form of explicitly formulated generalized categories. With these factors taken into account, it becomes apparent that rule accounts of precedent have a hard time showing that reasoning by precedent has the virtue of stability in the stability/flexibility balance. The reason why rule-accounts appeared to be especially well equipped to account for the virtue of stability is because rules usually take away a lot of the reasoning-responsibility from those who use rules in order to make decisions. In fact, one of the most convincing arguments for the usefulness of rules is that rules render decision-making efficient. Reasoners who use rules to make decisions do not have to weigh every possible reason for or against the decision any more. They decide to follow the rule, they consider whether the factual predicate applies and they are done, free to move on to more important things.[84] But taking away responsibility also means taking away freedom. For every reason a reasoner does not have to weigh and evaluate, a little bit of influence that the reasoner otherwise has is given up. If I follow a rule instead of reasoning my own way to a decision, then a lot of the ways in which I would evaluate particular reasons for or against the decisions simply do not factor in any more. Spider-Man was told that "With Great Power Comes Great Responsibility". The opposite is true too: responsibility brings with it the power to influence.

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[84] See, e.g. Frederick Schauer (1991), *Playing By The Rules*, p. 145 ff.

When judges are free to distinguish cases, when they are in a position in which they have to decide the level of generality at which the facts of the precedent case justify the decision, then a lot of the reasoning-responsibility that rules are supposed to take away rests on their shoulders again. This already happened to some extend when, following Lamond, we amended the rule-account to integrate distinguishing. The judge now decides whether some difference between cases (and one can always find some difference between two cases) warrants an additional exception to the precedent rule, based on her own justificatory reasoning. Adding the judge's own justificatory reasoning to the process with which the content of the factual predicate of the precedent-rule is determined gives the judge even more influence.[85] The judge now has to decide at which level of generality the facts of the case justify the decision, that is, what the factual predicate of the rule that the precedent supposedly provides looks like.[86] Suddenly, the precedent, which was supposed to provide the judge with strong, indeed conclusive, legal reason to decide one way rather than the other, seems to offer loose guidance at best. And judges, only having to take into account relatively weak legal reasons provided by the precedent, are free to factor in all kinds of other reasons when they determine which rule they want to attribute to the precedent, and whether or not they want to follow this rule in their decision. It seems that under these circumstances, legal reasons play a relatively minor role in the decisions, possibly smaller than other reasons.

This is, of course, one of the central claims of legal realism: that judges decide less on the basis of legal reasons and more on the basis of their own ideas of what would be fair or just in a specific case.[87] Legal Realists do not make this claim based on the assumptions that judges are incompetent or corrupt, or that they do not honestly attempt to use legal reasons in their decision making.[88] Rather, the argument is that legal reasons are simply not enough to determine the outcome of cases, that the law is indeterminate in two senses. First, in a considerable percentage of cases, the available legal reasons are not

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[85] Consider again our "throwing the dog out of the restaurant" example. Imagine you work at a restaurant, and you watch your boss throw a miniature Schnauzer out of the restaurant. After, the boss turns around and tells you to do as he did in the future, no matter how heartbreaking it is. According to Alexander and Sherwin, the boss, in order to have given you any guidance at all, has to have given you a rule of the form "All dogs shall be thrown out of the restaurant." This leaves you with very little to decide. According to Lamond, the boss has given you guidance in the form of a factual predicate, a consequence that follows tentatively from it, and a possible ground for exception that is excluded: "Anything that is a dog shall be thrown out of the restaurant, given there is no good reason to allow it to stay, but do not allow it to stay because throwing it out is heartbreaking." This leaves you with the decision what a good reason to let the dog stay might be – except when it comes to heartbreaking-ness. According to this account, the boss has given you only a pointer towards a possible factual predicate, a consequence that follows tentatively from it, and a pointer towards a possible ground for exception. This leaves you with the decision about what the factual predicate indeed is (Is it dogs the boss was after? Smelly animals? Miniature Schnauzers? Anything that disturbs the peace and quiet?), what a good reason to let something stay in the restaurant is, *and* what the excluded exception actually is (what constitutes heart-breakingness?).

[86] And, in addition, quit possibly at what level of generality possible grounds for exception have been excluded.

[87] For a description of the main commitments of American Legal Realism see, e.g. Brian Leiter (2005), "American Legal Realism".

[88] Brian Leiter (2005), "American Legal Realism", p. 51.

sufficient to justify a certain decision; and second, the rules provided by the law cannot be used to explain what judges actually do decide.[89] This is so not because there are no legal reasons present, but because there are too many available. According to legal realists like Karl Llewellyn, for example, the guidelines for interpreting precedents that have been established over time usually offer conflicting, but equally legitimate ways to come to an interpretation, leaving the judge with little to no guidance as to how they should understand the *ratio* supposedly established by a precedent.[90] And if the legal reasons provided by the precedent do not direct judges to a certain outcome, other reasons must fill the gap and determine the decision. It is then the moral, legal or prudential reasons judges consider weighty that will determine their decision, not the legal reasons given by the precedent. Adjusting the rule-account so that judges may determine the ratio of a vague opinion by way of interpretation therefore means that they decide what the ratio is based on their own moral and political ideas – or, what would be even more worrying, based in their implicit biases or moods. (Of course, how much of the judges own reasoning will weigh in on their interpretation depends on how much the opinion specifies.)[91]

In the end, then, it is questionable whether rule-based accounts can actually provide enough insight into reasoning by precedent to explain the constraint with which precedents are supposed to provide judges. In order to make rule-based accounts descriptively attractive it is necessary to adapt them so that they include the practice of distinguishing and allow for the present judge to considerably influence the content of the rule "provided" by the precedent. But this leaves them unable to show how judges are significantly constrained when it comes to deciding their present cases. Rule-based accounts of reasoning by precedent therefore leave us wanting. Either, they cannot give us a descriptive account of reasoning by precedent that fits legal practice and judges' beliefs about that practice, or they cannot show why reasoning by precedent possesses those characteristics that are generally taken to make it an attractive method of lawmaking: the balance between flexibility and constraint.

However, it is not self-evident that, if reasoning by precedent cannot be satisfyingly explained as a form of reasoning with rules, the only other option is that judges have to fall back on their own moral, political and prudential reasoning. Forms of reasoning other than rule-based reasoning exist, and precedents might yet be able to constrain the decisions of judges in other ways than through rules. Similarity-based accounts of precedents are attempts at describing reasoning by precedent without the assumption that precedents establish pre-given factual categories or rules.

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[89] Brian Leiter (2005), "American Legal Realism", p. 51.

[90] See, e.g. a list of conflicting principles usable for the legal justification for interpretations of cases provided by Llewellyn: Karl Llewellyn (1950), "Remarks in the Theory of Appellate Decision and the Rules or Canons about how Statutes are to be Construed", p. 401.

[91] American Legal Realism, according to Brian Leiter, was a movement mainly directed against the then dominant school of legal formalism, the idea that judges could decide most cases almost mechanically on the basis of legal rules (provided both by statutes and by precedents). (Brian Leiter (2005), "American Legal Realism", p. 50) It is therefore no surprise that the arguments that point out difficulties of rule-based accounts of reasoning by precedent are close relatives to the thoughts central to legal realism.

2.3 Similarity-Based Accounts of Precedent

Similarity-based accounts of precedent consider reasoning by precedent to be based on the recognition of relevant or important similarities or differences between precedent cases and the present case. Often, but not always, they liken reasoning by precedent to reasoning by analogy, either considering reasoning by precedent to be merely a form of reasoning by analogy or to be very similar to it. It is rather easy to see why this is so tempting. The way argument by analogy is described in textbooks on argumentation theory sounds so similar to commonplace descriptions of precedent that the idea they could be the same almost jumps out.

Textbook-descriptions of arguments by analogy explain that such arguments point out important similarities between two things and then infer a further similarity. Normative arguments by analogy point to similarities that are purported to be morally or legally important. They present these similarities as reasons for treating two things in the same way.[92] According to the doctrine of precedent, judges are obliged to treat a case in the same way as another case that was decided earlier if the two cases are importantly similar. Similarities between two cases justify similar treatment of these cases – that sounds very much like a normative argument from analogy. However, not all similarity-based accounts of reasoning by precedent describe it as similar to arguments by analogy. Other accounts attempt to combine similarity-based reasoning with the use of rules, or they understand precedent cases as examples that can be followed in later decision-making.

Similarity-accounts of reasoning by precedent can be distinguished from rule-based accounts through the roles they give to the precedent case and the present case in reasoning by precedent. Rule-accounts typically involve the claim that the content of the law is determined by the judge with reference only to the precedent case – by identifying the rule that is provided by it. The judge then goes on to see whether the present case fits the law as determined by the precedent case. Similarity accounts of precedent handle the roles the two cases play in reasoning by precedent differently. Whether there are important similarities or differences does not depend only on the precedent case, but, to an equal degree, on the present case. The judge therefore includes both cases throughout her whole reasoning process instead of concentrating on the precedent case first. As such, similarity-accounts do not have much difficulty accounting for the virtue of flexibility in the stability-flexibility balance – the role the present case plays in reasoning by precedent automatically imports new factors into the process with which the law develops. After all, it is the judge's task to determine whether a new factor coming from the present case, and a factor that is part of the precedent case, are together a similarity. But the challenge similarity-accounts face is to show that judges are actually constrained by precedent.

2.3.1 Combining Similarities and Rules – Frederick Schauer's Similarity-Based Account

The first similarity-account I will discuss here is Frederick Schauer's account of reasoning by precedent. It is actually a hybrid model combining a rule-based account with

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[92]See, e.g.: Leo Groarke and Christoper W. Tindale (2008), *Good Reasoning Matters*.

a similarity based account. Therefore, discussing it will not only be informative for our understanding of similarity-based accounts. It will also clarify even further why allowing judges to use their own first order justifications to determine the *ratio* of a precedent case makes it hard to account for the constraint provided by precedents – independently of whether this happens in the context of a rule-based account or a similarity based account.

In an early paper on precedent from 1987, Frederick Schauer describes reasoning by precedent as based on similarities and therefore different from reasoning by rules.[93] At the same time, he distinguishes reasoning by precedent from other similarity-guided forms of reasoning. He points out that other forms of such reasoning, for example reasoning from experience, are aimed at showing that the reasons which applied in a past case or situation also apply in a present case or situation. Reasoning by precedent does not work this way. Rather, it supports a conclusion based on the sheer fact that two cases are similar and the same conclusion was reached in the prior case: "The previous treatment of occurrence X in manner Y constitutes, solely because of its historical pedigree, a reason for treating X in manner Y if and when X again occurs."[94]

Schauer acknowledges that what is needed is some way of knowing whether or not two cases are importantly or relevantly similar. To illustrate, remember our situation with your boss and the Miniature Schnauzer. When the person with the bird enters the restaurant a week later, you have to determine whether the situation in which your boss decided to kick the Schnauzer out is similar enough to this situation to warrant the conclusion that you have to kick out the bird. Are birds and Miniature Schnauzers relevantly similar? If you want to follow your boss' precedent, you will have to be able to determine an answer to this question.

In order to solve this problem, Schauer brings rules back into the picture. However, these rules are not provided by the precedent. Rather they exist independently of the prior case and are supposed to determine which similarities or differences between it and the present case are relevant or important. Schauer calls these rules "rules of relevance".[95] Rules of relevance are contingent on the culture in which the precedent is being used and the time during which it is being used. In other words, what counts as a relevant similarity or distinction can change both from culture to culture and over time.[96] While it might be the case that in one society, birds and dogs are both grouped together simply as "pets", in another, birds might be "holy" while dogs are "dirty", and therefore no one would ever consider the possibility that the two might belong in the same category. However, at any given time and in any given culture rules of relevance determine whether the aspects of two different cases are being grouped into the same categories or not, and therefore whether the two cases are seen as having to be treated in

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[93] Schauer does believe that opinions (or recounts of earlier decisions) may involve formulated rules or generalizations. According to him, if one uses these formulations to make decisions – which are not always available – then one effectively reasons from rules, not from precedent. Given that he is interested in understanding "naked" arguments from precedent, he decides to exclude this factor from his considerations. (Frederick Schauer (1987), "Precedent", p. 573 ff. and p.581.

[94] Frederick Schauer (1987), "Precedent", p. 571.

[95] Frederick Schauer (1987), "Precedent", p. 578.

[96] Frederick Schauer (1987), "Precedent", p. 578.

the same way or not. In a society in which birds and dogs are simply pets, the two cases are determined as similar by the established rules of relevance – and in a society where birds are "holy" and dogs are "dirty", they are determined as different. By introducing rules of relevance, Schauer does not mean to say that there is one or several rules of relevance that simply apply to all cases in which a past case is compared to a present case for the purpose of reasoning by precedent. Rather, rules of relevance are manifold. Some can be found in the way we sort objects into categories in our natural language and our established social practices.[97] Other rules of relevance have been developed in the law, through the establishment of legal categories.[98] If a pre-established category exists under which the aspects of both the precedent case and the present case can be sorted, then there is a rule of relevance that can be used to justify treating the two cases as similar in virtue of these aspects.

In *Playing By The Rules*, about four years later, Schauer presents his rules of relevance as tools for the construction of the factual predicate of rules provided by precedents, moving his own account closer to rule-based accounts.[99] He still claims that reasoning by precedent works through the determination of similarity between two cases. The factors of the two cases, because their similarity is determined through a rule of relevance, can be grouped together under common categories – categories that can then perform the function of the factual predicate of a rule.[100] According to this understanding, your boss established a rule when he kicked out the dog and instructed you to do the same in the future, a rule that is determined by his actions and the applicable rule of relevance. This means that, in the pet-society, your boss established the rule "if something is a pet, kick it out", while in the holy/dirty-society, your boss established the rule "if something is dirty, kick it out".

In addition to the rules of relevance provided through natural language and legal categories, Schauer also considers the past court's description of the facts of the precedent case a tool for determining whether two cases are alike. However, if such characterizations are not available, he refers back to categories found in natural language and social practices. According to Schauer, the various rules of relevance provide guidance for determining whether or not the facts of two cases can be brought together as similar under common categories. These categories together can be seen as forming the factual predicate of a rule. Therefore, Schauer now claims that reasoning by precedent is importantly related to rule-based reasoning.[101] It simply also includes the determination of similarities through the use of rules of relevance.

Later, in *Thinking Like A Lawyer*, Schauer's emphasis on the rule-aspect of reasoning by precedent is even stronger. He now rejects the idea that pre-legal categories can provide the reasoner with the appropriate rules of relevance that will guide her to the identification of important similarities. He does so for two reasons. First, legal categories do not always follow pre-legal categories. Therefore there is no way for a judge to

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[97] Frederick Schauer (1987), "Precedent", p. 585/586.
[98] Frederick Schauer (1987), "Precedent", p. 586.
[99] Frederick Schauer (1991), *Playing By The Rules,* p. 183.
[100] Frederick Schauer (1991), *Playing By The Rules*, p. 184.
[101] Frederick Schauer (1991), *Playing By The Rules*, p. 187.

determine whether the law would or would not embrace some specific pre-legal category. And second, pre-legal categories are not determinate. Not only do they change over time. But, more importantly, any aspect of a precedent case may fit into several pre-legal categories.[102] For example, it is not actually the case that we group dogs only in the category "pet.". We might, at the same time and in the same culture, also group them in categories like: "potentially dangerous animal", "allergy inducing fur-carrier" or "dirty". Which category you should pick in order to make sense of your boss' actions is underdetermined by the rules of relevance.[103] Therefore Schauer now argues that precedents only provide guidance if fully determined categories are given in the precedent opinion. If there is no *ratio* that can be determined, then the precedent simply cannot provide the guidance needed.[104] Precedents do not always provide rules and if they don't, then they do not provide guidance either.

Schauer's view has developed from one that is mainly based on the recognition of important similarities through rules of relevance to one according to which precedents either provide rules in their *rationes* or do not provide guidance at all. It is of course always risky to speculate about the reasons why authors would change their views, and I do not want to claim that I understand what Schauer's motivations were. However, the move from the use of rules of relevance to the rejection of the idea that anything but categories clearly formulated in the opinion of the precedent could provide any guidance makes sense independently of the motivations of a single person. The idea that judges could be restricted in their reasoning through rules of relevance of the kind Schauer suggests early on is no real solution to the question how precedents can constrain reasoning. This is so precisely because Schauer cannot give a finite list of rules of relevance that apply in any case of reasoning by precedent.

The precedent case by itself cannot be used to determine the rules of relevance that will answer the question whether it is similar to any one later case. Which rules of relevance might be used to group two cases together is at least as dependent on the facts of the present case as it is on the past case. After all, if the opinion in the precedent case does not contain categories that can guide the identification of relevant similarities to present cases, then the past case only provides the very specific facts on which the decision was reached. A Miniature Schnauzer could fit into hundreds of different categories, many of which might have been reasonably adopted by your boss when he kicked it out: "allergy inducing" "potentially dangerous" "annoyingly loud" "dog" "animal" "potential cause of customer-complaint" are all possibilities. Schauer's rules of relevance function through pre-given categories, established either through natural language, legal practice, or through social practices of some other kind. However, the

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[102] Frederick Schauer (1991), *Thinking Like A Lawyer*, p. 49/50.

[103] It might be argued that the context of you bosses action – that he kicked the dog out of a restaurant – gives you indication as to which rule of relevance applies here. But this, again can easily underdetermine which category the dog is to be put in and therefore what other things the dog is to be considered similar to: the category "allergy inducing" would include the bird, and could be justified in a restaurant context – but the category "potentially dangerous" would exclude the bird and could be justified as well.

[104] Frederick Schauer (2009), *Thinking Like A Lawyer*, p. 51 ff. Unless your boss tells you "If something is potentially dangerous, kick it out of the restaurant", you will simply not know what to do with the bird.

facts of a past case do not carry their appropriate categories with them – hence, the precedent fails to provide a determinate solution. Only after one attempts to match the facts of a present case to those of a past case can one begin the search for rules of relevance that might justify sorting the aspects of both cases into the same categories and calling the two cases similar. The dog and the bird together, for example, would fit only into some of the categories mentioned above (such as "allergy inducing"), but not into others (such as "potentially dangerous") Which rules of relevance would justify calling the two cases "similar" therefore depends on both cases, the present and the past case, and their particular facts.

However, as Schauer himself points out, this does not mean that the two cases together can be used to determine conclusively *whether* a rule of relevance applies, and which one applies. Any two things can be sorted into some category of natural language together, if the category is just wide enough. If someone brought a cell-phone into the restaurant, it would be possible to kick the cell-phone out under the justification that they can both be categorized under "annoyingly loud". Intuitively, we can easily see that the appropriateness of sorting two objects into one category depends strongly on the situation in which we want to do this, and our normative commitments with respect to this situation. If we have the normative commitment that restaurants should be kept quiet under all circumstances, dogs and cellphones might appropriately fall under the same category. But if we have the normative commitment that restaurants should be as convenient for as many customers as possible, it is might be more questionable whether a cell-phone and a dog belong in the same category.

So we seem inevitably led to the following conclusion. Schauer's rules of relevance depend on pre-established categories. However, if there are categories available to sort almost any two aspects of cases together, and if the appropriateness of these categories is dependent on the situation in which they are being used, then referring to a rule of relevance in order to show that an important similarity exists needs further justification. It is not enough just to claim that a certain category exists into which the two cases can be grouped. Why is that particular category appropriate here? This question can only be answered with recourse to moral, political or prudential reasons. The reference to rules of relevance thus turns out to be no more than the reference to non-legal reasons: reasons for why certain similarities are relevant and others are not. Therefore rules of relevance cannot restrict the reasoning of judges when they decide whether or not they want to call a case relevantly similar. Schauer's early account does not give the reasoner any guidance that would prevent her from simply deciding whether a precedent case has to be followed based on her own first order moral and political considerations.

As I already said at the beginning of this section, this problem applies not only to similarity-accounts of precedent –it also applies when rules of relevance are used in order to determine the rule a precedent opinion provides. In both cases, the judges own moral and political considerations turn out to be doing the main part of the work.

2.3.2 Precedents as Examples – Barbara Levenbook's Similarity-Based Account
In "The Meaning of a Precedent", Barbara Baum Levenbook appears to go a completely different way than Schauer. According to her, rules play no role in the way precedents

guide judges. Rather, they guide by giving examples. The meaning of these examples is socially set.[105] When an action or a decision functions as an example, according to Levenbook, it can provide action-guidance even if the justification for the action or decision is unknown (or if it is unjustifiable).[106] This is crucial, because the doctrine of precedent requires judges to follow decisions whether or not they are ultimately justified.[107] According to Levenbook, precedents are examples that need to be followed when they apply.[108] Their ability to guide actions without reference back to their justification is their "exemplary force". This force determines what it is that the example exemplifies.[109] Levenbook acknowledges that whether or not an example applies might depend on what exactly it is an example for, and this, in turn, depends on the categories that the factors which play a role in the decision fall into.[110] Whether the example your boss set with the dog applies to the bird depends on the categories to which the bird and the dog are appropriately assigned. However, Levenbook is well aware that precedents do not simply deliver the categories necessary to determine what kind of decision or action the precedent is an example of.[111] Decisions might have been made without the use of fully fledged categories, and preserved as examples to be followed without setting categories that can guide those who follow. Your boss might simply have not decided a category for the dog – kicking it out was merely a reaction to the factual situation your boss found himself in. Nonetheless, a precedent might still have action guiding force, even if it provides only partial categories. Imagine, now, that your boss described the event to you, mentioning the term "a filthy Miniature Schnauzer" in his description of what happened. This might not be enough to fully determine the category your boss was referring to when he told you to "do as he did in the future". Did he mean to restrict the action of "kicking out" to dogs, or to one of the categories that encompass dogs but also other things? Did he mean dogs or four-legged pets with fur? Pets in general? Dirty Animals?[112] Nonetheless, we have the intuition that the mentioning of the Miniature Schnauzer, together with the context, might provide enough information to know that some things definitely fall into the same category[113] (perhaps a Cairn Terrier, which is also a dog, also smallish and also likely to bark a lot), even though with respect to other things this might be very unclear (is a bird in a cage permitted?). The precedent has action guiding force when it comes to the Cairn Terrier. This is so even though it does not provide full categories, as the insecurity about the bird in the cage shows. And so,

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[105] Barbara Baum Levenbook (2000), "The Meaning of a Precedent", p. 186/187.

[106] Indeed, we all know that we can follow an example without knowing why the exemplary action was performed in the first place. If the reader has siblings, he or she might remember having done just that as a game set out to annoy said sibling to the point of tears.

[107] Barbara Baum Levenbook (2000), "The Meaning of a Precedent", p. 191.

[108] Barbara Baum Levenbook (2000), "The Meaning of a Precedent", p. 188/189.

[109] Barbara Baum Levenbook (2000), "The Meaning of a Precedent", p. 190.

[110] Barbara Baum Levenbook (2000), "The Meaning of a Precedent", p. 192/193.

[111] Barbara Baum Levenbook (2000), "The Meaning of a Precedent", p.201.

[112] Barbare Baum Levenbook (2000), "The Meaning of a Precedent", p. 203.

[113] Levenbook calls this "knowing it when you see it." (Barbara Baum Levenbook (2000), "The Meaning of a Precedent", p. 204).

according to Levenbook, the more cases in a line of precedents are decided, the more further cases might become clear(er) in light of the examples provided.[114]

This move is important. If Levenbook is justified in claiming that we share the intuition that examples can guide us in some instances even if we cannot pick out the categories they exemplify, then she has demonstrated that precedents can provide guidance even without a fully formulated rule – unlike what Schauer or Alexander and Sherwin fear. However, this alone does not yet explain how it is that we determine that Miniature Schnauzers are so close to Cairn Terriers that we do not need to waiver when it comes to declaring them similar. Even less does it explain how to proceed when things are not so clear and need to be worked out – even when precedents guide through partial categories. Where do they come from, if they are not explicitly announced? Levenbook rejects the idea that the categories which determine what the precedent is an example of might be set through the intentions of the judge or the judiciary as a whole.[115] She argues that precedents are dealt with and decided in the language that the judges share with the wider population. Certain things are clearly categorized together in common language and in the common thinking of the population, and officials cannot implement new categories simply by having the intention to do so.[116] Your boss' intention to ban all noise-making objects from the restaurant by kicking out a dog alone does not mean that he succeeded in setting an example that would apply to a cellphone. Our common ways of dealing with dogs and cellphones simply do not allow for this. Levenbook claims that this is not only factually the case. It would also be detrimental to the use of precedents if the common understanding of what is similar and what is different did not play a major role in the way judges understand precedents. The population has to be able to determine whether their own conduct is acceptable according to the law, and they would not be able to use precedents for this unless what these precedents mean is at least usually in line with common understanding and usage.[117] If you could not rely on your socially informed intuitions about what is similar to Miniature Schnauzers (Cairn Terriers) and what is not (cellphones), then the directive of your boss to do as he did might well send you into a panic because you would not know how to follow his instruction.

According to Levenbook, precedents guide behaviour through socially determined categories of what is similar and what is not. If, however, these categories prove insufficient, then the meaning of the precedent has to be determined through discussion, analogical reasoning. etc. It might even be the case that the precedent simply has no, or only insufficient meaning to provide guidance.[118]

Levenbook's account of precedent sets out to determine what a precedent means rather than to describe how reasoning by precedent works, and so it takes some adjusting

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[114] Barbara Baum Levenbook (2000), "The Meaning of a Precedent", p. 211.

[115] Barbara Baum Levenbook (2000), "The Meaning of a Precedent", p. 213/214.

[116] Barbara Baum Levenbook (2000), "The Meaning of a Precedent", p. 215.

[117] Barbara Baum Levenbook (2000), "The Meaning of a Precedent", p. 217 ff. Nonetheless, Levenbook does believe that official can have some influence on the categories dealt with by precedent because their decisions shape the way the population can behave and therefore also how they will think about their behaviour.(Barbara Baum Levenbook (2000), "The Meaning of a Precedent", p. 226/227).

[118] Barbara Baum Levenbook (2000), "The Meaning of a Precedent", p. 229/230.

to see the implications her ideas have for reasoning by precedent. However, it soon becomes apparent that her account shares a number of attributes with Schauer's early views. Like Schauer, Levenbook believes that the cases for which precedents set examples can be determined through the identification of similarities – the precedent case is an example for the present case because its aspects can be grouped together with the precedent case's aspects under common categories, whether they are fully articulated or only partial. Like Schauer, Levenbook relies on common language and social practices to provide these categories. Similar is what people see as obviously similar. Unlike Schauer, Levenbook does not pretend that there are rules of relevance a judge could fall back on when deciding whether or not something is similar. She simply claims that the society, its language and its habits, make it plain or obvious that some things are and others are not similar. And, if things are not so clear, those trying to follow the precedential example might have to "reflect, reason by analogy, discuss with others, attune their attitudes to those of others, let something currently in the cultural climate sway them one way or another, relying on rational or non-rational means."[119]

Unfortunately, this does not provide us with what we were looking for. Rather than giving us the way in which precedent constrains the reasoning of judges, Levenbook seems to tell us to trust that it does – that the meaning of precedents just *is* socially fixed. But, as we have seen with such a simple example as a Miniature Schnauzer being kicked out of a restaurant, social conventions are often not enough. And if they are not, so her suggestion seems to go, then because the meaning of the precedent is not clear enough, one has to reason in order to figure it out. But her suggestions of how this might go are rather sparse. The only form of argument she mentions explicitly is reasoning by analogy.[120] It is to this kind of reasoning that we now turn.

2.3.3 Analogies – The Problem of Relevance and Analogy-Based Accounts

Comparing the restraint provided by precedent to the argumentative restraint of analogies seems like a good idea, at least if we assume arguments by analogy provide real justificatory support for a conclusion, and that they work without reference to pre-established categories. Unfortunately, the reputation of analogies as reasoning devices is anything but unblemished. So-called false or weak analogies appear regularly in lists of fallacies; dangerous forms of arguments that appear sound but are not.[121] The distinction between fallacious and a non-fallacious uses of arguments by analogy comes down to the question of whether or not the similarities between the two things compared in the analogy are relevant for the further similarity claimed in the conclusion. It is therefore not very informative to claim that reasoning by precedent is like reasoning by analogy. To be sure, arguments by analogy work by using similarities between two objects to support the assertion that a further similarity exists, and arguments or reasoning by precedent is also supposed to function in the same way, at least according to similarity-based accounts. But

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[119] Barbara Baum Levenbook (2000), "The Meaning of a Precedent", p. 204.

[120] Barbara Baum Levenbook (2000), "The Meaning of a Precedent", p. 204.

[121] There are a number of lists of fallacies available on the internet, many of which list the so-called "weak analogy". See, e.g. www.logicallyfallacious.com/tools/lp/Bo/Logical Fallacies/ 181/Weak_Analogy (09.05.2016); writingcenter.unc.edu/handouts/fallacies (09.05.2016).

we already know that the similarity of two cases warrants their similar treatment. Indeed, that is exactly what the doctrine of precedent demands. Unfortunately, this tells us nothing that helps us answer the question that causes such difficulties for both Schauer and Levenbook: When are similarities relevant? This is the central issue that plagues all similarity based approaches to reasoning by precedent.

Similarity-based approaches can only present precedent as constraining if judges are restricted in choosing the similarities they treat as important. If there is no way to identify the kinds of similarities that are important, then judges will be free to decide cases however they see fit, citing similarities and differences merely to give their decisions the appearance of legitimacy. With respect to the restaurant example, this might mean that if you dislike birds, you can easily claim that the dog and the bird are both allergy-inducing and that the bird therefore has to go. On the other hand, if you like birds, then you might well claim that, unlike the dog, the bird is not potentially dangerous and so the bird can stay. What all this means is that proponents of analogy-accounts of reasoning by precedent have a hard task in front of them. They have to show not only that reasoning by precedent is like reasoning by analogy, but also that reasoning by analogy provides real guidance for the conclusion that is being reached, sorting relevantly similar cases from merely superficially similar ones.

Many accounts fail here. Edward Levi, in his classic book, *An Introduction to Legal Reasoning*, endorses an analogy-approach but he does not explain how it works any further than by saying: "The determination of similarity or difference is the function of each judge."[122] Lloyd Weinreb, who dedicates a book to the defence of analogical reasoning in the law, goes one step further. He explains that experience provides us with the ability to tell a good analogy from a bad one in every-day-life. In a similar manner, experience with the law provides judges with the ability to distinguish good legal analogies from bad legal analogies. [123] According to Weinreb, the recognition of important similarity might feel like some kind of mystical "intuition", but it is actually the employment of past experience. The ability to detect similarities is one of our most basic capabilities, acquired in very early childhood.[124] Relevance or importance is determined here, as elsewhere, through an unconscious process of comparison with past experiences.[125] Weinreb acknowledges that the reference to basic abilities and acquired experiences does not actually explain how reasoning by analogy works. More detail is needed. But he goes no further and instead provides his reader with a list of references for the further study of reasoning by analogy.[126] Unfortunately, without elaboration, Weinreb runs right into the problem we have already discussed. If he cannot point to more than a

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[122] Edward H Levi (1949), *An Introduction to Legal Reasoning*, p.2.

[123] Loyd Weinreb (2005), *Legal Reason. The Use of Analogy in Legal Argument,* p.91 Judges are further aided by rules already established in the law. These rules limit the number of cases that can possibly turn out to be precedents, and thereby guide the judge in deciding where she has to employ analogical reasoning in order to pick between those cases. (Loyd Weinreb (2005), *Legal Reason. The Use of Analogy in Legal Argument*, p.105.).

[124] Loyd Weinreb (2005), *Legal Reason. The Use of Analogy in Legal Argument,* p.126.

[125] Loyd Weinreb (2005), *Legal Reason. The Use of Analogy in Legal Argument,* p.132.

[126] Loyd Weinreb (2005), *Legal Reason. The Use of Analogy in Legal Argument,* p.124.

judge's past experiences or explain how exactly they are restrictive in the right way, then he has not given an account that can explain how precedent actually guides and restricts the judge's reasoning. What counts as importantly similar and what does not depends on the judge's experience-informed perceptions of similarity and importance. Like Schauer and Levenbook, Weinreb cannot show that it is not the judge's first order moral and political reasons or, even worse, her biases and moods that, in the end, determine what counts as relevantly similar and relevantly different to her.

Even when more insight into the manner in which analogical reasoning works is provided, similar problems resurface.[127] Hunter, for example, uses empirical research on how analogical reasoning is actually conducted by people to construct a purely descriptive picture of how judges might reason when using precedent.[128] He is rather unconcerned with the justificatory impact of reasoning by analogy, merely wanting to describe the reasoning-process of judges. Therefore, even though his account is much more detailed than Weinreb's, he does not even try to pretend that he solves the problem of relevant similarity.

Hunter advocates what he calls a multiple-constraint-process of similarity mapping between the past and present case.[129] Like Levenbook, he does not believe that precedents need to work by using rules which establish factual predicates composed of pre-established categories. Analogies, he emphasises, work through one-to-one similarity comparisons, not necessarily relying on pre-established generalizations. Indeed they can work without ever establishing generalizations in the process of drawing the analogy.[130] In reasoning, analogies are used to provide support for a conclusion by highlighting similarities between two objects, situations or cases.[131]

Hunter explains the generally accepted picture of reasoning by analogy in cognitive sciences. Analogies work through the mapping of features from a source domain to a target domain.[132] In "People are like Wolves", wolves are used as the source domain, features of which are mapped onto the target domain, people. Through the process of mapping, we come to understand people as wolves. Once we have found a number of similarities between people and wolves, we are able to understand when someone suggests another similarity. Indeed we are even able to reason from the similarities we have just determined: if we see that people, like wolves, are treacherous and dangerous, we might be able to reason that we should avoid people, just as we should

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[127]Like Dan Hunter, whose account I will discuss here at length, Postema developed an account of precedent as analogy that made use of further insights into the ways analogy works. He sets out on an interesting and promising path, but ultimately stays too vague to really explain the constraining force of precedents. (Gerald J. Postema (2007), "A Similibus ad Simila: Analogical Thinking in the Law").

[128] Dan Hunter (2000), "Reason is too large: Analogy and Precedent in Law", p. 3.

[129] Dan Hunter (2000), "Reason is too large: Analogy and Precedent in Law", p. 3 He uses the multiple-constraint theory of Holyoak and Thagard as well as the structure mapping theory of Genter et. Al. (p. 7/8).

[130] Dan Hunter (2000), "Reason is too large, Analogy and Precedent in Law", p. 9.

[131] Dan Hunter (2000), "Reason is too large, Analogy and Precedent in Law", p. 11.

[132] Dan Hunter (2000), "Reason is too large, Analogy and Precedent in Law", p. 14.

avoid wolves.[133] The mapping between source and target happens on two levels of similarity and is constrained on a third level.[134]

The first kind of similarities that usually gets picked out are surface-level similarities, like same colour, same age, same number of rooms etc. However, Hunter remarks that whether such surface-level similarities are perceived and pointed out depends heavily on the context in which two objects are compared.[135] He also points out that surface similarities can be found between any two objects and that they are therefore seldom the sign of an effective analogy.[136]

The second kind of similarities important in mapping analogous objects or situations are structural similarities. These are similarities between the ways in which certain aspects of both objects relate to one another.[137] For example, in an analogy like "Love is like Gravity" we might pick out a structural similarity between the way lovers relate to each other (they are pulled together by a force) and big objects relate to each other (they are pulled together by a force). Of course, relations can connect more than two aspects into systems, and the bigger the relational systems that can be mapped from source to target, the better the analogy appears.[138]

Third, there is the purpose constraint that determines which similarities we pick out as important. This relates to the reason why we engage in analogical reasoning in the first place.[139] Hunter points out that the purpose constraint becomes important when we use analogies for arguments. We will search for those source analogues that allow us to present the conclusion as especially convincing and reject those that do not – whether or not they fare equally well on the level of surface and structural similarities.[140] If we want to support the conclusion that people can be dangerous, for example, we will choose an analogy that likens people to wolves, rather than one that likens people to dogs, whether

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[133] Hunter gives a different example here, but for the sake of brevity I have used this shorter one. Dan Hunter (2000), "Reason is too Large: Analogy and Precedent in Law", p. 15.

[134] Dan Hunter (2000), "Reason is too Large: Analogy and Precedent in Law", p. 17.

[135] Dan Hunter (2000), "Reason is too Large: Analogy and Precedent in Law", p. 21. Hunter describes an experiment that shows this as follows: " (….) subjects were asked which one of a group of countries was most similar to Austria. They were first asked which one of group (Sweden, Hungary, Poland) was most similar to Austria. Subjects generally chose Sweden. However, when presented with the group (Sweden, Hungary, Norway) and asked the same question, 'Which country is most similar to Austria?', subjects usually chose Hungary. The change of only one possibility -- Poland swapped for Norway -- was enough to change the assessment of similarity, even though the changed country was not deemed to be the closest. The explanation is simple: in the first test, the similarities between Poland and Hungary (at the time both were Eastern Bloc communist under Soviet control) grouped them together, leaving Sweden to appear more like Austria—emphasizing their similarity in terms of their being Western European in orientation, and capitalist. In the second test, the similarities between Sweden and Norway (similar language; both being Scandinavian/Nordic countries) grouped them together, leaving Austria to appear more like its old imperial ally, Hungary. Thus, human assessment of similarity on surface features has been shown to be context-dependent. (Dan Hunter (2000), "Reason is Too Large: Analogy and Precedent in Law", p. 19/20).

[136] Dan Hunter (2000), "Reason is too Large: Analogy and Precedent in Law", p. 22.

[137] Dan Hunter (2000), "Reason is too Large: Analogy and Precedent in Law", p. 23.

[138] Dan Hunter (2000), "Reason is too Large: Analogy and Precedent in Law", p. 25/26.

[139] Dan Hunter (2000), "Reason is too Large: Analogy and Precedent in Law", p. 26/27.

[140] Dan Hunter (2000), "Reason is too Large: Analogy and Precedent in Law", p. 29.

or not we could find similarities between people and dogs equally well as between people and wolves.

Hunter shows that both kinds of similarities do work in reasoning by precedent by pointing out that judges refer to both surface- and structural similarities in their opinions. In addition, he claims that the purpose constraint operates when lawyers search for precedents that will help their clients. And, unconcerned with the implications this has for the legitimacy of using precedent, he believes that his account of reasoning by analogy is also in harmony with the finding of legal realists. Judges, having made up their mind on what is the correct way to decide a case are able to justify their decisions by finding a convincing precedent through purpose-constrained reasoning by analogy. That is, they justify their decisions by actively searching for a precedent that can be shown to be similar to the present case and that has been decided the way they want to decide the present case.[141]

2.4 The Big Weakness of Similarity Based Accounts

As should be obvious by now, the major weakness of similarity-based accounts of precedent is that the claim "these two are similar" can be made much too easily. Those accounts that claim that similarities are determined through pre-established categories, for example the accounts developed by Schauer, Levenbook and Weinreb, fall prey to the problem that there are simply too many such categories and no means of choosing among them. These accounts do not provide fixed "rules of relevance" that apply to each and every pair of precedent and present cases. Rather, they permit all pre-established categories as possible determinants for similarities: categories of common-language, categories established through social practices, and categories established by the law itself. The result is that the aspects of cases can always somehow be fitted into the same categories. When the situation arises where distinctions have to be made between those similarities that justify treating a case as a precedent, and those that do not, and between those differences that justify distinguishing and those that do not, the sheer existence of pre-established categories cannot help any more. At this point, the use of the categories chosen has to be justified. Yet the accounts discussed above provide no guidance as to how this choice is justifiably to be made. And so, in the end, the judge has no option but to fall back on her own moral or political reasoning, telling her which similarities are important and which are not.

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[141] Later, when criticising rule-models of precedent, Hunter deals with their concern that analogy might not be constraining enough. He rejects this and refers to the constraints he has pointed out: surface and structural similarities as well as purpose (Dan Hunter (2000), "Reason is too Large: Analogy and Precedent in Law", p. 50). But here he seems to misunderstand the kind of constrain the rule-theorists are after. Precedents are supposed to constrain the judge insofar as they direct her to a justified conclusion. However, Hunter does not believe that analogies belong into the justificatory part of reasoning by precedent. Rather, he determines them to be part of what he calls the process of discovery (Dan Hunter (2000), "Reason is Too Large: Analogy and Precedent in the Law", p. 51). For Hunter, reasoning by precedent works in two stages, the discovery stage in which the judge finds a precedent case by discovering similarities between two cases through analogical reasoning. After, the use of this precedent is justified through other forms of legal reasoning (Dan Hunter (2000), "Reason is Too Large: Analogy and Precedent in the Law", p. 53).

The situation is not different when existing analogy-accounts of precedent reject the use of pre-established categories and rely on descriptions of how reasoning by analogy actually functions in people's reasoning. Hunter does not even pretend that his account can provide an answer to the familiar objections raised by legal realists: on the contrary, he whole-heartedly accepts that it is in agreement with them. Analogies, to him, do not justify treating one case, rather than another, as the applicable precedent that should guide a decision.[142] A judge who has made up her mind about how she wants to decide a case will simply use analogical reasoning to pick out the precedent which looks similar enough to make her decision acceptable to her peers.

2.4.1 Analogies *Make* Us See New Similarities

In order to understand the full extent of the problem of determining which similarities should be treated as relevant and which should not, we have to take an even closer look at the ways analogies work within the minds of reasoners. As we have already seen, the usual view of arguments by analogy is that they point to a number of pre-recognized similarities in order to justify that the existence of a further similarity should be accepted. However, this usual view is flawed in one important, fundamental respect: analogies do not draw our attention to pre-recognized similarities only. On the contrary, they make us see similarities where we did not see them before. Max Black described this phenomenon most eloquently with respect to metaphors, which share it with analogies. [143] Black explains how metaphors can make similarities apparent that we did not notice before and even let us see that something has some characteristic we did not know it had. Consider the example: "In battle, Sam is a storm." Before the construction of the metaphor, it might have been hard to find a similarity between storms and Sam, especially because storms usually do not do battle at all. Nonetheless, the metaphor highlights a feature of Sam. Even though human violence is different from the violence of weather events, the metaphor encourages us to think of Sam as violent simply because he *and* storms can both be described that way. According to Black, metaphors *create* similarities for us instead of highlighting pre-recognized ones.[144] His "interaction view" is designed to show how.

Black divides metaphors into two parts – the literal part and the figurative part, the source and the target in an analogy. For example, in the expression "In battle Sam is a storm", "storm" is the source of the metaphor while "Sam" is the target.[145] As in Hunter's account, the target is mapped onto the source. According to Black, this means that the source is used to highlight and suppress certain aspects of the target by projecting an implication system from source to target. Take the example "Sam is a Storm." According to Black, we share certain commonplaces about storms that easily come to mind when we think of them. What a storm is, which attributes it is commonly held to have, is pre-structured in our mind and easily accessible: storms are unpredictable, chaotic, violent,

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[142] Hunter claims that analogy belongs to the discovery part of reasoning by precedent, rather than the justificatory part. However, he does not offer a theory when it comes to the question how the justificatory part works. Hunter (2000), "Reason is Too Large: Analogy and Precedent in the Law", p.51.

[143] Max Black (1962), *Models and Metaphors,* p.25ff.

[144] Max Black (1962), *Models and Metaphors,* p. 37.

[145] Max Black (1962), *Models and Metaphors,* p. 28.

strong, etc. When trying to make sense of the metaphor "Sam is a storm", we use this implication-system about storms in order to think about Sam. Anything about Sam that can be described in the terms we use for storms is brought into the foreground and anything that does not fit steps into the background. Those aspects of storms for which we cannot find an equivalent in Sam are ignored.[146] Finally, those aspects of Sam that have equivalents in storms are ordered into relations that mirror the relations of their counterparts in storms. In summary: In order to make sense of the metaphor, we re-structure our idea of Sam such that it fits our readily-accessible implication-system for storms.[147] As a result, we now see similarities between Sam and the storm. Metaphors – as well as analogies - confront us with a task: to restructure our idea of the target part of the metaphor or analogy so that the target part and the source part *become* similar for us. Once we have fulfilled this task, our perception of Sam has been altered – it has been altered in such a way that makes Sam similar to storms.

2.4.2 Analogies are always friends, never foes
It is this property of analogies - that they are able to make us see two objects as similar even if we did not see them as similar before - that explains why Hunter is so quick to agree that judges use precedents simply to justify decisions they have already made. A judge who has a certain outcome already in mind that she finds appealing, and who uses precedent through reasoning by analogy, seems to have no problem in finding cases with the preferred outcome that she can present as similar to her present case, or to present them as justifications for her decision. Analogies do not restrict the mind. Rather, they are a creative reasoning device, helpful in seeing things in new ways – possibly exactly those ways in which a judge wants to see them in the first place.

To Frederick Schauer, this is reason enough to reject the idea that precedents might have anything to do with analogies at all. In his unambiguously entitled paper "Why Precedent in Law (and Elsewhere) is Not Totally (or Even Substantially) About Analogy", he points out that precedents, unlike analogies, are supposed to restrict reasoning instead of guiding it to new heights of creativity.[148] When it comes to analogies (and metaphors), Schauer suggests, the reasoner typically has a choice of source analogs. This choice is not restricted by anything more than what the reasoner finds helpful in making a decision, gaining a new perspective or persuading someone.[149] Precedents, on the other hand, are supposed to preclude decisions judges might have otherwise preferred.[150] If reasoning by precedent actually works as a constraint (and not

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[146] Max Black (1962), *Models and Metaphors,*, p.44.

[147] Max Black (1962), *Models and Metaphors,*, p.41.

[148] Frederick Schauer (2007), "Why Precedent in Law (and Elsewhere) Is Not Totally (or Even Substantially)
about Analogy".

[149] Frederick Schauer (2007), "Why Precedent in Law (and Elsewhere) Is Not Totally (or Even Substantially)
about Analogy", p.456.

[150] Frederick Schauer (2007), "Why Precedent in Law (and Elsewhere) Is Not Totally (or Even Substantially)
about Analogy", p.456.

just as pretence for judges behind which they can do what they want) then a judge cannot simply choose the case that will help support the decision she wants to make in the present case. Most of the time, she has to deal with a certain precedent case even if she would prefer not to, simply because this is the precedent that applies.[151]

2.5 Conclusion

This chapter has shown two things: First, there is little hope that a good account of reasoning by precedent as an existing practice of justificatory reasoning can be developed out of existing rule accounts. Rule-based accounts of reasoning by precedent are ill-equipped to explain the practice of distinguishing. It appears that they either have to present distinguishing as no different from overruling, like Alexander and Sherwin have done, or they have to attempt to integrate distinguishing as a vital part of reasoning by precedent. If the first option is pursued, the resultant account suffers from descriptive inaccuracy – instead of describing the practice of precedent as it exists, the account ends up presenting a theoretical basis for a different kind of practice, even if it is one that might have similarities to what we usually think of as reasoning by precedent. If the second option is pursued, then, as Grant Lamond has shown, the resultant rule-based account will lose all the advantages that come with being able to present reasoning by precedent as deductive reasoning. In addition, rule-based accounts need the assumption that precedents, in their opinions, present the aspects of the case that were the basis for the decision in a way that can be readily used as the factual predicate of a rule-conditional. Unfortunately, that is not always or even mostly the case. Opinions seldom contain readily formulated *rationes* that offer pre-established categories to judges who can simply apply these categories to later cases. Accounting for this difficulty, however, leaves rule-based accounts unable to explain the constraint that precedents are widely believed to have on judicial decision making. Taken together, these problems make rule-based accounts of reasoning by precedent rather unappealing.

Unfortunately, little help can be expected from the side of the analogy- or similarity-based accounts. Not only can similarities as well as differences always be found between any two cases, analogies enable reasoners to re-construct their perceptions of the new case in such a way that it fits the past case. It therefore seems as if an analogy-based account of precedent has little hope of being able to show precedents as restrictive enough to provide any real guidance when it comes to deciding cases.

So where does this leave us? Grant Lamond's argument has shown that the very idea that precedents could provide rules fit for deductive reasoning is incompatible with one of the most central elements of reasoning by precedent, distinguishing. But no such basic incompatibility has emerged in the idea that analogy serves as one of the central features of reasoning by precedent. While it is clear that precedent opinions simply do not seem to deliver rules – fully generalized factual predicates and consequences – the relationship that the doctrine of precedent describes between precedent case and present case is strikingly similar to that which textbooks in argumentation theory describe between the source and target of an analogy used in arguments by analogy. The following

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[151] Frederick Schauer (2007), "Why Precedent in Law (and Elsewhere) Is Not Totally (or Even Substantially) about Analogy", p.457.

chapters will be devoted to developing a new account of reasoning by precedent as closely related to reasoning by analogy. This account will show that the feature of analogical reasoning highlighted by Black, that analogies lead a reasoner to see similarities where none was seen before, and that seemed to be the most problematic when it comes to accounting for a precedent's ability to restrict a judge's reasoning, is actually the *key* to understanding reasoning by precedent. It is key to understanding how and why precedent is able to accommodate *both* the need for stability *and* the need for flexible. It will do so by presenting a judge not as an arguer who uses an analogy to support their conclusion, but as an interlocutor who evaluates an analogy between precedent case and present case, presented to them in an argument by precedent.

The third chapter will be devoted to explaining the role analogy plays in reasoning by precedent. The forth chapter will describe, in detail, the process of evaluating an argument by precedent.

3 Can Analogies Constrain Reasoning? Towards an Argumentative Account of Reasoning By Precedent

The last chapter has revealed that the biggest challenge for analogy-based approaches to reasoning by precedent is to account for the constraining effect that precedents have on judicial decision making. This constraining effect is supposed to prevent judges from making decisions only according to their own normative commitments and implicit biases. Instead, they are to apply what the law has already settled as far as possible, bringing in new ideas and factors only modestly and only were the law allows for it. When judges make decisions on the basis of precedents, the precedents are supposed to provide them with legal reasons that they apply instead of their own reasons. At the very least they are supposed to apply the legal reasons established by the precedents whenever such reasons are available.

However, it is not at all clear whether a precedent can do this job if it is treated as a part of an analogy. We have seen that, according to the standard account of reasoning by analogy, we use analogies to justify conclusions by pointing out that two objects, situations or cases are relevantly similar. However, not only are there always some similarities to be found between any two situations, objects or cases. As it turns out, analogies, like metaphors, have the power to make us see similarities where before we could not see any. In addition, differences can also be found between any two cases. If we see precedents as parts of analogies, then it seems as if the legal reason a precedent can provide is always inconclusive: the decision can go either way, and it is the judge's own normative commitments that have to make the difference. This means that, so far, we are lacking any reason to believe that an analogy-based account could portray reasoning by precedent as constrained enough to produce a stable common law.

Consider, again, the restaurant scenario discussed in the previous chapter. How do you decide whether you have to kick the bird out if all the precedent your boss gave you can do is provide part of an analogy? Presumably, you are supposed to treat the incident with the Miniature Schnauzer as your source analogue, the case of the bird as your target

analogue, and the boss's decision to kick the Schnauzer out as establishing the conclusion that the bird must go. But this is so only if source and target turn out to be sufficiently similar. And yet our discussion of analogical reasoning has shown that the mere fact that you pair bird and Schnauzer together in an analogy will make similarities between the two appear. On top of this, the same discussion has also revealed that there will also be many differences. What are you to do but reason yourself about whether and why birds should be kicked out of the restaurant – or be allowed to remain? Even if you wanted to avoid deciding only according to your own idiosyncratic normative commitments – how could the precedent ever provide you with the guidance you need? How could it ever give you any grounds, other than your own normative commitments, from which you could build the arguments to justify your decision?

     This chapter takes a long hard look at arguments by analogy and the way we reason with them. In order to do so, it will take a detour and analyze a prominent part of the discussion about arguments by analogy that has taken place in contemporary argumentation theory. Ultimately, it will defend the idea that source analogues can provide constraint if they are used in an argumentative context. But before this can happen, we have to make one very important change to how we see the role of judges in this reasoning process.

3.1 Are Judges Arguers or Interlocutors?

     In the last chapter, we saw that Frederick Schauer mistrusts the idea that analogies might play an important role in reasoning by precedent because, as he puts it, they always serve as a friend, never as a foe.[152] A reasoner, needing inspiration, might look for analogies and metaphors that open up new perspectives on old issues and help her to come to new, creative ideas and insights. And a speaker, seeking to persuade an audience, might search for the right source analogue, the one that will make her listeners see the issue in the light she wants them to see it in. In each case, the analogy serves the ones who employ it; it does not constrain them. The speaker *uses* the analogy to guide the audience, and *chooses* the target analogue according to her own needs. No constraint there.

     However, a closer look will reveal that things are not a simple as they may seem. Analogies are indeed a preferred tool for speakers wishing to convince an audience. They are extremely effective at guiding interlocutors to adopt certain points of view towards some subject matter, even at making them accept conclusions about subject matters they might otherwise have rejected. Certainly this must mean that they provide some kind of guidance for the mind. After all, they are being used over and over again in order to guide the minds of audiences. It might be true that the one choosing the analogy, the one who uses it to explain or argue something, is not restricted in her choice. But what about those who listen to her? They do not get to choose either the source or the target of the analogy. Instead, they are provided with them. They contemplate them, and in doing so, subject themselves to the effects we discussed in the last chapter: the analogy between source and target makes the reasoner re-structure their understanding of the target and source such

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[152] Frederick Schauer (2007) "Why Precedent in Law (and Elsewhere) is Not Totally (or Even Substantially) About Analogy", p. 6/8.

that they appear similar. There seem to be two roles at play here when it comes to the use of analogies: (a) the role of the explainer or arguer, unconstrained and creative in her use of analogies;[153] and (b) the role of the interlocutor, subjected to the effect of the combination of source and target, and guided by it towards some point of view or conclusion. Which of these roles is a better fit for our judge, having to decide whether the precedents she is considering are binding on her? It seems that when the judge tries to decide this, she is not so much in the role of the arguer, looking for the most effective source analogue in terms of providing inspiration or persuading audiences, but instead in that of the audience. The case the judge is working on will be, in any analogy-based account of reasoning by precedent, the target analogue. Consequently, the respective precedent case functions as the source-analogue. Everything needed is already there: the source and target analogue as well as the conclusion for which the analogy is supposed to provide support. So it seems clear that at this point, the judge does not occupy the role of the arguer. Rather, she occupies the role of the interlocutor. She is not the one who chooses an argument to persuade. She is the one who is supposed to be persuaded by the argument.

Of course, this does not mean that the judge is passive, even though one intuitive picture of arguer and audience portrays the arguer speaking in front of an enthralled, silent mass of people who are listening closely and simply following the line of reasoning the arguer presents to them. But this is not the only picture we have, and certainly not the one most fitting for the role of a judge. Another kind of audience is the interlocutor, carefully reconstructing the argument as it is presented to her, according to the principle of charity, evaluating it for its strengths and weaknesses, coming up with possible objections. An audience in the form of an interlocutor is decidedly active, reacting to the argument not by passively following it but instead by situating herself to it, employing her own argumentative and reasoning skills.[154]

I will here assume that our judges are not lazy, ill-meaning or simple-minded. I therefore assume that judges are members of the second kind of audience, willing to employ their reasoning skills in order to distinguish good arguments from bad ones. Of course this entails that that they can in fact to do so – and that a way to do so therefore exists. To some extent my assumption is a risky one to make. After all, lazy, ill-meaning and simple-minded individuals can be found everywhere. However, I believe it is an assumption that has to be made by everyone who sets out to provide an account of any kind of justificatory reasoning. No account of how a certain kind of reasoning can justify its results can prevent errors due to laziness, meanness or lack of intelligence. I will therefore assume that judges are part of the active kind of audience: that they are interlocutors in the best sense of the word and that they therefore engage in deliberate attempts to determine whether the arguments presented to them indeed justify adopting their conclusion.

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[153] I should remark that finding convincing analogies can be very hard. Many, me included, know this from experience. However, this does not mean that it is never possible to find an analogy to support any point.

[154] On the role of the active audience, see e.g. Christopher Tindale (2015), *The Philosophy of Argument and Audience Reception,* and Christopher Tindale (2004), *Rhetorical Argumentation: Principles of Theory and Practice*, esp. Chapter 4.

Accordingly, I will cast the role judges occupy when reasoning with precedents as that of an interlocutor, presented with an argument similar to an argument from analogy. Most often, this argument will be presented to the judge by a lawyer arguing for a specific outcome. In this argument, the precedent case that is up for consideration takes the place of the source analogue, while the present case functions as the target analogue. The conclusion argued for is the claim that the two cases are the same in the relevant legal respects, i.e. that the precedent is binding on the present case. From this it follows, on the basis of the doctrine of precedent, that the judge has the duty to follow the decision in the precedent case when deciding the present case.

The question that needs to be answered, then, is what does an interlocutor do? Or putting this another way: what does an interlocutor need to do who is, in all seriousness, trying to determine whether or not she should accept a conclusion based on a precedent-based argument from analogy? The simplest answer to give here is that an interlocutor has to perform at least two steps in order to be able to decide whether she should accept a conclusion based on such an argument. First, she has to use the *principle of charity* in an attempt to understand the argument as actually providing some good reason to accept the conclusion. And second, she has to evaluate the argument in order to decide whether this reason is sufficient to accept the conclusion. Both of these steps are equally important, and both are in need of at least a short explanation and justification.

It is relatively easy to see that the interlocutor needs to do her best to understand the argument. Otherwise she has no basis upon which she can decide whether it provides her with sufficient reason to accept the conclusion. But why does she need to employ the *principle of charity*?

Interlocutors might engage with arguments for all kinds of reasons. They might have chosen the goal to make the arguer look irrational or unintelligent, for example. In this case, the interlocutor does not need to understand the argument under the employment of the *principle of charity*. Instead, the interlocutor needs to try and understand the argument in a way that makes the argument most vulnerable. The *principle of charity*, by contrast, asks us to understand an argument in such a way that it actually provides good reasons to accept the conclusion, at least if that is possible without changing what is presented as the argument to such a great degree that it is replaced with another argument.[155] For example, imagine someone says:

> Banks are designed to keep your money safe.
> Therefore, you should put your money there.

In this case, the *principle of charity* tells you to choose the interpretation of the word "bank" according to which the argument actually provides a good reason for its

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[155] I am here adopting Trudy Govier's conception of the principle of charity. "**Charity as a principle of interpretation** On a very generous principle of charity, not supported here, we would make out an argument to be as reasonable and plausible as we could, always giving the arguer the benefit of the doubt. On a more modest principle of charity, recommended in this text, we would avoid attributing to an arguer loose reasoning and implausible claims unless there is good evidence, in the presented speech or writing, for doing so." (Trudy Govier (1985), *A Practical Study of Argument*, p.55).

conclusion – that is, you interpret "bank" not as "river-bank", which would not be a safe place at all, but instead as the money-handling-institute, which is actually a safe place to put money.

An interlocutor who wants to make the arguer look unintelligent or irrational has no reason to employ the *principle of charity* in such a way. After all, it is much easier to make fun of someone who suggests that river-banks are safe places to put money. However, an interlocutor who is interested in using the argument to determine whether she should accept the conclusion has an interest in employing the *principle of charity*, because she has an interest in determining whether she should accept the conclusion on the basis of as many strong reasons as she can find. Therefore, such an interlocutor needs to begin her consideration of the argument by trying to understand it under the employment of the *principle of charity*.

Let us assume that judges are honestly interested in fulfilling their duties and that they consider precedents in order to determine whether they have a duty to follow a precedent when deciding a case. What follows from this?

A precedent determines a very small bit of the law because it includes a decision on a specific case and, according to the doctrine of precedent, all cases that are the same in the legally relevant respects have to be decided in the same way. A precedent therefore settles the law with respect to all those cases that are the same with respect to the legally relevant aspects. When a precedent case is being considered, the question is whether the law can be considered settled for the present case in light of the precedent case: whether the decision made in the precedent case can determine the decision that has to be made in the present case. An analogy claims the similarity of two cases. Bringing the precedent and the present case together in an argument by analogy therefore involves claiming that the two cases are similar – the same in the relevant respects. The doctrine of precedent states that a precedent case pre-determines the decision for all cases that are the same in the legally relevant respects. Therefore, by extension, the argument by analogy serves as an argument for the claim that the precedent settles the law with respect to the present case. It grounds the claim that the judge has a legal reason to decide the present case in the same way that the precedent case was decided. It is the strength of this legal reason the judge has to evaluate.

As I have just explained, evaluating the strength of a reason provided by an argument involves first understanding the argument under the employment of the *principle of charity*, and then critically evaluating it. Through this double-step, the evaluation of the argument involves the weighing of the strongest reason the argument can provide against the reasons suggesting that the argument is not sufficient to support the conclusion. The result is that the interlocutor decides either to accept or to not accept the conclusion on the balance of reasons. If the judge tries to understand the argument by analogy from precedent case, present case and precedent decision under the employment of the *principle of charity*, she attempts to understand the legal argument for following the precedent so as to render it a strong argument. Or, in other words, she makes available, to herself, as strong a legal reason for considering the present case as being settled by the law as she can. It is this legal reason that she will have to defeat with other reasons if she wishes to depart from the precedent. It is this legal reason (and, as we will see in chapter

4, some other legal reasons) that restrains her in her application of her own normative commitments. If we assume that the judge is interested in performing her duty as a judge well, then we should also assume that she is interested in deciding her cases on whatever legal reasons are available. Therefore, the judge will be interested in dealing with the argument by precedent in the strongest form it can plausibly bear. Judges, when performing the first step of understanding the argument, need to employ the *principle of charity*.

To illustrate, if you are a good employee, then you will be interested in following your employer's directive by kicking out the Miniature Schnauzer whenever that directive applies. When the bird in the cage enters the restaurant, you will therefore ask yourself whether your boss's decision to kick out the dog determines how you should treat the bird. The best way to come to a conclusion about this is to first ask yourself what the best argument is that someone could give for the claim that the bird-situation and the dog-situation are the same, and then to critically evaluate this best argument. You want to apply the *principle of charity* to the argument that bird-situation and dog-situation are the same and that you therefore should have the bird removed. Once you have done this, you are in the position to critically evaluate this particular argument, as it is the strongest one you can come up with. When you eventually reach a conclusion, you will be in a good position to accept your conclusion as justified insofar as it is based on a well-balanced assessment of the pertinent considerations.

On this analysis, understanding an argument from precedent in such a way that it provides a reason based on analogy for accepting the conclusion (if that is possible without replacing the argument) is not enough to determine whether the conclusion should be accepted. In addition, the argument also needs to be evaluated. That is, the interlocutor has to make some effort to determine whether the reason provided by the argument is strong enough, and whether there are good objections that defeat the argument. Take again the argument that

> Banks are designed to keep your money safe.
> Therefore, you should put your money there.

This argument gives you a good reason to put your money in the bank. But perhaps your country is in a major banking crisis, and therefore, even though banks are designed to keep money safe, they are currently failing at performing this function. That would mean that even though the argument provides some reason to put your money in the bank, overall it fails at justifying the acceptance of that conclusion.

When it comes to our judge, who is trying to decide whether she should follow a given precedent case when deciding her present case, this means that she has to perform two steps. First, she needs to employ the *principle of charity* in an attempt to understand the argument by precedent she is being confronted with. In other words: she needs to understand the argumentative analogy between precedent case and present case, and she needs to try to understand it in such a way that it provides the strongest possible reason for following the precedent case (if that is in fact possible). Then she needs to evaluate the

argument by precedent in order to determine whether the reason provided by it is indeed strong enough to justify a duty to decide her case by following the precedent.

The remainder of this chapter will be concerned with determining and explaining what the performance of the first of these two steps entails. How should a judge approach the analogy between precedent case and present case if the goal is to discover the strongest possible argument for following the precedent? The next chapter will then suggest and justify a method for evaluating arguments by precedent. Together, these two chapters present an argumentative account of judicial reasoning by precedent according to which reasoning by precedent can be understood as understanding and evaluating arguments by precedent in order to determine whether their conclusion (that the judge has a duty to follow the precedent) should be accepted.

3.2 A Deductivist Account of Arguments by Analogy

As noted above, my intention is to provide an account of reasoning by precedent that describes it as similar to (though, as the next chapter will reveal, not the same as) the reasoning that goes on when an interlocutor considers an argument by analogy. In order to do this, I will first need to find a suitable account of what arguments by analogy are and how they work. Argumentation theorists have long worked at providing such an account. Unfortunately, far too many accounts have been suggested thus far and the debate about which one is the right one is still as intense as it was when it first started. *Fortunately*, our interest in arguments by analogy is motivated by the goal of fashioning an account of reasoning by precedent. Above, I argued that judges should try to understand an argument from precedent under application of the *principle of charity* so that they make their decision under the influence of legal reasons that are as strong as possible. It is my goal to show that doing this will allow the precedent to constraint judicial decision making. The account of arguments by analogy I am interested in, therefore, is one that can clearly show how and why analogies can deliver reasons to accept a conclusion (if this is indeed the case).

A good deal of disagreement in the literature about arguments by analogy revolves around how an argument by analogy should be reconstructed. It will therefore be directly helpful for the goal of this chapter – to find an understanding of arguments by analogy on the basis of which an account of reasoning by precedent as a justificatory practice can be developed – if we consider the debates that have taken place. Interestingly enough, one of the main discussions about analogies mirrors the discussion of reasoning by precedent we looked at in the last chapter. Deductivist accounts of arguments by analogy share certain features with rule accounts because they defend the idea that a rule or principle should be found through consideration of the source analogue and then applied to the target analogue. And like the proponents of analogy accounts of reasoning by precedent, those who criticise deductivist accounts of analogy – and propose rhetorical accounts instead - claim that arguments from analogy work through an interaction of target and source analogue.[156] Analyzing this debate will help us determine which one of these two ways of understanding arguments by analogies is helpful in developing an account of reasoning by

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[156] As, for example, Lilian Bermejo Luque (2012), "A Unitary Schema for Arguments by Analogy" and Lilian Bermejo Luque (2014), "The Uses of Analogies".

precedent that allows a precedent case (the source analogue) to unfold its full constraining potential.

We will start with the deductivist account of arguments by analogy. One influential example of such an account is provided by Bruce N. Waller and later defended by Fabio Perin Shecaira.[157]

3.2.1 Deductivist Accounts of Argumentation

Deductive arguments are arguments that establish an inference between premises and conclusions such that, if the premises are true, it is impossible that the conclusion is false.[158] Some deductive arguments can be expressed in formal logic. An example of *formally* valid deductive arguments are arguments that fall under the form *modus ponens*, such as the argument:

> If Socrates is a man, then he is mortal.
> Socrates is a man.
> Therefore he is mortal.

This argument can be formalized in the following way:

> A ->B
> A
> Therefore: B[159]

Accounts of argumentation can be roughly divided into deductivist and non-deductivst accounts. Deductivist accounts of argumentation come in at least two different forms.[160] According to the reconstructive forms of deductivism, all arguments should be considered attempts at constructing deductively valid arguments and should be evaluated accordingly.[161] Of course, authors who defend this form of deductivism are well aware that arguments are not always presented in a shape that reveals them as deductively valid. These arguments are considered to have implicit premises that should be added when the argument is being reconstructed for evaluation. The missing premise should be chosen so that the argument becomes deductively valid. In addition, it should be chosen such that it

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[157] Bruce N. Waller (2001), "Classifying and Analyzing Analogies"; Fabio Perin Shecaira (2013), "Analogical Arguments in Ethics and Law: A Defense of Deductivism".

[158] See: Leo Groarke (1999), "Deductivism Within Pragma-Dialectics", p. 2.

[159] However, not all deductive arguments are valid in virtue of their form. As Leo Groarke pointed out, many arguments are deductively valid in virtue of their content. This is called material validity. An example of a materially valid argument is:
> Jon is a Bachelor.
> Therefore, Jon is not married.
The meaning of the term "bachelor" makes it impossible for the premise to be true and, at the same time, the conclusion to be false.(See Leo Groarke (1999), "Deductivism Within Pragma-Dialectics", p. 2 ff.).

[160] Fabio Shecaira, (Private Communication from Dr. Fabio Shecaira, Federal University of Rio De Janeiro) "A Case For Deductivism in Law and Elsewhere", p.1).

[161] See, for example, the account Leo Groarke provided in his paper "Deductivism within Pragma-Dialectics".

is plausible to assume that the arguer might have included the premise given the contextual evidence.[162]

Groarke notes that it should not be assumed that deductive arguments always show that their conclusion is necessarily true. Rather, deductive arguments merely show that the truth of the conclusion is at least as certain as the truth of the premises: deductive arguments are *certainty preserving*. The conclusion cannot be false if the premises are true, therefore we can be at least as certain of the conclusion of a deductive argument as we can be of its premises.[163] Because reconstructive deductivist accounts of argumentation assume that every argument is formulated with the goal of producing a deductively valid argument, they allow for arguments to be evaluated only *after* they have been reconstructed into their fully deductive shape. For the evaluator, this has certain advantages. The inference from premises to conclusion in deductive arguments always has the same strength (it is certainty-preserving), therefore only the premises are in need of evaluation. In order to determine how much support the argument gives to its conclusion, the evaluator merely needs to assess how certain it is that the premises are true. From this she can then infer how certain it is that the conclusion is true. This is a very straightforward process. The appeal of its reliability becomes even stronger when Groarke points out that, once the argument is reconstructed, all its premises are out in the open for scrutiny. This provides the evaluator with a security that non-deductivist accounts cannot necessarily offer. The evaluator, having examined the argument as it is presented in its reconstructed form, can be sure to have considered it in its entirety. She does not need to worry that she has forgotten or failed to notice one of the ways in which the argument might be weak.[164]

Fabio Shecaira suggests another form of deductivism: normative deductivism. According to this form of deductivism, not all arguments that are offered in everyday argumentation should be considered attempts at deductive arguments. However, because deductive arguments have the advantages of being clear, precise and unambiguous, arguers should aim at producing deductive arguments. Non-deductive arguments are flawed to some extent in almost all contexts because their lack of clarity and preciseness produces the risk that the argument might convince interlocutors who would not be convinced if they were aware of hidden, possibly controversial premises. Alternatively,

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[162] Leo Groarke (1999), "Deductivism within Pragma-Dialectics", p. 6.

[163] Leo Groarke (1999), "Deductivism within Pragma-Dialectics", p 3.

[164] See Leo Groarke (1999), "Deductivism within Pragma-Dialectics", p 8 ff. It should be noted that not all forms of reconstructive deductivism claim that all arguments are deductive. Some forms allow, in addition, for inductive arguments and for arguments on the basis of probabilities. An example for such an argument would be:

> The probability that it will rain today is 95%.
> If it rains, Sue will stay at home.
> Therefore, it is fairly certain that Sue will stay at home.

However, all forms of deductivism claim that all non-inductive arguments should be reconstructed as deductive arguments.

such non-deductive, merely suggestive arguments might alienate interlocutors because they are too ambiguous and hard to understand.[165]

At first sight, deductive accounts of argumentation appear especially attractive for our purpose of providing an argumentative account of reasoning by precedent because they offer a very straight-forward image of the work that needs to be done by an interlocutor. Like the Alexander and Sherwin's extreme rule-account, they promise a simple explanation of how arguments by analogy work and how they can be convincing. Therefore, it is worthwhile to take a look at the deductive account of arguments by analogy.

3.2.2 Waller's Deductive Account of Arguments By Analogy

Unsurprisingly, deductivism has produced many accounts of different kinds of arguments, casting them all as deductive at heart. In 2001, Waller proposed a reconstructivist-deductive account for arguments by analogy, bringing out both the advantages and some of the problems with understanding arguments by analogy as deductive in nature. Put simply, Waller claimed that all arguments by analogy are really deductive arguments.[166]

After what we have learned so far about analogies, the claim that arguments from analogy are deductive might seem counter-intuitive. However, like most deductivists, Waller claims that arguments by analogy do not *appear* to be deductive arguments because they are often presented in a way that omits an important premise: the principle that ties the analogy together.[167] In order to show how he understands arguments by analogy, Waller provides an *argument scheme*, claiming that every non-inductive, *a priori* argument by analogy should be analyzed so that it fits this scheme.

Argumentation theorists propose argument schemes to provide arguers and interlocutors with guidance for composing and evaluating arguments, but also to illustrate

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[165] Fabio Shecaira, (Private Communication from Dr. Fabio Shecaira, Federal University of Rio De Janeiro) "A Case For Deductivism in Law and Elsewhere" and Fabio Perin Shecaira (2013), "Analogical Arguments in Ethics and Law: A Defense of Deductivism", p. 435.

[166] In his paper, Waller follows others, such as Trudy Govier (e.g. Trudy Govier (1989) "Analogies and Missing Premises") in distinguishing between so-called inductive analogies, that are most commonly used in the sciences, and *a priori* arguments by analogies that are often used, for example, in law and ethics.
Inductive analogies work through the sheer number of similarities between two objects. By something like an inductive method, a further similarity is predicted. Trudy Govier offers the following example:
> 1. Rats (or some other nonhuman animals) are like humans in respects 1, 2, 3,…
> 2. Rats suffer effects x, y, z when exposed to doses at such-and-such levels of toxic emissions.
> 3. Exposure to toxic emissions at so-and-so level in humans is equivalent to exposure at
> such-and-such levels in rats.
> Therefore, probably,
> 4. Humans will suffer effects x, y, z when exposed to a dose at so-and-so level of these
> substances. (Trudy Govier (1985), *A Practical Study of Argument*, p. 333/334.)

Because these kinds of analogies are used to justify predictions, we are not interested in them here, so we can exclude them from our analysis for now. They are a different type of argument, though an often used and important type. *A priori* arguments by analogy are most often used to argue that, given the similarity of two subject matters, they should be treated or regarded in the same way. According to Waller, all *a priori* arguments by analogy are deductive arguments. When I speak of arguments by analogy here, I will be referring to *a priori* arguments by analogy.

[167] Bruce N. Waller (2001), "Classifying and Analyzing Analogies" p. 202.

the way they propose to understand certain argument types. Argument schemes are inspired by the formalizations of arguments in logic. For example, this is the formal scheme for *modus ponens:*

A ->B
A
So: B

This is a scheme that has been proposed for arguments by expert opinion:

A says P
A is an expert
So: P

The argument-scheme Waller proposes for *a priori* arguments by analogy looks like this:

I. We both agree with case a.
2. The most plausible reason for believing a is the acceptance of principle C.
3. C implies b (b is a case that fits under principle C).
4. Therefore, consistency requires the acceptance of b.[168]

If Waller is correct about the way arguments by analogy work, then any argument by analogy contains, as one of its premises, a universal principle. This means that an interlocutor, in order to understand the argument as providing some reason for accepting the conclusion, would have to identify and add such a principle to the argument. An argument like:

"Sam is like a tropical storm.
Therefore you should not expect him to stick around for long."

would have to be reconstructed so that it contains some universal principle that applies to storms and justifies the conclusion about them and that can be tested for its applicability to Sam. Waller does not claim that the premise containing the principle is always, or even most of the time, part of the argument as it is presented.[169] Indeed, he is well aware that sometimes, neither the author of the argument nor the audience might immediately be able to say what this principle is. He writes: "the principle is not logically or epistemically prior to the particular cases. Instead, the process of evaluating and understanding *a priori* analogies requires thoughtful mutual adjustment."[170] Waller believes that the interlocutor, in order to understand the argument by analogy, has to ask herself why she believes that

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[168] Bruce N. Waller (2001), "Classifying and Analyzing Analogies" p. 201.
[169] Bruce N. Waller (2001), "Classifying and Analyzing Analogies" p. 205.
[170] Bruce N. Waller (2001), "Classifying and Analyzing Analogies" p. 208.

the source should be treated in a certain way, or has some characteristic.[171] Having answered this question, she has discovered the principle that makes her accept the conclusion about the source. Then she can apply this principle to the target. In the example above, the interlocutor would ask: Why do I not expect tropical storms to stick around for long? And, according to Waller, they would hopefully answer something like: Because tropical storms are intense but short-lived. And thus we are led to the following argument:

1. We both agree that tropical storms should not be expected to stick around for long.
2. The most plausible reason for believing this is the principle that: If something is intense but short lived, then it should not be expected to stick around for long.
3. Sam fits under this principle because Sam's attention is intense but short lived.
4. Therefore the principle implies that Sam should not be expected to stick around for long.
5. Therefore, consistency requires accepting that Sam should not be expected to stick around for long.

We can see that now that the interlocutor has reconstructed the analogical argument into a deductive argument, more precisely, into an argument of the type *modus ponens*, fitting the formal scheme:

A-> B
A
So: B

The modus ponens at the heart of this specific reconstructed argument would be:

1. If something is intense but short lived, then it should not be expected to stick around for long.
2. Sam's attention is intense but short lived.
3. So: We should not expect him to stick around for long.

Waller suggests that, once the argument has been reconstructed, the interlocutor can evaluate the argument by deciding whether the major premise, the principle, is acceptable and whether the target case really fits under the principle – that is whether the description of the target in the minor premise of the modus ponens is also acceptable.[172] We can see that Waller's account fits well with the description of reconstructive deductivism as I have provided it above. When evaluating arguments by analogy, the interlocutor works in two steps. First, she uses the source analogue to determine a principle that explains the way the source analogue is treated in the argument. Then she applies the principle to the target analogue, evaluating both the principle and its applicability to the target analogue.

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[171] Bruce N. Waller (2001), "Classifying and Analyzing Analogies" p. 202.
[172] Bruce N. Waller (2001), "Classifying and Analyzing Analogies" p. 202.

It is easy to see why this account might be attractive as an account of argument by analogy on which an account of reasoning by precedent could be built. According to this account, having used the precedent case to identify a principle, all the judge needs to do in order to evaluate the argument by precedent is to decide whether or not her present case falls under this principle. However, the reconstructive-deductive account of arguments by analogy faces a number of serious difficulties.

3.2.3 Objections against Waller's Account and Shecaira's defence

An obvious objection to Waller's account is that by adding the "missing" principle to the set of premises, the premise containing the source analogue becomes redundant.[173] Let us take another look at the scheme Waller offers. Once the principle has been introduced, we can form a complete deductive argument from the principle and the target analogue without any need for the source-analogue. If all intense but short lived things should not be expected to stick around for long, and we know that, then we do not need to think about tropical storms in order to know that Sam's interest will fade soon. However, this seems to do away with the argument by analogy completely. It makes it appear as if the analogy really does not do anything for the argument at all, as if the source analogue is merely a fancy way to allude to the principle. This problem makes Waller's account, as it stands, useless for our goal to understand reasoning by precedent: after all, the question central to our inquiry is how an opinion that does not contain a fully formulated principle or rule can guide a decision. An account that starts with the assumption that such a principle or rule can simply be found can therefore not explain what we want to know most.

Fortunately, Fabio Shecaira, in his paper "Analogical Arguments in Ethics and Law", develops Waller's account further, making it more tenable. He suggests understanding arguments by analogy as arguments that contain both an abduction[174] and a deduction, and claims that a charitable reading of Waller will support this understanding of his scheme.[175]

An abduction is a form of reasoning that infers a principle or universal claim from at most a few statements about single instances (often, it is only one single statement about a single instance). Usually this is done in the attempt to find the simplest or most plausible principle that can encompass the observation or single instance. One form of abduction is, for example, inference to the best explanation, in which an event is in need of an explanation and the reasoner chooses that explanation which seems to be most plausible considering both the event and what is usually assumed about the world in general.

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[173] This problem was pointed out by Govier even before Waller's paper had been written. See: Trudy Govier (1989), "Analogies and Missing Premises", p. 144.

[174] Or rather an inference that resembles an abduction. Abductions are commonly understood as inferences to the best *explanation*. If so, then we need to acknowledge that moral principles are not quite abduced: they justify, they do not explain.

[175] See Fabio Perin Shecaira (2013), "Analogical Arguments in Ethics and Law: A Defense of Deductivism" p. 409. His account is similar to the account of reasoning by precedent defended by Scott Brewer (1996) in his *Exemplary Reasoning: Semantics, Pragmatics and the Rational Force of Legal Argument by Analogy*. My remarks on Shecaira's rendering of Waller's scheme will largely also apply to this account.

According to Shecaira, the source analogue is used in order to abduce the principle in a first step. That is, the source analogue provides the claim about a single instance for which a principle needs to be found that is both plausible and can accommodate the source analogue. The principle is then used in a deductive argument in a second step. Indeed, given that Waller describes the process of understanding an argument by analogy as including an investigation into *why* an interlocutor agrees with the source analogue, this seems a plausible reading of his account. However (and Shecaira is aware of this) even then, the account is still open to further, closely related worries. The main point of contention is whether or not arguments by analogy can actually be said to include a principle as a hidden premise at all. After all, the arguer does not need to commit to some specific principle in order to formulate an argument by analogy and neither does the interlocutor in order to understand the analogy well enough to be convinced by it or to object to it. In his answer to Waller's paper, Marcello Guarini points out that his students, even if an argument by analogy convinces them of some claim, are not always prepared to endorse any specific principle:

"The members of this persuaded group tend to fall into two classes: (i) those who are also persuaded of some principle they initially rejected, and (ii) those who, while persuaded to change their view (…), are not prepared to endorse any principle."[176]

If there can be whole exchanges over arguments by analogy, complete with the arguer coming up with the argument and presenting it, as well as the interlocutor hearing or reading the argument and being convinced by it, in what sense is the principle then part of the argument? It seems, then, that there can be arguments by analogy that function without a principle. After all, the allegedly hidden principle never arises at all, either in the discourse or as an element of the reasoning processes of either arguer or interlocutor. For how can we say that an argument contains a premise that no one, not the arguer nor the audience, ever used in order to reason with the argument?[177]

Shecaira, when defending Waller's scheme, concedes this point. He does not claim that every argument by analogy *does* contain a principle. Instead, he suggests that we should adopt a normative deductivism towards arguments by analogy instead of a reconstructive one.[178] According to Shecaira, the *best* arguments by analogy contain a principle both when it comes to the law and in general. Those that do not are lacking. Accordingly, arguers should attempt to use only those arguments by analogy that make some principle explicit enough that it can easily be extracted and evaluated by an interlocutor.

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[176] Marcello Guarini (2004), "A Defence of Non-Deductive Reconstructions of Analogical Arguments", p.156.

[177] The problem that adding missing premises amounts to attributing something to an arguer that this arguer might never have included in her argument is one that deductivism generally faces. See David M. Godden (2005), "Deductivism as an Interpretive Strategy: A Reply to Groarke's Recent Defence of Reconstructive Deductivism" for a thorough critique of deductivism, partly on the basis of this argument.

[178] Fabio Perin Shecaira (2013), "Analogical Arguments in Ethics and Law: A Defence of a Deductivist Analysis", p. 424.

Shecaira defends this normative claim on two levels. First, he deals with the worry that, by claiming that only arguments by analogy containing principles are good arguments, he has declared a great number of arguments by analogy to be bad that most people consider good arguments. Second, he presents arguments designed to show that analogical arguments containing a principle are better than analogical arguments not containing one. Let us look at each of his arguments in turn.

Shecaira claims that it is possible to divide arguments by analogy into those that explicitly or implicitly contain a principle and those that do not. Many arguments by analogy, Shecaira says, implicitly contain a principle because they point out the similarities that are supposed to support the argument by analogy.[179] And, he goes on, most arguments used in serious debates contain rather strong indicators of the kinds of similarities the arguers have in mind. Therefore, good arguments by analogy are not at all scarce.[180]

While it is hard to deny that *some* analogies list the similarities considered important so explicitly that a principle can be gleaned from them (just as *some* opinions explicitly list their rules), I doubt that every argument by analogy that provides indications of which similarities are important actually contains enough material to gain a determinate principle from it. Take this longer version of the Sam-storm analogy:

Tropical storms come with sudden winds, ripping out trees, blowing roofs off houses and then, from one minute to the next, there is no wind, no rain, and the sun is shining.
Sam is like that. Do not expect him to stick around.

This argument gives ample indication as to which similarities are the ones the arguer wants to point out. Why? Because the arguer indicates, in the description of the source analogue, which aspects of storms are relevant for his argument. But it is not clear that we have enough to glean one and only one principle from the argument. Here's why.

Let us say that a similarity between two objects includes, at least, two aspects of the objects that are similar. For example, the similarity between wolves and rabbits that they both have ears includes at least, on the one hand, the ears of the rabbits, and on the other, the ears of the wolves. Let us further say that the rabbit-ears and the wolf-ears are, for the purpose of the similarity, being treated as equivalents. Then we can say that, by pointing out those aspects that she considers relevant in the source analogue, the arguer gives us indication to which similarities she will consider relevant: those similarities that contain, as one part of the equivalents, those aspects she pointed out. In other words, if the arguer says:

Rabbits have ears, they are like wolves.

[179] Fabio Perin Shecaira (2013), "Analogical Arguments in Ethics and Law: A Defence of a Deductivist Analysis", p. 417.
[180] Fabio Perin Shecaira (2013), "Analogical Arguments in Ethics and Law: A Defence of a Deductivist Analysis", p. 421.

 we can gather from this that the similarity that the arguer is after is one that contains the rabbit-ears and some equivalent to the rabbit-ears in the wolves. Therefore, by pointing out those aspects of storms she considered important, our arguer gave us indication as to which similarities between Sam and storms she thinks are relevant.

Still, I can think of at least two different principles that might be gleaned from the source-analogue.

1) If something tends to suddenly appear and disappear, do not expect it to stick around.
2) If something uses a lot of energy when it first appears, it will soon wear out, so you should not expect it to stick around.[181]

For this reason, I do not think that giving ample indication as to which similarities an analogy is targeting in the description of the source analogue is the same as containing an implicit principle. Arguments by analogy that simply give indication as to which similarities are the basis for the comparison would therefore not necessarily be good arguments under Shecaira's definition of a good argument by analogy.

Shecaira also offers a justification for the idea that only arguments by analogy containing a principle are really good arguments by analogy. He calls arguments by analogies that do not offer enough material to determine which principle stands behind them *bare* analogies. Bare analogies, says Shecaira, have little justificatory power because they rely on nothing but shared intuitions between arguer and interlocutor. Instead of laying open the universal background assumptions they operate on, they are vague and confusing.[182] In a later paper, Shecaira argues that bare analogical arguments are suggestive rather than clear, and therefore risk alienating or deceiving interlocutors, thereby hindering a productive critical discussion. An analogical argument that makes the underlying principle clear, by contrast, enables a productive discussion because it makes it possible for all arguers involved to refer to the same premises in their discussion.[183] Here, Shecaira also attempts to deal with the objection that principles might not always be available to an arguer. Arguers might use analogical arguments to give reasons for normative beliefs about specific situations for which they do not have a principle. Asking them to always deliver a principle might be too high a demand.[184] Shecaira answers that such a problem might sometimes be a good enough reason to give a bad argument rather than none at all.[185] However, he claims that while it might be difficult to find suitable

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[181] The argument by analogy discussed by all these authors, and offered up as a *good* argument by analogy, is Thompson's violinist analogy. This argument will be discussed below. I believe that this argument, too, gives ample indication as to which similarities are targeted, without giving enough information to determine one single principle at one specific level of abstraction.

[182] Fabio Perin Shecaira (2013), "Analogical Arguments in Ethics and Law: A Defence of a Deductivist Analysis", p. 422-424.

[183] Fabio Perin Shecaira (Private Communication from Dr. Fabio Shecaira, Federal University of Rio De Janeiro), "A Case for Deductivism in Law and Elsewhere", p. 19-22.

[184] Fabio Perin Shecaira (Private Communication from Dr. Fabio Shecaira, Federal University of Rio De Janeiro), "A Case for Deductivism in Law and Elsewhere", p. 20.

[185] He also considers the possibility that such principles might simply not be available at all. However, he claims, most theorists dealing with analogies concede that every analogy comes with the *assumption* that

principles, principles are so important to a successful argument by analogy that the idea that they should not be sought cannot bring any gain for critical discussion.[186]

3.2.4 Possible Consequences of Shecaira's Account for an Analogy-Based Account of Reasoning By Precedent

As I have already mentioned, there are some obvious parallels between the reconstructive-deductive account of arguments by analogy that I have just discussed and rule-accounts of reasoning by precedent. According to rule-accounts, judges first determine a rule from the precedent case and then attempt to apply this rule to the present case. Similarly, reconstructive deductive accounts of arguments by analogy have the interlocutor first determine a principle from the source analogue, and then attempt to apply it to the target analogue.[187] It is not surprising, then, that worries that arise when it comes to reconstructive deductive accounts of arguments by analogy are similar to those that make the rule-account of reasoning by precedent unattractive. The source analogue often does not contain enough information to determine a principle, the arguer might not have had any principle in mind, and so it might be impossible to determine which principle should be used when evaluating an argument by analogy. We can therefore turn away from the idea that the reconstructive deductive account of arguments by analogy can guide us to a better understanding of reasoning by precedent. But what about the normative deductive account?

At first glance, it seems that a normative deductive account cannot be of much help either, given that it asks the *arguer* to aim for deductively valid arguments by analogy that include the relevant principles. After all, as we have seen, the judge is best understood in the position of an interlocutor, understanding and evaluating an argument from analogy that consists of the opinion of the precedent case, the present case, and the decision in the precedent case. How could normative deductivism offer any guidance here?

We should not forget that even though judges who reason to determine whether some precedent is relevantly similar to their present case, and then whether they should follow or distinguish, are in the business of understanding and evaluating arguments, they still need to justify their decision to themselves and in their opinions. After all, precedents are supposed to have a restrictive influence on the decision-making of the judge. The judge should therefore evaluate the argument that consists of the precedent and the

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some principle stands behind the analogues cited in the analogy. (Fabio Perin Shecaira (Private Communication from Dr. Fabio Shecaira, Federal University of Rio De Janeiro), "A Case for Deductivism in Law and Elsewhere", p. 22).

[186] Fabio Perin Shecaira (Private Communication from Dr. Fabio Shecaira, Federal University of Rio De Janeiro), "A Case for Deductivism in Law and Elsewhere", p.23.

[187] There are, of course, two interesting differences. First, there is a difference between rules and principles. Often, it is assumed that rules are fixed and either apply or not while principles are open to changes and have a certain weight. However, it is unclear whether Waller had this difference in mind when speaking of principles in his account of arguments by analogy. Second, judges cannot refuse to apply the rules they glean from the precedent because they believe them to be bad rules, while one of the ways in which interlocutors evaluate arguments from analogy is to evaluate the principle inherent in them, and they may refuse to accept the conclusion on the basis that the principle is a bad principle.

present case according to certain standards, standards that enable her to justify her conclusion. Judges are, like other people, in the business of arguing; arguing for the outcome of their evaluations.

Now, it is possible to object that judges do not really need to argue anything. They have the authority to make decisions and hence do not need to justify their conclusions to anyone. However, this is clearly not the right way to look at the matter. First, if we assume that judges are neither lazy nor ill-meaning, then we should also assume that they aim at making justified decisions. They will weigh arguments in both directions and then settle on one line of justification, based on what they believe are the strongest arguments on offer. Therefore, they at least argue with themselves. Second, often judges write opinions, depicting the reasoning that led them to their conclusions. These opinions may be directed at an unspecified audience, but nonetheless, they are directed at an audience. Writing these opinions, which contain justifications, therefore counts as an act of arguing. Judges argue for their decisions, both to themselves and to the unspecified audience of their opinions. They show that their understanding of the argument by precedent is not uncharitable, and that they are justified in either concluding that the argument provides sufficient support for its conclusion and they need to follow the precedent, or not. Because they are arguers in this regard, it is possible to apply the standards of normative deductivism to them. But should we? And what would that look like?

Shecaira argues, following MacCormick, that legal reasoning is in general centered on the so-called legal syllogism. The legal syllogism is a deductive argument with a general norm serving as the major premise, a description of the specific case as the minor premise, and a norm concerning the case as the conclusion.[188] Here's a somewhat simplified example.

Everyone who commits first degree murder or second degree murder is guilty of an indictable offence and shall be sentenced to imprisonment for life.

Sam committed first degree murder.
Therefore: Sam shall be sentence to imprisonment for life.

Shecaira goes on to explain that the use of such syllogisms in arriving at legal decisions is often in need of justification.[189] He claims that legal reasoners should not only aim at

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[188] Fabio Perin Shecaira (Private Communication from Dr. Fabio Shecaira, Federal University of Rio De Janeiro), "A Case for Deductivism in Law and Elsewhere", p. 26/27.

[189] To be precise, it is in need of both internal and external justification. Internal justification is necessary to show that the norm constituting the major premise does indeed apply to the case featured in the minor premise. This becomes necessary if, for example, the norm is formulated in vague terms. Think here of variation of Hart's famous example of a rule forbidding vehicles from a park. (H.L.A. Hart (1958) "Positivism and the Separation of Law and Morals" p. 607).

Whoever brings a vehicle into the park shall pay a 20 Dollar fine.
Sam brought a toy motor car into the park.
Sam shall pay a 20 Dollar fine.

In order for this argument to become deductively valid, it has to be shown that Sam's toy motor car counts as a vehicle for the purposes of the norm through internal justification.

using such syllogisms to support their conclusions, but that they should also aim at using deductive arguments with acceptable premises for the justification of these syllogisms, that is, they should try to find a deductive argument to support the truth of the premises of these syllogisms.[190] By doing so, legal reasoners will render the process of dealing with legal questions more clear, explicit and precise. At the same time, trying to formulate deductive arguments will not hide the fact that legal reasoning is fallible and tentative. Rather, it will make mistakes more easy to find and correct, rendering the whole process more reliable.[191]

Perhaps, then, judges should attempt to determine the principle they believe is best suited to explain the precedent case and then construct a deductive analogical argument from the precedent and the present case using this principle as the major premise of a legal syllogism. This would enable both the judge and later audiences of the judge's reasoning to gain a precise understanding of how the judge understood the argument by precedent and why she either accepted or rejected its conclusion. The choice of this clarifying principle would, according to Shecaira's understanding of arguments by analogy, happen through an abduction using the source-analogue. The correctness of this choice should be justified, as far as possible, through deductive arguments. This should be possible even if the opinion of the precedent case does not give enough information to determine a principle or rule based only on its contents. After all, judges can use moral or other normative reasoning to determine the principle or the rule that they think is the best one amongst the alternatives that would justify the outcome of the precedent, committing to universal claims about which principles are morally or politically the best in which situations.[192] In keeping with this thought, Shecaira argues that, even if the cases judges have to decide are not yet settled by the accessible legal sources, they should still try to justify their decisions with the best available rationale outside of legal sources – the normative principle that guided them. After all, the law is supposed to be consistent, and by giving the full rationale for her decision, the judge provides those who come after her

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External justification is necessary in order to show that the premises as they a presented in the syllogism are true. That is, that the norm as it is cited does exist and that the case, as it is described, is correctly described. (Fabio Perin Shecaira (Private Communication from Dr. Fabio Shecaira, Federal University of Rio De Janeiro), "A Case for Deductivism in Law and Elsewhere", p. 27/28).

[190] Fabio Perin Shecaira (Private Communication from Dr. Fabio Shecaira, Federal University of Rio De Janeiro), "A Case for Deductivism in Law and Elsewhere", p. 29.

[191] Fabio Perin Shecaira (Private Communication from Dr. Fabio Shecaira, Federal University of Rio De Janeiro), "A Case for Deductivism in Law and Elsewhere", p. 34.

[192] This sounds much like Dworkin's theory of interpretation as he presents it in *Law's Empire*. Dworkin suggests that judges should use the principles already integrated into the law in order to decide hard cases – cases were the law does not easily offer up one definite answer. These principles are determined in two stages: First the judge determines which principles would *fit* all the statutes enacted and cases decided relevant to her case. If there are more than one principle that fits the law as it already stands, then the judge chooses among these principles by picking the one that is best morally i.e. that will make the law appear in the best light. This principle then guides her to a decision in her hard case. Similarly, Shecaira seems to suggest that the judge picks those principles that fit the precedent case and then chooses among them the one she considers best in order to decide the present case. (See Ronald Dworkin, (1986), *Law's Empire*, Chapter 7.)

with the means to settle later cases consistently.[193] Keeping one's rationale hidden, simply because it is not based on a legal source, might just perpetuate confusion and uncertainty.[194] The judge, by reconstructing the analogy between precedent and present case as a deductive argument, and by defending her choice of principles through deductive arguments as far as possible, makes her own reasoning as clear as possible for those who will use it later in further cases.

3.2.5 Should Judges Choose the Principle Behind the Precedent?

It is important to note that this suggestion is importantly different from rule-accounts of reasoning by precedent. Rule-accounts claim that judges find the rule they have to apply in the opinion of the precedent, either in the form of a clearly stated conditional, or through careful interpretation. The account that is on the table now recognizes that this is not always, or even normally possible. Instead, it asks the judge to study the precedent, and then abduce a principle that both explains it and is normatively justifiable. This principle is then applied to the present case. It is an analogy-account of precedent, modelled after the deductive scheme of arguments by analogy as it has been provided by Waller and improved by Shecaira. According to this account, a judge who is trying to understand an argument by precedent should restructure it as a deductive argument employing that principle which both fits the source analogue (the precedent case) and is normatively justifiable.

In order to determine whether this account will do as a basis on which to understand reasoning by precedent, let us first evaluate its performance as a description of arguments by analogy. Let us take another look at Waller's scheme:

I. We both agree with case a.
2. The most plausible reason for believing a is the acceptance of principle C.
3. C implies b (b is a case that fits under principle C).
4. Therefore, consistency requires the acceptance of b.[195]

According to the normative deductivist approach to arguments by analogy, arguers should attempt to formulate their arguments by analogy according to this scheme. But, to raise a worry related to the one Govier formulated when she pointed out that the addition of a principle seems to make the source analogue unnecessary: Where do we find the analogy in this scheme?

In the last chapter, we learned that analogies do their work by causing us to re-structure our understanding of two things such that each one fits our understanding of the other. If I tell you that "Sam is like a tropical storm", you might never have seen any similarities between Sam and storms before. Indeed, if you did not know about the existence of such devices as analogies and metaphors, you might think me crazy for

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[193] Fabio Perin Shecaira (Private Communication from Dr. Fabio Shecaira, Federal University of Rio De Janeiro), "A Case for Deductivism in Law and Elsewhere", p. 38/39.

[194] Fabio Perin Shecaira (Private Communication from Dr. Fabio Shecaira, Federal University of Rio De Janeiro), "A Case for Deductivism in Law and Elsewhere", p. 36.

[195] Bruce N. Waller (2001), "Classifying and Analyzing Analogies" p.201.

saying something like that. However, given that you should assume that I was trying to tell you something of relevance, you will now attempt to figure out what it was that I attempted to communicate to you. In order to do so, you will need to find a way to make sense of the claim that Sam is like a tropical storm. And you will do that by mapping the characteristics you know Sam to have onto the characteristics you have reason to believe are dominant in our shared understanding of tropical storms. You will restructure your understanding of Sam so that it fits what you think is our shared understanding of tropical storms, thereby making similar what would have seemed to you utterly different.

This process of one-to-one mapping, as it has been described by Black and, in regard to precedent, by Hunter, seems to have little place in Waller and Shecaira's scheme of argument by analogy. Analogies engage both source and target in one single process that leads to the recognition of similarities. By contrast, Shecaira's two-step process never lets source and target touch. His account of arguments by analogy goes like this: Source -> Principle. Principle ->Target. Rather than one-to-one mapping, what is going on here is a case of normatively justified abduction, followed by a deduction. There is no analogy in Shecaira's argument by analogy, at least not the kind of reasoning by analogy that psychological accounts of analogy describe.

Does this create a problem for someone who attempts to use the normative deductive view of arguments by analogy for an account of reasoning by precedent? I argue it does. Remember that the precedent case, which functions as the source analogue in reasoning by precedent, is supposed to have a constraining effect on the judge's reasoning process. It is supposed to prevent the judge from deciding the present case according to her own idiosyncratic normative commitments. Instead, the judge is supposed to use legal reasons provided by the precedent as far as possible. We have already established that the opinions of precedent cases are not always formulated to meet the standards of deductivism – they do not openly declare the rule or principle on which the precedent decision is based. This principle would then have to be determined by the judge through interpretation. According to the normative-deductivist account of reasoning by analogy, the judge is supposed to determine the principle through her own normative reasoning: she is supposed to choose that principle which is normatively best justified. But bringing in the judge's own normative commitments at the state of precedent-interpretation is awfully early. It means that the judge does not only *evaluate* the argument by precedent using her own normative commitments, but that she uses those commitments already when she is simply trying to *understand* how this argument works. This is exactly the kind of thing Sherwin and Alexander, the legal realists and Schauer were worried about. To illustrate this point, remember that we have already seen that even an argument by analogy that gives ample indication as to which similarities are important often allows for more than one principle that could plausibly be identified as the missing premise. Recall our earlier argument.

> Tropical storms come with sudden winds, ripping out trees, blowing roofs off houses and then, from one minute to the next, there is no wind, no rain, and the sun is shining.
> Sam is like that. Do not expect him to stick around.

Now consider the following two principles:

> P(1) If something tends to suddenly appear and disappear, do not expect it to stick around.

> P(2) If something uses a lot of energy when it first appears, it will soon wear out, so you should not expect it to stick around.

Do each of these two principles, P(1) and P(2) apply to Sam? It is possible, we do not yet know anything about Sam. But it cannot be guaranteed. It is also possible that Sam's interest does indeed suddenly appear and disappear, but that Sam never uses much energy on anything. In other words, it might very well be that one of the two principles applies to Sam while the other one does not. However, if we try to abduce a principle from the source analogue, as Shecaira's account seems to suggest, then we only consider a) whether the principle fits the source analogue and b) whether the choice of the principle can be justified normatively. Therefore, there is no guarantee that we will choose the principle among the two on offer that actually fits Sam. As the legal realists pointed out, a precedent decision that is described in an opinion without a fully formulated rule can often be seen as supported by several different principles. Some of these principles will apply to the present case – but some will not. The normative-deductive method does not provide a way to single out those that fall into the first category. But if a judge is supposed to perform the first step of understanding the argument by precedent using the *principle of charity,* then she should aim to always understand that argument in such a way that it does provide some reason to decide the present case by following the precedent case. Later, in the evaluative step, she is supposed to determine whether this reason is strong enough to actually follow the precedent. The normative deductive method does not favour this process. By allowing the judge to choose the principle applied in the precedent case according to her own normative commitments, it makes it as likely as not that the principle chosen will be one that actually supports following for the present case.

The concerns that we have identified about using the normative-deductivist account as the basis for an account of reasoning by precedent are reminiscent of the old legal-realist worry that judges are always able to interpret precedent decisions in ways that suit their purposes. In other words, they can (and do) decide cases as they see fit, and then go on to use the relevant precedents to rationalize the decision they have already made on other grounds. They simply choose the principle for the precedent that will include or exclude the precedent case, depending on what suits them better.

We might now say that perhaps the restriction that the chosen principle has to be able in some way to explain the precedent is all the constraint that *can* be gained from the precedent. Perhaps some opinions really provide next to no real guidance for judges because they do not make clear which principle their decision should be subsumed under. Perhaps it is simply true that judges can use precedents whose opinions are like this in whatever way they want. Is this not a conclusion that a descriptive account of reasoning by precedent should simply embrace? It might be true that this means that reasoning by precedent really is not the kind of practice that can be identified as truly justificatory

reasoning, simply because precedents often just *do not* deliver the constraint necessary for a real balance between stability and flexibility. Seen from a descriptive perspective - is it really a problem that a precedent does not constrain the judge more than the precedent *can* constrain the judge? Maybe this is the point at which one should abandon the normative project, admitting that reasoning by precedent is not, after all, a form of justificatory reasoning. Maybe, instead of trying to find an account of reasoning by precedent that explains the restrictive power of precedent, I should rather instruct judges to write opinions that offer more constraint and leave it at that.

But then, again, perhaps this very pessimistic conclusion is premature. It is possible that what we have gathered so far about analogies can be used to provide the necessary constraints. As will soon become apparent, the normative-deductive account of analogy, applied to reasoning by precedent, portrays the constraint exerted by precedent as weaker than it actually is, or can be. Let us see why.

What if the Sam-Storm analogy were presented to us, not in an attempt to argue for a conclusion, but simply as a metaphor or figurative analogy? In other words, what if all we were told is the following:

> Sam is (like) a tropical storm, coming with sudden winds, ripping out trees, blowing roofs off houses and then, from one minute to the next, there is no wind, no rain, the sun is shining.

According to the approach to metaphor presented in the last chapter, understanding this metaphor or figurative analogy would have involved a process in which both our knowledge of Sam and our knowledge of storms were involved in the work of re-structuring our understanding of Sam according to our understanding of the tropical storm. When processing a figurative analogy, the two parts of the analogy are brought into *interaction* with one another,[196] an interaction in which our ideas about Sam play as much a role as our ideas about storms. In order to understand the metaphor or analogy, we *use* what we know about storms to guide our re-structuring of Sam, and we select the aspects we pay attention to in storms such that it is possible to do so.

Imagine you know to be true what I suggested about Sam above: Sam's interest does suddenly appear and disappear, but Sam never uses much energy on anything. Imagine now that I come to you with the following argument:

> Tropical storms come with sudden winds, ripping out trees, blowing roofs off houses and then, from one minute to the next, there is no wind, no rain, and the sun is shining.
> Sam is like that. Do not expect him to stick around.

Imagine further, in a sudden turn of events, that I reveal my interest in argumentation theory, and that I was never really concerned about your relationship with Sam at all. I show you Waller's argument scheme:

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[196] See max Black's interaction view of metaphor as discussed in Chapter 2.4.1.

I. We both agree with case a.
2. The most plausible reason for believing a is the acceptance of principle C.
3. C implies b (b is a case that fits under principle C).
4. Therefore, consistency requires the acceptance of b.[197]

Now imagine that I ask you to identify for me the principle that is included in this argument as a hidden premise. I would not be at all surprised if the principle P(2) (If something uses a lot of energy when it first appears, it will soon wear out, so you should not expect it to stick around) never occurs to you. But why? After all, there is much energy-talk in the description of the source-analogue. The storm comes with sudden winds, rips out trees and blows off roofs. Why do you not even pay attention to that? Most likely, you will go directly to Principle P(1) (If something tends to suddenly appear and disappear, do not expect it to stick around) and you will be content that you understood me sufficiently. According to Black's description, the reason for this is that in understanding the analogy, you used both your knowledge of Sam and my description of the tropical storm to understand my analogy. The principle you selected came *after* you had already understood how Sam is like the tropical storm, and you selected it using the similarities you became aware of *as a result of* your restructuring.[198] That is how it came about that the only principle you thought of fit both the storm and Sam. You were constrained in choosing your principle not only by my description of the storm, but also by your knowledge of Sam. The fact that you were supposed to learn something about Sam by considering storms guided you to a certain way to access your understanding of storms, so that it would provide you with a way to understand Sam.

This example illustrates the fact that analogies guide the minds of interlocutors with more than just the source-analogue. Rather, the description of the source, together with what the interlocutor knows about the target analogue, guides her mind towards a certain understanding of the analogy. What the source "storm" *meant* for your understanding of Sam was determined not only by what you know about storms, but also what you know about Sam. If this were not so, we should expect arguments by analogy to be much less effective than they indeed are. People react differently to descriptions of tropical storms, and they might think differently about tropical storms in the first place. If they would choose a principle that fits the storm without thinking about Sam, we should expect them to select a principle that does not fit Sam as often as they selected one that did. They would then fail to understand the analogy, rejecting it on the basis that the principle about storms does not apply to Sam. In other words, we would expect that arguers who try to use analogies come across a problem similar to the one legal realists worry about with respect to the common-law system. In the same way that legal realists worry that judges might be able to interpret precedents so that they either apply or do not apply to their present cases, arguers would have reason to worry that their interlocutors would understand source analogues either to be similar or dissimilar to the target analogues, depending on the principle they chose for the source analogue.

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[197] Bruce N. Waller (2001), "Classifying and Analyzing Analogies" p.201.
[198] In other words, instead of the principle leading you to the recognition of similarities, the recognition of similarities led you to the principle.

Allowing judges to choose a principle that explains the precedent decision based on its normative merit means giving them considerable freedom when it comes to the way they decide their present case. Instead of instructing them to make the present case fit the precedent case if this is at all possible, we would be asking them to judge the fit of the present case with a principle that they have chosen because it seems to make the precedent appear in the best light.

If the description of the source of an analogy provides a fully formulated principle, there is good reason to believe that analogies can have a much more restrictive effect on the mind without the additional step of choosing a principle by employing normative justificatory reasoning. It is much more likely that an interlocutor will be able to see why the argument portrays source and target as similar if she does not try to find a principle for the source first. But if this is so, then an interlocutor performing the first step should not try to find a principle in the way that the account of Shecaira seems to suggest. An interlocutor, in order to put herself in the position to determine whether she should accept a conclusion based on an argument should first try to understand the argument under the employment of the *principle of charity*. For arguments by analogy (and, consequently arguments by precedent) this means that an interlocutor should first try to understand *why and how* the target (the present case) could be understood as similar to the source (the precedent case). If applying the normative-deductive account is not the way in which the interlocutor will most reliably come to see why target and source could be considered similar, then an interlocutor should not apply it – that would go against the *principle of charity*.[199] Rather, she should apply that account which will make her understand the argument best – the account which will make it most likely that she will understand *why* source (the precedent case) and target (the present case) *could* be seen as similar. In other words, she should apply that account which will allow the analogy between source (precedent case) and target (present case) to restrict her understanding most. And this is the account gleaned from Black and Hunter and described above. If a judge employs this account of arguments by analogy when trying to understand the argumentative analogy in an argument by precedent, she will be most likely to see the precedent case and present case as similar. This is so because she will employ her understanding of the present case as well as what she reads about the precedent case in order to figure out why the two might be similar. This means that she will be most likely be able to see *why* the argument by precedent might be said to provide a reason for her to follow the precedent. The result is that when she later moves on to evaluate the argument by precedent that she has now understood, she is evaluating the argument in at least a minimally strong form – a form that, to her, provides at least some reason for its conclusion and that therefore provides at least some argumentative resistance to her if she

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[199] It is also possible to apply Shecaira's account of how interlocutors should deal with bare analogies in a somewhat different way. Shecaira could suggest that interlocutors should use allow the analogy to affect their mind as described by Black and Hunter and *then* use the restructured understanding of source and target to determine the best justified principle that fits both. The evaluation of a normal argument by analogy would then proceed with the evaluation of that principle. In this way, Shecaira's account would be saved from the worries presented above. At the end of this chapter, I will discuss how this possibility could be applied to reasoning by precedent.

wishes not to follow the precedent. The normative-deductive account of reasoning by analogy does not lead her to create this resistance when she understands the argument because it provides her with the freedom to choose a principle for the precedent case that does not apply to the present case in the first place. Therefore, it cannot be best at explaining the restrictive effects precedents are said to have.

3.3 A Rhetorical Account of Arguments by Analogy

So far, we have determined that we need an account of arguments by analogy that enable the interlocutor to use the restrictive effects analogies can have on the mind when she tries to understand these arguments. The deductive account of arguments by analogy was not able to provide us with this. This is not a surprising result. Deductivism is mainly concerned with the justificatory relation between premises and conclusions. It is not overly concerned with the effects arguments have on the mind. Rather, it addresses the validity of arguments independent of their effects on those who engage with them. One goal of this chapter, however, is to explore whether analogies (and arguments by analogy) can be used so that they have a restrictive effect on the reasoning of judges because we want to know whether an analogy-account of precedent can explain the guidance precedents provide for judicial decision-making. We therefore need to approach arguments by analogy from a different angle, one that pays more attention to the effects of analogies on the minds of arguer and audience. Traditionally, the field of rhetoric is most concerned with the *effects* of arguing and measures the success of arguments by their *effectiveness* on the minds of audiences. We will therefore now turn to the rhetorical theory of argumentation and use a rhetorical model of how arguments by analogy work. Similar rhetorical models of arguments by analogy have been developed for example by Lilian Bermejo Luque, Peter Mengel and Eugen Fischer. The account I propose here is in general agreement with these accounts, but it is specifically designed to be useful for an account of reasoning by precedent.[200]

3.3.1 The Rhetorical Theory of Argumentation

The rhetorical theory of argumentation has long distanced itself from the mainly negative picture of rhetoric as deceptive, opportunistic and, in the best case, merely ornamental. The constructive rhetorical approach views argumentation as a fundamentally communicative and inter-subjective practice. Arguments, from the point of view of this approach, are importantly defined by their purpose, the purpose to *persuade*. Unlike the deductive account of argumentation that we discussed above, rhetorical accounts do not consider arguments isolated from the context in which they are used, or the people that use them.[201] Argumentation is seen as one way in which the "meeting of the minds"

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[200] Lilian Bermejo-Luque (2012), "A Unitary Schema for Arguments by Analogy"; Lilian Bermejo-Luque (2014a), "Deduction without Dogmas: The Case of Moral Analogical Argumentation"; Lilian Bermejo-Luque (2014) "The Uses of Analogies"; Eugen Fischer (2014) "Messing Up the Mind? Analogical Reasoning With Metaphors"; Peter Mengel (1995), *Analogien als Argumente.* (I am not sure whether Peter Mengel would agree to label his account "rhetorical". It is, however, so similar to the main insights of the other as well as my own account that I feel justified listing it here.).

[201] Christopher Tindale (2015), *The Philosophy of Argument and Audience Reception* p. 23.

between arguers takes place,[202] and its effect and goal is the changing of the reality as it is perceived by the arguers and audience through the giving of reasons.[203] The arguer constructs the argument for her audience in an attempt to effect persuasion. Arguments are therefore conceived of as social tools. Chaïm Perelman distinguishes them from demonstrations, that derive truths from further truths and that are independent of who conceives of them, or to whom they are to be presented.[204] To construct an argument involves much more than to construct a demonstration. An argument is always intended for an audience, and with the audience in mind. Whether an argument is good is not determined solely by asking whether its conclusion is indeed supported by its premises. To be good, an argument has to be effective in persuading its audience. What this means can be demonstrated if we consider Charles Hamblin's often discussed example of the argument about orang-utans. Hamblin points out that the argument:

> "Oranges contain dietary supplements.
> Therefore they are good for orang-utans."[205]

contains true premises that indeed support the conclusion. However, whether this is a *good* argument as it stands depends on the audience to which the arguer is speaking. If I present this argument to a group of biology students in the second half of the 20th century, this argument might be very good. But if I speak to ancient Romans, who have not only never heard of vitamins, but also lack the necessary background knowledge for even beginning to understand what vitamins could be, then my argument becomes very bad. As Christopher Tindale points out, this is not simply an issue of whether or not the audience knows of the truth of the premises. People can be informed of the truth. The issue is whether the reality in which these people operate is constructed such that the concept of vitamins can be entered into it without major reconstruction.[206] For ancient Romans, the argument carries virtually no persuasive power at all, independent of the relationship between its premises and conclusion. Therefore, if it is presented to ancient Romans, then it is a bad argument because it fails to engage with what they perceive as reality in a way that has any hope of changing it.

According to Tindale, the audience is therefore one of the most fundamentally important aspects of argumentation, and being an audience (one type of which is being an interlocutor) is as important as being an arguer.[207] A good argument leads the interlocutor to persuasion. However, this does not necessarily entail an image of a passive audience and an arguer in full control. In the best case, the audience is not passive but fully active in the sense introduced above, but also in another sense. The arguer functions as a provider of the means of persuasion, inviting the audience to see a subject matter through her eyes, and the audience, using these means, persuades itself, constructs for itself the

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[202] Chaïm Perelman (1982), *The Realm of Rhetoric*, p.9.
[203] Christopher Tindale (2004), *Rhetorical Argumentation*, p. 19/20.
[204] Chaïm Perelman (1982), *The Realm of Rhetoric*, p. 9.
[205] C.L. Hamblin (1970), *Fallacies*, p. 160.
[206] Christopher Tindale (2004), *Rhetorical Argumentation*, p. 160/161.
[207] Christopher Tindale (2004), *Rhetorical Argumentation*, p. 179 ff.

subject matter as it would appear in a reality in which the conclusion of the argument is correct.[208] In other words, the arguer offers her arguments as tools that the audience can use by allowing them to affect their minds. The tools with which the arguer invites the audience into a certain understanding of the subject matter are then what is, in part, the concern of a rhetorical theory of argumentation. Therefore, it is well suited to develop an account of arguments by analogy that incorporate the effects analogies have on the minds of those trying to understand them.

3.3.2 Using Analogies to Argue Rhetorically
It is not hard to see that, from the rhetorical perspective on argumentation, analogies and metaphors are especially interesting. We can use them to make others see a subject matter in a new light. As their addressees, we can use them to gain new perspectives by subjecting ourselves to their effects. Because an analogy or metaphor only makes sense once the person trying to understand it has invested their own work, metaphors and analogies offer themselves as ideal tools for invitational rhetoric. If I tell you that Sam is like a tropical storm, and therefore you should not expect him to stick around, I have not provided you with the fully articulated argumentative pathway that leads from Sam's character traits to the assumptions you should or should not make about whether or not Sam will stick around. In fact, I have not even spelled out Sam's character traits. Instead, I have provided you with just enough information so that you can reconstruct a point of view of Sam that portrays him as someone who will not stick around. I have communicated to you that, if you conceptualize Sam as a tropical storm, you will see that he cannot be expected to stick around. If you want to understand my argument, you will have to do the rest. If you do not understand my argument, you cannot respond. I have basically employed you to work for me – to persuade yourself. At the same time, I have given you some guidelines as to how you are to understand my argument.

The first of these guidelines is the pairing between source and target of the analogy or metaphor. If I tell you that Sam is like a tropical storm, I obviously intend for you to concentrate on those characteristics of Sam for which there are equivalents in the understanding of storms we can assume that we share, and on those characteristics in storms for which there are equivalents in Sam. However, the guidance analogies and metaphors can offer is not absolute. Often, it is possible to achieve a fit between source and target in different ways. The analogy between Sam and the tropical storm by itself, without a conclusion, could easily be interpreted in at least two ways. Sam might be understood to be the kind of person whose attention span is extremely short. However, the analogy by itself does not forbid an interpretation according to which Sam is understood as extremely strong and destructive. Analogies and metaphors are famously open ended.

Arguments by analogy, however, have at least one further aspect that provides guidance for how the analogy is to be understood: the conclusion. Indeed, from a rhetorical point of view, the conclusion is not only that for which the argument provides justification, it is also part of the tools that make the argument effective. By stating the conclusion, the arguer communicates what they think the analogy can show about the

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[208] See, e.g. Christopher Tindale (2004), *Rhetorical Argumentation*, p. 50 ff. and Sonja Foss and C.L. Griffin (1995), "Beyond Persuasion: A proposal for an invitational Rhetoric".

target analogue. The analogy has to be understood such that it fits two different bills: source and target have to match so that the target fits the source *and* so that the conclusion becomes plausible for both source and target. Imagine you tell me that you do not think that Sam cannot be expected to stick around just because he is like a tropical storm. I might then ask you why you object. You might have all kinds of good reasons. But if you tell me that being strong and destructive has nothing to do with whether or not someone will stick around, then you have not defeated my argument. I can simply tell you that you just did not understand the analogy correctly. As Lilian Bermejo-Luque points out, reacting to an analogy simply by saying that the analogues are not the same is not forming a valid objection: Of course they are not the same, they are analogous.[209]

These two elements together already provide firm guidance as to how the analogy in an argument by analogy should be understood. However, the arguer has further options for exerting control over the way her interlocutor will understand the analogy. She can employ further rhetorical tools when describing the source analogue, guiding the interlocutor's understanding of it even more decidedly.[210] In order to see this, let us take a look at the argument by analogy that has been most analyzed by argumentation theorists: Judith Jarvis Thompson's "violinist" analogy. In her paper, Thompson first states the conclusion she wants her analogy to support: there is no duty not to abort, even under the assumption that the fetus is a person.[211] Thereby, she informs her interlocutor that the source analogue is supposed to be understood in such a way that it can inform the interlocutor's understanding of pregnancies. Then, Thompson asks us to imagine the following situation:

> You wake up in the morning and find yourself back to back in bed with an unconscious violinist. A famous unconscious violinist. He has been found to have a fatal kidney ailment, and the Society of Music Lovers has canvassed all the available medical records and found that you alone have the right blood type to help. They have therefore kidnapped you, and last night the violinist's circulatory system was plugged into yours, so that your kidneys can be used to extract poisons from his blood as well as your own. The director of the hospital now tells you, "Look, we're sorry the Society of Music Lovers did this to you-we would never have permitted it if we had known. But still, they did it, and the violinist now is plugged into you. To unplug you would be to kill him. But never mind, it's only for nine months. By

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[209] Lilian Bermejo-Luque (2014a) "The Uses of Analogies", p. 65.
[210] In an analogy like "Sam is like a storm", the interlocutor's understanding of source and target interact almost equally. What the interlocutor finds important about Sam is going to influence what she picks out as important similarities as much as what she finds important about storms. But if the arguer determines certain factors in the storm she designates as important, the source "storm" becomes less flexible, and the arguer has to concentrate more on restructuring the target and less on restructuring the source.
[211] Judith Jarvis Thomson (1981), "In Defense of Abortion", p.47f.

then he will have recovered from his ailment, and can safely be unplugged from you."[212]

Thompson goes on to point out that our intuition is that it would be nice of us to agree to stay connected to the violinist, but not at all morally required. After this, she asserts that, for this reason alone, something is wrong with the idea that, if a fetus is a person, a mother has a duty not to abort.[213]

Thompson's analogy is so famous because it is so extremely effective. Even people who are against abortion seem to be able, with the help of Thompson's argument, to understand the position of those who are pro-choice. How is Thompson able to guide other people's minds so effectively in this one specific direction?

In Thompson's argument by analogy we can clearly see the two basic sources of guidance that we discussed above. Thompson informs her reader of the conclusion she wishes to support with her argument and she entrusts him with the task of re-structuring his image of pregnancy according to her story of the violinist. It is important to note that the violinist-story by itself could be useful in many different ways. It might, for example, be a story to illustrate what is wrong about abductions. However, by bringing together the violinist story and the concept of pregnancy, Thompson accomplishes two things: we are supposed to understand the violinist story as informative about pregnancies – and we are supposed to gain a new perspective on pregnancies that fits the violinist-story. But Thompson's source analogue does more. Thompson has effectively set up her description of the violinist-situation so that those factors in the situation that can be connected with inferences to support the intended conclusion are easy to notice. In rhetorical terms, she has endowed certain elements with a *presence*. This means that by putting emphasis on certain elements of her story, she has highlighted them for her reader, placing them in the foreground of his mind and focusing his attention on them.[214] One finds oneself in the situation suddenly one morning. The violinist is a stranger. The director of the hospital admits that the society of music lovers had no business doing what they did. These factors (and more) are all important for the intuition Thompson wants to invoke. Thompson, talking to an educated, western audience has given presence to those elements of the situation she knows will encourage her readers to draw the conclusion she wants: that there is no duty to stay connected.[215]

Taken together, these three means of guidance, the combination of source and target, the conclusion, and the presence given to certain elements of the source-analogue, have a powerful restrictive effect on the way Thompson's reader conceptualizes pregnancy for the purpose of understanding the analogy. In an attempt to understand Thompson's analogy or metaphor, the reader has to enter into an at least tentative

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[212] Judith Jarvis Thomson (1981), "In Defense of Abortion", p.48f.

[213] Judith Jarvis Thomson (1981), "In Defense of Abortion", p.49.

[214] See Christopher Tindale, *The Philosophy of Argument and Audience Reception* (2015), p.182 ff.

[215] Gaining an understanding of the audience and then drawing attention to those aspects that one knows are going to elicit certain reactions from the audience is called the *pathetic* element of rhetorical argumentation. The arguer gets to know his audience and is sensitive to their dispositions when creating arguments. (See, e.g. Christopher Tindale (2004), *Rhetorical Argumentation*, p.21).

cooperation with her.[216] The factors Thompson gave presence to in her story are obviously important for the conclusion she wants to reach. Therefore, if the reader wants to understand the argument, he has to find equivalents for them when re-structuring his conception of pregnancies according to the story. In this way the reader is encouraged to concentrate his attention on very specific aspects of pregnancies – those that are equivalents of these factors. By engaging the reader in the task of understanding the metaphor or analogy, Thompson has guided the reader to transferring the presence she gave to the elements in her story to certain elements of pregnancies. Other aspects (perhaps that there is a special bond between mother and child) do not find an equivalent in the story, and are therefore placed into the background during the re-structuring. Simply because the reader does not need to think of them in order to understand Thompson's analogy, they vanish from the group of things that he pays attention to and that are therefore likely to appear in his reasoning about the topic. Once the restructuring is finished, aspects like the unwanted nature of certain pregnancies are fresh in the mind of the reader, while other aspects, such as the special bond between mother and child, are not. (Interestingly enough, though, Thomspon has not given presence *only* to those aspects of her story whose equivalents in pregnancies will serve as premises for a pro-choice argument. She has also highlighted the personhood of the violinist and his absolute dependence on the help of the victim of abduction. The result is that, if her analogy works and the reader admits that they would feel no obligation to stay connected to the violinist, Thompson has effectively precluded objections on the basis of these two elements. That this is a possible move will become important later on in our analysis of the evaluative part of reasoning by precedent.)

The aspects that are now endowed with presence and are fresh in the mind of the reader are the equivalents of the aspects in the story that enabled the inference to the non-duty to stay connected. They enable the equivalent to this inference – the non-duty not to abort. Other aspects that might have obstructed the inference are ineffective because they have been moved to the background. Thompson's analogy made the conclusion she wants about abortion *accessible*. It guided the reader towards a new perspective on abortion so that possible premises for Thompson's conclusion are endowed with presence while possible hindrances in coming to this conclusion have been pushed to the background. This does not mean that Thompson has *provided* her reader with reasons, or even with premises. She leaves this to him, again engaging the reader in the process of helping her to persuade him.[217] Indeed, the reasons why the reader might now share her intuition about the violinist story and about abortion might differ from reader to reader. For some it might be most important that the connection was involuntary or unplanned, for others, that the person connected is a stranger. Which one will depend on the reader. The description of the source of the analogue is unspecific enough to allow the reader to

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[216] In this way the analogy or metaphor invites the reader to reason alongside the arguer – rhetorical devices work best if they can guide the audience or reader towards developing the point of view the arguer wants them to understand on their own, working alongside the arguer. It is therefore a goal of rhetoric to unite speaker and audience, rather than emphasise the distinctions between them. (See: Christopher Tindale (2004), *Rhetorical Argumentation*, p.21).

[217] See Christopher Tindale (2004), *Rhetorical Argumentation,* p.50.

achieve the fit between source and target in a way that will make the argument most convincing to them. To some degree, the reader's conception of pregnancies plays a role in how exactly she will understand the similarities between source and target. But through her description of the target, Thompson has made the conclusion accessible and shifted the perspective on what is important and what is not such that it becomes very easy to share her intuitions. So easy that many may well be tempted to agree with her without even knowing why exactly they do so.

According to the rhetorical understanding of arguments by analogy that has been developed here, arguments by analogy work in a different way than the classic premise-premise-conclusion structure we have come to expect from arguments. Instead of bringing together premises that are supposed to provide support for their conclusion through an inference, the argument by analogy is a device used to show an interlocutor that – and how – a certain conclusion about some subject matter can be reached; or in other words, that this conclusion can be integrated into a perspective on the subject matter which is accessible to the interlocutor.[218] The argument therefore works in a slightly different way than we are used to. Rather than the premises by themselves giving reason to accept the conclusion, arguments by analogy come as one whole package: source-analogue, target-analogue *and* the conclusion are all presented together so as to provide guidance such that the interlocutor may come to a new understanding of the subject matter, one that includes the conclusion as one aspect of how it is now seen.

Of course, not every argument by analogy is a good argument by analogy. Arguments by analogy can fail in a number of ways. First, the interlocutor, in an attempt to understand the argument by analogy, might find himself unable to map the target analogue onto the source analogue because he cannot find any aspects of the target analogue that could plausibly be considered an equivalent to a highlighted aspect of the source analogue. He might therefore reject the whole argument as employing a bad analogy. Alternatively, the interlocutor might be able to map the target analogue on to the source analogue but find that some important aspect of the target analogue cannot be integrated into the new image of it that results from this mapping. He might therefore object to the argument on the basis of an important difference between source and target. Or, a third possibility, the interlocutor might find that the analogy works well, but disagree with the conclusion as it applies to the source analogue, arguing that, even though the target can be reconstructed to fit the source, the argument does not provide reason for the conclusion about the target analogue because the conclusion cannot be reached for the source analogue in the first place. For example, this would be the case if an interlocutor claimed that he *would* feel obliged to stay connected to the violinist, should he find himself in the situation that Thompson describes.

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[218] Furthermore, a good analogy that works shows the interlocutor that the conclusion is *easily* accessible, with only a few changes in the way he already perceive things. This is so because the analogy leaves it up to the interlocutor to make the connections between source and target of the analogue. It therefore has to rely on the interlocutor being able to find equivalents for the elements of the source – for otherwise he will not be able to accept the analogy as even understandable. A good analogy therefore does not only show that the conclusion is accessible, but it also shows that it is accessible without the necessity of big changes in how the interlocutor otherwise sees the world.

It should be noted that, even if the argument by analogy is a good one that leads the interlocutor to a perspective on the target that makes the conclusion accessible, this has only shown that there *is* a perspective according to which the conclusion is acceptable, not that this perspective is the one that *should* be adopted from now on. Arguments by analogy by themselves are weak, they guide the mind to some new perspective, but they do not justify adopting this perspective for the long run. This means that the justificatory power of arguments by analogy is limited, but not at all unimportant. Showing that some perspective on a subject matter can rationally be adopted, and guiding the interlocutor to recognition of a possible argumentative structure for the conclusion the arguer has in mind, are significant argumentative accomplishments. Once the new understanding has been gained, the question whether it is the one that should be adopted for some specific purpose needs to be dealt with through further argumentative work. In other words, once the interlocutor has performed the first step and understood the argument by analogy by using the provided combination of source and target to gain an understanding of the target analogue that makes the conclusion acceptable, she has to engage in the second, evaluative step to determine whether this conclusion should indeed be adopted.

3.3.3 Precedents as the Source-Analogues in Rhetorical Arguments by Analogy

A rhetorical analogy-based account of reasoning by precedent presents the judge as an interlocutor faced with a rhetorical argument by analogy. This argument contains a) the opinion presenting the precedent case as the source-analogue, as well as b) the precedent decision, functioning as the conclusion and c) the present case, as it has been presented to the judge as the target analogue. It is the task of the judge first to understand this argument under application of the principle of charity and then to evaluate it. However, because the judge needs to understand the argument before she can start evaluating it, she has the opportunity to make use of the full potential for guidance arguments by analogy can offer. Using the description of the precedent in the opinion and the decision made in it, she can make an attempt at constructing a perspective on the present case that warrants seeing it as parallel to the precedent case and repeating the precedent decision. Guided by the attempt to understand the argument by precedent as a strong argument, she allows the analogy between precedent and present case to affect her so that she gains an understanding of the present case and precedent case as they need to be understood if they are to be seen as similar. The similarities she comes to see through this process are likely those similarities that are going to be legally relevant (even though, as the next chapter will show, this needs to be subjected to examination in the evaluative step).[219] Why?

The precedent judge decides her precedent case based on reasons. These reasons refer to certain factors of the precedent case. Imagine, for example, that a judge in the

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[219] I should note that, when lawyers use precedents to argue their case, they will also often suggest ways in which they believe the precedent and present case to be similar. In order to evaluate the arguments presented by lawyers, judges can (and probably should) also take these suggestions into account: Understanding the precedent and present case as similar under the guidance of the way the lawyer sees them as similar will make accessible to them the argument by analogy as the lawyer perceives it.

land *Far Far Away*[220] decides to convict the red-head Kara for a newly invented kind of crime, which she calls *bodily injury caused by negligence*. While helping her aunt Jennie move out of her old apartment, Kara threw an old piano that her aunt did not want any more off the Aunt's fifth floor balcony without looking. As a result, one of the legs of the piano scraped the rib-cage of a passer-by, causing several broken ribs. The precedent judge will have made her decision based on some of the factors that I just described in my story, but not based on all of them. For example, she might have taken into account that Kara did not look when she threw the piano off the fifth floor, but not that Kara was a red-head. By making her decision based on some factors but not others, the judge marks these factors as important for her decision. And because our judge operates in a common-law system, her marking them as important is authoritative. For simplicity, we can say that she has put a mark of authority on them so that from now on, the factors that *she* took to be reasons for convicting Kara for *bodily injury caused by negligence* are factors that are *legal reasons* for convicting people for *bodily injury caused by negligence*. These factors are now legally relevant.

Opinions describe the precedent case from the point of view of the judge who decided it. They will therefore present those aspects of the precedent case as important that the precedent judge considered important, and will neglect or outright reject the importance of those aspects the precedent judge did not consider important. The judge might write "The defendant did not look before throwing the piano off the balcony" but neglect to mention Kara's hair-color. Therefore the opinion of precedent cases will also – in varying degrees but always to some extent – offer the additional guidance of endowing certain aspects of the precedent case with presence. The reader might remember the example of the rabbit-ears and wolf-ears that I suggested earlier. The person who said:

Rabbits have ears, they are like wolves.

thereby indicated that the similarity to which attention should be drawn includes at least the ears of the rabbit and the equivalent to them in the wolf. She thereby marked that similarity which contains the rabbit-ears as one of the equivalents as relevant. Similarly, when a judge gives presence to a factor of a case in her opinion she thereby indicates that this factor contributed to her decision. In our example-opinion, Kara's-not-looking-before-throwing-the-piano is being put forward as such a contributing factor and thereby as legally relevant. Consequently a similarity that contains as one equivalent Kara's-not-looking-before-throwing-the-piano is marked as a legally relevant similarity.

The present judge, trying to gain a perspective from which the precedent could be seen as binding on the present case (in order to evaluate this perspective later), will construct the two cases as similar guided by the aspects of the precedent case that have been highlighted in the opinion. The similarities she picks out between the precedent and the present case will be those that become important in her re-structuring; they will be the pairs of highlighted aspects from the precedent case and equivalents she found in the present case. She will, for example, look for some factor in her present case that can function as an equivalent to Kara's-not-looking-before-throwing-the-piano. Her choice of similarities is therefore guided not so much by her own ideas of which similarities are

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[220] Where the legal system is not yet very developed and things are still nice, neat and easy.

legally relevant and which are not, but instead by the way the opinion presents certain aspects of the precedent case as legally relevant. The present judge uses the opinion of the precedent case as a means to let herself be guided by the precedent judge when picking out similarities as legally relevant.

Interestingly, this process does not just have an effect on the judge's understanding of the present case, it will also have an effect on how the judge understands the precedent case – what the precedent case *means* to the judge. When the judge understands precedent and present case in an analogy together, she does not only restructure her understanding of the present case. She also approaches the precedent case with the goal of making it fit the present case. She is constrained in her understanding of the precedent case by the language and rhetorical tools used in the opinion. But where the opinion is vague, she will understand it in such a way that it will be able to fit the present case. By understanding the analogy, she therefore also comes to see the precedent *as* a case that can provide guidance for deciding the present case. (As a result, if the judge later decides to follow, she fixes the meaning of the precedent case further. It is then *authoritatively* designated as similar to the present case – therefore it has a meaning that fits the present case. A similar thing happens if she decides not to follow – she then authoritatively fixes that present case and precedent case are not similar and therefore that the precedent case must have a meaning that excludes the present case. The present case – and how it will ultimately be decided – has an influence on the meaning of the precedent case going forward.)

The rhetorical view on arguments by analogy therefore opens up a way to understand how the present judge can use all the potential for guidance that is contained in the precedent opinion even if that opinion does not offer a fully formulated rule. The judge needs to employ the principle of charity when trying to understand the argument by precedent, and in order to do so, she allows the analogy between precedent case and present case to affect her mind so that she comes to a re-structured understanding of the present case and the precedent case as similar.

3.3.4 Arguments by Analogy and Principles
In the deductive account of arguments by analogy, principles played a central role. They served as the link that connected the source-analogue to the target-analogue because both could be subsumed under the principle. Consequently, any view of reasoning by precedent based on this view of reasoning by analogy had to involve the use of principles.

The rhetorical account of reasoning by analogy presents arguments by analogy in a different way, making the use of principles unnecessary. As a result, there is reason to think that it can be used to formulate an account of reasoning by precedent that presents precedents as restrictive without the need to presuppose that the opinions of precedents provide fully formulated rules, or even that the judge must use her own normative reasoning in order to settle on a principle she can use to apply the precedent. Descriptively, this has the advantage of being able to explain why judges report themselves to be bound by precedents even if no clear-cut rule can be gleaned from the opinion. However, this independence from principles might raise the worry that an account based on the rhetorical view on arguments by analogy might err descriptively in

the other direction. After all, some opinions *do* offer fully formulated *rationes* that can be used like rules, and others provide at least partial rules, with parts of the factual predicate fully specified into easily applicable categories and others parts only hinted at through a description of the particulars of the precedent case. Additionally, the common law produces principles through the combined effect of several precedents, such as the so-called "Neighbour Principle", the doctrine that "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour."[221] Can we expect that an account of reasoning by precedent as it was sketched above will be able to account for these ways in which rules and principles factor into the application of precedents in the common law?

In order to deal with this worry, let us make a short comparison between analogies and rules. One of the main differences between analogies and rules seems to be the following. Analogies provide us with a source-analogue according to which we are meant to make an attempt at restructuring the target-analogue so that it fits the source. In doing so, we highlight those aspects of the target analogue that fit the source, leaving the others in the background. By contrast, when trying to apply a rule to some specific case, we are provided with a factual predicate that contains categories under which our specific case is meant to fit – and usually, the factual predicate provides us with these categories in the form of general terms (in "No vehicles in the park", the term "vehicles" informs us about a category of objects by providing us with a general term that is meant to apply to all the objects in this category).

However, hidden in this difference there lies an interesting similarity between the ways in which analogies and rules work. Peter Mengel points out that, when we apply a category specified by an abstract term to an object, or when we perform a generalizing abstraction to form a category that will comprise all and only the objects in some set, we also highlight certain aspects of these objects at the expense of others.[222] If we apply an abstract term to an object (if we think, for example, of a fire truck simply as a vehicle), then we highlight those characteristics of the object that are the conditions for falling under the category denoted by that term and push the others into the background. Similarly, if we perform a generalizing abstraction over a set of objects to form a category that applies to all of them, we will highlight those characteristics they have in common (those that will be included in the category) and ignore those that make them different (those that cannot be included in a category comprising them all). [223]

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[221] Donoghue v. Stevenson [1932] AC 562.

[222] Peter Mengel (1995), *Analogien als Argumente*.

[223] This means that with respect to every single, concrete thing, we choose a specific perspective, one from which we see the thing as part of the category. Performing a generalizing abstraction over a set of specific objects to come to a new generalisation involves a seemingly impossible double-step. In order to gain the new perspective on the concrete thing, we need to know which characteristics to highlight – i.e., we need to know the category already. But in order to construct the category, we need to perform the work of re-structuring our understanding of the concrete objects and find those characteristics that are equivalent in all of them. It appears that each step presupposes the other – and none can be performed by itself. (Peter Mengel (1995), *Analogien als Argumente,* p. 174/175) Mengel points out that this problem occurs only if we ignore the context in which we perform generalizing abstractions. We usually do so in the context of an end that we wish to attain, or in order to come closer to the solution of a problem. This problem or end then

According to this insight, then, both the categories provided by the factual predicate of a rule and the analogy have a similar effect on the interlocutor. In both cases, the interlocutor is guided towards viewing some subject-matter in a specific and possibly new way, by highlighting some of its aspects and ignoring others. It is therefore no problem if an opinion contains whole or partial factual predicates. In the first case, the judge simply applies the factual predicate to the present case, seeing whether it fits. In the second case, the judge applies those categories that are provided by the opinion and uses analogical guidance for those aspects of the case that are not categorized in the opinion.

The insight provided by Mengel also explains why principles can arise out of lines of precedent. Analogies can be used to find principles because they can guide us towards a generalizing abstraction. They group together two things (objects, situations, sets of objects etc.) and leave the interlocutor with the problem of re-structuring his understanding of these things so that they fit together. The interlocutor must find one perspective for both of them, concentrating only on those characteristics an equivalent of which can be found in the respective other. It is then possible to collect the characteristics for which an equivalent was found, perhaps give them names, list them, and call having them the individually necessary and jointly sufficient conditions for belonging to a new category.[224] However, in order to take this opportunity, the interlocutor needs to go one step further than merely restructuring the target and source so that they fit each other – he needs to keep book of the characteristics he highlighted in the process and make a choice about which he will include in the category. Depending on the purpose he has in forming his new category, he might consider whether he wants to include all of them, some of them, or even additional ones that might be used to exclude objects that could be seen as analogous to both source and target but that he does not want in his category.

3.3.5 One Remark about A Possible Interpretation of Shecaira's Account

This leads to one additional consideration. Above I suggested one way in which Shecaira's normative-deductive account of reasoning by analogy could be made fruitful for an account of reasoning by precedent: by asking judges to use normative, justificatory reasoning to determine the best principle that could explain the decision in a precedent case (if no principle has been explicitly offered in the opinion). However, this is not the only way in which Shecaira's account could be extended to how interlocutors should treat bare arguments by analogy. After all, Shecaira accepts that descriptively, not all arguments by analogy employ principles, and merely points out that they usually *should* employ such principles if they are supposed to be good (or the *best* possible) arguments by analogy. Therefore it is possible that Shecaira would, instead, advise interlocutors (and judges) to use the rhetorical guidance provided by a bare analogy to come to the principle that can most plausibly be considered to be the basis of the analogical argument. First, Shecaira could suggest, the interlocutor allows the analogy to influence her mind such

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guides our generalizing abstraction by suggesting certain characteristics in one of the things which can contribute to solving the problem. We then search for equivalents for these characteristics in the other things, and form our generalisation from those for which we find equivalents. (Peter Mengel (1995), *Analogien als Argumente*, p.178).

[224] Peter Mengel (1995), *Analogien als Argumente,* p.183 ff.

that she sees target and source as similar. And *then* the arguer uses the combination of newly structured source and target to abduce a principle in the way described in section 3.3.4. This principle is then guaranteed to apply both to source and target. In addition, if the interlocutor makes it clear that it is this principle that she understood to be at the basis of the argument, and if she makes this principle the object of her evaluation, then she furthers Shecaira's goal of clarity and precision. This version of Shecaira's normative-deductive account of arguments by analogy would make use of both the rhetorical ideas described above *and* the deductive ideal. As such, it could serve as a basis for an analogy-based account of reasoning by precedent. Such an account would look much like the one I am suggesting here. It, too, would require the judge to follow a two-step process of first understanding the argument by precedent under the application of the principle of charity and then evaluating it. It, too, would employ rhetorical insights into the way arguments by analogy work in order to explain how judges are to understand those arguments by precedent based on an opinion that does not include a clearly stated rule. However, then it would part ways with the analogy-account that I will be proposing here. In a step I do not require, it would ask the judge to use her newly-gained understanding of the present case as similar to the precedent case in order to formulate a fully categorized rule or principle under which both cases fall. The judge would then assume that it is this principle she would have to endorse in the opinion she would write for the present case were she to follow the precedent. And it would be this principle that would be the focus of the judge's evaluation of the argument by precedent. If the principle can be endorsed, she will follow the precedent, if it cannot, she will not.

This account of reasoning by precedent would be a normative-deductive analogy account of reasoning by precedent. But for several reasons, I find this account unacceptable. First, there is no way to show that all judges do actually take this extra step of finding a principle that will fit both precedent and present case. Nor that they *have to* do this for reasoning by precedent to work effectively. I do think that it is possible that some judges do this, or that all judges do this sometimes. But that is not excluded by the account of reasoning by precedent that I am giving here. The account I am suggesting allows judges to determine a principle that fits both present case and precedent case and to include that principle in the opinion they write for the present case if they decide to follow the precedent and the principle for which it stands. But it does not require it. It is designed to describe reasoning by precedent as an existing practice of justificatory reasoning without making a commitment as to whether judges ever, in the entire process, determine – or ought to determine – a fully formulated principle or rule. Second, I am not sure whether the normative suggestion that judges *should* always determine a principle that would fit present and precedent case is actually a good one, especially if this implies that judges should always write such a principle into their opinions. Let us recall the argument with which Wil Waluchow justified using reasoning by precedent as a means for the development of the law. If the law is the outcome of a process guided by the principle of *stare decisis* then it is also the outcome of the reasoning efforts of long lines of judges, faced with many different real-life situations.[225] In other words, this kind of law

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[225] Wil Waluchow (2005), "Constitutions as Living Trees: An Idiot Defends" p. 577.

is less likely to be over- or under-inclusive, because it has been developed under considerations of the many strange things that may happen in life. Waluchow's argument delivers a good reason why a judge should abstain from including a rule of principle in her opinion if she is not entirely sure which principle or rule would be best employed, or how broad a range of cases it should cover. If there is a way to come to a justified conclusion through reasoning by precedent without ever having to determine or endorse a principle or rule, then this way should be open to judges who are not sure about the rule they would want to endorse. The account I am suggesting here is designed to provide such a way. Of course, my account does not suggest that a judge who feels sure about some principle or rule is prevented from expressing it in the opinion she writes to justify her decision.

4. The Constraint of Analogies
In this chapter, I have argued that analogies, and especially arguments by analogy, can have a strong restricting effect on the minds of those to whom they are presented. If I am right, then what I have provided is the basis for an analogy-account of reasoning by precedent that can explain the constraining function of precedent. It is important to stress, however, that this account does not cast the judge in the role of an *arguer* formulating an argument. Instead it casts her in the role of an *interlocutor*, understanding and then evaluating an argument that is formed from (a) the precedent case, (b) the precedent decision, and (c) the present case. Often, the judge is actually in the position in which she is presented with a precedent by a lawyer. I have shown that in order to capture all the restrictive elements an argument from precedent can offer, the analysis of the reasoning of a judge in this role should be based on the rhetorical rather than the deductive account of arguments by analogy. On the basis of the rhetorical view on arguments by analogy it becomes clear that, if the judge uses the precedent opinion as the source of an analogy that she allows to affect her mind, the precedent can provide the judge with guidance in three different ways: (a) through the combination of source (the precedent case) and target analogue (the present case); (b) through the conclusion (the decision arrived at in light of the precedent); and (c) through the presence given to certain factors of the precedent case in the opinion. In arriving at her decision, the judge takes two important steps. In the first step, the judge uses the rhetorical guidance of the analogy formed from the two cases and the decision, thereby coming to an understanding of the present case that casts it as warranting a repetition of the precedent decision. In the second step, the judge goes on to evaluate the perspective she has gained in this manner, deciding whether the precedent case is indeed binding on the present case and therefore, whether she has a duty to follow it in her decision. It is to this this second crucial step that I now turn.

4 Evaluating a Precedent
The last chapter contained the first step towards forming an analogy-based account of reasoning by precedent understood as an existing practice of justificatory reasoning. In the introduction, I established that such an account has to include those aspects of reasoning by precedent which are widely accepted as important parts of the practice, such as, for example, *following* and *distinguishing*. In addition I argued that such an account

has to explain the balance of flexibility and stability that the use of precedent is generally believed to bring to the common law. In order to do so, the account has to show that reasoning by precedent both leaves the judge with some flexibility when it comes to reaching decisions in her present case, and restricts her meaningfully so that she cannot simply decide her cases according to her own idiosyncratic views. However, one result of the discussion in the second chapter was that analogy-based accounts of reasoning by precedent often fail to show that such reasoning is meaningfully restrictive in the required way. Using reasoning by analogy in order to explain reasoning by precedent turned out to be problematic mainly because, as Frederick Schauer puts it, analogies are *always a friend, never a foe*.[226] In other words, it is almost always possible to recognize any two things as similar through reasoning by analogy. Therefore analogies usually serve as a creative reasoning device that opens up new perspectives and insights. In the law, it appears, they can be used to make any two cases appear similar. In addition, differences can also be found between any two cases. Therefore, it seems as if an analogy-based account of reasoning by precedent has little hope of establishing precedents as meaningfully restrictive. Rather, such an account seems to play directly into the hands of American legal realists: if judges use analogies to justify why they followed or distinguished a precedent case when deciding their present case, then it appears they will be able to pick and choose among precedent cases in such a way that they can always reach the outcome they personally prefer.

In the third chapter, I suggested a change in perspective in order to deal with this problem. I pointed out that, while arguers can pick and choose analogies to serve their needs almost without restriction, analogies serve as powerful devices exactly because they have a strong restrictive effect on the audiences to which they are presented. A judge who reasons by precedent, I argued, aims at determining whether or not she should follow a certain precedent case when deciding her present case. In this scenario, she is confronted both with the precedent case and the present case, and she tries to determine whether she should accept that the decision of the precedent case needs to be repeated in the present case. From her perspective, all the parts of an argument by analogy have already been determined. The precedent case serves as the source analogue, the present case as the target analogue, and the decision as that aspect of the source analogue that arguably should also be asserted for the target analogue. The argument is already there. She is therefore not so much in the position of an arguer, trying to convince an audience or interlocutor of a conclusion. Rather, she is in the position of an interlocutor, trying to determine whether to accept a conclusion on the basis of an argument. Her goal, here, is to figure out whether or not the precedent case is indeed binding on the present case, or, in other words, whether the precedent case is indeed *legally the same* as the present case. As I explained in the introduction, I treat a precedent case as *legally the same* as a present case if it fulfills all the conditions for being binding on the present case, that is, if a) it is authoritative with respect to the present case, i.e., it has been decided by a court that stands in the right relationship to the court deciding the present case, b) it has legally

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[226] Frederick Schauer (2007) "Why Precedent in Law (and Elsewhere) is Not Totally (or Even Substantially) About Analogy", p. 6/8.

relevant similarities to the present case, i.e., the two cases are legally similar and c) it does not have any legally relevant differences as compared with the present case, i.e., the judge cannot find a legally relevant difference that justifies distinguishing. The judge, having before her a precedent case presented in an opinion, the present case and the precedent decision, needs to decide whether the precedent case is indeed legally the same as the present case in this sense. In order to do so, she has to determine whether she has sufficient reason to believe it is so.

I argued that interlocutors in general need to do two things when trying to determine whether an argument provides them with sufficient reason to accept a conclusion. First, they need to understand the argument under the application of the principle of charity. This is important because interlocutors in this sense are interested in accepting the conclusion if the argument indeed provides sufficient reason for accepting it. Therefore they have an interest in dealing with the argument in an at least minimally strong form (and ideally in its strongest form). Second, they need to evaluate the strength of the argument. This is important because interlocutors are also interested in accepting the conclusion *only* if the argument provides sufficient reason for accepting it. All the first step can show is that there is some reason for accepting the conclusion. Whether or not it is sufficient needs to be determined in a second step, an evaluative step.

I argued that in the case of the judge, this means that she first needs to try and understand why it is possible to see the present case and precedent case as similar. Only then will she be able later to evaluate the argument that claims that this similarity is sufficient reason to treat the cases as legally the same. I claimed that, in order to understand how present case and precedent case can be seen as similar, the judge makes use of the restrictive effect analogies can have on the mind of an audience. She allows the analogy between precedent case and present case to guide her towards a re-structuring of her understanding of the present case (and to some degree, the precedent case as well) such that she gains an understanding of it that makes it appear similar to the precedent case. I explored the ways in which analogies can be used to guide the mind of those to whom they are presented as arguments. My discussion showed that deductive accounts of arguments by analogy cannot be useful for this purpose because they do not account adequately for the effect analogies have on the minds of interlocutors. Instead, I defended a rhetorical approach to arguments by analogy,

According to the rhetorical approach, the judge can make full use of the restrictive elements arguments by analogy are able to offer by using the opinion of the precedent case as the source analogue. I argued that precedent opinions are the kind of source analogue that, in addition to offering the restrictive elements of the combination of source and target as well as a conclusion, also offer the restrictive element of endowing certain aspects of the precedent case with *presence*. Because opinions describe precedent cases from the point of view of the deciding judge (or judges), they will endow those factors with presence and allow them to serve as the basis for the decision made in the precedent case. The present judge, in her attempt to re-structure her present case so that it fits the precedent case, will therefore pick out those similarities likely to be legally relevant. This is so because she will pick out those similarities that have, as one equivalent, the precedent factor that was highlighted by the precedent judge as contributing to the

decision. By deciding on the basis of these highlighted factors, the precedent judge has, so to say, put his mark of authority on them: they are now factors legally important for reaching the kind of decision reached in the precedent case. Therefore, similarities between precedent case and present case that contain such a legally important factor in the precedent case, as one equivalent, and its equivalent in the present case, are likely legally relevant as well. This is so because they present the present case as similar to the precedent case with respect to those factors that were the basis of the precedent decision, and that thereby became legally relevant for decisions of this kind. At the same time, determining factors in the present case as similar to the highlighted factors in the precedent case further specifies those factors and their meaning in the precedent case. Therefore a judge who uses the opinion of the precedent case in order to re-structure her understanding of both the present and the precedent cases so that they appear similar gains that understanding of the cases that will likely show them as legally similar. Approaching the argument by precedent (containing the precedent case, the present case and the precedent decision) in this way allows the judge to understand it as a strong argument, one that indeed provides a reason for following the precedent case. Why? Because approaching the argument in this way allows the judge to understand the present case as legally similar to the precedent case.

Having fulfilled the first step that an interlocutor should perform in order to determine whether she should accept a conclusion based on an argument, the judge now has to move on to the second step: she has to attempt to evaluate the argument. This evaluation should proceed in such a manner that it can plausibly be expected to reveal reasons for the judge *not* to accept the conclusion of the argument she is evaluating – that is, the argument supporting the conclusion that she has a duty to follow the precedent case. If sufficient reasons cannot be found, then the judge, as a satisfied interlocutor, needs to follow the precedent. In any case, the judge is not entirely free in her decision. In the first step, she gains an understanding of the present case that endows the argument for following the precedent with some strength. If she does not want to follow the precedent, she needs to find reasons sufficient to overcome this argumentative resistance.

Having come this far, we will now turn to the second step the judge has to perform in reasoning by precedent. The question in need of an answer now is this: How does a judge evaluate an argument by precedent? However, before I enter this stage of developing the argumentative analogy-based account of reasoning by precedent, I would like to remind the reader of the goal I am trying to reach. I do not wish to provide a justification for using reasoning by precedent in the common law. Nor do I wish to give a psychological description of what goes on in the head of judges who deal with precedents. Rather, I wish to argue that reasoning by precedent is a form of justificatory reasoning that provides the judge both with enough freedom to accommodate the degree of flexibility associated with common law reasoning and with enough restraint such that the judge can be considered meaningfully guided by decisions made in precedent-setting decisions, thereby providing the common law with stability.

4.1 Defeasible Arguments and the Standard of Being Free from Objections
As noted above[227] deductive accounts of arguments and argumentation have the considerable advantage of making the job of the evaluator relatively straight-forward. The inference in every deductively valid argument is of the same type: it guarantees the truth of the conclusion if the truth of the premises can be shown, that is, it is certainty-preserving.[228] Therefore, there is no need to evaluate the strength or appropriateness of the inference. Instead, the evaluator can simply determine whether she is faced with a deductively valid argument. If she is, then she can move on to consider the truth or falsity of the premises. If she is not, then she either determines that the argument is invalid and moves on, or she adds a missing premise to make it deductively valid. The only thing that needs to be evaluated after this is, once again, the truth of the premises, or the probability that the premises are in fact true. Sometimes, that might be a relatively difficult task, for example when the evaluator has no idea whether the premises are true. However, the goal is clear: find out how likely it is that the premises are true, so that you then know how strong the argument is.

Having rejected a deductivist account of arguments by analogy, the method of evaluating arguments simply by evaluating the certainty with which one knows their premises to be true is barred from us. After all, according to the rhetorical account of arguments by analogy, the argument does not work simply by claiming that it is true that source- and target-analogue are similar and that the conclusion follows from this fact. Instead, it gives the interlocutor a task: to *make it true* that the source- and target analogue are similar and to do this in such a way that the conclusion becomes accessible. The concept of validity is not very useful in evaluating such an argumentative move, and neither is the question whether the premises are true. After all, that source and target are similar in some ways and dissimilar in others is always true. Nonetheless, in order to produce a feasible analogy-account of reasoning by precedent, some method of evaluation is needed. We therefore have to look for another standard of evaluating arguments, one that can encompass the evaluation of non-deductive arguments.

Those argumentation theorists who do not subscribe to a deductivist account of argumentation often call arguments with inferences weaker than deductive validity *defeasible arguments*.[229] The difference between defeasible arguments and deductive arguments is as follows. Assuming that the premises of a deductively valid argument are true, it is impossible for the conclusion ever to be be false. No matter which other statements are also true, the conclusion of a deductively valid argument with true premises is never false. In other words, if we *know* that an argument is deductively valid and we *know* that the premises of this argument are true, then we *know* that the conclusion is true – and no new information about the world could ever change that.[230] This is not the case for defeasible arguments. For defeasible arguments, the truth of the premises is not

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[227] See Chapter 3.2.1.
[228] See Leo Groarke (1999), "Deductivism within Pragma-Dialectics", p 8 ff.
[229] See, e.g. Douglas Walton and Christopher Reed (2002) "Argumentation Schemes and Defeasible Inferences".
[230] In a world where, whenever it rains blue cheese, the cats are dancing, and in which it is true that it is, right now, raining blue cheese, it cannot be false that the cats are dancing.

enough to secure the truth of the conclusion. Even if we *know*, with absolute certainty, that the premises are true, the conclusion might still be false. This is so because the inference between premises and conclusion is *less than* certainty preserving. It only transfers *some* of the certainty from the premises to the conclusion, and how much might differ from argument to argument. Therefore, even if we decide that the conclusion of a defeasible argument is true on the grounds of a defeasible argument, we can never do so without reservation: new information might always make a difference. Defeasible arguments provide *some* support for their conclusion, but not absolute support and indeed not even support to the degree of certainty that we can reach with respect to our belief in the truth of its premises. To use a term favoured by Douglas Walton, defeasible argument only justify a *presumption* in favour of their conclusion.[231]

Arguments by analogy are certainly such defeasible arguments, and usually weak ones. How then should they be evaluated? Is there a method for the evaluation of defeasible arguments that we can use? For, if we assume that judges evaluate the need to follow precedents by evaluating arguments by analogy composed of a precedent case, the present case and the precedent decision, then we must assume that at least part of their evaluation must follow such a method.

A standard of evaluation that appears in many theories of argumentation is one that I will call the *standard of being free from objections*. The idea behind this standard is that an argument should be evaluated by asking two questions: (1) Does the argument provide any support for the conclusion? and (2) Can all objections against the argument be answered? I will now look at these two requirements in turn.[232]

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[231] See, e.g. Douglas Walton and David M. Godden (2005), "The Nature and Status of Critical Questions in Argumentation Schemes", p. 479. To be clear: I will here use the term *defeasible argument* to describe arguments that provide some support for their conclusion, however weak, but not for arguments that provide clearly *no* support for their conclusion because they are nonsensical. It is disputed whether such things should be called arguments at all. I will here not enter that dispute, but simply say that I will not call such a thing as: "My aunt Trudy is at home. Therefore triangles are squares." a defeasible argument.

[232] I will mainly follow the terms used by Douglas Walton in my specifications. This is not so, however, because the idea that a conclusion has been sufficiently justified if reasons for accepting it have been offered and if the objections against accepting it have been dealt with is exclusive to his approach to defeasible arguments. Objections play an important role in many of the most prominent theories of argumentation. Ralph Johnson, in his *Manifest Rationality*, claims that every argument needs a so-called *dialectical tier*, a part in which the most important and obvious objections are answered, in order to count as a worthwhile argument at all (Ralph Johnson (2000), *Manifest Rationality*, see esp. pp. 159 ff). The pragma-dialectical school of argumentation theory, as it has been developed by Frans van Eemeren and Rob Grootendorst, analyzes and evaluates all argumentation in the context of a dialogue, ideally a critical discussion, with a proponent and an opponent.(See, e.g. Franz van Eemeren and Rob Grootendorst (1984), *Speech acts in argumentative discussions: A theoretical model for the analysis of discussions directed towards solving conflicts of opinion*.) Harald Wohlrapp, in his *The Concept of Argument* claims that a so-called *thesis* (a proposed solution to a practical or theoretical problem) can be considered valid (sufficiently justified through argumentation) only if all objections against its argumentative justification have been appropriately dealt with. He believes that we can accept such a thesis as a plausible solution to a problem only if we have shown an argumentative way that connects it to our established basis of knowledge and if we have dealt with all questions and criticisms opponents have brought forward against this argumentative

4.1.1 Does the argument provide any support for the conclusion?

Defeasible arguments are normally used in situations in which parties have to come to some resolution with respect to some question, and in which it is at least very costly to withhold judgment, or withholding judgment would result in an outcome equivalent to what would have resulted had a particular judgment been made. Therefore, some answer to the question has to be accepted, even if the acceptance of this answer is only justified to some degree. Imagine, for example, that you have to decide whether to order food to be eaten at home or to dine at the pub ten minutes from home. You do need to eat and those are the only options that appear even remotely appealing, so you have to make a decision. Imagine I tell you:

"We should go to the pub. We have not been out in a while." I have now given you an argument that supports the conclusion that we should go to the pub. It is not a very strong argument. Even if it is true that we have not been out in a while, that is only a rather weak reason to go to the pub. But, imagine you really did not care at all whether you eat at home or at the pub before I gave you this reason. You need to eat. Now you have something to base your decision on, so you go to the pub with me.

However, the situation I described above rarely ever happens. Usually, arguments do not need to justify a conclusion merely to some *minimal* degree, but to some significantly higher degree. Imagine again that you are deciding whether to eat at home or go to the pub, and I tell you we should go to the pub because we have not been out for a while. But now imagine you had a long day and are not especially inclined to move. You just do not feel like it, and so you already have a presumption in favour of staying home. That we have not been out for a while is a very weak reason. It might be simply too weak to move you to go to the pub. I need to give you a stronger reason, one that provides stronger justification for my conclusion that we should go to the pub. Douglas Walton uses a concept from the field of law in order to describe this way in which conclusions must be supported to different levels or degrees, According to Walton, the argument will have to meet a certain *burden of proof*.[233] That is, it will have to establish its conclusion to a certain specified degree, by means of the support the argument can lend to it.

Depending on the context in which an argument is offered, the burden of proof might be more or less heavy. Often, it might not be possible to determine in advance exactly how heavy it is – neither you nor I might know how strong your urge to stay on the couch will turn out to be and so I will simply have to offer better and better arguments until I overcome it. But sometimes we are in argumentative situations in which the burden of proof is pre-determined and can at least be described. In courts, for example, it is might be the case that the guilt of a defendant in a criminal trial must be proven *beyond a reasonable doubt*.[234]

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way. If this has been accomplished, he calls the argument for the conclusion "objection-free" (Harald Wohlrapp (2014), *The Concept of Argument*, p. 278 ff.)

[233] For a detailed discussion of the burden of proof in argumentation see Douglas Walton (2014), *Burden of Proof, Presumption and Argumentation*.

[234] Walton gives an overview of the different ways in which people have tried to specify exactly what the different standards of proof mean in court settings. See Douglas Walton (2014) *Burden of Proof, Presumption and Argumentation*, p 57ff.

Recall that whether the burden of proof is met in a deductive argument can be ascertained simply by evaluating the premises. Imagine you have given me the promise that we will eat at the pub the next time Susan is eating there, and you accept that you must, under all circumstances, keep this promise. Then you might accept the following conditional as true: If Susan will eat at the pub tonight then we should eat at the pub tonight. Now imagine I tell you that I am very sure that Susan will eat at the pub tonight. And further imagine that you in fact believe me. Then you have at your disposal the following argument:

> Susan will eat at the pub tonight. (Very certainly true)
> If Susan will eat at the pub tonight then we should eat at the pub tonight. (True)
> Therefore: We should eat at the pub tonight. (Very certainly true)

If you are willing to get off the couch if I can provide you with reasons that make you very certain that you should do so, then this argument meets your burden of proof. Its conclusion is established with very high certainty. You will say: "Fine. Your argument has made me very certain that I should go, so I will go."

However, in the case of reasoning from precedent we are not dealing with deductive arguments. Instead, we are dealing with defeasible arguments. As we have seen, a defeasible argument can also lend support to its conclusion. But it is not quite as easy to measure this support because the strength of the inference determines the support the argument can give to the conclusion. As I have already pointed out, defeasible arguments are the kinds of arguments whose strength can change with additional information. Take this argument, for example:

> Ernie is a bird.
> Therefore, Ernie can fly.[235]

For now, this looks like a pretty strong argument, given what we generally assume about birds. But now imagine, I add the following bit of information:

> Ernie lives in the penguin-cage at the zoo.

Now the argument is much weaker, given that penguins do not fly, and that the kind of bird most often found in penguin-cages at the zoo are penguins. Add another piece of information:

> Ernie is very famous, because he is the only Albatross ever known to fall in love with a penguin.

The argument is strong again because albatrosses can usually fly. What this shows us is that, when it comes to defeasible argument, even under the assumption that all the

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[235] This example was used in the course "Introduction to Logic" given by Benjamin Schnieder at the University of Hamburg.

premises are true, it is still possible that new information will change the status of the argument. Therefore, in order to be able to say whether or not a defeasible argument can meet its burden of proof, we first have to make fairly certain that we are aware of all the relevant information that might change the status of the argument. We make certain of this by searching for such new information (or for information that is not new but that we have not yet taken into account) and presenting it in the form of *objections*. A defeasible argument, even though it provides *some* reason for its conclusion, is therefore never good enough, not even if we assume that all its premises are true. It has only met the first of two requirements of the *standard of being free from objections.*

4.1.2 Can All Objections Against the Argument be Answered?
Of course, this question of whether all objections against the argument can be answered is relevant for both deductively valid and defeasible arguments. However, there is an important difference. When it comes to deductively valid arguments, the only thing in question is the truth of the premises. If I offer the argument:

If it rains blue cheese, then the cats are dancing.
It rains blue cheese.
Therefore, the cats are dancing.

The only objections that needs to be answered to show that the argument meets its burden of proof are those that attack the truth of the premises. In other words, an interlocutor who argues against a deductively valid argument will try to show that the certainty with which the premises are true is too low to meet the burden of proof. Once the truth of the premises is established, nothing more needs to be done, except perhaps to join the cats in dance.

By contrast, defeasible arguments are always open to objections, even if it is settled that the premises are true. Therefore, whether or not they have met the burden of proof is never clear simply from looking at the argument and evaluating the truth of the premises. Whether or not an arguer, in putting forward a defeasible argument which appears very strong, has met her burden of proof can change with every objection that might be presented. It is therefore often said that an arguer who has provided a defeasible argument for her conclusion has *shifted* the burden of proof away from her, fulfilling it for the moment. If a possible opponent still wants to resist the conclusion even though the argument is provided, they have to come up with an objection so as to shift the burden of proof back to the arguer.[236] For example, after I have told you that we should go to the pub because we have not been out for a long time, you might present the objection that we have been to your mother's birthday tea just this weekend. I would then have to answer this objection, possibly by pointing out that referring to your mother's birthday tea as "out" is using the term "out" in an entirely different way than I had originally in mind.

In this little interlude, I seemingly had met my burden of proof. But then, in order not to have to get up from the couch, you countered my reason by telling me about your mother. In order to preserve the support my argument gave to my conclusion, I had to

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[236] See Douglas Walton (2014), *Burden of Proof, Presumption and Argumentation*.

provide an answer to this objection. In this dialogue, it seemed as if the burden of proof was shifting back and forth, having been met at first, then not, then again.

In an attempt to account for the difference between meeting burdens of proof and merely shifting them, Walton, following Prakken and Santor,[237] distinguishes between three different kinds of burden of proof. The *burden of persuasion* is the burden of proof that has to be met in order to establish the conclusion as worthy of acceptance in the circumstances in question, that is, in my example, in the situation in which we try to decide what to do for dinner.[238] For example, if you could not come up with any further objections after I had corrected your use of "out", then we would consider my burden of persuasion as having been met: the conclusion that we should go to the pub has been shown worthy of acceptance (and if you are willing to follow the better reason, you should finally give in). During our little discussion, however, there was another burden of proof shifting back and forth between us. First I had it then you had it assuming you wanted to resist my conclusion, and then I had it again after you offered your birthday-tea-argument. This shifting burden is called the *tactical burden* of proof.[239] It moves back and forth between the parties and it always rests on the party who would "lose" the discussion if she could not come up with a new reply. Finally, at every turn of our discussion, there was one specific burden of proof on either one of the parties. At the beginning, I had the burden to offer some reason or other if I wanted to even make the pub a viable option. Then you had the burden to come up with some objection or other if you wanted to resist the pub at all. Then I had the burden to counter that objection. We fulfilled these specific burdens one after the other, and every time we fulfilled them, the tactical burden shifted. These smaller, specific burdens are called the *burden of production*.[240]

In order for an argument to support its conclusion sufficiently, the burden of persuasion has to be met, i.e., the initial burden of production has to be met and all objections against the conclusion of the argument have to be dealt with. No matter whether the argument could meet the burden of production that existed when the conclusion was first brought up, if an objection is discovered that cannot be answered, the argument has not succeeded in supporting its conclusion. The objection has shifted the tactical burden of proof back to the arguer supporting the conclusion, leaving them with a burden of production to present an adequate answer to the objection. If they cannot, the tactical burden stays on them and the burden of persuasion is not met. However, if all objections against an argument can be answered sufficiently, then all burdens of production have been met. This in turn means that the tactical burden has been shifted away from the arguer for good and the burden of persuasion is fulfilled. Under these circumstances, the conclusion can be considered sufficiently supported.

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[237] Douglas Walton (2014), *Burden of Proof, Presumption and Argumentation*, p. 64.

[238] Douglas Walton (2014), *Burden of Proof, Presumption and Argumentation,* p.64.

[239] Douglas Walton (2014), *Burden of Proof, Presumption and Argumentation,* p.64, 69.

[240] Douglas Walton (2014), *Burden of Proof, Presumption and Argumentation,* p.64, 69.

4.1.3 Argument Schemes and Critical Questions

The upshot of the above discussion of burdens of proof is this: an argument can support its conclusion sufficiently if it can provide a reason strong enough to meet the initial burden of production and if all objections against the argument and against accepting the conclusion can be met. This standard of evaluating is suitable for defeasible arguments as well as for deductive arguments.[241] Therefore, it can be helpful in understanding reasoning by precedent. However, the standard is also rather vague and leaves us with some yet unanswered questions. What does it mean to say that the argument by analogy, formed from a precedent case, a precedent decision and a present case, provides strong enough support for the conclusion that there is a judicial duty to repeat the precedent decision, and that all objections to this conclusion can be (or have been) met? How can an interlocutor come to the point where she is satisfied that she has considered enough possible ways to object to the argument and now needs to accept the conclusion? In other words, given that arguments by precedent are defeasible arguments, how can a judge get to the point where she can stop trying to find reasons *not* to follow the precedent and instead acknowledge that she has a duty to follow it? This will have to be specified. A helpful tool for this will be the development of an *argument scheme* for reasoning by precedent, together with a set of *critical questions.* It is to this task that I now turn.

While discussing the deductive account of arguments by analogy, I briefly touched on the topic of argument schemes.[242] Argument schemes model the structure of everyday arguments by presenting them in an abstract form. To this end, the scheme specifies the form of the premises and conclusion that are typically part of the type of argument it models.[243] For example, the scheme for the defeasible argument by expert opinion proposed by Walton is as follows:

> Major Premise: Source E is an expert in subject domain S containing proposition A.
> Minor Premise: E asserts that proposition A (in domain S) is true (false).
> Conclusion: A may plausibly be taken to be true.[244]

These schemes are usually matched with so called critical questions. Critical questions provide guidance to lines of criticism that are potentially effective against the argument type in question.[245] For example, Walton suggests six critical questions for argument by expert opinion:

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[241] In other words the standard is broad enough so as to apply to both types of argument. In the case of deductive arguments, the truth of the premises needs to be shown to be probable or plausible enough to meet the initial burden of production and all objections against the premises being true must be dealt with.

[242] For accounts of argument schemes see, e.g. Douglas Walton (1996), *Argumentation Schemes for Presumptive Reasoning* or Douglas Walton and Christopher Reed (2003), "Diagramming, Argumentation Schemes and Critical Questions".

[243] See Douglas Walton and Christopher Reed (2003), "Diagramming, Argumentation Schemes and Critical Questions", p. 197.

[244] Douglas Walton (1997), *Appeal to Expert Opinion*, p. 210.

[245] See Douglas Walton and Christopher Reed (2003), "Diagramming, Argumentation Schemes and Critical Questions", p. 198.

1: Expertise Question: How credible is E as an expert source?
2: Field Question: Is E an expert in the field that A is in?
3: Opinion question: What did E assert that implies A?
4: Trustworthiness Question: Is E personally reliable as a source?
5: Consistency Question: Is A consistent with what other experts assent?
6. Backup Evidence Question: Is E's assertion based on evidence?[246]

The use of schemes is helpful for both argumentation theorists and those who are engaged in the formulation and evaluation of arguments. Argumentation theorists can use argument schemes in order to illustrate how they understand certain types of arguments to work. This makes discussion of the correct way to understand certain forms of arguments easier because theorists can refer to the proposed schemes to show why and how they agree or disagree when arguing about the right way to understand certain kinds of arguments. For example, in the last chapter I discussed Waller's understanding of arguments by analogy, using the argument scheme he had provided as a point of reference for my criticism.

Those who use arguments or who evaluate them can, on the other hand, use argument schemes to identify the kinds of arguments they are dealing with. They can also use the critical questions in order to make sure that the arguments they themselves compose are strong, and to evaluate the arguments with which they are confronted. In general, the kinds of arguments that are represented by argument schemes are typically able to carry some weight towards their conclusion. Arguments that are put forward and that meet the requirements of the scheme with premises that are acceptable provide reason to accept their conclusions. An interlocutor confronted with such an argument would, all things being equal, have an argumentative obligation to accept the conclusion (at least if we presuppose that this interlocutor is interested in adopting beliefs that are supported by reasons). However, this obligation is only tentative: the interlocutor always has the opportunity to criticise the argument by pointing out weaknesses. Indeed, according to the picture of the interlocutor that I provided, an interlocutor who wants to know whether or not she should accept a conclusion based on an argument should try to find grounds for such criticism to make sure that she does not accept the conclusion prematurely. The critical questions attached to the argument scheme serve as guidance for the formulation of such criticism.[247] They point out the ways in which the type of argument represented by the scheme usually or often fails, thereby suggesting ways in which it should be tested. A good argument scheme with well-chosen critical questions can guide an interlocutor through the phase of argument evaluation to a point where the interlocutor is justified in being fairly certain of her assessment of the argument.

In what follows, I will develop an argument scheme and critical questions that can guide judges when reasoning by precedent. First, I will investigate the form of the arguments judges are evaluating when they confront arguments from precedent. Then I

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[246] Douglas Walton (1997), *Appeal to Expert Opinion,* p. 223.
[247] See Douglas Walton and Christopher Reed (2003), Diagramming, Argumentation Schemes and Critical Questions, p. 198.

will turn to the critical questions that can guide them in their evaluation of those arguments. For the success of this account of reasoning by precedent, it is very important that the critical questions are well chosen. After all, considering them is supposed to put the judge in a position in which she can be fairly certain that she is justified in either accepting the conclusion of the argument by precedent, and therefore following the precedent, or not. To be more specific: Because it is my goal to show reasoning by precedent as an existing practice of justificatory reasoning, in what follows I will be careful to do two things: 1) I will try to develop critical questions that closely follow what is provided through the *doctrine of precedent*. In this way, the critical questions will include those elements of precedent that are generally recognized to be important. In addition it will be easier to see that my account of reasoning by precedent is close enough to the existing practice of reasoning by precedent to say that it describes it. 2) I will try to show how each critical question contributes to the restricting effect that reasoning by precedent is supposed to have on judges when they decide cases. In this way, I will later be able to defend my account as one that actually meets the standard of showing reasoning by precedent as a justificatory practice of reasoning, that is, as a kind of reasoning that can actually provide justification for its conclusion.

4.2 An Argument Scheme for Reasoning by Precedent: What does an Argument by Precedent Look Like?

At the end of the last chapter, I suggested we consider reasoning by precedent as an exercise in which judges understand and then evaluate arguments by analogy, composed from precedent case, precedent decision and present case. I argued that analogies, when used in arguments, can be restrictive enough to explain the guiding power precedents have on the reasoning of judges. In the second chapter, we already reviewed the reason why it seems to be an obvious possibility to explain reasoning by precedent in terms of reasoning by analogy.[248] Analogies, like precedents, are similarity-based. That is, arguments by analogy purport to support some conclusion about a subject matter by pointing out the possibility of seeing that subject matter as similar to another one for which the conclusion holds. If a precedent has to be followed in a present case then this is because the precedent and the present case are sufficiently similar, or, to be precise, similar to the point of being *legally the same*.

However, there are important differences between arguments and reasoning by precedent and arguments and reasoning by analogy that must be accounted for when developing an argument scheme to be used by judges when they reason from precedent. Analogies can be employed in order to reason and argue about almost any topic and in almost any situation. Analogies are a hardy and pervasive species. There is almost no circumstance in which an appropriate analogy cannot provide some support for a conclusion. Analogies are at home everywhere and of help everywhere. Not of *much* help, mind you, since they can only provide very weak reasons. Nonetheless, using them to argue or reason is almost never completely out of place.

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[248] See chapter 2.3.

Precedents are different. While arguments by precedent do not only appear in the law, but also elsewhere, they are by far not as common as arguments by analogy. Attempting to answer a question or solve a problem through the use of arguments from precedent only makes sense under very special circumstances. A quick example will illustrate this. A teenager, Maggie, might be in a position to construct an argument from analogy in an attempt to persuade her mother that she should be allowed to go to a concert. Assuming that Maggie's mother believes her friend's mother to be a good parent, she might accept her daughter's claim that the friend's being allowed to go by her mother is a good reason for her to allow Maggie to go as well. But it is almost absurd to think that Maggie's mother must engage in reasoning from precedent, or that she has to accept an argument from precedent from her daughter. Maggie cannot hope to get her way by citing the decision of her friend's mother as a precedent that has to be either followed or distinguished by her own mother.

Why not? Because the friend's mother's decision stands in no special relationship to the decision of Maggie's mother. Specifically, Maggie's mother has no duty to make decisions consistent with the decisions of the friend's mother. She does not even need to take the friend's mother's decisions into account when making her own decisions. In short, there is no relationship of *authority* here whatsoever. Analogies work even when such a relationship does not exist. All they do is to show that some conclusion is accessible. In this case, Maggie shows her mother that she can allow her to go to the concert and still remain a good mother because she can model herself after the friend's mother, whom she respects and who, incidentally, has agreed to let her daughter go to the concert. Precedents, on the other hand, are not like this. They are employed to show that there is in fact a *duty* to make a particular decision. If Maggie were able to cite her friend's mother's decision as a precedent, then she would not be in a position merely to argue that her mother *should* come to the same conclusion as her friend's mother. Instead she would argue that her mother has a *duty* to allow her to go to the concert simply because her friend's mother allowed her daughter to go. And this would be a duty that holds regardless of whether Maggie's mother thinks that allowing her daughter to attend the concert is a good idea or not. As Frederick Schauer put it: "The bare skeleton of an appeal to precedent is easily stated: The previous treatment of occurrence X in manner Y constitutes, *solely because of its historical pedigree,* a reason for treating X in manner Y if and when X again occurs."[249]

What all this means is that arguments by precedent are a much more specialised tool than arguments by analogy. They require a certain systematic setup to function properly and to be of use. Precedent requires a system of official or unofficial rules or rule-like structures that explicate that certain types of decisions are authoritative when it comes to certain other decisions, and that specify which decisions these are. Such systems exist wherever it can be said that certain decisions *must* cohere or be consistent with certain other decisions. The common-law contains such a system and the doctrine of *stare decisis* provides the rules that govern this system. When deciding a case, a judge who operates under the doctrine of *stare decisis* has a duty to follow the decision of a

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[249] Frederick Schauer (1987), "Precedent", p. 571.

precedent case if the precedent case is binding on her present case. A precedent case is binding on a present case if it is legally the same as the present case. Or, in other words, if a) it has been decided by a court who's decisions are authoritative with respect to the decisions of our judge; b) it is similar to the present case in a legally relevant way and c) it cannot be distinguished, that is, no legally relevant differences between the two cases can be found. Overruling is only possible if the precedent decision was not made by a higher court. Even then the judge has to have much weightier reasons for disregarding the precedent than an every-day reasoner would need in order to justify ignoring an analogy.[250]

From this follow two important implications for the difference between arguments by analogy and arguments by precedent, and therefore for the way in which arguments by precedent have to be evaluated. In the preceding chapter I argued that the precedent case, the present case and the decision of the precedent case, can together be seen as an analogy used to argue for a repetition of the precedent decision in the present case. However, while such an analogy lies at the core of an argument by precedent, this is not all there is to it. In addition to the analogy, an argument by precedent also relies on the rule, grounded in the doctrine of *stare decisis*, according to which legal sameness is a sufficient reason for a duty to repeat the precedent decision – that is to follow the precedent. There is therefore a part of the legal argument from precedent that does not contain a reference to analogy. It has the following form:

(P1) If a present case B is legally the same as a precedent case A, then B must be decided in the same way as A (case A has to be followed in case B).
(P2) The present case B is legally the same as the precedent case A.
(C) Therefore, B must be decided in the same way as A (case A has to be followed in case B).

Where then does the analogy come in? It is used to establish the antecedent of the conditional in (P1). Legal sameness is established through an argument by analogy:

(P1) The present case B can be considered similar as the precedent case A.
(C) Therefore the present case B is legally the same as the precedent case A.

Accordingly, the argument by precedent is composed of two argumentative parts: an argument by analogy used to establish that two cases are legally the same – and an argument from rule or principle, used to establish that the legal sameness is enough to support a duty to decide accordingly. Let's call this *The Precedent Scheme*:

(P1) The present case B can be considered similar as the precedent case A.
(C1) Therefore the present case B is legally the same as the precedent case A.

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[250] See e.g. Grant Lamond (2006), "Precedent and Analogy in Legal Reasoning" and Frederick Schauer (2009), *Thinking Like A Lawyer*, p. 36 ff.

(P2) If a present case B is legally the same as a precedent case A then B must be decided in the same way as A (case A must be followed in case B).
(P3) The present case B is legally the same as the precedent case A.
(C2)Therefore B has to be decided in the same way as A (case A must be followed in case B).

4.2.1 Two Remarks on the Argument Scheme for the legal Argument by Precedent
There are two remarks that need to be made at this stage in order to avoid misunderstandings of the *Precedent Scheme*. First, the scheme does not reflect the fact that the two argumentative parts are quite different in relevant respects. Following up on what we established in the preceding chapter, it should be stressed that the first part of the argument is a *rhetorical* argument that functions by engaging the interlocutor in an exercise of attempting to make case A and B similar. Both the precedent and the present case are brought into interaction in the mind of the interlocutor that results in the two cases appearing similar. The second part of the argument, on the other hand, seems to fit the deductive form of modus ponens:

(P1) A->B
(P2) A
(C) B

For this reason, it seems as if the second part of the argument could be considered deductive. However, in the setting of common-law systems, this is not entirely correct, at least not when it comes to arguments by precedent directed at courts that are not lower in the judicial hierarchy than the court which initially set the precedent. These courts have the power to overrule the precedent. Therefore, for them the rule

(P2) If a present case B is legally the same as a precedent case A then B must be decided in the same way as A (case A must be followed in case B).

of the *Precedent Scheme* does not always hold. If they decide to overrule, then they may decide case A differently than case B, even if the two cases are legally the same. In order to accommodate arguments that have the form of *modus ponens*, but that make use of rules that need not be applied in some cases, Douglas Walton introduces the concept of a *defeasible modus ponens* argument.[251] A defeasible *modus ponens* argument employs a rule that holds almost always and is therefore not entirely certainty-preserving. The rule employed in a defeasible *modus ponens* argument is subject to exceptions. In the case of legal arguments by precedent, the rule that the present case has to be decided in the same way as a precedent case if the two cases are legally the same is subject to an exception if: (a) the present court is not lower than the precedent court; and (b) the present court finds that the precedent is seriously lacking because, e.g., it perpetrates a significant injustice or has been decided in a legally inappropriate manner.

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[251] Douglas Walton (2005), "Justification of Argument Schemes", p.5 ff.

The second remark is that the scheme itself does not specify what it means for two cases to be "legally the same." Even though I have provided the conditions for legal sameness several times, it is important to take a closer look at the matter. There is, in the common law, a distinction between following or distinguishing a precedent and extending or refusing to extend an analogical past case. A good account of reasoning by precedent should be able to account for this distinction.[252] In my introduction, I discussed the difference between these two ways to deal with precedents, but it would be wise to revisit the matter here.[253] If a judge comes to the conclusion that she needs to follow a precedent case, then she is under a duty to repeat the decision made in the precedent case. If, on the other hand, a judge considers whether to extend an analogous precedent by deciding a present case according to the decision in the precedent case, then her situation is more like that of Maggie's mother in our example above. That the precedent case was decided in the way that it was gives Maggie's mother some reason to think that her present case should be decided in the same way. But it does not impose a duty on her to do so. She is free to decide differently if she believes that the precedent case was poorly decided.[254] In the terminology I have adopted here, a precedent case with respect to which it is open to a judge to decide whether to extend it or not is one that is merely viewed as similar to the present case. By contrast, a precedent case that is binding and has to be followed because it is legally the same as the present case is not merely similar to the present case. It also fulfills certain formal requirements. For example, it has to have been decided in the same jurisdiction as the present case, in the same area of law, etc. It is therefore possible that of two precedents, case A and case B, which are both equally similar in content to a present case C, only A is *legally* the same because while A and C have both been decided in England, B was decided in France.[255]

4.2.2 An Example

Imagine judge Judy, in the land Far Far Away,[256] who is faced with the following case. A year ago, Sarah's aunt Jennie moved out of her old apartment and then spent a year overseas. After she came back, Sarah helped Jennie move into her new apartment. While transporting her aunt's furniture to the new apartment, Sarah leaned the headboard of her aunt's bed against a street-lamp. She was in a hurry because her aunt had just called her on her cell and so she did not bother to look whether anyone was nearby. Unfortunately,

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[252] This has been, for example, repeatedly pointed out by Grant Lamond (e.g. Grant Lamond (2006), "Precedent and Analogy in Legal Reasoning", and Grant Lamond (2014), "Analogical Reasoning in the Common Law".

[253] See Chapter 1.3.

[254] Grant Lamond discusses the analogical extension of precedents in Grant Lamond (2014), "Analogical Reasoning in the Common Law". He also discusses possible reasons judges might have to take the similarity between their present case and a merely similar precedent case seriously even if they are under no duty to decide accordingly. I will not discuss the analogical extension of precedents in more detail here, but the topic is an interesting and important one.

[255] Whether and how a case decided in another country should be taken to provide a reason to decide cases in the home-country in the same way has been the subject of an interesting discussion, especially in the United States. For a very short introduction into the discussion, see, e.g. Beverly McLachlin (2010), "Keynote Address: The Use of Foreign Law – A Comparative View of Canada and the United States".

[256] Where the legal system is not yet very developed and things are still nice, neat and easy.

the street lamp's fundament had eroded over the years, so the lamp fell over, part of it broke off and flew right into the rib-cage of a person reading on a bench, causing several broken ribs. Far Far Away has adopted a common-law system, so the judge must follow a precedent, should there be a precedent case binding on this case. The crown prosecutor Larry claims that Sarah should be convicted for the crime of *bodily injury caused by negligence* and he cites the famous *Kara-case*.[257] Prosecutor Larry presents the judge with an argument by precedent, claiming that the precedent set in *Kara-case* is binding on the present *Sarah-case.* Judge Judy therefore sees herself confronted with an argument by precedent. According to our *Precedent Scheme,* this argument has the following form:

> (P1) The present *Sarah-case* can be considered similar as the precedent *Kara-case.*
> (C1) Therefore the present *Sarah-case* is legally the same as the precedent *Kara-case.*
> (P2) If a present case B is legally the same as a precedent case A then B must be decided in the same way as A (case A must be followed in case B).
> (P3) The present *Sarah-case* is legally the same as the precedent *Kara-case.*
> (C2) Therefore the *Sarah-case* has to be decided in the same way as the *Kara-case* (the *Kara-case* must be followed in *the Sarah-case*).

Judge Judy sits down and reads the opinion written for the famous *Kara-case*. She reads:

> "Defendant Kara is guilty of *bodily injury caused by negligence*, even though the accident occurred while Kara was doing a good deed in helping her aunt move. The defendant did not look before throwing a piano of a balcony. The piano hit a passer-by and caused bodily harm."

In a first step, she uses the opinion to restructure her understanding of the *Sarah-case* so that it fits the description of the *Kara-case*. Sarah takes the role of the defendant, Kara. She did not look before leaning a head-board against a street-lamp. The street-lamp hit a reader on a park bench and caused bodily harm (the broken ribs). Now, the judge can see how the *Sarah-case* is similar to the *Kara-case*. In a second step, she now needs to evaluate the argument that she has just understood.

4.3 Evaluating the Argument: Critical Questions

If arguments by precedent are used in other than the common-law context, those at whom they are directed need to evaluate both the analogical part of the argument and the rule-based part of the argument. Imagine, for example, a professor, Sally, who is faced with the argument that she needs to give a student in circumstances C an extension on his essay because some other professor gave this same student an extension in the same circumstances. The rule that is implied by the argument could plausibly be this one:

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[257] For a description of the *Kara-case*, please see Chapter 3.3.3.

R: If case A and B are the same in respect to the circumstances in which the extension is being asked for, and one professor has handled case A in manner x, then any professor must handle case B in manner x.

Sally might well have good reasons to doubt that R holds in her case, and might therefore reject the argument by precedent, not on the grounds that the two cases are not the same in respect to the allegedly relevant respects, but on the grounds that there is no good reason to consider the rule R valid and applicable to her. In other words, Sally needs to make an evaluative judgment on whether or not she ought to consider herself bound by R.

However, in the case of precedents used in the context of common-law reasoning, the judge does not need to evaluate the bindingness of the rule that provides the conditional in (P2) of the *Precedent Scheme* outlined above. Her role as a judge in a common-law system brings with it the requirement that she respect the doctrine of *stare decisis* whenever she is engaged in judicial decision-making. In other words, the rule specified in (P2) applies to her as long as she makes decisions in her capacity as a judge. She will therefore have to concentrate her evaluative efforts, not on the rule specified in (P2) but only on the first part of the argument by precedent – the analogy. Judge Judy from our example, in other words, has to figure out whether or not the *Kara-case* is indeed legally the same as the *Sarah-case*, not what she needs to do if it is. This is true unless she has the authority to overrule the precedent with which she is dealing – in which case she will have to evaluate whether the conditions for overruling apply. Here I will set aside instances in which overruling is a possibility and concentrate on the way in which the judge must evaluate the first part of the argument by precedent:

(P1) The present case B can be considered similar as the precedent case A.
(C1) Therefore the present case B is legally the same as the precedent case A.

According to the *Precedent Scheme*, legal sameness between case A and case B entails a duty to follow the decision made in case A when it comes to deciding case B This means that, for a precedent case to be legally the same as a present case, a) the precedent case has to be authoritative with respect to the present case, b) the two cases have to be legally relevantly similar and c) there cannot be any legally relevant differences between precedent case and present case. In evaluating the argument by precedent, the judge therefore has to perform several evaluative steps. First, she has to determine whether the precedent case is both legally similar (i.e. similar in a legally relevant way) to the present case and authoritative when it comes to the present case. Then she has to determine whether the precedent case must be followed or distinguished. Most of the remainder of this chapter will be devoted to discussing these evaluative steps and to determining the critical questions that can guide a judge in performing them.

4.3.1 What is the Status of Critical Questions in Reasoning by Precedent?

An argument by precedent that fits the *Precedent Scheme* is used to justify the claim that the judge has a duty to decide a present case in the same way as the precedent case. This precedent case is brought into the argument in its very first premise, the premise that claims similarity between the present case and a precedent case. By

providing this first premise (that is by showing that a precedent case exists that can be the basis for the first premise) the initial burden of production can be considered to have been met: the judge has been provided with a reason for deciding in the way suggested by the argument. This reason is not very strong – after all nothing has yet been determined about the kind of similarity that can be found between precedent case and present case. Nonetheless, introducing the precedent is enough to prompt an examination into the nature of the proposed similarity between precedent case and present case – enough to consider the possibility that the precedent case might have to be followed. It is therefore a (weak) reason in support of following. Prosecutor Larry, by citing the *Kara-case*, gave judge Judy some reason to decide her case in the same way, that is to convict Sarah of *bodily injury caused by negligence*. However, the judge needs to evaluate the strength of this reason before she can decide whether the argument meets its burden of persuasion and, therefore, whether she really has a duty to decide according to the precedent decision. She can do so by testing whether certain critical questions can be answered adequately.

Douglas Walton and David Godden have raised the question whether defeasible arguments always need to be tested with critical questions before they can be accepted as having a supporting effect on their conclusion. Perhaps critical questions are merely a useful heuristic tool that can guide an interlocutor to ways in which an argument *could* be questioned.[258] In response to this suggestion, they argue that a defeasible argument can only maintain the support it is intended to provide if all critical questions that are *actually being asked* can be answered. Therefore, for every defeasible argument it has to be at least *possible* to answer all critical questions satisfactorily.[259] However, Walton and Godden also point out that it will not always be practical to ask every possible critical question that might arise, in any possible situation.[260] If, for example, I offer you an argument from expert opinion during a discussion about a topic that is not very important to either of us, and the expert I am referring to is known to both of us as a very honest, trustworthy person, then asking the critical question whether the expert is personally reliable as a source is a mere formality. It is a formality that will not only unnecessarily slow the process of deliberation, it will also quite possibly be an insult to the expert we are talking about.

However, when it comes to reasoning by precedent, we can say that the premise with which the argument by analogy meets its initial burden of production is rather weak. The mere fact that two cases can be understood in such a way that they are similar is not a very strong reason for considering them to be legally the same. Sarah should not be convicted *just* because prosecutor Larry brought up the *Kara-case*. Given that, in almost all instances in which a judge reasons by precedent a lot hangs on the outcome of her evaluation, it is clear that she should never simply accept the legal sameness of the cases without going through a serious evaluation first. The judge should therefore determine to

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[258] Douglas Walton and David Godden (2005), "The Nature and Status of Critical Questions", p. 477 ff.
[259] Douglas Walton and David Godden (2005), "The Nature and Status of Critical Questions", p. 478.
[260] Douglas Walton and David Godden (2005), "The Nature and Status of Critical Questions", p. 478.

the best of her ability whether all applicable critical questions can be met before making her decision.

4.3.2 Is the Precedent Case authoritative with the respect to the Present Case and are the Two Cases Similar in a Legally Relevant Way?

A precedent case that is both legally similar to a present case and authoritative with respect to it gives the judge a so-called *content independent reason* to decide the present case in the same way as the precedent case. This means that the judge, unless the precedent case has to be distinguished, has a (sufficient) reason to repeat the precedent decision in the present case *whether or not* she believes the way the precedent case was decided was correct and *whether or not* she believes that the reasons for the decision provided in the opinion are good ones.[261] If judge Judy ultimately comes to the conclusion that Sarah's case really is legally the same as the *Kara-case*, then she has to convict Sarah, no matter whether she thinks that this is the right thing to do.

4.3.2.1 Is the precedent case authoritative?

If a precedent provides a *content-independent* reason to follow it, then this is because of the authoritative relationship that obtains between the court that made the precedent decision and court in which the present case is to be decided.[262] Judy, because she is a judge in a common-law system, cannot simply decide Sarah's case however she wants. She is required to treat precedent decisions, like the *Kara-decision,* as authoritative. As mentioned above, not all precedents are authoritative in this way. A judge does not need to follow or distinguish all precedents. Often she merely has to decide whether the precedent should be extended. Many precedent cases have not been decided by a court that stands in the right authoritative relationship with the court on which the judge who must decide the present case sits. If so, then the precedent case does not qualify as binding on the present case. A case that was decided as a tort-case, for example, cannot be a binding precedent for a case decided in a criminal court. Furthermore, a case might not have been decided under the right sub-section of legal doctrine and might therefore not qualify as binding. For example, two cases might both have been decided under tort-law, but the one might have involved a tort of negligence while the other might have concerned a tort involving strict liability.[263] The first critical question the judge therefore needs to ask is whether the precedent case she is dealing with stands in the right authoritative relationship to her present case. When prosecutor Larry presents the *Kara-*

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[261] See, e.g. Frederick Schauer (2009), *Thinking Like a Lawyer,* p.62, and for the classic discussion of content-independent reasons H.L.A. Hart (1992), "Commands and Authoritative Legal Reasons".

[262] For a more detailed discussion of the difference between binding precedents (and other binding legal sources) and non-binding precedents (and other legal sources) see, for example, Frederick Schauer (2008a), "Authority and Authorities".

[263] See Grant Lamond (2014), "Analogical Reasoning in the Common Law", p. 576ff. for a discussion of the relationship between the bindingness of a precedent and the area of law under which it was decided. Lamond also points out that the closer the two sub-areas of the legal doctrine are, and the more similar the two cases are, the harder it becomes to decide whether a case is authoritative with respect to another or not. As a result, in these cases it might be hard to decide whether the judge is deciding whether to follow or distinguish a precedent, or whether she is deciding whether to extend.

case as a reason for convicting Sarah of *bodily injury caused by negligence*, the first thing judge Judy wants to know is where and by whom the *Kara-case* was decided. She wants to see that the *Kara-decision* was actually made in Far Far Away, and by the right kind of court. Only then can she even consider whether she needs to follow the *Kara-decision* in her *Sarah-case.*

4.3.2.2 What is "Legally Relevant Similarity"?

Once this question has been asked and answered, the judge now turns to the second part of her evaluation of whether or not the precedent case is binding on the present case. She must decide whether the precedent case and the present case can be seen to be similar in the relevant way, that is, whether the similarities that can be established to exist between precedent and present case can justifiably be seen as a reason supporting the claim that the two cases are legally the same. It is important to be very clear that, in using the effect analogies have on the mind in order to *understand* the argument by precedent, the judge already gained an understanding of the present case and the precedent case as similar. And, as I argued in chapter three, the kinds of similarities she found in her exercise of understanding the analogy are *likely* to be legally relevant. This is so because the judge was guided by the way the opinion presented the precedent case when she re-structured her present case to fit the precedent case. The opinion highlighted those aspects of the precedent case that were the basis of the precedent decision. For example, the judge who wrote the *Kara-opinion* highlighted that Kara <u>did not look</u> while she was <u>throwing a piano of a balcony</u> and that the <u>piano hit a passer-by</u> and that this <u>caused bodily harm</u>. In trying to understand why her *Sarah-case* is similar to the *Kara-case,* judge Judy tries to find aspects in the *Sarah-case* that could serve as equivalents to those aspects highlighted in the *Kara-case*. For example, she might choose the fact that part of the street-lamp hit a person reading on a bench as an equivalent of the fact that the <u>piano hit a passer-by</u>. <u>Street lamp-part hit person-on-bench</u> and <u>piano hit passer-by</u> then form a similarity between the precedent *Kara-case* and her present *Sarah-case*. As noted in chapter three above, this is the kind of similarity that is likely legally relevant. Why? By using the aspect <u>piano hit a passer-by</u> as a basis for her decision to convict Kara of *bodily injury caused by negligence*, the precedent judge *made* it legally relevant for decisions about *bodily injury caused by negligence*. She could do this because she decided her case within a common law system in which precedent decisions have authority with respect to later decisions about similar cases. Therefore, a similarity that contains this aspect as one equivalent is likely legally relevant.

However it is very important to note that the simple fact that judge Judy was able to construct her *Sarah-case* so that it shared similarities with the *Kara-case* that are likely legally relevant *is not enough*. As we will see now, in order for judge Judy to be able to conclude that the *Sarah-case* and the *Kara-case*, in their entirety, are similar in a legally *relevant way*, she must do more than just find similarities that are likely legally relevant.

Let us begin our exploration of what else is required by asking first what is meant by "in the relevant way"? The easiest way to understand this concept in the context of reasons and arguments is to say that a premise is relevant for a conclusion, if accepting the premise as true changes the certainty with which the conclusion or the belief can be

accepted as true.[264] In other words, a premise is relevant if it provides *a reason* for accepting the conclusion. In the case of reasoning by precedent, the similarities that can be established between precedent and present case are ultimately meant to support the conclusion that the present case should be treated the same as the precedent case. They are meant to do so by establishing the sub-conclusion that precedent and present case are *legally* the same. Therefore, the similarities that judge Judy found between her present *Sarah-case* and the precedent *Kara-case* can only make the two cases similar in a *legally relevant way* if they provide a *reason* to consider the two cases as legally the same.

When judge Judy restructured her *Sarah-case* so that she could understand why it might be considered similar to the *Kara-case*, she found equivalents between the two that were likely legally similar. However, as I said before, this is not enough to establish that the two *cases* are in fact legally similar. The equivalents that judge Judy found could fail to establish this in two different ways. They could fail to establish that the two cases *in their entirety* are similar in a legally relevant way. Or it could turn out that while the similarities are *likely* legally relevant, they are not *in fact* legally relevant.

4.3.2.3 Are the Cases Similar In Their Entirety?

Let us first take a look at why these similarities could fail to establish that the two cases are similar *in their entirety*. The judge who decided the *Kara-case* wrote in her opinion:

> "Defendant Kara is guilty of *bodily injury caused by negligence*, even though the accident occurred while Kara was doing a good deed in helping her aunt move. The defendant did not look before throwing a piano of a balcony. The piano hit a passer-by and caused bodily harm."

We said that this opinion highlighted that Kara <u>did not look</u> while she was <u>throwing a piano off a balcony</u> and that the <u>piano hit a passer-by</u> and that this <u>caused bodily harm</u>. Now, this does not mean that every single factor, by itself, served as grounds for the decision (i.e., that there were four separate grounds for the decision). It was these factors taken together that formed the grounds for deciding that Kara should be convicted of *bodily injury caused by negligence*.

Now, imagine that judge Judy would not be able to find an equivalent for one of the aspects when she was thinking about her *Sarah-case*. Imagine, for example, that Sarah had in fact looked around and seen that no one was in reach when she leaned the head-board against the street-lamp. Imagine that the injured party was not simply a man reading on a bench, but a suicidal individual who, upon seeing the lamp fall, jumped under it, even though Sarah had been screaming in distress for him not to do that. (There

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[264] Authors like David Hitchcock (1992), "Relevance", and Dan Sperber and Deirde Wilson (1986), *Relevance: Communication and Cognition,* have offered more sophisticated definitions of relevance in argument and reasoning. But the definition I have chosen to employ here has been adopted widely by argumentation theorists (see, e.g. the by-now classic textbook R.H. Johnson and J.A. Blair (1977), *Logical Self-Defense*, p. 12ff.). It may also lie at the core of the more sophisticated definitions provided by these authors.

might be other differences between the two cases, but we will discuss those in the section on distinguishing.) In this particular scenario, judge Judy can find equivalents for all the relevant factors but one. She can find equivalents for <u>throwing a piano of a balcony,</u> <u>piano hit a passer-by,</u> <u>caused bodily harm</u> but not for <u>did not look</u>. In this case, judge Judy would have still found similarities between the two cases that were likely legally relevant, but these similarities, taken together, would have failed to establish that the cases *in their entirety* were similar in a legally relevant way. This is so because the precedent judge did not establish that any of the highlighted factors of the *Kara-case* by themselves were grounds for the *Kara-decision*, but rather, that they were *taken together*. It is the *precedent-decision* that is authoritative with respect to the present case[265], and this decision was made, not on four different grounds, but on one ground, composed from the highlighted aspects. If judge Judy wants to establish, not only that there are similarities between the *Sarah-case* and the *Kara-case* that are likely legally relevant, but that the *Sarah-case* and the *Kara-case*, in their entirety are likely legally similar, then she also has to find an equivalent for <u>did not look</u>. In fact, Sarah did *not* make sure there was no one around, so judge Judy can do this in her case. In the way our hypothetical *Sarah-case* was originally described as it happened in Far Far Away, judge Judy could find an equivalent for every aspect highlighted in the *Kara-opinion.*[266]

　　To sum up what we have seen in the last pages, in order to determine whether a precedent case can be considered legally similar to a present case, a judge has to evaluate whether it is possible to restructure the present case in such a way that equivalents can be found for all those factors in the precedent case that resulted in the precedent decision. A precedent case is relevantly similar to a present case only if there is a relevant similarity between precedent and present case with respect to every factor in the precedent case that contributed to the precedent decision. It is the task of the judge to determine whether this is the case.

　　There is, however, one factor that might complicate this task with respect to some precedent cases.　Some opinions contain more than one line of argument intended to support the precedent decision. In other words, some opinions will in fact provide more than one set of grounds upon which the decision was reached. In addition, the precedent case might have been decided by a group of judges, several of whom came to the same decision, but cited different lines of argument for the court's decision.[267] It is difficult to say what should be done if this is the case. Sometimes it might be clear from the way the case is presented in the opinion that one line of argument should be taken to be authoritative, while the other is intended only to give additional support to the decision. And sometimes, it might be indicated that only *both arguments together* were strong

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[265] I believe this is what Grant Lamond means when he says that the doctrine of precedent requires judges to treat precedent cases as having been decided correctly.

[266] It is important to note here that it does not make much sense to say that the present case must be, on some level, the same as the precedent case *as it was independently of the opinion*. If we assume that the judges deciding the precedent case had no interest in deceiving those who would come after them, then they presented the precedent case in the way they saw it, and made their decision about the case as they saw it. A similar point is also made by Barbara Baum Levenbook (2000) "The Meaning of a Precedent", p. 189f .

[267] See Neil Duxbury (2008), *The Nature and Authority of Precedent*, p. 67ff.

enough for the decision, and that they are really just one argument in two parts. But sometimes this might not be clear. I believe that the following can be said. The judge must be able to find equivalents for the factors that figured in at least *one* line of argument presented in the opinion of the precedent case if it is not clear which line of argument is intended to be the authoritative one. The reason for this suggestion is as follows. As I argued above, in order for a premise to be relevant, the premise has to provide a reason for its conclusion. Judge Judy had to find an equivalent for every highlighted aspect in the *Kara-opinion* because these aspects provided grounds for the *Kara-decision* only if taken together – and so the *Sarah-case* needed to be similar with respect to all these aspects *taken together* before judge Judy could establish that the *Sarah-case* stood as binding precedent for the *Kara-case*. However, if an opinion provides several lines of argument for a decision and it is not possible to see that either one of these lines of argument is taken to be the principal one by the precedent judge, or that the precedent judge believes that only together do these lines of argument provide a strong enough reason for the decision, then it is justifiable to treat each line of argument as sufficient to justify the precedent decision. Therefore, the present judge only has to find equivalents for the factors in one of these lines of argument.

4.3.2.4 Are the Found Similarities in Fact Legally Relevant?

Now, let us take a look at why similarities that are likely legally relevant might turn out not to be *in fact* legally relevant.

It might seem as if the requirement that a judge find equivalents in the present case for all the highlighted factors in the precedent case still leaves the judge relatively unconstrained. After all, a realist might argue, whether or not some factor in the present case can be considered an equivalent to some factor in the precedent case is completely within the discretion of the judge. For example, who told judge Judy that throwing a piano and leaning a headboard against a streetlamp could count as equivalents? Unless the precedent opinion sorts provides clearly defined categories that can easily be applied to the present case little guidance is provided to the judge in determining whether or not some pair of factors can be considered equivalent. It is the old problem all over again: a judge who has, on the basis of her own idiosyncratic reasons, a pre-formed view of how she would like to see the present case decided can either (a) claim that all important factors in the precedent case are mirrored in the present case, or (b) select some factor in the precedent case for which she claims no equivalent can be found in the present case. She will surely always (or at least very often) be able to find some ad hoc reason to justify (at least to herself) her claims.

I do not want to deny that there is some wiggle-room here for the judge, especially if the precedent opinion presents the factors that contributed to the decision in a very ambiguous manner and without any attempts at categorization. However, it is not true that the judge finds herself entirely unconstrained either. This is so because of several restraining factors that play a role in her attempts to fulfill the task of restructuring the present case such that it fits the precedent case.

4.3.2.5 Surrounding Law

The first of these factors is that judges are not free to understand the cases they deal with however they want. As Barbara Baum Levenbook points out, the judge does not encounter her present case as something that she can conceptualize in any way she sees fit. She is not simply confronted with a case in the way, for example, that a police officer would be.[268] The judge does not investigate the case herself. She reads about it in documents and hears about it in testimony and arguments while she is presiding over her case. When dealing with a sexual assault case, she does not interview the victim herself and then determine whether she is dealing with a matter of sexual assault. She is confronted with the case *as a* sexual assault case. To a judge, a case comes pre-categorized and pre-structured. Judge Judy learns about Sarah's story as a *possible* story of *bodily injury caused by negligence*.

Hearing her present case, the judge further pre-structures it, deciding what kind of a case it is she is dealing with.[269] In a well-developed common law system, the judge is restricted by many conventions and rules when pre-structuring the case. In common law systems that contain statutory law, statutes will influence which factors of cases have to be highlighted as important and how they have to be understood. If, for example, a Canadian judge is confronted with a case in which someone has been accused of sexual assault, she cannot file the information that the assaulted person was under the age of consent away as unimportant. This is so simply because there is a statute determining the age of consent and distinguishing sexual assault cases according to it.[270] It is also possible that, even though the opinion in some precedent case does not explicitly categorize some highlighted factor, the law has, by now, developed such that a category is available which either includes or excludes a possible equivalent factor in the present case.[271] Additionally, of course, there might be certain factors that are highlighted in the precedent case and for which the precedent opinion does specify a category that can guide the judge.

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[268] See, for example, Barbara Levenbook (2000), "The Meaning of a Precedent", p.189.

[269] Attorneys will have an impact here, pointing out factors of the present case that have to be taken into account in the judgment.

[270] See, e.g. the Canadian Criminal Code Section 151: "151. Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of 16 years (*a*) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or (*b*) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of 90 days." (Criminal Code, R. S. C., 1985, c. C -46, section 151.)

[271] On the basis of such developments judges may argue that the scope of the precedent is not the same as it was considered to be when the precedent was decided or used in other cases – that is, that the scope of the precedent needs to be reinterpreted. For example, imagine a case decided in Far Far Away that cites "repeated tardiness without adequate excuse" as an acceptable reason for an employer to fire an employee. Some years later, the government of Far Far Away establishes a new law that is meant to protect young, single parents from professional disadvantages that might be the result of their family-situation. Before these laws were established, tardiness because of problems to find a reliable day-care would not have fallen under the term "adequate excuse". However, now that the laws have been established, these problems have turned into what would be considered an adequate excuse under the law.

All this means that, in her attempt to find equivalents for the highlighted factors of the precedent case in her present case, the judge will face certain boundaries. She cannot consider some factor of her present case to be an equivalent of some factor of the precedent case if there is a statute in existence that clearly states that the two factors are not equivalent in the eyes of the law. To return to our example, a statute might well exist that either states or implies that sleeping with someone who is *under* the age of sixteen and shows all signs of eagerness is not equivalent to sleeping with someone who is *over* sixteen and also shows all signs of eagerness. Therefore, one of the questions a judge must ask when attempting to determine whether present and precedent case are similar in the relevant way is whether there are any pre-established legal categories (established in the precedent opinion or through applicable surrounding law) that make it impossible to treat precedent and present case as similar with respect to some factor highlighted as contributing to the precedent decision.

4.3.2.6 Argumentative Structure

Yet another way in which a precedent opinion can provide guidance when it comes to the kinds of equivalents that need to be found in the present case is this. The opinion provides not only an insight into which factors of the precedent case contributed to the precedent decision. It also provides an argumentative structure into which these factors figure, an argumentative structure that purports to justify the precedent decision. It is important to note that I am not here advocating in favour of trying to find the meaning of a precedent through the justification it offers for the decision made. Barbara Baum Levenbook has shown that this would be a mistake. It is central to the use of precedents that they can provide guidance without being justified.[272] As Levenbook shows, a precedent can apply even when its justification does not apply. This is most clear in the case of precedents that are considered wrongly decided in terms of all the standards of justification we can imagine. A precedent that has been wrongly decided (i.e. it should be overruled) still has a guidance function and can still bind courts that do not have the power to overrule it. Yet, by all standards, we have to consider it unjustified. Therefore it is not possible to rely on its *justification* in order to determine what it means for the present case, i.e. into which categories its highlighted factors should fall, or which factors of the present case can count as equivalents to its highlighted factors.[273] If I tell you that I destroyed your child's toy because I did not like your child's face, then my behaviour is simply *not justified*. Therefore, there is no *justification* in existence from which you could gain the categorized conditions under which I am permitted to destroy the toys of little children.

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[272] Barbara Baum Levenbook (2000), "The Meaning of a Precedent", p. 190 ff.

[273] Barbara Baum Levenbook (2000), "The Meaning of a Precedent", p. 194. Levenbook also points out that the search for a precedent's justification has the potential to go on forever. In order to find out why a precedent decision is justified, one would have to determine its all-things-considered justification, including those deeper-level justifications that justify the applicability of certain justifications to the precedent case. This is necessary because it is at least possible that each deeper-level justification might reveal that certain factors of the precedent case should be understood differently than the higher level justifications seem to suggest. (Barbara Baum Levenbook (2000) ," The Meaning of a Precedent", p. 194f.).

Arguments are different from justifications. In order for something to be an argument for a claim, it is merely necessary that it *purport* to justify its claim, not actually do so. The distinction between doing something and *purporting* to do something has been important in the philosophy of law before, and it is important here, too.[274] Consider this argument:

> The greatest of all baseball stars, José Bautista, recommends Gatorade.
> Therefore, Gatorade is good for you.

This argument is a variation of what is often presented as the *bad* form of argument from theoretical authority – one where there seems to be no reason to believe that the so-called "authority" has any real expertise when it comes to the claims he is making. This argument provides basically no justificatory support for its conclusion. Nonetheless, it is an argument, and one the likeness of which we are presented with quite often. It *purports* to justify its claim, even though in this case, it fails to actually do so.

Precedent opinions typically (though I do not want to claim that they *always* do this) present the factors that are highlighted as contributing to the precedent decision in the form of an argument that purports to justify this decision on the basis of these factors. Often, these arguments are quite complex. They contain conclusions and sub-conclusions, weaving together instantiations of different widely-used and familiar argument types like arguments from rule, argument from expert opinion, argument from best explanation etc. I will now show that a judge, when trying to find equivalents in her present case for those factors highlighted in the precedent case will find herself guided in her choices by the argumentative structure she finds in the opinion.

It is reasonable to assume that we generally possess the ability to recognize an argument's form as well as its content. Consider the following conversation:

> A: You really should not drink pop all the time.
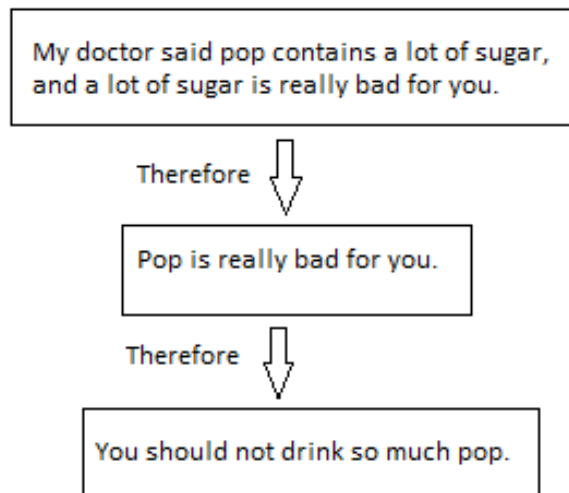> B: Why?
> A: It is really bad for you.
> B: What makes you say that?
> A: My doctor said that pop contains a lot of sugar, and consuming a lot of sugar is bad for you.

Assume now I told you: A premise is a sentence that contains a reason. A conclusion is a sentence that makes a claim for which reasons are provided in premises. And then I asked you: What is A's conclusion? You would likely not have any problems telling me that the conclusion was the B should not drink pop all the time. If I asked you further: What was the premise A provided for this, you might think a bit. But you would be able to answer fairly quickly: That it is really bad for you. And if I asked you: What was the premise about the doctor doing in all of this? You would probably be able to tell

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[274] For example, Joseph Raz claims that the law, in order to have legitimate authority, needs at the very least to *purport* to give directives based on the moral and political reasons that already apply to its subjects. (see, e.g. Joseph Raz (1990) *The Authority of Law*, p. 9ff.).

me: It was used to support the claim that drinking pop is really bad for you. In other words, you would find it rather easy to explain to me the form of the argument that A provided B. It might be easy for you to see that this form looks something like this:

My doctor said pop contains a lot of sugar, and a lot of sugar is really bad for you.

Therefore ⇩

Pop is really bad for you.

Therefore ⇩

You should not drink so much pop.

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Now consider these two conversations about different topics:

A: You really should not have that much pear-juice.
B: Why?
A: You'll feel horrible.
B: What makes you say that?
A: Every time I drink a lot of pear-juice, I feel horrible afterwards, and my daughter does too.

A: You really need to go try out the new restaurant!
B: Why?
A: You'll love it!
B: What makes you say that?
A: Eduardo, the famous restaurant-critique, gave it five out of five stars!

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275 What you see here is a very simple version of a so-called argument diagram, a way to illustrate argument structures. There has been considerable success in the development of methods for generating so-called argument-diagrams. In fact, generating these diagrams is so intuitive that the generation of diagrams can be taught to first- and second-year undergraduate students in the matter of one or two lectures. Even if recognizing an argument form might sound difficult, this shows that it is not. (For example on the basis of the textbook "The Power of Critical Thinking", which deals with this topic in one of 11 chapters and is meant for a one-term-course of 12 weeks. (Lewis Vaughn and Chris MacDonald (2013), *The Power of Critical Thinking*, Chapter 3.).

I assume that I could ask you two different questions, both of which you would find fairly easy to answer. First I could ask you which of the two later conversations was more similar to the first one with respect to their *topic*. You would likely tell me that it was the one about the pear-juice. Then I could ask you which of the two later conversations was more similar with respect to the *kind of argument* A provided at the end. You would likely tell me that it was the one about the restaurant. You will be able to do so, presumably, even if you have not already learned that there is an argument type called "argument from expert opinion" and another called "argument from experience." Why? Because you would be able to see that while the premise about Eduardo performed the same function as the premise about the doctor (that is, it provided expert support), the premise about my own experiences with pear-juice did not. It performed a different function (that is, it provided support from anecdotal experience). You would be able to see that, for the purpose of performing certain functions within an argument structure, the premises about the doctor and Eduardo could be seen as equivalent – they were able to perform the same function. The premise about my experience with pear-juice, on the other hand, could not be seen as equivalent to the premise about the doctor with respect to performing structural functions in an argument. And the reasons are fairly straightforward. I cannot possible count as an expert on pear juice and, because I did not cite expert-knowledge on my part, the premise did not perform the function of providing expert support.

We are generally able to determine whether some premise is performing the same function as some other premise in an argument structure because we are generally able to understand the form of the argument as well as its content. Imagine you just told me to stop drinking pop because your doctor told you that the sugar in it is bad for you. Imagine further that I countered with: Well, then you should stop drinking pear-juice *for the same reason*! And finally, now imagine I said one of two things:

a) After all, my nutritionist told me that too much pear juice makes you sick.
b) After all, I feel sick every time I drink too much pear juice.

If I said a), you might be happy now and accept both that you should not drink pear-juice all the time *and* that this is so for the same reason. But if I said b) you would certainly protest that the reason I offered you was not the same as the one you offered me at all!

Opinions that present the factors that are highlighted as contributing to the precedent decision in the form of an argument use these factors as the basis for *premises that figure in the argument for the precedent decision*. And these premises, just like the doctor-premise above, fulfill certain structural functions within this argument. When a judge tries to determine whether a factor in her present case can count as an equivalent for a factor in the precedent case – for example when judge Judy wonders whether throwing a piano and leaning a headboard against a streetlamp could count as equivalents – she can therefore attempt to determine whether it is possible to use the present-case factor as the basis for a premise that fulfills the same argumentative function as the premise in the precedent case.

Opinions, by presenting the factors they highlight as contributing to the precedent decision in the form of an argumentative structure, therefore provide additional guidance for the judge in her attempt to re-structure the present case according to the precedent case. She does not only need to find equivalents for all the highlighted factors in the precedent opinion in such a way that the precedent decision becomes accessible. She also has to do so in a manner that replicates the argumentative structure that the precedent case is presented in through the precedent opinion. The judge needs to ask, and answer, the critical question whether the present case can be understood in such a way that the argumentative structure presented in the precedent opinion in support of the precedent conclusion can be mirrored by the present case.

Again, it is important to note that this does not mean that the judge needs to determine whether the justification for the precedent decision also applies to the present case. The precedent decision might not be – by any standards – justified. In addition, it is very possible that, if one of the argumentative structures presented in the precedent opinion can be mirrored in an understanding of the present case, the resulting arguments regarding precedent and present case are of differing strength. After all, one might argue that a premise citing a nutritionist might, all else being equal, not provide as much support as a premise citing a doctor. Therefore, the argumentative structure in the opinion does not provide a way for the judge to determine whether it would be justified to reach the precedent decision in the present case. It merely provides some additional guidance that the judge can use in order to determine whether the equivalents she has picked out in the present case could indeed be considered equivalents to those factors the precedent judge highlighted as contributing to the precedent-decision.[276]

In summary, we have now identified two critical questions the judge should ask in order to determine whether the precedent decision is binding on the present case. One of these questions has two sub-questions that are designed to help the judge decide whether she can indeed consider precedent case and present case to be relevantly similar. They are based on the considerations presented above. The first set of critical questions a judge needs to ask when evaluating an argument by precedent is therefore the following:

I) Does the precedent case A stand in the right authoritative relationship to the present case B?

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[276] Grant Lamond makes a similar point. The justifications given in the opinion do not have to be applicable to a present case in order for the precedent to be binding. Rather, they help determine what factors were determinative of the precedent decision – i.e. how the precedent case was understood. "Courts are bound to consider the legal conclusion on which the result in the precedent case was based, and must treat that conclusion as correctly decided. The precedent court's justifications are relevant to ascertaining what was concluded (i.e., in ascertaining the exact content of the ratio) but are not themselves binding on lower courts. There are many situations in which later courts ignore or discount some of these justifications; there are even cases where later courts find no compelling rationale at all for the legal doctrine on which a precedent was decided." (Grant Lamond (2005), "Do Precedents Create Rules?" p. 12.).

II) Can the present case B be understood in such a way that it is relevantly similar to the precedent case A?

> II.I) Is it possible to understand the present case B in such a way that a at least one line of argument as it is presented in the precedent opinion can be mirrored, in its entirety and with its argumentative structure intact for the present case B?

> II.II) Are there any pre-established legal categories (established in the precedent opinion or through applicable surrounding law) that make it impossible to treat precedent case A and present case B as similar with respect to some factor highlighted as contributing to the precedent decision?[277]

It is important to note that even if it cannot be established that a precedent case is authoritative with respect to a present case, the precedent case might still be used to form an argument for deciding the present case in the same way as the precedent case. In this instance, the conclusion of the argument is that the precedent should be extended to cover the present case.[278]

4.3.3 Should the Precedent be Followed or Distinguished?

Let us assume judge Judy is satisfied that the court that decided the *Kara-case* was indeed the kind of court that has an authoritative relationship with her court and that therefore the *Kara-decision* is authoritative when it comes to her *Sarah-case*. In addition, she has come to the conclusion that the *Sarah-case* and the *Kara-case* are indeed similar in a legally relevant way, that is, she was able to mirror the argument that led to the *Kara-decision* in her *Sarah-case* and, for every similarity that she identified, there was no legal reason why she could not treat the respective aspects in the *Kara-case* and the *Sarah-case* as equivalent. The *Kara-case* is both authoritative and legally similar to the *Sarah-case*.

Even though judge Judy has determined all this, she does not yet know whether or not she is under a duty to follow the *Kara-decision* when she decides the *Sarah-case*. So far, she has only determined that she has *either* to follow *or* to distinguish. Therefore, the next critical question she needs to ask in order to determine whether the precedent case is indeed legally the same as her present case and therefore needs to be followed is whether

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[277] The reader might wonder why this question focuses only on the possibility that there are established legal categories that make it *impossible* to treat present and precedent case as legally the same. After all, there are also established legal categories that will make it *mandatory* to treat some factors of precedent and present case as equivalent (I gave an example of those above). However, we are here determining those critical questions the judge is supposed to consider in order to evaluate her own best attempt at understanding the present case as similar to the precedent case. The existence of legal categories that make it mandatory to treat certain factors as equivalent will, however, figure in my discussion of the decision to either follow or distinguish.

[278] I am not dealing with the reasoning behind the decision whether or not to extend a case here. For a discussion of this matter, see, e.g. Grant Lamond (2014), "Analogical Reasoning in the Common Law".

there is a relevant distinction between precedent case and present case that warrants distinguishing the two cases.

However, this critical question is peculiar in a rather interesting way. When, for example, judge Judy asked whether the *Kara-case* had been decided by a court that stands in a relationship of authority with her court, some kind of evidence needed to be provided to show that it indeed did. For example, it was necessary to look up the court that provided the *Kara-opinion*, name it and describe its status within the legal system of Far Far Away. If such evidence could not be provided, judge Judy had no reason to further bother with the *Kara-case* as a possibly binding precedent: the critical question alone had shifted the burden of proof. But, for some reason, merely asking whether there could not be an important difference between the *Sarah-case* and the *Kara-case* does not seem to do the same thing. It seems as if the answer to this question could easily be: There *could* be an important difference, but I cannot think of any. Asking the question alone does not produce the need to provide any evidence for anything. Rather, it's the other way around: if no evidence *for* a relevant difference can be produced, then it seems that the *Kara-case* needs to be followed.

That critical questions can be different in this way is not unknown to argumentation theorists. Godden and Walton discuss the status and role of critical questions and come to the conclusion that two different types of critical questions can be distinguished.[279] The first type consists of critical questions meant to address a concrete, unspoken assumption that needs to be made in order for the argument to get off the ground at all. For example, using an argument by precedent (rather than simply an argument by analogy) makes sense only under the assumption that a relationship of authority between the past decision and the present decision obtains. Another example is the so-called "field question" used for the argument scheme by expert opinion:

> 1: Expertise Question: How credible is E as an expert source?
> 2: <u>Field Question: Is E an expert in the field that A is in?</u>
> 3: Opinion question: What did E assert that implies A?
> 4: Trustworthiness Question: Is E personally reliable as a source?
> 5: Consistency Question: Is A consistent with other experts' assent?
> 6. Backup Evidence Question: Is E's assertion based on evidence?[280]

If you take another look at our Batista-argument, it should become clear that asking this question, by itself, shifts the burden of proof:

> The greatest of all baseball stars, José Bautista, recommends Gatorade.
> Therefore, Gatorade is good for you.

If I ask you whether Bautista is an expert about the good and bad effects of different kinds of drinks and you have absolutely no evidence to give me that he is, then the argument does not get off the ground at all. If José Bautista is not an expert in the field of energy

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[279] Douglas Walton and David Godden (2005), "The Nature and Status of Critical Questions", p.480ff.
[280] Douglas Walton (1997), *Appeal to Expert Opinion,* p. 223.

drinks, then why should we consider his judgement about Gatorade? If he is not an expert, then the argument provides no reason to think that Gatorade is good for you. Therefore, merely asking the question shifts the burden of proof to the arguer: she has to answer by giving at least some evidence that José Bautista knows his stuff when it comes to energy drinks.

But now imagine that instead of José Bautista, my nutritionist recommends Gatorade.

My nutritionist recommends Gatorade.
Therefore Gatorade is good for you.

Suppose further that I have ample evidence to provide you with that suggests that the expert I was citing is actually an expert about the goodness or badness of energy drinks. I could, for example, show you a course list about what nutritionists typically study. In this instance, you must move on to other critical questions. You could, for example, ask me the trustworthiness question, whether my nutritionist is personally reliable as a source. After all, it is possible that my nutritionist is biased. Maybe Gatorade is paying her. That would be a good reason to discount her advice about Gatorade even though she is an expert and as such her recommendation provides some reason to believe Gatorade is good for you. However, in order for you to be able to reject my argument based on the trustworthiness question, you have to provide some evidence suggesting that my nutritionist is *not* trustworthy. That you asked me whether she is trustworthy is not enough. I am not now under obligation to show you positive evidence for the trustworthiness of my nutritionist. I can very well say: I know of no evidence that she is not trustworthy – and that is enough as an answer. The trustworthiness question is not so much a question that needs an answer so that the argument can get off the ground at all. Rather, it is there to show you one way in which it is often possible to formulate a good counter-argument that might defeat my argument from expert-opinion. The argument:

Your nutritionist is being paid by Gatorade.
Therefore she is not trustworthy.

would be a good counter-argument, for example. What this shows is that, if you ask the trustworthiness question, there is a burden of proof on *you* first, to show some evidence that the question should be seriously considered under the circumstances. There are therefore two different kinds of critical questions: those that move the burden of proof merely by being asked (like the field question), and those that can only shift the burden of proof if their own burden of proof is met first (like the trustworthiness question). [281]

The critical question whether there is a relevant difference between precedent case and present case that warrants distinguishing is of this latter type. The judge needs to establish for herself that the precedent case is authoritative and legally similar to the present case by finding answers to the associated critical questions. However, in order to answer the question whether there is a relevant difference between precedent case and

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[281] Douglas Walton and David Godden (2005), "The Nature and Status of Critical Questions", p.480ff.

present case, the judge merely needs to truthfully point out that she cannot think of one. This question can be used to shift the burden of proof only if first some evidence is provided that there is, indeed, some difference that might justify distinguishing. Only then is the argument for following the precedent in danger of failing. In other words, establishing that the precedent decision is authoritative and legally similar to the present case creates a *presumption* in favour of the conclusion that the precedent decision must be followed. Once the judge has come this far, she will follow unless there is an additional, positive reason not to do so in the form of a difference that could be considered relevant. If judge Judy is not to convict Sarah for *bodily injury caused by negligence*, there needs to be some reason to think that the *Sarah-case* and the *Kara-case* are different in a legally relevant way.

At least one objection against this understanding of the issue whether to follow or distinguish a binding precedent needs to be addressed. More than one author has claimed that a judge needs to follow *or* distinguish an applicable precedent, and that this is a balanced choice with no pre-established favourite in either direction.[282] Lamond suggests that, while judges do show a reluctance to *overrule* a binding precedent in order to arrive at a decision they believe needs to be made, there is no evidence that judges feel any such reluctance when it comes to *distinguishing* a precedent case so as to arrive at a decision they believe is appropriate.[283] But one must be careful here. Judges might indeed feel no reluctance whatsoever to distinguish once they have identified a difference between the precedent and the present case. For example, judge Judy might take a hard look at Sarah's and Kara's cases and realize that it could be *expected* of Kara to look before she threw a piano from the fifth floor onto a side-walk. Any reasonable person knows that passers-by walk on the sidewalk and that pianos falling from the sky can cause harm to them. But Sarah did not throw a piano on a sidewalk. She leaned a headboard against a streetlamp. And no-one could *expect* her to consider that the fundament of the lamp could have been eroded. No reasonable person would research the age and durability of street-lamp-fundament-materials before assuming the lamp would provide a stable support. Once judge Judy has come to this realization, she might not be reluctant at all to distinguish the two cases. But that does not mean that there was no presumption for following *before* Judy thought of the difference between Sarah and Kara's cases. At the point in her reasoning at which judge Judy found herself before she considered these relevant differences, she needed no additional reason for following. But she *did* need an additional reason for distinguishing. Lamond's claim is that there is no presumption against distinguishing once a relevant difference between binding precedent case and present case has been found.[284] However, it is clear that in order to distinguish, courts have to cite some difference between precedent case and present case as a reason for deciding the present case differently.[285]

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[282] See, e.g. Grant Lamond (2005), "Do Precedents Create Rules?" and Frederick Schauer (1987), "Precedent".
[283] See Grant Lamond (2005), "Do Precedents Create Rules?" p. 12f.
[284] Grant Lamond (2005), "Do Precedents Create Rules?" p. 12.
[285] Grant Lamond (2005), "Do Precedents Create Rules?" p. 10.

This need to cite a difference is reason enough to conclude that determining that a precedent decision is authoritative and legally similar to a present case establishes a *presumption* in favour of following it. The choice between following and distinguishing is not completely balanced. While an additional reason is needed to warrant the decision to distinguish a binding precedent, no such reason is needed to justify the decision to follow it. In other words, once a precedent has been shown to be authoritative and legally similar, the tactical burden of proof rests on whomever is in favour of distinguishing.

The result of the above argument is that the critical question whether there is a relevant difference between precedent case and present case needs to be supported by an argument purporting to establish that some such difference exists. This argument needs to cite a relevant difference between the two cases, as well as that part of the doctrine of precedent that designates relevant difference as a sufficient reason to depart from an authoritative and legally similar precedent:

(P1) X is a relevant difference between present case B and precedent case A.

(P2) If a relevant difference between the present case B and the precedent case A exists, then the precedent decision must not be followed but should instead be distinguished.

(C) Therefore, the precedent decision must not be followed but should instead be distinguished.

4.3.4 Critical Questions for Distinguishing

Given the account just sketched, the realist worry that judges might decide cases according to their own ideas of what is best rather than according to established law rears its ugly head once again. After all, one might ask, what is a *relevant* difference? Some difference or other can always be found between two cases. And if this is so, it seems as though precedents cannot possibly constrain the reasoning of judges after all. How might one answer this realist worry? The first place to begin is by noting, once again that there are certain considerations that will serve to restrain the judge in choosing relevant differences so as to justify distinguishing.

First, just as the applicable law might forbid considering some factor in the present case the equivalent of a factor in the precedent case, there might be law that forbids making a distinction between two factors in precedent and present case. For example, a Canadian judge cannot categorize the defendant in her present case as "a Caucasian person" and, on this basis, refuse to consider the defendant as equivalent to the Hispanic defendant in a precedent case involving negligence. That is, she cannot properly argue that the two cases must be distinguished because they deal with defendants who relevantly differ in terms of race. She is prohibited from doing so by section 15 of the Canadian Charter of Rights and Freedoms.[286] It is, of course, also possible that such a prohibition has been established either through statute or binding precedent decisions.

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[286] Canadian Charter of Rights and Freedoms, 1982, Section 15.

Imagine, for example, that in Far Far Away, there had been a long history of discrimination against red-heads. Judge Judy, who is not a very good person, would like to distinguish Kara's case from Sarah's case, by pointing out that while Kara is a redhead (and so deserves to be punished), Sarah is not. Assume further that the supreme court of Far Far Away had just made a landmark decision in which it declared all distinctions on the basis of hair-colour unconstitutional. Judge Judy might want to do so, but she would not be able to distinguish on the basis of Kara's red-headedness any more. Accordingly, when considering a possible ground for distinguishing, a judge is required to ask the question whether there is any applicable law or legal decision that forbids distinguishing on that basis in that type of context.[287]

Second, the judge can obviously not distinguish on the basis of factors that were in fact present in the precedent case. While this may appear to be a self-evident point, it deserves some attention because such factors might not be part of the line of argument that the judge has focused on in determining whether the precedent decision is binding on her. Or the case might be one in which there is a fully or partially formulated, fully categorized *ratio*, but the relevant factors are not part of it.

In the second chapter,[288] I discussed Grant Lamond's criticism of the rule-based approach to reasoning by precedent. Lamond pointed out that one important difference between precedents and rules is that rules come with lists of acceptable reasons for exceptions – and do not allow for any further exceptions. Precedents, on the other hand, come with lists of unacceptable grounds for exception and allow exceptions on all other grounds.[289] These unacceptable grounds are those parts of the precedent case that get taken up in the opinion, not as a factor that provided a reason for the precedent decision, but either as a factor that did not influence the balance of reasons at all, or as a factor that, while speaking *against* the decision, was not weighty enough to change the outcome. In rhetorical terms, I am here speaking of those characteristic of the precedent case that are acknowledged in the opinion as part of the case, but that either do not get highlighted in any way at all but are kept in the background during the arguments presented in the opinion, or that are highlighted as possible grounds for objections against the arguments presented. Some of these factors might already have played a role when the judge attempted to restructure her present case according to the precedent case, especially if they had the potential to play an important role as possible grounds for objection in both cases. How this might work can be seen if we take another look at Thompson's violinist-argument that was discussed in chapter 3.[290]

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[287] It is possible that a precedent case that is not binding on the present case, but closely analogous to it, has established a category that contains both a factor that is present in the binding precedent and the factor that is considered as a possible ground for distinguishing. This would be an argument against distinguishing because the two factors have been treated as equivalents in a closely analogous case. However, the strength of this objection will depend on several factors, including how closely analogous the two cases are and how authoritative the court that decided the analogous case happens to be, etc. Similarly, an objection of some weight might be based on a statute that establishes such a category but that is not directly applicable etc.

[288] See Chapter 2.2.1.

[289] Grant Lamond (2005), "Do Precedents Create Rules?", p. 19/20.

[290] See Chapter 3.3.2.

> You wake up in the morning and find yourself back to back in bed with an unconscious violinist. A famous unconscious violinist. He has been found to have a fatal kidney ailment, and the Society of Music Lovers has canvassed all the available medical records and found that you alone have the right blood type to help. They have therefore kidnapped you, and last night the violinist's circulatory system was plugged into yours, so that your kidneys can be used to extract poisons from his blood as well as your own. The director of the hospital now tells you, "Look, we're sorry the Society of Music Lovers did this to you-we would never have permitted it if we had known. But still, they did it, and the violinist now is plugged into you. To unplug you would be to kill him. But never mind, it's only for nine months. By then he will have recovered from his ailment, and can safely be unplugged from you."[291]

As noted earlier, Thompson here includes two factors in her source analogue the equivalents of which could, with respect to the target analogue pregnancy, be used as grounds for an objection to her conclusion that there is no duty not to abort: (a) the violinist is rather obviously a person (and a special person at that) and (b) his life is entirely in the hands of the one he is plugged into. The genius of the analogy lies in the fact that an interlocutor who agrees with Thompson, after having completed the task of restructuring her understanding of pregnancies according to Thompson's analogy, has *already* integrated these factors into her understanding and has *still* reached the desired conclusion. Therefore the interlocutor cannot prevent the conclusion from becoming accessible on the basis of these factors anymore. In a similar way, when restructuring the present case according to the opinion in the precedent case, equivalents to factors that were presented in the opinion as possible, but weak grounds for objection against the precedent decision are already integrated into the new understanding of the present case. They are integrated insofar as the precedent decision establishes them as too weak to warrant a decision other than following the precedent decision. A second question the judge therefore needs to ask when considering a possible ground for distinguishing is whether the precedent opinion mentions an equivalent of it as a relevant factor in the precedent case. Judge Judy, for example, could not distinguish the *Sarah-case* on the basis that Sarah was in the middle of being nice to her aunt by helping her move when she caused the injury because an equivalent of this is already mentioned in the *Kara-opinion:*

> "Defendant Kara is guilty of *bodily injury caused by negligence*, <u>even though the accident occurred while Kara was doing a good deed in helping her aunt move.</u> The defendant did not look before throwing a piano of a balcony. The piano hit a passer-by and caused bodily harm."

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[291] Judith Jarvis Thomson (1981), "In Defense of Abortion", 48f.

Finally, decisions that were made following the binding precedent also need to be taken into account. As Lamond points out, when a precedent decision is followed, the list of possible, though unacceptable grounds for distinguishing will likely get longer. The subsequent case in which the precedent is followed brings with it a new set of factors, none of which the court which decided to follow it considered weighty enough to warrant distinguishing.[292] Therefore, if the precedent under consideration has been followed before, the equivalents of those factors that were not considered grounds for distinguishing before should not now be used as grounds for distinguishing.[293] The judge must therefore ask whether the factor that is now being proposed as a ground for distinguishing has appeared in any earlier cases in which the same precedent was followed and was not considered a ground for distinguishing then.[294] If this is so, the earlier case in which the precedent was followed will serve as a binding precedent on the present case too (because it was established as legally the same as the precedent case), preventing the judge from distinguishing on these grounds. The critical questions associated with the argument scheme for distinguishing a binding precedent are therefore the following:

I)   Is there any applicable law that forbids making a distinction on grounds X?

II)   Is X based on a factor in the present case B an equivalent of which has been recorded as having been present in the precedent case A?

III)   Has it been recorded, in the opinion of other cases whose decisions followed the precedent decisions, that X or an equivalent of X has already arisen as a possible ground for distinction and has not been used as such?

If we combine the argument scheme for argument from precedent with the applicable critical questions as well as the necessary supporting argument, then we get the following guideline for reasoning by precedent:

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[292] Lamond makes the important point that this means that both the decision to distinguish *and* the decision to follow change the law. (Grant Lamond (2005), "Do Precedents Create Rules?" p. 17).

[293] This is one expression of what we have already seen in chapter 3. Later cases have an influence on the meaning of precedent cases – if a later case is seen as similar to the precedent case and decided accordingly, then the judge authoritatively determines that the grounds on which the precedent case was decided are ones that apply to the later case too, and this has an influence on what the precedent case means for decisions after that.

[294] It is not entirely clear whether this critical question comes with a burden of proof. I think it is likely that it does, given that some precedents have been followed in a great number of cases, which would make the work of answering this question both tedious and time-consuming. It is therefore possible that this question should only be considered to shift the burden of proof if it is possible to point out a case in which an equivalent of the distinguishing factor under consideration had already appeared.

Precedent Scheme

(P1) The present case B can be considered similar as the precedent case A.
(C1) Therefore the present case B is legally the same as the precedent case A.
(P2) If a present case B is legally the same as a precedent case A then B must be decided in the same way as A (case A must be followed in case B).
(P3) The present case B is legally the same as the precedent case A.
(C2)Therefore B has to be decided in the same way as A (case A must be followed in case B).

Critical Questions for the Precedent Scheme

I) Does the precedent case A stand in the right authoritative relationship to the present case B?

II) Can the present case B be understood in such a way that it is relevantly similar to the precedent case A?

II.I) Is it possible to understand the present case B in such a way that a at least one line of argument as it is presented in the precedent opinion can be mirrored, in its entirety and with its argumentative structure intact for the present case B?

II.II) Are there any pre-established legal categories (established in the precedent opinion or through applicable surrounding law) that make it impossible to treat precedent case A and present case B as similar with respect to some factor highlighted as contributing to the precedent decision?

III) Are there Grounds for Distinguishing Present Case B and Precedent Case A?

Supporting Argument Scheme for Argument for Distinguishing Precedent

(P1) X is a relevant difference between present case B and precedent case A.

(P2) If a relevant difference between the present case B and the binding precedent case A exists, then the precedent decision must not be followed but should instead be distinguished.

(C) Therefore, the precedent decision must not be followed but should instead be distinguished.

Critical Questions for Argument for Distinguishing Precedent

I)   Is there any applicable law that forbids making a distinction on grounds X?

II)   Is X based on a factor in the present case B an equivalent of which has been recorded as having been present in the precedent case A?

III)   Has it been recorded, in the opinion of other cases whose decisions followed the precedent decision, that X or an equivalent of X has already arisen as a possible grounds for distinction and has not been used as such?

4.4 Conclusion and Some Further Remarks on Distinguishing

I have now provided an argument scheme and critical questions that are supposed to guide the judge when she engages in evaluating an argument by precedent. Considering them should lead the judge to a justified decision on whether the argument from precedent provides her with sufficient reason to consider herself duty-bound to follow the precedent decision. However, before I end this chapter, there are a few additional remarks that should be made about distinguishing.

Even though the doctrine of *stare decisis* excludes some kinds of differences between present and precedent case from being used as grounds for distinguishing, it is clear that judges enjoy a good deal of freedom when deciding whether or not to distinguish a precedent case. Indeed, the possibility of distinguishing can plausibly be considered *the* source of flexibility within reasoning by precedent. Once again, we face the Realist's concern. The worry is that judges, enjoying this much discretion when it comes to the decision whether to follow or distinguish precedents, are far too unconstrained in their decision-making, despite all the ways in which previous decisions, combined with the doctrine of precedent, can be seen to guide them. Indeed, Schauer describes common-law courts as peculiarly powerful, able to establish law where there is none and change what seems to be settled law already:

> Finally, and most importantly, common law rulemaking does not merely make new law where there is no existing law. Instead, the lawmaking power of common law courts is more than interstitial, and extends to modifying or replacing what had previously been thought to be the governing rule when applying that rule would generate a malignant result in the case at hand.[295]

Indeed, judges change the law both when they follow *and* when they distinguish, and in two possible ways. First, according to Lamond, judges change the status of possible grounds for distinguishing the precedent case when they decide a present case.[296] These possible grounds are converted either into *actual* grounds for deciding differently (if they distinguish) or *prohibited* grounds for deciding differently (if they follow). And second, judges clarify the *grounds* upon which the precedent has to be considered decided. If they follow the precedent in their decision, then they decide that the present case and the precedent case are indeed similar. Thereby they authoritatively declare that the understanding of the precedent case under which precedent and present case are similar is the understanding that from now on has to be considered the correct one. (If you throw the bird out, then you declare that the grounds on which the dog was thrown out have to be ones that also apply to birds.) And if they refuse to follow a precedent, either based on the first set of critical questions or by distinguishing, then they do the opposite. (For whatever grounds the dog was thrown out, they do NOT apply to birds).

Our question remains. If judges are sometimes free to distinguish even when it *seems* as if the established case-law clearly demands one outcome (if the first set of

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[295] Frederick Schauer (1988), "Is the Common Law Law?", p. 455.
[296] Grant Lamond (2005), "Do Precedents Create Rules?" p. 17.

questions can easily be answered), then it seems as if precedents might be, after all, not restrictive enough to provide meaningful guidance. Furthermore, for those whose cases are being dealt with by these judges there is no secure way to predict whether or not they will leave the courtroom as winners. And this might seem patently unfair to the losers.

There are two possible strategies available for one who wishes to address this worry. First, one might draw on the advantages of giving judges the freedom to avoid unacceptable results despite the foreseen consequence that the outcome of cases will not always be fully predictable. The literature in jurisprudence has produced several arguments supporting the claim that accepting the drawbacks of judicial discretion can be worth it in light of the gains. Second, one might draw attention to additional sources of guidance available to a judge engaged in reasoning by precedent. The kind of guidance at play here is not the kind that determines whether or not the judge is engaged in a process of decision-making *properly viewed* as reasoning by precedent. Rather it is the kind of guidance that must be respected if a judge's decision-making is to be characterizable as *good* reasoning by precedent, that is, reasoning that produces not merely acceptable decisions, but ones that can properly be thought of as *good*. In the following section, I will pursue both strategies. In so doing, I will be following the classic way to deal with a problem that cannot outright be fixed: first show that it is not really a problem at all, and then show that it is not necessarily as big as one thinks it is.

4.4.1 There is Not Really a Problem After All

In his classic text, *The Concept of Law*, H.L.A. Hart warned us of the dangers of trying to make law according to the formalist model by enacting statutes in the form of rules specific and fine-woven enough that every possible case receives one clear and determinable answer through them.[297] In order to achieve such a set of rules that would decide every case in a completely predictable manner, it would be necessary to determine certain features of cases that fall under every rule, to define these features with necessary and together sufficient conditions, and to make them, in turn, the necessary and together sufficient conditions under which the rule applies.[298] But the consequence would be, Hart notes, a system unable to deal with unforeseen developments. Rule makers cannot know the circumstances of every possible case that might arise under their rules. Taking all possible combinations of factors within cases into account is a superhuman task that is impossible for a legislator to fulfill.

Hart's famous toy motor car in the park example shows how easily a seemingly reasonable rule can produce absurd outcomes. This is because human language is often not precise enough to distinguish everything that might have to be distinguished in some future situation, and because the human mind is not powerful enough to think of all these situations in advance. A rule has been enacted that states: "No vehicle may be taken into the park". It is obviously a reasonable rule, because parks are there for people to relax and for children to play safely. Cars and trucks would disturb the peace and quiet of the park, and they would in all likelihood convert the park into a dangerous place for children to play. But now suppose that a little child takes her toy car, propelled by a small electrical

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[297] H.L.A. Hart (1961), *The Concept of Law*, p.124 ff.
[298] H.L.A. Hart (1961), *The Concept of Law*, p. 128.

motor, into the park and rides around in it. Quite obviously applying the rule to the child, throwing her out of the park, and fining her parent seem absurd.[299] Yet, if no one had thought of this possibility when drafting the rule, and if a vehicle had been defined, for the purpose of the rule, as a "means of transportation, propelled by a motor", this is precisely what the rule would seem to entail. This, Hart claims, is the kind of result one can anticipate in a formalist world where certainty of outcome is purchased at the cost of reasonable flexibility.

The argument for judicial discretion that follows from this problem is fairly simple and straight forward. In order to avoid the absurd outcomes otherwise reasonable and well-intentioned rules will have if they are applied in an inflexible and automatic manner, some leeway is necessary when dealing with cases as they arise. Judges are, of course, the ones who need to deal with cases as they are arise, because they are the ones deciding them. Therefore, some leeway has to be given to judges when applying the law. They must be allowed to make exceptions whenever making exceptions is necessary to avoid outcomes that are unjust, obviously unwanted in light of the reasons for which the rule was originally set in place, or just plain absurd.[300]

This argument can not only be used to justify giving judges discretion when interpreting statutes. It can also serve to justify according judges a degree of freedom in deciding whether to distinguish or to follow a binding precedent. As Wilfrid Waluchow emphasizes when discussing Hart's argument, legislators act wisely when they deliberately include vague, abstract or "open textured" terms in statutes, thereby giving judges more room to decide cases in ways necessary to avoid unjust outcomes.[301] Far removed from the situations in which the enacted statutes may or may not apply, legislators cannot be expected to foresee every possible circumstance that might make the outcome suggested by the statute unjust or absurd. Something similar is true of judges deciding precedents. Even though they are dealing with a real-life case when making their decision, instead of being caught up in abstract deliberations, their focus does not always extend to the various future cases to which their precedent will be seen to apply. On the contrary, they will often be preoccupied with the particular details of the case they must decide. Furthermore, judges, like other human beings, are prey to certain cognitive biases that are bound to influence how they decide the case before them. For example the cognitive bias that makes it seems as if those things that have in fact just occurred are much more likely to occur again than is actually the case.[302] These biases have the potential to prevent judges from seeing the consequences that their decision and the manner in which it is formulated and justified, might have in later cases. If they choose to

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[299] This example is only slightly altered from Hart's original one which can be found in H.L.A. Hart (1961), *The Concept of Law,* p. 126.

[300] For a similar argument, see H.L.A. Hart (1961), *The Concept of Law*, p. 130.

[301] Wilfrid J. Waluchow (2007), *A Common Law Theory of Judicial Review*, p. 196.

[302] See: Tversky, Amos and Kahneman, Daniel (1973), "Availability: A Heuristic for Judging Frequency and Probability". Frederick Schauer raises the worry that these kinds of biases might have the effect that law-making under the influence of specific cases, as it occurs through common-law judging, might actually make for worse law than law-making in the abstract, as legislators do when they decide cases. (Frederick Schauer, (2006)"Do Cases Make Bad Law?").

formulate the grounds for their decision in highly abstract terms that encompass many situations, they are likely inadvertently to render a decision that is binding on some cases that would better be decided differently than the case they are dealing with right now.[303] Even if they describe their case as specifically as they can, they will seldom if ever be able to anticipate and note the absence of all those factors that might have led them to a different decision. It is therefore necessary that the judges who come later, and who realize that these earlier decisions are binding on them, have a way to take these additional factors into consideration because life is even more colourful than the most active imagination. The way they do so, of course, is to distinguish the cases they must decide from those that went before, thereby avoiding repetition of the decision made in the binding precedent. As Waluchow puts it: "[…]two facts remain indisputable: (a) We cannot always foresee the results to which general rules will lead; and (b) it would be foolish to ignore this point in thinking about how best to design our legal institutions."[304] Adding the possibility of distinguishing as a relatively constrained way to avoid a bad outcome that results from slavish adherence to an unfortunate precedent is the primary way in which the common law deals with unforeseeability. While the judicial freedom that the power to distinguish gives judges might be worrisome because it makes judicial decisions harder to predict, it is also necessary to avoid the even worse problems of formalism.

4.4.2 The Problem is Not Really as Big as It Might Seem

In addition to what has been said above, it should also be pointed out that judges are not as free in deciding whether to distinguish or to follow as it might seem. As I have already argued, the decision to distinguish a binding precedent needs to be justified, that is, the difference on the basis of which the present case and the precedent case are supposed to be distinguishable has to be shown to be relevant. I have already established that there are certain differences on the basis of which a judge may not decide to distinguish. I believe that among the remaining differences we can distinguish two groups, with respect to each of which there is reason to believe that citing a difference of that kind can be sufficient to meet the burden of proof necessary to show that distinguishing is justified. The first group consists of differences that are arguably legally relevant, while the second group consists of differences that are arguably morally relevant.[305] Even though a thorough discussion of these groups is not appropriate for a discussion of the nature and structure of reasoning by precedent, it is possible to make a few tentative remarks about each of them.

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[303] For this reason, Larry Alexander and Emily Sherwin suggest that judges should try to make rules as specific as possible, for as limited a range of cases as possible. (Larry Alexander and Emily Sherwin (2008), *Demystifying Legal Reasoning*, p. 117ff).

[304] Wilfrid Waluchow (2007), *A Common Law Theory of Judicial Review*, p. 208.

[305] I do not want to claim that these two groups exhaust all the possible differences upon which a judge might want to base the decision to distinguish. There might be differences that can be claimed to be relevant for prudential reasons or for policy-reasons. However, whether and under which circumstances such reasons could be weighty enough to meet the burden of proof attached to distinguishing is a difficult question that cannot be discussed here. (See, e.g. Ronald Dworkin (1977), *Taking Rights Seriously*, p. 82ff; John Mackie (1977), "A Third Theory of Law").

Differences between a precedent case and a present case can be established to be legally relevant in a number of ways. It is important not to forget that common-law judges are not restricted to reasoning by precedent when they decide cases, but engage in a much broader form of legal reasoning that we can here call *common law reasoning*. Common-law reasoning draws the premises for its arguments not only from binding precedents, but also from other legal sources, including sources that are not legally binding on the present case. So-called persuasive authorities are legal sources that, for some reason or other, (e.g. they originate in a foreign legal system) do not have a binding effect on the present decision. They nonetheless provide some reason to decide the present case in one way rather than another. One example that is interesting here might be a statute that belongs to another area, or sub-section of the law, and that treats the difference found between the precedent case and the present case as relevant with respect to some other matter. Similarly a non-binding, but closely analogous precedent case might have treated the difference under consideration as relevant. Both could be cited as a strong reason to treat the difference between precedent and present case as relevant enough to distinguish on the ground that it was considered relevant enough to have had a legal effect before. It seems reasonable to assume that the further away the area of law to which the statute or the analogous precedent belongs is from the area of law with which the present case is concerned, the less weighty the reason to distinguish that can be devised from it will be. Similarly, it seems reasonable to assume that how the statute or non-binding precedent has been treated in the past will have an impact on how weighty a reason it provides for distinguishing. Given that there is no binding authority that compels the judge to take the precedent or statute into account, it is important whether the difference they give relevance to has been, in the past, judged to be morally relevant. In other words, it will be important whether the enactment of the statute or the setting of the precedent has been treated by other judges as morally justified. If, for example there are clear signs that judges have attempted to interpret the statute so as to limit the impact of the difference recognized by it, this might be a sign that the statute is generally considered to be undesirable. Consequently, the reason it provides for distinguishing will tend to be far less weighty than it might otherwise be.

A difference between precedent and present case can also be shown to be relevant, not because it has made a difference in the law before as in the examples above, but because it *should* be treated as relevant on moral grounds. However, it is reasonable to think that the burden of proof associated with establishing moral relevance should be greater than the burden associated with legal relevance – if only because whether or not a difference appears to be morally relevant to a judge might depend on the judge's own moral biases and idiosyncrasies. In addition, legal reasoning is especially strongly based on arguments from authority, and so a moral reason that cannot be shown to have been used before will be seen as lacking in strength simply for that reason. As Schauer puts it:

> [A] legal argument is often understood to be a better legal argument just because someone has made it before, and a legal conclusion is typically taken to be a better one if another court either reached it or credited it on an earlier occasion. The

> reference to a source in this context rarely refers to one that is more persuasive or authoritative than one that could be marshalled for an opposing proposition, but instead appears to be the legal equivalent of the line commonly used by the humorist Dave Barry-"I am not making this up."[306]

So an argument for moral relevance based on a moral principle that has already been recognized in law will tend to be much stronger. Ronald Dworkin famously argued that the law contains principles that underlie enacted statutes and past decisions, and that can be identified by examining these materials with an eye towards determining which principles are able to explain all or a great number of them.[307] Wil Waluchow refined this idea further by introducing the concept of a *community's constitutional morality*, which consists of the sum of moral and political principles to which a political community has committed itself.[308] A community's constitutional morality does not consist of the sum of all objectively correct moral principles, nor of the sum of all moral convictions the members of the community might, at some point in time, be willing to assert.[309] Rather, it consists of those principles to which the community has committed itself through its legal and political acts, such as enacting laws or signing treatises. Waluchow connects Rawl's concept of reflective equilibrium with Dworkin's concept of legal principles, suggesting that it is possible to identify moral principles to which a community has committed itself by attempting to establish consistency and coherence among its various political and legal acts and the moral opinions the community apparently has adopted or should adopt. A moral principle can be considered part of the community's constitutional morality only if it is consistent and coherent with the political and legal acts the community has performed and the other legal and moral principles to which it is committed.[310] A principle that has passed this test and can be shown to cohere with the community's moral and political actions of the past, and has possibly even been cited in enacted statutes, signed treatises or famous decisions, is a real moral commitment of the community.[311] Moral principles that have been integrated into the legal landscape in a Dworkinian or Waluchowian way can be the basis for strong arguments supporting the moral relevance of certain differences between precedent and present case. They can do so if they can be shown to present these differences as important, that is, already judged legally relevant. Therefore they can bestow not only moral, but also legal relevance on the difference in question.

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[306] Frederick Schauer (2008a), "Authority and Authorities", p. 1950 (quoting Dave Barry (1994), *Dave Barry is not Making This Up*).

[307] See e.g.: Ronald Dworkin (1977), *Taking Rights Seriously*, p. 22ff.

[308] See Wil Waluchow (2007), *A Common Law Theory of Judicial Review*, p. 223 ff.

[309] Wil Waluchow (2008), "Constitutional Morality and Bills of Rights", p 67.

[310] Wil Waluchow (2007), *A Common Law Theory of Judicial Review*, p. 224 ff.

[311] Such serious commitments need to be distinguished from mere moral opinions. Just like people, communities can adopt all kinds of opinions as fashionable and come to them in many different ways. Unlike serious commitments, moral opinions are not the outcome of a process of reflection that determines whether they are coherent and consistent with already adopted principles and already performed actions. They might have been adopted in the spur of the moment, out of fear or bias and are therefore not representative of what lies at the core of the community's identity. (See Wilfrid Waluchow (2007), *A Common Law Theory of Judicial Review*, p. 223ff.

5 Conclusion

5.1 A Short Overview Over What Has Been Done

In the first chapter, I specified the requirements that the account of reasoning by precedent I was about to develop was supposed to meet. On the one hand, I wanted to describe reasoning by precedent in a way that would stay true at least to those parts of the existing practice that are considered most central by those who engage in it: following, distinguishing, the fact that some opinions have an easily determinable *ratio* while others do not, etc. On the other hand, I wanted to show that this practice can produce justified decisions, or in other words, that it is a practice of justificatory reasoning. I argued that the decisions generated properly through reasoning by precedent were justified if the employment of the practice of reasoning by precedent for the development of the law was justified as a whole. Then I analyzed the most popular arguments that have been presented for the legitimacy of this practice and determined that reasoning by precedent would have to be both restraining and flexible if it was to produce justified conclusions. On the one hand, the use of precedents in judicial decision-making would have to prevent the judge effectively from deciding cases based only on their own idiosyncratic normative commitments. On the other hand, reasoning by precedent would have to leave judges enough room to modestly integrate new ideas and to react to unforeseen factors.

In the second chapter, I described two popular accounts of how reasoning by precedent works – the rule-based account and the similarity-based account of reasoning by precedent. Both accounts had their specific advantages. The rule account, according to which every precedent provides a rule that the judge can apply in later cases, seemed well suited to explain the restrictive effect of precedents. This was especially true for Alexander and Sherwin's extreme rule-based account, according to which reasoning by precedent could effectively be reduced to deductive reasoning utilizing an argument of the form *modus ponens*. Unfortunately, their account needed to be amended in two ways to make it descriptively more attractive. First, Alexander and Sherwin's account does not allow for a difference between distinguishing and overruling. However, this difference is central to the existing practice of reasoning by precedent. Secondly, Alexander and Sherwin claim that a precedent can only have restrictive force if it is possible to determine a fully categorized rule from the text of the opinion alone, without the judge using her own justificatory reasoning. But it has long been shown that judges consider themselves constrained even by the many opinions that do not make it possible to determine fully formulated rules in this way. However, amending the rule-account so that it could accommodate both distinguishing and opinions without fully specified rules resulted in an account that had difficulty explaining why and how precedents could have a restricting effect on judicial reasoning.

The inability to account for the restricting effect of precedents in reasoning by precedent was also the big weakness of similarity-based accounts of precedent. Similarity-based accounts of reasoning by precedent, especially those that are based on reasoning by analogy, brought with them a set of descriptive advantages. The way in which reasoning by analogy is usually described in reasoning-textbooks is very similar to the way reasoning by precedent is widely assumed to work. While relevant similarities

support the conclusion that two cases or objects should be treated similarly, relevant differences count against this conclusion. This made it easy to account for both following and distinguishing and to show where the flexibility in the stability/flexibility-balance came from. But there are similarities and differences to be found between any two cases, and analogies even have the psychological effect of making two things seem similar that so far always have appeared very dissimilar. Therefore, similarity-accounts of precedent had a hard time explaining exactly how the precedent could have the restrictive effect on judicial reasoning that is so important in reasoning by precedent.

All this showed that the main obstacle faced by any theory of reasoning by precedent – including my own account – would be to account for the constraining effect of precedents while also staying true to the existing practice of reasoning by precedent. I was required to develop an account of precedent that could explain how judges reason with precedents whose opinions provide *rationes* of different degrees of vagueness – from descriptions of the situation without any hint of a principle or rule the precedent could fall under; to opinions with partial rules that do provide some categories but only describe specific facts in the place of others; to opinions with fully categorized, specified principles or rules. My account had to be able to describe the way judges decide whether a precedent case delivers any reason at all to follow it, and then how they could determine whether they *should* indeed follow it or instead avail themselves of the option of distinguishing. Most importantly I needed to show that judges receive enough guidance from precedents so that they do not end up deciding cases according to their own idiosyncratic normative commitments alone – even when the opinions of these precedents do not offer them fully formulated rules. At the same time, my account also had to show that judges do have the freedom to integrate new ideas and to react to unforeseen factors.

The account I suggested in chapter three and four accomplishes this by drawing out the consequences of changing the role judges are characteristically seen as playing when engaged in reasoning by precedent. Frederick Schauer, in his paper "Why Precedent in Law (and Elsewhere) is Not Totally (or Even Substantially) About Analogy," pointed out that arguers can almost always find a source-analogue to support any conclusion they want to argue for, and that therefore reasoning by analogy cannot be restrictive enough to be the basis for an account of reasoning by precedent.[312] But I rejected the basic premise of this argument: when judges reason by precedent, they are not typically taking the role of the arguer, composing and formulating a source analogue such that it best supports the conclusion they want to defend for the target-analogue. Instead, they decide whether they should follow or distinguish a precedent whose opinion is already written, and they are confronted with a present case they did not choose. When judges engage in reasoning by precedent, they are not choosing source or target. Rather, they should be thought of as evaluating an argument by precedent, composed of the precedent case (source analogue), present case (target analogue) and precedent decision (conclusion). It is true that analogies serve the arguer to convince her audience. But this is *only* true because analogies have significant guidance power when it comes to the minds of those who are

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[312] Frederick Schauer (2007) "Why Precedent in Law (and Elsewhere) is Not Totally (or Even Substantially) About Analogy".

presented with them. As mentioned above, they are able to influence the mind in such a way that the similarity of two objects becomes apparent, even if these two objects appeared completely different thus far. And it is this power judges can use to access the restrictive effects precedents can provide.

When judges reason by precedent, they are deciding whether a precedent case provides them with a reason to follow in their present case, and whether that reason is sufficient to impose a duty to take this step or whether other reasons render distinguishing an option. They are *evaluating* an argument formed from the precedent case and the present case that supports the conclusion that they are under duty to repeat the precedent decision. They are in the position of an interlocutor. This idea is not new. We can find it, for example, in Neil MacCormick's book "Rhetoric and the Rule of Law", where he alludes to it in passing: "(…)counsel are principally *analogy hunters*, judges primarily assessors of the adequacy of *analogies* offered by counsel."[313] Spelling out the consequences of this change in perspective for the argumentative role of judges reveals why and how precedents are restraining when they are treated as the source analogue of an argument by analogy. An interlocutor who wants to know whether an argument provides her with a sufficient reason to accept the conclusion has to perform two steps: first, she has to employ the *principle of charity* in order to understand the argument as providing as strong a reason as plausible for its conclusion; and then second, she has to critically evaluate the argument in order to determine whether this reason is indeed strong enough to provide the necessary support for accepting its conclusion. In this way, the interlocutor can reach a conclusion about the way she should react to the argument on the balance of the best reasons available to her. First she performs steps to gain, from the argument, the strongest reason for the conclusion and then she performs steps to test whether this reason is indeed strong enough to warrant following the precedent.

The judge, by subjecting herself to the psychological effects of the analogy between precedent and present case, trying to understand the argument by precedent composed from them, puts herself into a position to see precedent case and present case as similar. This is true whether the precedent opinion delivers a fully specified *ratio* with readily formulated categories, or whether it delivers a very vague *ratio*, only describing singular facts. And by seeing the similarities between precedent and present case, she puts herself into the position of being able to see a minimally strong legal argument for following the precedent. This minimally strong legal argument is where the restraining force of the precedent comes from. The analogy delivers to the judge a perspective on the precedent case and the present case that shows them as similar. The present case takes the role of the target analogue. In order to understand the two cases as similar, the judge has to restructure it so that it fits the precedent case. But not only this: where the precedent case is too vague to provide determinate guidance as to how it is to be understood, the task of making present and precedent case appear similar shows the judge how to understand the precedent case *if* it is to be followed. The present case therefore provides the judge with a kind of additional, tentative guidance – through reasoning by analogy, the judge can see what the precedent case means if it is fit to determine the decision that

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[313] Neil MacCormick (2005), *Rhetoric and the Rule of Law,* p. 210.

has to be made in the present case (and what it will mean subsequent to the decision if the judge decides to follow). The opinion of the precedent case, written by the precedent judge serves as the source analogue and delivers, if not fully specified categories, then (often) rhetorical guidance with respect to the factors the precedent judge considered important. This makes it likely that the similarities the judge picks out will be those that contain the factors in the precedent case to which the precedent judge gave legal relevance. Therefore, the exercise of trying to understand the argument by precedent leads the judge to see the ways in which the present case can likely be considered legally similar to the precedent case. According to the *doctrine of precedent*, legal similarity between cases provides a sufficient reason to follow unless a relevant difference can be found. It is then the minimally strong (but possibly very strong) legal argument by precedent that the judge needs to defeat if she wants to avoid following the precedent. She cannot simply decide the present case according to her own idiosyncratic normative commitments. She needs to evaluate the argument by precedent, and determine whether it is strong enough to justify following. If it turns out to be strong enough, she needs to follow the precedent. It if is not, she cannot follow it but must instead distinguish.

In the fourth chapter, I described the reasoning process through which the judge can determine whether the precedent case can in fact be seen as legally similar to the present case, and whether she should follow or distinguish the precedent set in the earlier case. I pointed out that offering the precedent case, by itself, can deliver some reason for the judge to follow it. However, this reason is very weak. In fact, it is just strong enough to meet the initial burden of production for giving any reason at all why the judge should decide her present case in a specific way (i.e., the way the precedent case was decided). In order to be able to come to a justified decision as to how the precedent case should ultimately be treated, the judge needs to evaluate the argument supplied by the existence of the precedent case. I pointed out that arguments by analogy – upon which arguments by precedent are based – are *defeasible* arguments. Therefore, they cannot be evaluated simply by deciding whether their premises are true. Specifically, the argument by precedent cannot be accepted simply because it is true that precedent case and present case are similar – after all, understanding the analogy *makes* this true. While this is a first step in considering whether the precedent decision should be followed, it is by no means a sufficient step.

I argued that defeasible arguments can only be considered sufficient to establish the necessity of accepting the conclusion if all objections against the argument can successfully be answered. I therefore had to provide an account of the kinds of objections that would have to be considered when it comes to arguments by precedent. In order to do this, I offered an argument scheme for arguments by precedent, together with critical questions to guide the judge through the evaluative part of reasoning by precedent. I defended my choice of these questions by referring to the *doctrine of precedent* as the basis for the content of each question. I pointed out that, according to the *doctrine of precedent* only those precedent cases can be binding on a judge that have been decided by the correct kind of court under the right circumstances. In addition, a precedent can only be binding if it is in fact legally similar to the present case. This mean that first, it has to be possible to determine that all legally relevant aspects of the precedent case can be

mirrored in equivalents in the present case, and that the established law does not forbid considering the aspects in precedent and present case as similar. And second, it must be possible to use the found equivalents of the present case in order to construct an argument that mirrors at least one line of argument that was presented in the precedent case as grounds for the decision.

Having to answer these critical questions provides further constraint on the judge who reasons by precedent. Part of this constraint comes from the surrounding law: the judge is not able to declare cases to be legally similar by citing similarities that have already been rejected in other cases or statutes. Another part comes from the precedent case itself: the judge is also not able to declare two factors in precedent and present case as similar if these factors cannot play the same roles in the mirrored lines of argument found in precedent and present case. However, if the judge finds that these critical questions can be answered, then she has established a presumption in favour of following the precedent. The present and the precedent case can now be considered to be in fact legally similar. Any reason in favour of distinguishing will now be considerably stronger than before these critical questions had been considered. This is so because understanding the analogy between precedent and present case could only lead the judge to construct an understanding of the precedent case and the present case as *likely* legally similar. However, now the judge has considered and dealt with the possible ways in which the two cases could still turn out *not* to be legally similar after all. And if the two cases are legally similar, then the only possible reason why the precedent case should not be followed is that they are not also legally the same. That is, that there is a legally relevant difference in addition to the legally relevant similarities the judge has already identified. Having employed mainly legal reasons so far, the judge is therefore now at a point where she is confronted with a rather strong argument for following the precedent case – so strong, in fact, that it is sufficient unless a relevant difference between the cases can be found.

I continued to argue that the critical question whether there is a legally relevant difference between precedent and present case is a different kind of critical question than the ones coming before it. This is so because, in order for this question to offer an effective objection, the judge is required to cite a difference between the two cases that could be considered legally relevant. In order to justify distinguishing, a further argument has to be provided. This argument in turn has to be tested with critical questions to make sure that the difference cited has not already been rejected in the surrounding law, the precedent case, or any cases that were decided by following the precedent case. This provides considerable restraint on the judge when it came to offering a relevant distinction on the basis of which she is able to distinguish.

Despite these constraints placed on any judge who wishes to distinguish, I argued, the practice of distinguishing also provides the judge with considerable freedom. It is here where we find most of the flexibility that can be attributed to reasoning by precedent. And it is here where it is most easy for the judge to integrate new ideas and unforeseen factors. However, this does not mean that the judge is able to distinguish based on just any difference that can be found between precedent and present case so long as the surrounding law and the precedent do not forbid it. After all, as I pointed out, the judge is

expected to provide *justification* for the distinction on the basis of which she chooses to distinguish, at least if she wants to decide the present case in a manner that is not only *acceptable* but can also be considered an example of *good judicial decision making*. I suggested that this justification could either attempt to show that the distinction is legally relevant already because it has been cited as important in statutes or cases other than the precedent case. Or it could attempt to show that the distinction has already been indirectly accepted as morally relevant in the law by indicating how it is based on a moral principle that is part of the constitutional morality of the community in which the decision is made. In this way, I attempted to show that, while distinguishing does indeed allow the judge a considerable amount of freedom when deciding cases, the judge cannot easily abuse this freedom in order to decide cases simply on the grounds of what she wishes the decision to be.

5.2 What Has Been Accomplished and What Still Needs to be Done?
        What kind of constraint, according to the account developed in this dissertation, do precedents offer to judges who decide cases through employment of reasoning by precedent? Can this account integrate all those aspects of reasoning by precedent which are generally considered to be important? And what is still missing from the account?
        According to the account provided here, precedents do not provide judges with absolute constraint. They do not force them to decide their present cases in one way or another. Rather, they exert an argumentative force when they are combined with a present case. They do so by providing a reason for deciding the present case in the same way as the precedent case was decided. This reason is generated by a defeasible argument - an argument by analogy. The main difference between an analogy-based account of reasoning by precedent, and a rule-based account, is the role the present case plays. In a rule-based account, the present case enters the picture as the minor premise in an argument of the form *modus ponens*. It plays no role in how the judge understands the precedent case and does not, itself, offer the judge any guidance. But if the present case is seen as the target analogue in an argument by analogy, then it influences the reasoning of the judge in a completely different way. It features into the judge's reasoning much earlier. Instead of first asking what the precedent case means, and then applying it to the present case, the judge asks herself what the precedent case would mean if it were applicable to the present case. She then sets out to determine whether the outcome of this exercise in reasoning can hold up to criticism. She evaluates an argument that was formed using *both* precedent *and* present case. This evaluation can be done by using the critical questions provided in chapter four. By considering each critical question, the judge makes sure that she fulfills the requirements of the *doctrine of precedent* when she decides her case. The critical questions also give a describable shape to the additional constraining force that comes from the surrounding law, a force that further guides the judge when she evaluates the applicability of the precedent. With every critical question the judge answers successfully, the argumentative force of the argument by precedent becomes stronger. When the final question is answered, and no grounds for distinguishing have been found, this force is sufficient to show that the judge has a duty to follow. However, throughout the process of reasoning by precedent, and before the decision is finally made,

the constraining force of the precedent is never absolute. At any point, the judge may find an objection against following that could defeat the argument by precedent she is evaluating. Some of these objections will come in the form of legal reasons, like the objection that some similarity the judge found between present and precedent case cannot be treated as legally relevant according to enacted statutes. But others might be moral, like the objection that some difference between the present case and the precedent case is relevant because it is based on a moral principle that has been recognized in the community's constitutional morality. It is here that flexibility enters into reasoning by precedent. The balance between flexibility and constraint that is so important for showing that the practice of reasoning by precedent is a practice of justificatory reasoning is therefore – maybe unsurprisingly – a balance between reason pro and reason con, a balance between argument and objection.

In addition to being able to account for the balance between flexibility and constraint, the account I have provided is also successful in including those aspects of reasoning by precedent that are generally considered important by legal practitioners and theorists. For example, it integrates without problem the roles that following and distinguishing play, the role of precedent-opinions, as well as the importance of the hierarchical structure of the courts. It can also explain how judges can use *ratios* of different degrees of vagueness. Where ratios are vague and provide no generalized categories, judges determine relevant similarities by matching aspects of precedent case and present case through purely analogical reasoning. And *where* ratios provide generalized categories, judges can use these to determine which parts of a present case should be considered as the equivalents to aspects in the precedent case. In addition, it allows for judges to either determine principles and rules through their decisions, if they are confident about the rules they want to integrate into the law, or to refrain from doing so by writing very specific opinions about the singular facts of the case they decided. All this matches well with the practice of reasoning by precedent as it currently exists.

Perhaps surprisingly, this account of precedent can also explain why we sometimes say that the common law is judge-made *and* that it is characteristically subject to evolutionary development. What precedent cases will come to mean depends not only on the content of the opinion – not even only on the content of the opinion plus the surrounding law. It also depends on the later cases in which they are being followed or distinguished. And it depends on them on two different levels, only one of which is determined by the deciding judge. First – and that is why we say that common law is judge-made law – the judge influences what precedent cases come to mean by integrating new ideas – moral, legal and political – into developing doctrines of precedent. And second – and this is why we say that the common-law develops in an evolutionary manner – the accidental order in which new cases come up determines, independently of judges, in which direction these doctrines will develop, which areas of the human life they will regulate. Why? According to the account of precedent I provide here, judges do not first determine what a precedent means and then apply it to a present case. They determine what a precedent *would* mean if it were to be applied to a present case, and then determine the feasibility of that. No matter how the judge decides after this, she makes a decision about the combination of precedent case and present case (she either rejects or

endorses this combination). To illustrate, consider, once again, our now familiar example. If a bird in a cage is the first thing that enters the restaurant after the dog was kicked out, then the doctrine of throwing-out-of-restaurants is set up to develop into a general regulation-of-animals direction. But if a boom-box is the next thing to be considered, the doctrine is set up in a general regulation-of-noisy-things direction. Reasoning by precedent is set up to select, from among the meanings of precedent cases the latter could possibly be said to have, the one that will help decide the present case – the case that actually makes its way to court. This is analogous with the way in which those variations of living organisms get selected that can deal with the problems with which their environment actually confronts them.

Still, there remains much to do. What has not yet been included in this account of reasoning by precedent is the fact that judges often decide their cases under the constraint of multiple precedents, or that they find they have to piece together the decisions they find in multiple precedents in order to come to a decision. This is a complicating factor with which the present analysis does not deal. However, because reasoning by analogy can work both with one and with several source analogues, it is reasonable to think that accounting for this complication is possible within the boundaries established by the analogy-account of reasoning by precedent developed herein.

Furthermore, I have only very briefly discussed overruling, pointing out that courts with the power to overrule need to evaluate the rule-part of the precedent scheme as well as the analogy part. However, I have not described how this should be done, nor have I offered a suggestion about the critical questions that might be employed. However, this too should be possible without much adjustment to the basic account.

Finally, it will be a worthwhile project to extend this account of reasoning by precedent into an account of reasoning *with* precedent, including the reasoning that judges do when they use sources that are not biding but merely *persuasively* authoritative. But, as one of my favourite authors has said, "that's another story, and shall be told another time."[314]

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[314] Micheal Ende (1997), *The Never Ending Story*, p. 386.

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