1. Overview

The topic of this research project is reasoning by precedent both in and outside of the law. The first (and main) part of the project is concerned with the method of reasoning judges can employ if they want to come to a justified conclusion about whether a specific legal precedent-case provides them with a binding, authoritative reason to follow in a specific present-case. It intervenes in a discussion on whether reasoning by precedent should be understood as based on rule application or as based on analogical comparison. It shows that both accounts are viable because both accounts can be amended to deal with the objections so far levelled against them. However, it argues that amending the analogy account of reasoning by precedent reveals certain normative advantages of analogical comparison that are not shared by reasoning by precedent through rule application. This part of the project is in the revision-stage. In the past months I have produced the first draft of a paper on this topic. The draft is available upon request and all suggestions and comments are very welcome.

The second (shorter) part of the project uses insights from the first part to discuss arguing with precedent in general. It develops an account of arguments by precedent in every-day context as different than other forms of normative arguments by analogy. It also discusses when arguments by precedent in every-day contexts are strong, weak, and even fallacious.

The method I use in the both papers of this research project is the formulation and critical discussion of argument schemes paired with critical questions. This method is widely used in argumentation theory and informal logic. The argument scheme portrays in abstract form the
premise-conclusion structure that is typically advanced in a certain kind of argument. An example is the following scheme for argument from expert opinion:

S says that P
S is an expert in the subject matter that P is about.
Therefore: P

The critical questions portray lines of criticism that are frequently successful against this type of argument. Two such critical questions for the argument from expert opinion are for example:

Is S trustworthy?
Do other experts in the field agree with S?

Argument schemes paired with critical questions are meant to portray defeasible reasoning - reasoning that can lead to justified conclusions, even though it does not prove its conclusions beyond all doubt. If the argument scheme and list of critical questions is well formulated, then a conclusion supported by an argument that fits the scheme and for which all questions can be answered is justified. This method is useful for exploring reasoning by precedent because it is well suited to portray reasoning engaged in weighing considerations for and against a suggested conclusion: If a judge is considering whether a precedent-case is binding on her present-case, she has to take into account reasons for and against following the precedent. The same is true for an every-day person confronted by an argument from precedent. In addition, argument schemes with critical questions are good tools for learning and teaching reasoning methods, and serve as reference points for theorists.

2. Research Project – First Part

In common-law systems, large areas of the law are developed according to the doctrine of precedent. According to the doctrine of precedent, judges are bound to take the decisions made in past cases into account when they decide new cases. Specifically, the existence of a precedent-
case can give a judge a binding authoritative reason to follow the precedent-case in her present-case – to decide her present-case according to the decision in the precedent-case.

When a judge reasons by precedent, she determines whether the existence of a specific precedent constitutes a reason for her to follow in her specific present-case. The question is which method of reasoning she can employ in order to come to a justified conclusion. The literature offers a large number of different attempts at an answer. Two especially prominent and very different approaches can be identified.

According to the rule-account, reasoning by precedent is a form of rule-application. A judge identifies a rule that the precedent opinion either sets up or refers to in its ratio. Then she uses the rule to make a decision by determining whether the present-case falls under it. According to the analogy-account, reasoning by precedent is a form of analogical reasoning. The judge compares the precedent-case and the present-case. If the two cases are legally the same, which means there are legally relevantly similar and have no legally relevant differences, the precedent-case has to be followed in the present-case. Both of these approaches have been subjected to strong criticisms.

The rule-account has been criticised for being unable to account for the fact that judges are able to avoid following applicable precedent by distinguishing and for unjustifiably assuming that opinions reliably provide enough information to extract determinative rules. The analogy-account has been criticised because it seems to be unable to explain how precedents can constrain judicial decision-making so that judges cannot always reach their own preferred decision on the basis of their preferred reasons.

I work under the assumption that these objections are basically well founded. I assume that in order to portray reasoning by precedent adequately, an account of reasoning by precedent has to
be minimally descriptively accurate. That means it has to be able to integrate the practices of following and distinguishing, as well as the existence of opinions and of rationes decidendi. At the same time, such an adequate account has to describe a method of reasoning that leads to justified conclusions. Because precedents are supposed to provide authoritative reasons, this means that it has to be able to account for precedent-constraint without referring to the substantive reasons justifying the precedent decision. However, it is widely acknowledged that judges have some discretion when they reason with precedents. In fact, the well-circumscribed discretion of judges to take some first-order reasons into account is one of the factors that proponents of the common-law method cite as an advantage of law-development through reasoning by precedent. Therefore, an adequate account of precedent has to allow for some judicial discretion, presenting reasoning by precedent in a balance between constraint and freedom.

I argue that both the rule-account and the analogy-account of reasoning by precedent can be amended so that they can fulfill all these conditions. None of the objections classically levelled against the two accounts can tip the scales in favour of either one of them. Nonetheless, amending the analogy-account reveals some advantages of analogical reasoning that are not equally available in reasoning with rules.

The Rule Account:

The objections levelled against the rule account are usually directed against an especially strong version of it. According to this version, the judge uses the ratio (or holding) of the precedent’s opinion to formulate a universal rule. Then she uses the rule to formulate a formal logical syllogism of the form modus ponens with the rule as the conditional in the major premise
and a description of the present-case in the minor premise. If she is sure about her interpretation of the rule, and if the syllogism is valid, then the precedent has to be followed.

\[
A \rightarrow B \\
A \\
\text{Therefore: } B
\]

This account presents precedents as maximally constraining because evaluating whether a deductive syllogism is valid does not require the use of any first-order reasoning. However, it cannot make room for distinguishing because a universal rule, as is needed for a deductive syllogism, does not allow for exceptions. However, in the case of distinguishing, a judge decides not to follow even though her present-case fulfills the conditions set out in the rule. She does so on the basis that the present-case has a further property that she takes to be a reason against following the precedent decision.

The account is also problematic because it relies on the assumption that opinions provide the information necessary for the formulation of a well-defined rule that can serve as a conditional in a modus ponens. As has been pointed out over and over again since the American Legal Realist movement, this is not the case.

However, both of these objections can be met by amending the rule account twice. First, it can be amended so that instead of the deductive modus ponens with a universal rule, it uses a defeasible modus ponens that uses a defeasible rule. Second, it can be amended so that judges choose the normatively best rule among the rules consistent with the information actually given in the opinion and the surrounding law. The resulting argument scheme looks as follows:

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

Therefore, if a case B has properties n1, n2 -> (presumably) decision y should be reached.

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1 Notice that if the opinion of precedent A provides enough information so that only one rule is consistent with it, then rule a is the best choice simply in virtue of being the only choice.
If a case B has properties n1, n2 -> (presumably) decision y should be reached.
Case B has properties n1, n2.
(Presumably), therefore decision y should be reached.

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

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

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

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

The amended rule-account allows for first order reasoning to influence the judge’s decision in two places. It allows the judge to determine whether there is a reason to distinguish, and it allows the judge to determine the normatively best rule consistent with the opinion. However, this does not mean that the precedent exerts no constraint. Depending on how precise the opinion is formulated, its contents constrain the judge by limiting the number of rules she can choose from (possibly down to one). Furthermore, a judge can only distinguish based on a further property of the present-case if this property is the basis of a reason against following – and if treating it as such a reason is consistent with the surrounding law.

The Analogy Account

The objections levelled against the analogy account are based on the open-ended nature of analogies. According to the analogy account of reasoning by precedent, a precedent has to be followed if it is legally the same as the present-case. In this context, legal sameness translates into legally relevant similarities plus the absence of legally relevant difference. But any two cases will have many similarities as well as many differences – just like any other two objects in the world. Therefore, the key to analogical reasoning by precedent seems to lie in the
determination of legal relevance. If there is no method for determining whether the similarities between two cases are legally relevant and judges are left to determine this for themselves, then the precedent cannot meaningfully constrain their decision-making. Legal theorists have yet to describe such a method.

However, with an adequate understanding of analogical reasoning it becomes apparent that the analogy-account can be amended to deal with this objection. I will use the multi-constraint-theory of analogical reasoning that was developed in the 1980s and 90s as a basis to develop an understanding of when a similarity is legally relevant.\(^2\) According to this theory, analogical reasoning works through so-called analogical mapping. Mapping is the establishment of correspondences between aspects of the two analogues, the source analogue and the target analogue. When a correspondence for an aspect of the source analogue is chosen, reasoners typically attempt to fulfill so-called surface and structural constraints. First, to fulfill the surface constraint, they try to find aspects in the target-analogue that can be categorized under the same pre-established categories (the less abstract the better) as the corresponding aspects in the source analogue. However, the surface constraint is much less important than the structural constraint. According to this constraint, every mapped aspect of the source analogue should have one and only one aspect in the target analogue as a correspondent. In addition, if two aspects stand in a certain relation in the source analogue, the same relations should also exist in the target analogue between the two corresponding aspects. The better a mapping can correspond to these two constraints (but mainly to the structural constraint), the more similar are the two analogues with respect to their mapped aspects. Where it is not possible to find a mapping for an aspect of the

\(^2\) What follows is admittedly an extremely short description of the multiple-constraint theory that will be hard to understand for those who have never encountered it. A longer (but still short) description can be found in the paper on pages 24-29.
source analogue that adheres to the surface and structural constraints reasonably well, a difference has been found.

Most important for this project, however, is what the multi-constraint-theory calls the purpose-constraint. This constraint determines which aspects of a target-analogue become subject to attempted mappings. Analogies are often drawn for a purpose, for example in order to solve a problem in a target analogue that had existed and been solved before in the source-analogue. In the case of the problem, the purpose constraint directs the reasoner to attempt mappings for those aspects of the source analogue that are connected to the solution of the problem and to disregard those that were not. The success of the analogy is then measured by the success of these mappings in terms of the other two constraints. It is the similarities and differences that are discovered under adherence to the purpose constraint that are relevant. Other similarities and differences are not.

Other theorists have interpreted the influence of the purpose constraint in analogical reasoning as a reason to think that the analogy-account cannot explain precedent constraint. They have assumed that judges allow themselves to be guided by the purpose to find a precedent which will allow them to reach the decision they would like to reach in their present-case. The assumption is that judges first determine how they want to decide the present-case and then reject any precedent case whose decision cannot be mapped onto the favoured present-case decision. However, this assumes that judges consciously try to realize their own sense of justice instead of applying the law. However, no reasoning-method could stop an unscrupulous judge from meddling with the law. Instead, I assume a judge with the honest goal to apply the law as far as possible. If we assume that in approaching the analogy between precedent-case and present-case, judges have the purpose to determine whether the two cases are similar in a legally
relevant way, then the purpose constraint is the key to the ability of the analogy-account to explain precedent constraint on judicial decision making.

Even though this is not one of the classical objections levelled against it, it is a descriptive flaw that the analogy-account of reasoning by precedent does not give any prominent place to the precedent-opinion or the ratio. Rectifying it shows that precedent can constrain judicial reasoning through analogy. In the precedent opinion, the precedent judge authoritatively determines both which facts where part of the precedent-case, and whether these facts were relevant for the precedent decision. Either they were determined to be relevant for the decision because they were determined to be reasons for the decision – then they are a part of the ratio; or they were determined to be relevant because they were determined to be reasons against it – then they were authoritatively marked as too weak to defeat the reasons for the decision. By authoritatively making these determinations, the precedent judge has marked the factors that belong to the ratio as legally relevant. A successful mapping between such a factor and one in the present-case is a relevant similarity. If all factors that belong to the ratio can be mapped, this means that the judge has an authoritative reason to follow, if she cannot distinguish. All other successful mappings between the cases are also relevant similarities because they show that the mapped factor in the present-case cannot be the basis for distinguishing.

Importantly, where the opinion gives a clear category for one of the factors in the ratio, the mere fact that a factor in the present-case also falls under the category fulfills the surface constraint maximally. Such a mapping therefore constitutes a relevant similarity. Where the opinion is vague and merely highlights a factor as relevant without providing a clear category for it, the judge needs to determine whether two factors are similar enough by integrating her own first order reasoning.
This shows that the analogy-account can be amended to integrate opinions and *rationes decidenti*. The source-analogue in reasoning by precedent is different from source-analogues in normal analogical reasoning because it is an *authoritatively determined source analogue*. Amending the analogy-account of reasoning by precedent makes it possible to explain precedent constraint because it shows that it is not the case that the present-judge alone determines which similarities are relevant. Rather, the precedent judge does this in her opinion. Just like the rule-account, the similarity account imports first-order reasoning where the opinion is vague, but not where it is clear and precise. The argument-scheme for the amended analogy-account looks as follows:

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

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

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

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

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

Are there no legally relevant differences between A and B?

All this has shown that both accounts can be amended to meet the objections classically levelled against them. Neither the ability to integrate distinguishing, nor that to explain precedent constraint can help decide between them.
However, unsurprisingly, both amended accounts allow for some judicial discretion. To some degree, judges have to use their own first-order reasoning when they determine whether they have to follow a precedent in their specific present-case. Therefore, there is a danger that the personal prejudices of the judge may influence her decision making. One way in which the influence of prejudice can be reduced is by taking into account as many considerations both for and against a conclusion as possible, and to become aware of the most convincing case for either side. In the last section of the paper I argue that here the analogy-account has an advantage because of the way that analogical reasoning guides the attention of the judge:

In addition to sometimes presenting convincing reasons, analogical arguments are also extremely effective rhetorical devices. This is so because presenting someone with the task to understand an analogy has the rhetorical effect of encouraging them to change their understanding of both analogues in such a way that they will appear similar – even if they did not appear similar to them before. In the attempt to understand the analogy, the reasoner pays special attention to those aspects of both analogues that can be mapped successfully and allows other aspects to float to the back of their mind. To use a rhetorical concept: those aspects of both analogues that can successfully be mapped gain presence in the mind of the reasoner. If I present you with the analogy “People are like wolves”, you will concentrate on different aspects of people than when I say “People are like dogs”. The attempt to understand an analogy then leads to a new understanding of the analogues, one favourable for the analogy. In reasoning by precedent, a judge who compares precedent-case and present-case through mapping will construct and evaluate that understanding of the present-case and (where the opinion is vague) the precedent-case that best presents them as relevantly similar. It is this understanding of both cases that she has to reject if she wants to resist following. Analogical mapping therefore
encourages the judge to become aware of the best (or one of the best) case for following from her perspective. This is not necessarily the case when a judge reasons according to the rule-account. Here, she chooses the rule under consideration of only the precedent-case according to what she thinks is the best way it should be interpreted.

In addition, analogical mapping can also encourage the recognition of relevant differences lying behind relevant similarities. Where opinions provide clear categories, there merely has to be an aspect in the present-case that falls under the category and the judge has found a relevant similarity. However, while the applicability of the category is all that matters in the rule-account, in the analogy account the category is used as guidance for a mapping. Mapping the two aspects of precedent- and present-case together that fall under the category gives them presence. Because similarity is measured by the degree to which a mapping can adhere to the structural constraint (in addition to the surface constraint), the mapping encourages the attempted mapping of the relations that the aspect stands in to other aspects in the precedent-case. This can lead to the discovery of relevant differences, drawing the attention of the judge to possibly convincing (and non-excluded) reasons against following.

I do not claim that reasoning according to the rule-account precludes the weighing of different considerations. Rather, I want to suggest that analogical-reasoning, by its nature, encourages the judge to pay attention to these considerations.

3. Research Project – Second Part

In the legal context, a rule-account of reasoning by precedent is viable because judges produce opinions from which rationes decidendi (or holdings) can be gathered that serve as the basis for a rule. However, in non-legal context we call the use of a past decision (or action) to argue that some specific decision must be made (or action must be performed) in the present an
argument from precedent. The contexts in which these arguments are used are often those in which no official description of the situation in which the decision was made is available. A typical example might be that of a professor who was moved by the tears of a sympathetic student to extend a deadline and now finds herself confronted by the argument of another student that she has to extend her deadline too. Here, so I argue, the only viable way to describe the argument is as a sub-category of arguments by analogy. However, it is not a straight-up argument by analogy because in addition to the analogy, it also relies on an appeal to practical authority. By citing the earlier decision as a precedent, the arguer does not simply suggest that the professor might be just as justified as she was then to make the equivalent decision now. Instead, the arguer suggests that because the precedent decision was made, the professor now has duty to make the equivalent decision. The paper I am planning to write will be concerned with the way these two aspects of the argument interact. I argue that arguments by precedent in everyday contexts are often much weaker than they appear. This is because they often rely on the fear of the addressee of the argument to lose face by admitting to have made a mistake or by appearing inconsistent rather than on a valid claim to practical authority. As in the first part of the research project, I aim to analyze the nature of arguments by precedent in every-day context in a way that will make it possible for me to justify the formulation of an argument scheme paired with critical questions.

While arguments by analogy have been given some attention in the general literature of argumentation theory, arguments by precedent have not, especially not outside the context of legal reasoning with written opinions. This is regrettable, given that arguments by precedent are not uncommon even outside the legal context. One reason might be that, while there is a broad literature on appeal to theoretical authority, argumentation theory contains relatively little on
arguments from practical authority. In the paper, I will use Joseph Raz’ account of authoritative reasons to remedy this, according to which an authoritative reason is a content-independent reason to φ protected by a second order reason that excludes some otherwise salient reasons against φ-ing from consideration.

In order to give an account of arguments by precedent in everyday use, I will adapt my version of the analogy-account of reasoning by precedent that was developed in the first part of the project. I will propose to understand arguments by precedents as a kind of argument by analogy with an authoritative source analogue. Every-day arguments by precedent are aimed to show that the addressee of the argument has a duty to make a certain decision in a situation because an equivalent decision has been made in a similar situation, even if that decision turned out to be a mistake. While the authority of legal precedents can be assumed to be accepted in legal reasoning (and arguing) with precedent, everyday arguments by precedent have to include an argumentative step to support the authoritative nature of the source analogue. This step supports the sub-conclusion that the existence of the precedent decision, plus the similarity between the context in which the decision was made and the present context, constitutes a protected reason for making the corresponding decision again. Because authoritative reasons are content-independent, the premises refer to the source of the decision or action (instead of its justification) and its relationship to the addressee of the argument.

I will argue that in actual uses of every-day arguments by precedent, this additional step is often left implicit. However, evaluating it carefully is vital for the evaluation of the argument by precedent. For example, there might not be any rule or practice at the professor’s university according to which a professor is expected to treat her earlier decisions as authoritative with respect to her later decisions. If no such rule exists, the professor is free simply to state that she
made a mistake. Then the argument by precedent might be very weak, relying on the assumption that the professor will \textit{treat} her earlier decision as authoritative because she fears a loss of face if she admits the mistake. The argument by precedent is then one that is highly \textit{effective}, but not \textit{good} – it does not justify its conclusion.

On the other hand, there might in fact be such a rule or practice. For example, two parents might have established and made apparent a habit of treating decisions made about one sibling as authoritative with respect to the other sibling (possibly in the name of fairness) across both parents. Then a brother might use the argument that the father allowed the sister to do something as an argument to show the mother that she has to allow the brother to do the same thing. This would be a non-fallacious use of argument by precedent.