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Setting Precedents Without Making Norms?

1 Introduction

In *Dillon v. Legg*[1], an influential case in California's common law, the court decided to set a precedent without providing determinate guidance for its application to later cases.[2] To summarize the case, a child had been killed in a car accident. The accident was witnessed by the child's sister and mother, who both made emotional distress claims. At the time, the common law had been slowly changing in favour of emotional injury claims. The use of the so-called "impact test", according to which emotional injury can only be recognized if the defendant has (however slightly) made a physical impact on the claimant, had been relaxed. Courts now recognized emotional injury claims if the claimant had been in the "zone of danger", where they could have been physically impacted.[3] In *Dillon v. Legg,* using the zone-of-danger rule would have led to recognition of the sister's emotional distress, but not the mother's, because the mother was close enough to witness everything vividly, but in no danger of being physically impacted. The court decided to break with precedent and recognize the mother's emotional injury. The argument was that the case made it obvious that the zone-of-danger rule was arbitrary.

While the court rejected the zone-of-danger rule, it refused to formulate, in its place, another rule, test or other form of determinate guidance for when claims for emotional injury should be recognized. While it declared that such awards would depend on whether the defendant

[1] Dillon v Legg, 441 P.2d 912 (Cal. 1968)

[2] In this case the development of the law of torts in California. For discussion, see, e.g. Juster, Charles (1980), "Negligent Infliction of Emotional Distress: Keeping Dillon in Bounds", *Washington and Lee L. Rev.* 37, pp. 1235-1246

[3] For a more detailed history of this doctrine, see Juster, (1980) n2.

could *reasonably foresee* the emotional injury, it did not provide determinate guidance as to what that meant in the context of emotional injury:[4] It argued that no fixed rule determining when emotional injury was foreseeable could be given. Instead of providing a formulation pointing to a precise line between cases to which the precedent of *Dillon v. Legg* would apply and those to which it would not apply, the court offered some "guidelines" meant to help making this decision: These included that later courts should take into consideration the proximity of the claimant to the event, whether the claimant directly observed the event with their senses, and the closeness of the relationship between claimant and victim. The court claimed that later cases would have to be decided on a case-by-case basis. [5] However, commentary on the opinion suggests that the court was really leaving the development of a determine rule or test etc. to later courts.[6]

The first criticism of the court's unwillingness to make an attempt at providing determinate guidance for the application of the precedent were voiced right in the dissenting opinion. There, Judge Burke produced a long line of questions about when emotional injury claims would be recognized (how close does the claimant have to be to the accident? How closely related do

[4] Reasonable foreseeability is a legal concept well used in legal norms, but in this context commentators, other courts and even the dissenting judge did not consider the guidance provided by using it nearly enough (see below).

[5] Later courts did not treat the decision as providing such a precise line either. For example, they did not automatically assume that the three factors provided in *Dillon v. Legg* were three necessary conditions any emotional injury claim had to fulfill. At least one court interpreted these guidelines as stating factors that could weigh in on the decision, but not as necessary conditions for recognizing emotional injury. (Tobin v. Gorssman, 249 N.E. 2d 419).

[6] "The California court intended the proposed guidelines to aid in the evaluation of mental distress claims on a case-by-case basis, maintaining that future adjudications would delineate the ex-act boundaries of recovery." Juster (1980) n2, p. 1241.

claimant and victim have to be? How soon after the event do the emotional injuries have to manifest themselves?).[7] He complained that while his court could avoid answering these questions, trial courts "will not so easily escape the burden of distinguishing between litigants on the basis of such artificial and unpredictable distinctions."[8]

Burke's complaint can easily be understood as based on rule-of-law values. He was worried that the court left the law unpredictable by introducing the possibility of recognizing emotional injury without trying to make clear when this would happen. Thereby, the court forced judges sitting in trial courts to make decisions about specific litigants based on their own assessments, rather than being able to rely on determinate categories provided by the law. This left litigants unable to form even moderately reliable expectations about how the law would treat their cases. Burke would likely have been happier to see the court provide explicit, determinate guidance by formulating a clear rule or test etc. for determining when a claim for emotional distress should be recognized. Instead, the court just gave rather vague formulations of a number of reasons (being proximate to the event, being closely related) that it presented as speaking for the recognition of such a claim and as strong enough in the specific case of *Dillon v. Legg*.

This kind of criticism is possible whenever a precedent-setting decision fails to provide sufficiently determinate guidance for the precedent's later application. In fact, the demand for such guidance in the name of rule-of-law values can be – and has been - generalized. Jeremy Waldron, for example, has argued that the rule-of-law ideal implies that courts always have a duty to formulate a general norm in their opinions.[9] But what does it mean to provide "determinate

[7] Dillon v Legg, 441 P.2d 912 (Cal. 1968) (Burke dissenting).

[8] Dillon v Legg, 441 P.2d 912 (Cal. 1968) (Burke, dissenting).

[9] Waldron, Jeremy (2012) "Stare Decisis and the Rule of Law: A Layered Approach", *Mich. Law Rev.* 111:1, p. 18.

guidance for a precedent's later application" in an opinion? In this paper, I will take this to mean that the precedent-opinion provides a formulation that makes it sufficiently clear what the category of cases is that the precedent is applicable to. I will say that a precedent being applicable to a new case means that the court has to either follow the precedent or find a sufficiently good reason to distinguish.[10] With respect to a specific new case, a formulation in a precedent opinion makes it sufficiently clear whether the precedent is applicable to the new case if, on the basis of the formulation, a reasonably well trained lawyer can easily determine that the precedent is or is not applicable to the new case. If there is great insecurity about this, then the formulation is not sufficiently clear with respect to this specific new case. If the share of new cases for which the formulation in the precedent opinion causes such insecurity crosses a certain reasonable threshold, then the precedent opinion fails at providing determinate guidance for a precedent's later application.[11]

[10] Precedents are always open to distinguishing, therefore it is impossible to give a formulation in a precedent opinion that makes it sufficiently clear what the category of cases is for which the judge has to *follow* the precedent. This feature of precedents will play an important role in my later argument – see section 3.2. However, I do not think that the possibility of distinguishing makes the discussion in this paper moot: It is a big difference whether you know that a precedent applies, and that your present case therefore has to be decided by following *unless* an additional reason for distinguishing can be found – or whether you are completely unsure whether the existence of the precedent implies anything at all for your present case.

[11] Hart has famously argued that every rule has a so-called penumbra of uncertainty, simply because all terms are vague to a certain degree. (Hart, H.L.A (1958), "Positivism and the Separation of Law and Morals", *Harv. L. Rev.* 71:4, p. 607.) Therefore, it would be impossible to provide guidance such that this percentage is zero. I can also not give a very clear indication of where this threshold lies – this may well depend on factors such as the area of law in which the precedent is set.

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In order to provide determinate guidance of this kind, the precedent opinion needs to contain a sufficiently precise and clear formulation representing a list of the conditions under which the precedent must be treated as applicable. These conditions usually will take the form of clear descriptions of categories into which the properties of the precedent case fall, and which, if fulfilled by a later case, make the precedent applicable. In other words, the court's formulations in the precedent opinion must make clear the list of categories into which the properties of future cases must fall for the precedent to be applicable. I will say that this list of categories together with the implication that if they are fulfilled then the precedent must be treated as applicable, is the general norm[12] that the precedent court will now count as having applied in the precedent case.[13] For the sake of brevity, I will from now on refer to a formulation that provides sufficiently determinate guidance for the later application of a precedent as a "determinate formulation of the precedent's general norm" or, even shorter a "determinate formulation". Often, determinate formulations come in the shape of a rule or a test. I do not want to rule out that a determinate

[12] Some precedents develop the law in more than one way. For example, a precedent might, at the same time, develop the law with respect to the admissibility of emotional injury claims and with respect to the admissibility of certain kinds of evidence. Therefore, a precedent-opinion could provide determinate guidance with respect to one of these issues but not with respect to the other. For the sake of simplicity, I will not deal with this complicating factor here.

[13] I do not mean to say that all judges always know the general norm that they applied to their case when they decide a case, or how to formulate it. In fact, later I will argue against this. Nor do I want to say that judges are always honest and never decide a case on the basis of one norm only to try and offer another in the opinion (maybe because the norm on which they really decided is legally unacceptable.) Rather, I merely mean to say that *if* a court succeeds at offering a formulation as I describe it here, *then* that is the formulation of the norm that the court will from now on count as having applied. I also want to stay agnostic on the question whether you can know a general norm that you cannot formulate.

formulation could also come in another form. [14] However, I will say that a court which formulates some arguments representing reasons in favor of its decision has not thereby automatically given a determinate formulation of the precedent's general norm. This is so because, as it was the case in *Dillon v. Legg*, the way the court presents its reasons may leave it too unclear when it thought these reasons would apply to other cases and what the status of the reasons was.[15] This my make it impossible to determine clear, broad categories into which later cases' properties have to fall in order for the precedent to be applicable. Or the court might give clear formulations only for some of the categories, while merely hinting at the definition of others.[16] Then the court's formulation

[14] For example, I am aware that there is a considerable amount of discussion on the question whether the rule of law requires rules or whether *standards* can do the trick too. Is a standard, requiring a driver to drive at a "reasonable speed with respect to the weather-condition", determinate enough to fulfill rule-of-law requirements and guide behavior? Some think so. Jeremy Waldron, for example, argued that lawmakers can often assume that people can figure out what, e.g. "reasonable" behavior looks like in certain situations – for example, what a "reasonable" speed is given certain weather conditions. What is important is that what "reasonable" means must be something the subject of a law can be expected to be able to figure out (and in *Dillon v. Legg*, with its "reasonably forseeable"- standard, this condition was apparently not met). (Jeremy Waldron (2013), "Vagueness and the Guidance of Action", in: *Philosophical Foundations of Language in the Law,* Marmor, Andrei and Soames, Scott (eds.), Oxford: Oxford University Press.) Others disagree. I will stay out of this discussion. (For work on the rule/standard debate see, e.g. Schlag, Pierre J. (1985), "Rules and Standards", UCLA L. Rev. 33, p. 379 ff.; Braithwaite, John (2002) "Rules and Principles: A Theory of Legal Certainty; Schauer, Frederick (2003) "The Convergence of Rules and Standards", N .Z .L. Rev. 3, p. 303-328.)

[15] Where they necessary for the decision? Sufficient? Could they be weighed against one another such that proximity to the accident could be weighed against closeness of the relationship?

[16] I thank one of my reviewers for pointing this out and providing the following example (that I adapted somewhat): The court in *Dillon v. Legg* could have said that the victim and the claimant must be either married or in a parent-child

of reasons may not determine the precedent's applicability to later cases enough to be a determinate formulation.

I am interested in the *formulation* of the general norm in the opinion because it is not the existence of the general norm in the judge's mind that provides the guidance, but instead its communication via a clear formulation – to provide guidance, a general norm has to be a *formulated* general norm. I am aware that the way I describe a "determinate formulation" makes it impossible for a court to *know* that it was successful at providing one in their opinion. It is well known that a person may try to provide a precise and clear formulation, *think* she has succeeded in doing so, and find out later that no-one but her understands what she was trying to say. However, this is not a problem for my discussion. In this paper, I am interested whether there is a duty to aim at providing a determinate formulation, assuming that trying your best but failing is excusable. A court can aim at providing determinate formulations or it can refuse to do so, as the court in *Dillon v. Legg* explicitly did.[17] I do not intend to answer the specific question whether the court in *Dillon*

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relation (very precise description of a category), the event that injured the victim must be spatially proximate to the claimant (less precise description of a category) and the temporal proximity between the accident and the start of the emotional distress is also important (rather imprecise description of a category). The question then is whether the imprecision of the last condition's description of its category makes it so that the precedent opinion does not provide sufficiently determinate guidance. I do not think this question can be given a simple answer – this may very well depend on such factors as *which* condition is formulated in an imprecise way, how often the condition becomes important in subsequent cases etc.

[17] In addition, we can often make good predictions as to whether a formulation will likely turn out to be sufficiently determinate or not. As I understand it, Burke's point in criticizing the decision in *Dillon v. Legg* is that the court's set of guidelines leaves things so open that it is already clear that those who engage with it will regularly by unsure about whether the precedent even applies. For example, the guideline that the relationship between claimant and victim had

v Legg should have aimed at providing a determinate formulation. Rather, I want to know whether the decision *not* to aim at providing a determinate formulation can be justified. More specifically, I am interested in this in the context of what the rule of law demands. I want to know whether *rule-of-law reasons* always council towards aiming at providing a determinate formulation, as authors like Waldron suggest. Importantly, this question is not about whether there is a *legal* duty to provide a determinate formulation, for there is none. Rather, it is whether a judge who is interested in contributing adequately to the development of the common law is *prima facie* obligated to aim at including a determinate formulation out of respect for the rule of law. I will argue that this is not always the case. Instead I argue that rule of law reasons could sometimes come down in favor of doing the things that the court in *Dillon v Legg* arguably did: Decide a case and write an opinion with the clear intention of setting a precedent but decline to provide a determinate formulation and instead merely offer descriptions of an open collection of reasons based on which the specific decision was made.

2 Two Rule-of-Law Arguments for A Duty to Provide a Determinate Formulation

Before I offer my own argument, I will have to give an account of the rule-of-law case for a *prima facie* duty to aim at providing a determinate formulation in every opinion. In its shortest and vaguest form, the rule of law ideal specifies that people should be governed by laws, and not by other people.[18] Generally, this is translated into the demand that people should not be exposed

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to be close was both seriously vague (*how* close was close enough?) and ambiguous (did "relationship" mean "related by blood" or did it also refer to close emotional relationships?).

[18] There is a discussion about how much is contained under the rule-of-law ideal. Most agree that the rule-of-law has formal and procedural aspects. The procedural aspect consists of such demands as access to the courts, fair hearings,

to the unpredictable decisions of powerful individuals; their fate should not hang on someone else's will.[19] Instead, people should be able to form expectations about how the agents of the state

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the opportunity to argue one's case etc. (see, e.g Bingham, Tom, (2011) *The Rule of Law*, New York: Penguin Books, chapter 9, and Fuller, Lon (1978), "Forms and Limits or Adjudication" Harv. L Rev. 92, pp. 353-409). However, some also believe that there are substantive aspects to the rule of law, for example, that the rule of law demands that human rights are respected (see, e.g. Bingham (2011) chapter 7). This is contested. (Raz, J., 1979, "The Rule of Law and its Virtue", in Raz, J. (author), *The Authority of Law*, Oxford: Oxford University Press, p. 211) There is no reason for me to take sides in this paper. What is under discussion here are the formal aspects of the rule-of-law ideal, and this is what I shall refer to when I use the term "rule of law".

[19] See, e.g. Waldron, Jeremy, "The Rule of Law", *The Stanford Encyclopedia of Philosophy* (Fall 2016 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/fall2016/entries/rule-of-law/>. I want to acknowledge that what it means that one's fate hangs at someone else's will can differ considerably depending on the person who's will one's fate hangs on. It is not the case that judges *either* decide according to the formulated norms the law provides *or* simply follow their preferences, prejudices or roll the dice. While some especially despicable individuals might do the second, judges might also decide differently than the law requires for noble reasons, based on their deeply held moral and political commitments. I want to thank one of my reviewers for pointing this out and insisting that the fact that we all live in legal systems with a significant amount of legally entrenched injustices is important, because it justifies some decision making *against* the law, even from judges (for justifications of this see, e.g. Lyons, David (1985) "Derivability, Defensibility, and the Justification of Judicial Decisions" The Monist 68 p. 325-346; Reeves, Anthony R. (2011) "Judicial Practical Reason: Judges in Morally Imperfect Legal Orders" Law and Philosophy 30 p. 319-352; Brand-Ballard, Jeffrey (2010) *Limits of Legality The Ethics of Lawless Judging*, New York: Oxford University Press.) Where the law is horribly unjust, having one's fate hang at the will of a just individual might actually be better and more dignified than having one's fate hang on deeply unjust, discriminatory laws. This does not mean that there is no harm in being subject to the will of others rather than subject to formulated, general norms, even when those others form their will on the basis of their deeply held moral and political convictions. I know very reasonable individuals who hold moral convictions close to their

will treat them, and these expectations should usually be reliable. Importantly, they should not be required to form these expectations by carefully studying the characters of the powerful and learning how to predict the way their personal moral and political commitments, desires and biases will lead to decisions. Rather, they should be able to know what is legally expected of them because legal expectations have been pre-determined, are made publicly accessible, and are binding on the agents of the state. This view of the rule of law is exemplified by Fuller's list of requirements: that the law should take the form of prospectively enacted general norms; that it must be publicly announced in a clear and intelligible way; that its norms must be consistent and that they cannot ask things of people that cannot be accomplished; that they cannot change too rapidly and that they have to be enforced as they are promulgated.[20] Taken together, all these requirements ensure that people will be able to (usually successfully) plan their lives so as to be in accordance with the law without having to predict the will of the powerful. Some scholars argue that the rule of law protects the dignity of the law's subjects because it binds the powerful and prevents them from using coercive force arbitrarily.[21] Such arbitrary use would deny the people's right to make autonomous

heart that make me shudder and ones whose moral convictions I admire, and it would be very harmful to me if, should I get directly engaged with the law, I did not know which one of them would make a decision about me according to their will. Nonetheless, this harm can be vastly outweighed by the injustice that happens where despicable norms are faithfully applied.

[20] Fuller, Lon (1964), *The Morality of Law*, New Haven/London: Yale University Press, pp. 33 ff.

[21] Here I mean "arbitrarily" to include "according to one's own moral and political convictions". We can assume that in all but the most favorable circumstances, this will be arbitrary from the point of view of the subject because the subject will not know, beforehand, what the moral and political convictions of the powerful individual are, how they will interact with the subject's case and when they may change. For illustration: Imagine that you are before the court

decisions about their life: While being subject to the enforcement of clearly formulated, general norms sets up boundaries for the sphere of autonomous decision-making, being subject to the arbitrary force of powerful individuals would destroy it.[22]

There are, then, at least two interconnected rule-of-law demands: i) that people should be able to form reliable expectations about the way state-power will be wielded and ii) that people shall not be subject to the arbitrary rule of powerful individuals. Each of these can serve as the basis of an argument suggesting that precedent-setting courts have a *prima facie* duty to aim at providing determinate formulations of their precedent's general norms in their opinions. In what follows, I will discuss each argument.

2.1 Expectations

The suspicion that the common law might get into trouble with the rule-of-law requirement to enable the formation of reliable expectations is not new. It has been around at least since Bentham compared the way that the customary law treats its subjects to the way in which owners (mis-)treat their dogs:[23] The dog is beaten. Because it is a dog, it cannot figure out exactly which

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of an imaginary country because your boyfriend sued you over having a first-trimester abortion without asking him. The country is as divided on the pro-life/pro-choice question as modern-day USA. If judges decided according to their deeply held moral convictions, and you did not know which judge you would face, you would probably feel that your fate is decided arbitrarily.

[22]For the connection between the rule of law and autonomy/dignity, see, e.g. Hayek, F.A. (1960) *The Constitution of Liberty*, Chicago: University of Chicago Press. p. 142; Fuller (1964) n.20, p. 162; Raz (1979) n. 18, p. 221; Waldron, Jeremy (2012a) "How Law Protects Dignity", *The Cambridge Law Journal* 71:1, pp. 200-222.

[23] Bentham, Jeremy (1970) *Collected Works of Jeremy Bentham: Of Laws in General*, ed. H.L.A. Hart, London: Athlone Press, p. 184. I do not mean to imply that customary law as Bentham knew it is the same as the common

behavior earned the punishment. It is left in the dark about the future: What will provoke further beatings?

Presumably, people who are given only the past decisions of judges to figure out what they can and cannot do are in a similar situation as the dog. They can see that certain cases were disposed of in certain manners. And they are told that if they bring a case that is legally the same as one of the precedent cases, then it will be decided according to the precedent decision. But they cannot form reliable expectations about how their own cases will be treated, since there is no discernible guideline provided by the precedent case.

From here the rule-of-law argument from expectations can be laid out roughly like this: To avoid putting people into this kind of situation, two things are required. First, they need to be given a complete expression of the categories that the properties of earlier cases fell into, which prompted the decisions in these cases. These categories must be described in formulations sufficiently clear and definite that they may be able to recognize their own cases as fulfilling these categories as well. Second, they need the reliable assurance that later courts will make the same decision as the precedent courts if a list of categories, so named, is fulfilled in later cases. If they are not provided with this, they are stuck like the dog. If they are involved in a case, the only thing they can do to figure out how their case will be treated is trying to determine whether it is relevantly similar to a precedent case. But that requires understanding which properties of the precedent case and present case will appear relevantly similar to the eyes of the judges on the later courts. Unfortunately, determinations of relevant similarity are harder to make than applications of clearly formulated categories, so even if we assume that there is a right answer, it is likely that people's judgements

law that we know from modern legal systems, merely that the rule-of-law based critique of the common-law method of lawmaking I describe here is parallel to Bentham's famous argument.

will differ. Given that no-one can know all the later judges and how they will use their discretion, it is hard to predict what they will think is relevant. So without an explicit list of the features that were relevant for the precedent court, the law's subjects will not be able to reliably determine whether their own case is legally the same as the precedent case. Therefore, people need to be provided with clearly formulated, complete lists of conditions that, if fulfilled will prompt certain decision to encourage and enable the formation of expectations. But these expectations also need to be reliably fulfilled. So later courts need to feel bound by such explicit lists. Otherwise, forming expectations will be nothing but an exercise in futility.

Of course, if a court provides a sufficiently clear formulation of conditions which, if fulfilled by a case, require a certain decision (unless distinguishing is possible), then she has provided a determinate formulation of the precedent's general norm. And so the requirement that the law's subjects should be able to form reliable expectations turns into the requirement that they should be provided with determinate formulations by precedent courts.[24]

[24]This is also the general outline of the rule-of-law argument Antonin Scalia gives for his claim that judges should provide (what I call) determinate formulations in their precedent opinions. He uses the term, "totality of the circumstances test", to describe the criterion by which decisions that do not provide determinate formulations are made, and claims that "[…]it is no more possible to demonstrate the inconsistency of two opinions based upon a "totality of the circumstances" test than it is to demonstrate the inconsistency of two jury verdicts." (Scalia, Antonin (1989), "The Rule of Law and a Law of Rules", *Univ. Chic. Law Rev.* 65:4, pp. 1179 ff.) Scalia's version of this argument goes further than asking courts to provide determinate formulations wherever they can. In addition to requiring courts to offer precise norms (Scalia (1989) p. 1184) he also wants them not to be too narrow (Scalia (1989) p. 1177). This means that in addition to wanting a clear line drawn between cases governed by a precedent and cases not so governed, he wants the area of cases governed by precedents to be relatively large – no formulated general norms with so many conditions that the precedent applies only to a couple of cases. This second demand can

2.2 Law, not People

Jeremy Waldron's work provides a different rule-of-law argument for the duty to provide a determinate formulation. This argument rests on the demand that people should be governed by the law, not by powerful individuals. It appears in a paper devoted to the attempt of defending the doctrine of stare decisis on rule-of-law grounds.[25] There, Waldron decides not to rely on the argument from expectation because he does not believe that the value of predictability is the most important and overriding value of the rule of law.[26] He points out that stare decisis and the rule of law through precedent are not necessary for legal predictability because selecting judges according to their characters in a way that makes their choices predictable would be enough.[27] More important in this regard is the requirement that people's cases are not decided according to the will of powerful judges but according to the law, that is, according to general legal reasons that judges are bound to apply, and that this is *apparent* to the people whose cases are so decided.

Therefore, Waldron develops an argument based mainly on the rule-of-law requirement that it should be the law that rules, not people. His argument shows that the need for determinate formulations can be based on the requirement that the subjects of the law should neither be nor

also be supported by rule-of-law requirements: the narrower a ruling is, the less predictability it introduces into the law because there will also be less cases that fall under the precedent, and hence less overall legal guidance. I will return to the issue of narrow rulings later.

[25] Waldron (2012) n.9.

[26] Waldron, (2012) n.9, p. 12/13.

[27] Waldron (2012) n.9, p. 13.

have reason to *perceive* themselves as at the will of powerful individuals. Translated into the vocabulary I have established for this paper, it proceeds as follows:

If the law is supposed to rule rather than the judge, the judge cannot decide cases by determining what they think the right outcome would be for the particular people in the particular case. Instead, they must determine what the *law* requires the outcome to be. But they can only hope to do that if the law is *general*: It must supply judges with authoritative reasons that will apply to whole, well-circumscribed categories of cases. Only then can the judge determine whether these reasons apply to her case without having to use her own first order reasoning. Therefore, deciding a case in agreement with the rule of law means deciding the case by applying the general reasons that are provided through legal sources which formulate them. The demand for the rule of law instead of people translates into the demand for "generality", which comes to the judge in the form of the formulations of general reasons in legal sources.[28]

In a common-law system, where judicial decisions make law, sometimes a judge will not be able to find any established general norms that fully determines how her case should be decided. Then she cannot fulfill the rule-of-law-requirement outright, at least not fully. Yet, Waldron argues that even in this situation, the judge should continue to follow the rule-of-law ideal as well as she can and refuse to decide by her own lights. Instead, she should ask the "Dworkinian" question: "what does the best understanding of the law imply for a case like this, given that the existing law does not determine the matter directly or explicitly?"[29] Thereby, she does her best to submit her will to the law as she understands it. She decides not as herself, but as a representative of the court

[28] Waldron (2012) n.9, p. 14.

[29] Waldron (2012) n.9, p. 15. I understand this as saying that the court should ask what the general norm *would be* that is most consistent and coherent with the rest of available formulated general norms.

and thereby a representative of the law. She does not ask what outcome *she* considers to be correct, but what outcome is correct from the perspective of the law.[30]

But to Waldron, deciding cases like this is not enough to fulfill the rule of law requirement. It is not enough that the judge *in fact* submitted her will to the law. He makes the important further demand that the subjects of the law must be given *reason to believe* that their case has been decided according to the law instead of the judge's personal opinion.[31] I assume that this demand is based on the same reason that also makes the promulgation[32] of the law important beyond its necessity for the formation of expectations: If people do not know the pre-determined standards by which their conduct will be evaluated, then they are forced to behave as if there were none, trying to guess what the powerful individuals want to see. And this has the same effect on their autonomy

[30] It is true that different judges may come to different conclusions about this depending on their background assumptions about descriptive and normative questions. But as I understand Waldron, he does not think that this means that they decided by their own lights after all. We may be able to turn to Waluchow (following a concept developed by Raz (1979) n 18, p. 156) to make sense of this idea: According to Waluchow, a judge can try to *take the perspective* of the law and decide *from this perspective*. This would turn the disagreement between two judges who would come to different conclusion from a normative one about what the law *should* say to a descriptive one about what the law *would* say. (Waluchow, Wil (2015) "Constitutional Rights and the Possibility of Detached Constructive Interpretation" *Problema* 9, p. 23-52.) Another way to deal with this puzzle is by rejecting Waldron's entire argument: Where a judge engages in Dworkinian interpretation, she *is* at least partially deciding according to her own will – and any attempt at persuading the judge's subjects that she is not is an exercise in deception. I have decided not to reject Waldron in this way because I do not think this would be a charitable reading of his argument.

[31] Waldron (2012) n.9, p. 20.

[32] See Fuller's second failure (Fuller (1964) n.20, p. 34/35.)

(and therefore dignity) as if the powerful individuals were just judging based on their own opinions.

Therefore, the judge may not leave the parties or the public in any doubt that her decision was determined by the law.[33] Given that the law governs through general reasons rather than particularized considerations, the judge must announce her reasons as a list of general conditions that her case fulfilled such that the law's subject can understand them. For Waldron, this means, she must provide what I called a determinate formulation for her decision.[34] It is not enough for her to announce the decision, or to offer an opinion containing the reasoning she believes justifies it, like the court in *Dillon v. Legg* did.

[33] It is important to point out that to Waldron, this argument applies whether or not the court knows that her decision will be treated as a precedent by later courts: Even if she knew that her decision and her opinion cannot have any influence on the way cases will be decided in the future, she would have to formulate such a general norm. The argument relies not on the demand that the subjects of the law must be able to form reliable expectations. Instead, it relies on the demand that the subjects of the law need to be provided with grounds for the reasonable and *true* belief that they are ruled by the law, not by people. (Waldron (2012) n.9, p. 21)

[34] Waldron (2012) n.9, p. 18: "[The court] might just explain the process of interpretation that she has been through, connecting a decision for the plaintiff with a Herculean account of existing law. Or she might present it as an intuited (or phronesis- based) response to the case based on an implicit understanding of existing law, a response that defies articulation. Either way, she is failing in the duty that I am currently trying to explain. (…) The rule of law requires generality, not in the sense that all law must be general (…) but in the sense that the making of particular legal orders is supposed to be guided by general norms. One of the important tasks of [the court] so far as the rule of law is concerned is to leave the parties - and the public - in no doubt as to the general norm that underpinned her decision."

This is a draft. The published version is here: Stevens, K. (2020). Setting Precedents Without Making Norms? *Law and Philosophy, 39*, 577-616.

3. Arguments Against a Duty to Provide a Determinate Formulation

I think that the two arguments just discussed succeed in part. I agree that they show that the subjects of the common-law should be provided with determinate formulations of general norms based on which they can form reliable expectations. I also agree that judges should write their opinions in a way that provides people with reason to believe that the judge decided her case according to the law, not according to her own will. However, I do not think that from this follows that courts need to always aim at providing a determinate formulation for the general norm of their case in every opinion: I believe that courts can provide the necessary assurance that they are bound by the law in their decision-making by candidly documenting the argumentative connections they see between the available legal reasons formulated in legal sources and their decision. Even if this does not amount to a determinate formulation. And the conclusion that rule-of-law considerations require the subjects of the common law to be provided with determinate formulations of general norms is considerably weaker than the one that *every judge,* in *every opinion* should feel the *prima facie* obligation to aim at providing a determinate formulation for *the* general norm of *this* case. From the first conclusion only follows that judges should feel obligated to formulate their opinions in the way that they believe will contribute best to the development of a body of formulated general norms that people can rely on. Sure, if the requirements of reassuring people that they are ruled by the law and not by judges and enabling them to form reliable expectations was best fulfilled by *always* aiming at a determinate formulation of the precedent's general norm, then judges would be required to try and provide one each time. But I will argue that, on the contrary, these requirements might sometimes be better fulfilled by abstaining from trying to give a determinate formulation. A judge may best contribute to their fulfillment by formulating an opinion in the way that the court did in *Dillon v Legg*. I think that this is most likely the case when the judge is not sure what a good

general norm determining the applicability of the precedent would be, or how it should be formulated – and whether other courts will agree that it is a good norm in the way in which it is formulated. Then the judge may formulate an opinion that contains arguments[35] presenting what she takes the important legal reasons she used, or factors she weighed, but not a determinate formulation. She may do this for several reasons, some of which are especially interesting here because they are based on rule-of-law considerations.

I will proceed in three steps. First, I will argue that common-law judges may sometimes feel confident in a decision and capable of providing good arguments for it, even while they feel incapable of identifying and/or formulating an appropriate general norm determining the applicability of the precedent. This is a claim that I presupposed in the introduction but did not, so far, provide sufficient arguments for. Then I will argue that when judges find themselves in such situations there are several reasons for making the decision to abstain from providing a determinate formulation. Specifically: i) They may shy away from the risk of entrenching "bad" formulated general norms into the common law and hope that, given more cases, an appropriate general norm will be easier to find. ii) They may worry that the formulated general norm they introduce could be based on a misinterpretation of the surrounding law and that it would make the common-law

[35] For the purposes of this paper, I determine that an argument is a formulation that purports to represent a reason for a conclusion. An argument does not necessarily present sufficient reasons for a conclusion. It might be that several arguments (as understood here) are needed to meet the burden of proof with respect to a conclusion. Take for example an argument for the conclusion: Dogs are better pets than cats. "Dogs are better pets than cats because unlike cats, they do not throw up hairballs." This argument represents *one* reason for thinking that the conclusion is true, but the reasons is not *sufficient*. More arguments, representing additional reasons, would be needed. In addition, an argument might meet the burden of proof, but be an enthymeme. More on this below (see footnote 40.)

less internally consistent, leading to rule-of-law losses. iii) They may fear that proffering a formulated general norm meant to govern a category of later cases at this stage of jurisprudential development will have more rule of law costs than allowing one to develop in the future because of how other courts might change it. After discussing these reasons, I will shortly consider whether judges should simply provide determinate formulations that make the general norm of the precedent very narrow in these situations. Finally, I will argue that even when judges do not provide a determinate formulation, they can still contribute to the development of general norms and their formulations. Thereby they can work towards fulfilling rule-of-law demands for predictability. This can be done by formulating their opinion in a way that will make it a good source-analogue for later reasoning-by-precedent.[36] Thereby, the judge can also provide the subjects of the law with reasonable assurance that their cases are decided according to legal reasons, instead of the whim of powerful individuals.

3.1 Can Judges Have Good Arguments for a Decision – But Be Unable to Give a Determinate Formulation for the Precedent's General Norm?

I agree that the common law should provide formulated general norms. These formulations have to be written down in black and white somewhere, sometime. So I do not argue that judges should always or even usually abstain from formulating their precedent's general norms in their opinions. Rather, I think that they should abstain if they have serious doubts whether any general norm for the precedent they come up with and can formulate will be close to the determinate

[36] Cognitive scientist treat analogies (e.g. Sam is like a lion) as consisting of two parts – the source analogue (lion) is used to say something about the target-analogue (Sam). (see, e.g. Holyoak and Thagard (1999) *Mental Leaps: Analogy in Creative Thought,* Cambridge, Massachusetts: MIT Press). In analogical reasoning by precedent, the precedent would be the source-analogue and the present case the target analogue.

formulation that the common-law should and (importantly) will, in the end, adopt as the determinate formulation of one of its governing general norms.[37] However, that does not mean that a judge shouldn't aim to provide arguments meant to present adequate legal reasons for her decision.[38] From this, the question arises how a judge could be able to formulate her reasons for a decision into arguments yet be unable to give a determinate formulation of the precedent's general norm. After all, it may be pointed out that all reasons are general – they all apply to *some* category of cases that *this* case is a part of (even if no other actual case should ever fall into that category again). Therefore, providing the set of reasons that justify an action means committing to a general

[37] I share this concern with the court's own perception of the adequacy of the best formulated general norm she can determine with other authors such as Cass Sunstein and Kent Greenawalt.The counter-part to Scalia's position is Cass Sunstein's theory of judicial minimalism. Sunstein advocates that courts (especially supreme-court courts) should announce narrow norms, supported by relatively shallow reasoning. Many of Sunstein's arguments are based on his idea that courts should be leaving as much as possible to the democratic process. He does not, however, rule out broad or deeply theorized decisions altogether. Acknowledging that there can be reasons in support of creating a broad norm – among them the rule-of-law-reason we have already seen in Scalia (see footnote 24) - he provides a list of factors meant to help decide between a minimalist and a broad ruling. Among the factors speaking for a narrow ruling, several point to the possibility that the court may not be sure which broader norm should be integrated into the law. (See Sunstein, Cass (1999) *One Case at A Time – Judicial Minimalism on the Supreme Court*, Cambridge, Mass.: Harvard University Press, p. 243.) We can also find the idea that courts might not be sure which norm should be integrated into the law in Kent Greenawalt's work. (Greenawalt, Kent (2013) *Statutory and Common Law Interpretation,* New York, Oxford: Oxford University Press, p.214/215.

[38]For a detailed discussion of the connection between the rule-of-law and the judicial duty to give reasons – as well as for reasons to make exceptions from this duty, see Cohen, Mathilde (2009) "The Rule of Law as the Rule of Reason", *Archiv fur Rechts- und Sozialphilosophie,* 96:1, pp. 1-16; Cohen, Mathilde (2015) " When Courts have Reasons not to Give Reasons: A Comparative Law Approach", *Wash. & Lee L. Rev.* 72:2, pp. 483-571.

norm that applies in this situation, would also apply in at least some specifiable hypothetical others, and whose consequent entails the action. [39] Of course, it might sometimes be hard to formulate one's reasons. But finding formulations for one's reasons is also necessary to provide arguments. It may then seem that, if you can formulate sufficient arguments for your decision, then you should be able to offer the formulation for the general norm that, according to you, legitimately governed your actions in the relevant situation and will govern all situations that fulfill the conditions set out in it.

I agree that by claiming that my decision is justified by reasons, I have committed myself to the *existence* of a general norm for that decision. However, there is a reason why almost all the arguments we offer when we justify or explain our decisions are actually *enthymemes*:[40] On the one hand, there is being able to formulate arguments that represent reasons so that they show a decision in a specific and available situation as justified. On the other hand there is the complete different matter of being able to find a formulation that represents the reasons that justify a decision fully and adequately enough that it is possible to determine, for all or many other situations,

[39] For example, it appears that, if I throw out a cup of yoghurt under the reason that its expiry-date has long come and gone, then I thereby commit myself to the general norm "If the expiry date on yoghurt has long come and gone, then it should be thrown out." For more on this, see, e.g. Schauer, Frederick (1995) "Giving Reasons" *Stan. L. Rev.* 47, pp. 633-659.

[40] That is, the argument relies on premises that are not explicitly stated. Arguments are usually enthymemes because stating all premises that an argument relies on would be impossible in most cases. Take the argument: "The dog is too fat, so we should buy him diet-food." The unstated premises include: Dogs are alive. Dogs are animals. Being fat means weighing too much. Weight is determined by the process of …. Not stating premises like these is acceptable insofar as we can assume that our audience already knows about them and accepts them.

whether that same set of reasons applies again.[41] It is easier to provide arguments for a decision that one judges as strong enough to justify it than to give a determinate formulation that one considers adequate for a whole group of cases, because much less awareness of one's own assessment, application and weighing of reasons is required for the former than for the latter. I will show this with the example of conductive arguments:

Often, and especially when we are under time-constraints (as judges usually are), we tend to make decisions by collecting arguments on each side and weighing them against one another. Where such reasoning is presented as an argument for a conclusion, the whole structure is called

[41] The following dialogue might illustrate what I have in mind: "I threw the yoghurt out because its expiry date has long come and gone." "Ah, so we throw out food when the expiry date has long come and gone?" "No … I wouldn't worry so much about flour." "So we throw out yoghurt when the expiry date has long come and gone?" "Depends. There is this really expensive, good yoghurt from brand x. I might just sniff that and risk it." "So there the expiry date does not matter?" "Well…, maybe it's not really that the expiry date has long come and gone. Maybe the expiry date really matters only if I do not know the product. If I know the product, maybe sniffing it is better. Expiry dates can be misleading. I wouldn't want you to pay too much attention to them…, but I can tell you that I do not trust *this* yoghurt beyond its expiry date." (Considerably more discussion might be necessary to figure out *which category* of yoghurts is such that it matters what happened with the expiry date.)

In addition, some recent research in the cognitive sciences suggests that our capacity to identify and formulate reasons for our beliefs might be a capacity that is distinguishable from our capacity to perform inferences. This capacity might have evolved mainly to make us able to *communicate persuasively* to others why they should agree with us (and to test what others communicate to us in terms of why we should agree with them). The reasons we present may therefore not be those that best *justify* our beliefs, but rather those most likely to *persuade*. (see Mercier, Hugo and Sperber, Dan (2017) *The Enigma of Reason*, Cambridge, Massachusetts: Harvard University Press.)

a *conductive* argument.[42] Conductive arguments can be convincing, legitimate arguments – especially if the arguments on the pro-side clearly outweigh the con-side. Still, we might not be sure about the status of every single argument that contributed to our decision (in fact, we might not be sure of *any* single argument). First, we might be unsure how strong the reason it represents really is, how much it contributes to the overall weight of our conductive argument.[43] Second, we might be unsure whether the reason it represents is really necessary for our argument to be successful. Some of our pro-arguments might represent reasons that merely provide additional weight, or all our arguments might represent reasons that provide some weight, but none so much that without it the whole conductive argument would collapse. And third, we might, at least for some of our arguments, not even be sure that they are valid and succeed at representing reasons at all. Where we present conductive arguments to others, we might not be sure whether they will accept all the arguments we have collected, whether they will weigh them in the same way we do, and which ones they will consider necessary or merely subsidiary. But we might be pretty sure that we have collected enough good arguments such that, overall, our conclusion is justified, and others will be convinced even if they do not agree with the details.

When we have reasoned conductively, we might feel comfortable with the task to argue for our decision. Arguments allow for complexity, they allow us to represent our reasons in a way

[42] See, e.g. a collection of essays on this issue: Blair, J.A. and Johnson, R.H. (eds.) (2011), *Conductive arguments, an overlooked type of defeasible reasoning* London: College Publications.

[43] In general, how the "weighing" of arguments works – how we assign weights, and why, and how these weight-assignments are justifiable is an object of controversy. See Blair and Johnson (2011) n.42, as well as Adler, J. (2013). "Are conductive arguments possible?", *Argumentation,* 27:3, pp. 245–257 and Blair, J.A. (2016), "A Defense of Conduction: A Reply to Adler", *Argumentation*, 30:2, pp. 109-128.

that preserves our insecurities. We can show that there are several lines of argument leading to the same conclusion, indicate which ones we consider stronger or weaker, and which ones we are not so sure about. I think it might be possible to interpret what the court did in *Dillon v Legg* that way: they presented the pro-side of their argument as a set of factors that they thought belonged to some as-of-yet underdetermined categories which, if fulfilled, provided reasons for their decision and advised later courts to place factors which would fall into those as-yet underdetermined categories on the pro-side again.

Of course, it is theoretically possible for a judge to try and collect *all* the reasons that featured on the pro-side of the argument for her decision, determine the categories of case-properties they apply to, give the best formulations for them she can come up with and combine them in the attempt of giving a determinate formulation.[44] In *Dillon v Legg*, the court *could* have said that "emotional harm is reasonably foreseeable if the claimant had a relationship to the victim at least as strong as a family-relationship, witnessed the accident with all senses and was only so-

[44] Any non-deductive argument can be turned into a deductive argument by simply adding a conditional that has a conjunction of all the argument's premises as the antecedent and the conclusion as the consequent. That conditional is then a formulation of a general norm. But what the status of this conditional is in the justification of the conclusion is extremely questionable. (See e.g. Fogelin, Robert, J. (1985) "The Logic of Deep Disagreements" *Informal Logic* 7:1, p. 1) Epstein and Sharkey argue that this is exactly what later courts did to the set of factors provided in *Dillon v. Legg* – they turned them into a formulated general norm, listing each of the factors as a necessary condition in the antecedent. (See Epstein, Richard A and Sharkey, Catherine M. (2016), *Cases and Materials on Torts, Eleventh Edition*, New York: Wolters Kluwer, p. 459/460.)

and-so many meters away from the accident".[45] But a judge might be justifiably wary about the question whether the resulting determinate formulation will represent a general norm close to one that the common-law should use to determine the applicability of her precedent, even if we assume that her decision is correct and her argument strong enough to justify it.[46] Why?

As Frederick Schauer points out, formulating a general norm that is meant to serve as law is about predicting the future.[47] Any formulated general norm will apply to some cases in which it would have been better not to follow it because of some additional, relevant properties it does not reflect.[48] For similar reasons, any formulated general norm will fail to apply in some cases in which it would have been better if it had applied. A formulated norm cannot reflect *all* possible properties of cases that might become relevant. If it did, it would lose its decision-guiding function and require that the decision-maker takes all possible reasons regarding the decision explicitly into account.[49] The question becomes *which* properties to include (and how to formulate them) when

[45] Notice that I am already making choices here that the court in *Dillon v Legg* refused to make: instead of providing that the relationship has to be at least as strong as a family relationship, which was my choice, they only offered the guideline that the strength of the relationship is important (and that *this* relationship was strong enough).

[46] Of course, people get things wrong all the time, so it is not simply a given that the decision was correct, or the arguments for it good.

[47] Schauer, Frederick (2006), "Do Cases Make Bad Law?" *Univ. Chic Law Rev.* 73, p. 893.

[48] Hart's famous example of the rule forbidding vehicles in the park was designed to make this clear: The rule seems to be a good one. And an electric wheelchair is technically a vehicle and falls under the rule. But it seems that electric wheelchairs should be permitted in parks. Hart, (1958) n. 11, p. 607. (Wheelchair added by me).

[49] See, e.g. Schauer, Frederick (2002) *Playing by the Rules*, Oxford: Claredon Press, p. 31 f. Just imagine the enormous complexity of the formulation of a general norm that forbids vehicles in the park but takes into account all possible reasons to make an exception *and* all possible reasons to make an exception from the exception.

making the determinate formulation of a general norm. And, Schauer argues, the answer to this question depends on the future. For the goal of norm-formulation usually is that following the norm so formulated leads to the right decision in as *many cases as possible.*[50] In deciding whether to include some category in the norm's antecedent, it will be important to estimate how many cases there will be that do not have a property that falls into this category and to which the norm would otherwise apply. It follows that where a determinate norm is supposed to be formulated from reasoning about only a single case, it is necessary to know whether, and in what respects the case is an exception.

For a judge who is trying to turn her (good) argument for a decision in a single case into a determinate formulation that the common-law should adopt for the future, this means two things. First, she must look at the properties of the case that she included as reasons in her argument. Which of the properties that featured in the (maybe conductive) argument for her decision should be included? Second, she then must think about the reasons that she might have relied on but left out of her explicit argument – reasons that impacted her decision but that she did not recognize or formulate. Most arguments are enthymemes, relying on background-reasons the importance of which the arguer is not reflectively aware of. Which properties that other cases may lack featured in the conductive argument in this way and should be included?

Schauer argues that judges, tasked with reasoning their way to a good decision in a single case, are in a rather bad place for the kind of future-prediction required here. Research in the cognitive sciences has shown that human beings use a variety of heuristics that can impair the rationality of their reasoning. He is especially worried about the effects of, for example, the availability

[50] Schauer (2006) n.47, p. 894. Maybe, if the park lies right next to a retirement-community with extremely many wheelchair users, it is worthwhile to include the wheelchair exception explicitly.

heuristic[51] and the anchoring bias.[52] These biases and heuristics lead to an over-assessment of the representativeness of an event that has just been experienced. [53] As a result, judges tend to believe that the cases they decide will be more representative of future cases than they are actually likely to be, making it hard for them to see that their case may be an exception – either altogether or in one or two of their properties. And this may lead judges to either include or forget to include properties in the formulations of their general norms, making them noxiously over- and/or under-inclusive. Thus, cognitive science suggests that judges are liable to create determinate formulations of the general norm of their precedent that lead to the correct outcome in the precedent case, but that would lead to bad outcomes in many other cases. For example, one of the factors that the court in *Dillon v. Legg* suggested for evaluating emotional injury claims was whether the claimant had witnessed an accident with all her senses. But a later court argued that it was wrong to think that a mother's emotional injury is more foreseeable if she is able to witness her child's death with all her senses.[54] This was the case in *Dillon v. Legg*, but it is at least plausible to think that the court overestimated this factor's importance for the mother's suffering, that parents who do not directly see their child die may nonetheless suffer great harm, and that a driver should know this. In a

[51] The availability heuristic is a mental shortcut by which people measure the likelihood of an event based on how easily an example comes to mind.

[52] The anchoring bias is the tendency to rely more heavily on the first pieces of information we receive when making a decision than on pieces of information we receive later.

[53] Schauer (2006) n.47, p. 895 ff.

[54] Tobin v. Gorssman, 249 N.E. 2d 419: "The sight of gore and exposed bone is not necessary to provide special impact on a parent."

conductive argument, this would have been the case of a subsidiary reason that the court may have mistaken for a necessary one.

For these reasons, I think that it is possible that a judge may feel confident in her decision and able to provide a strong argument for it without being able to also provide a determine formulation for her precedent's general norm – either because they are not sure that they actually know a good general norm for the future application of the precedent or because they do not think they can formulate faithfully what they believe to know.

3.2 Settled vs Right?

From here, the most natural way to proceed in arguing against a *prima-facie* duty to aim at providing a determinate formulation is to bring the risks of entrenching bad law to attention. For example, Schauer completes his argument by pointing out that a prematurely announced clear rule may get entrenched in the law despite its badness, specifically *because* it is clear. Changes in the common law are usually made on appeal. But where a formulated general norm is clear, cases tend not to end up on appeal because parties do not consider it likely that they will win. The common-law attracts development where it is vague. Keeping a decision minimally vague will encourage litigation on appeal. So a judge who is not confident to provide a determine formulation can best encourage other courts to take a look by providing arguments for her decision but falling short of a determinate formulations.[55]

This consideration provides reasons that can be weighed against rule-of-law reasons for aiming at providing a determinate formulation. For even if rule-of-law considerations speak for the determinate formulations in all cases, the (formal side of) the rule of law is not the only value

[55] Schauer (2006) n.47,, p. 915 f.

by which legal system should be measured. Raz argued that a legal system may adhere perfectly to the formal rule-of-law requirements and at the same time enact the most evil laws imaginable.[56] Thus, a judge might be aware that according to rule-of-law values she should try to provide a determinate formulation. Nonetheless, she may find that this demand stands in conflict with the equally important demand that she should contribute to the development of the law *in the right direction*. She might legitimately decide to sacrifice rule-of-law values on the altar of "good law" and leave the determinate formulation of a general norm for later, when more cases have amassed. This familiar argument is employed as often to justify holding off on determinate formulation-making as it is to justify un-settling the law through overruling.[57]

[56] Raz, J. (1979) n.18, p. 211.

[57] See, e.g. Larry Alexander and Emily Sherwin (2008) *Demystifying Legal Reasoning*, Cambridge: Cambridge University press, p. 107ff and (2007). "Courts as Rule Makers". In D. Edlin (Author), *Common Law Theory,* Cambridge: Cambridge University Press, pp. 27-50; Frederick Schauer (2006) n.47, p. 915; Kent Greenawalt (2013) n.37, chapter 7, D and F, using the danger of bad law for holding off on norm-making; and R. Kozel (e.g. Kozel, Randy (2013) "The Rule of Law and the Perils of Precedent", *Michigan Law Review First Impressions* 111, pp. 37-45.) as well as Waldron himself Waldron, (2012) n.9, p. 26, using the danger of bad law as a reason to over-ruling and thereby un-settling the law. That the rule of law is not the only important value that should be taken into consideration can also be used in another argument against establishing general norms in every opinion: Courts may hold off on making norms – especially broad ones - because they believe that they should avoid lawmaking as far as possible, and instead leave it to the democratically elected legislature to do so. This, of course, can also serve as an argument against the common-law method in general. We find a version of this kind of argument for example in Cass Sunstein's theory of judicial minimalism. (Sunstein (1999) n.37)

Still, the argument is not an automatic winner. Judge Brandeis famously remarked that it may often be more important that the law is settled than that it is right.[58] This is especially true when the "wrongness" of the law would not be too extreme, and when the harm that results from rule-of-law losses is great. Does that mean that the current question simply reduces to the old matter of weighing the value of the law's being "settled" against the value of its being "right"? Is it simply that rule-of-law considerations, counselling for aiming to provide determinate formulations, are sometimes outweighed by the fear of bad law? I think we can say more. There is a case to be made that under the right (or wrong, depending how you look at it) conditions, those same rule-of-law considerations can be shown to speak against trying to provide a determinate formulation of a precedent's general norm.

First, the announcement of a determinate formulation arguably always carries with it *some* rule-of-law risks. As authors like Kozel and Eisenberg point out (and Waldron himself hints at), it is possible, via such a formulation, to insert a general norm into the law and thereby make it *less* predictable by making the law less consistent.[59] For a judge, this may happen even if her decision

[58] Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting); See also Sunstein, Cass (2008) "Beyond Judicial Minimalism", John M. Olin Program in Law and Economics Working Paper No. 432. Here Sunstein provides the conditions under which he thinks that his arguments for minimalism are outweighed.

[59] Kozel (2013) n.57 directly engages with Waldron's paper and argues that stare decisis can be a minus for the rule-of-law where it entrenches norms incoherent with the rest of the legal system, and where it reduces the ability to make effective arguments before a court. Eisenberg, M. A. (1988) *The Nature of the Common Law*, Cambridge, Mass., London: Harvard University Press, chapter 5, argues that a newly introduced common-law norm must be consistent with the overall structure of the common law. Kent Greenawalt (2013) n.37, p. 201, points out that courts will attempt to make the law surrounding a precedent coherent with it, which means that the disruptive effects of a bad precedent might spread. Waldron (2012) n.9, p. 8 hints at something similar.

is the right one and her arguments for the decision justify it. For example, the judge may be dealing with what should be integrated into the surrounding law as a principled exception to otherwise sound, broad general norms. But based on a misinterpretation of the surrounding law, she mistakenly attempts to announce it as the core-case to a broad norm that is incoherent with surrounding law. Then the judge may introduce a determinate formulation that makes everything more confusing and less predictable. The amount of predictability the formulation has introduced for the small number of cases that the it governs directly might be outweighed by the confusion it has generated for the cases governed by the law around it. The introduction of such a determinate formulation may also fail to give the law's subject reason to believe that it is the law, and not the personality of the judge which decided the outcome. For if the general norm that the formulation represents comes as a surprise to everyone, then it is at least plausible to think that the judge is simply trying to change the law according to her own beliefs.

Second, the nature of the common-law doctrine of precedent may have the effect that providing a determinate formulation of the wrong general norm (or simply a misleading formulation of the right one) could, through the way it is dealt with by later judges, lead to rule-of-law losses. Schauer has argued that the common-law tends to be developed mainly where it is vague.[60] But even if we are only carefully optimistic about the idea that the "common-law works itself pure", we may think that after having (badly) guided action for some time, an ill-conceived formulated general norm will eventually land before an appeal court. The same may be true for a norm that is well-thought-out but does not fit the surrounding law or other judge's idea of good law. Once this has happened, the way that the common-law works may cause the fact that there is

[60] Schauer (2006) n.47, p. 915 f.

a determinate formulation to start generating rule-of-law costs because the general norm it represents starts being whittled down.

The basis for this argument has been established by Grant Lamond, in a paper arguing against the notion that precedents create legal rules in the same way that statutes do.[61] According to Lamond, a valid statutory rule must be followed in each case that falls under its antecedent – but this is not true for precedents, which can be distinguished.[62] The practice of distinguishing cannot be harmonized with the idea of statutory-like-rules. Lamond is aware that all rules are over-inclusive to some extent, and that therefore adding exceptions based on unexpected additional characteristics of the case is usually possible even for statutory rules. But, he argues, rules as they are produced in statutes are generally not defeated in virtue of *any* additional property of a case that could be seen as tipping the scales against the decision advocated by the rule. There is a heightened burden of justification for adding an exception to a statutory rule. Lamond argues that no such heightened burden exists when it comes to the practice of distinguishing.[63] Courts distinguish based on any feature of the present case that tips the scale in favor of deciding differently and that is not shared with any of the cases in the line of precedent. Try as a precedent court may, it can therefore not establish the same kind of rule by setting a precedent as a law-maker does when she enacts a statute.[64] What Lamond's argument shows is that what the court establishes when it provides a determinate formulation of her precedent's general norm is different

[61] Lamond, Grant (2005) "Do Precedents Create Rules?", *Legal Theory* 11:1, pp. 1-26.

[62] Lamond (2005) n.61, p. 9.

[63] Lamond (2005) n.61, p.12

[64] Lamond acknowledges that with a broader understanding of what "rule" means, judges can offer rules in precedents – his point is that it is wrong to think about these in the same way as we think about statutory rules.

than a statutory determinate formulation of a general norm:[65] All that a later court needs to justify *not* deciding according to the precedent decision is a property that is not shared by the precedent case and that in her opinion tips the scales against the precedent decision. Precedents cannot establish the kinds of rule that statutes do, even when they provide determinate formulations, because of the immense impact later judges will have on what any precedent really means in the development of the common law.

Lamond provides us with the basis for arguing that an ill-conceived determinate formulation may end up resulting in rule-of-law losses. For Lamond draws attention to the fact that common-law judges get *one* (not necessarily the first, certainly not the last, not even the second to last) word on how the law will handle a category of cases; they are not even the final word on how cases get grouped into categories even if they provide determinate formulations. The common-law, according to the familiar story,[66] is grown incrementally out of the decisions of judges, is changed through them, and even gets cut back through them.[67] In other words: judges *can* provide determinate formulations in their opinions, but what they *cannot* do is make the common-law entrench the general norms they were meant to represent. That only happens through

[65] This is why I decided to say that a determinate formulation must determine whether a precedent is applicable to a new case, not whether it has to be followed, see. section 1.

[66] As, referenced and dismissed by Scalia himself (Scalia (1989) n.24, p. 1177), and taken for granted by, e.g. Sunstein (1999) n.37, p.221.

[67] This "growth" metaphor of the common-law is influential, for example, in "living-tree constitutionalism". (see, e.g. Strauss, David A. (2010) *The Living Constitution*, Oxford, New York: Oxford University Press.)

lines of cases. The law-making activity of the common-law-courts is a collective activity.[68] Once a case has been decided and an opinion written, later judges have the ability, and consider it part of their role, to work on how it will get integrated into the common law. This includes extending formulated general norms as well as narrowing them, either through distinguishing or through re-interpretation. Where later judges do not feel they have the grounds for overruling but are very unhappy with a formulated general norm, this re-interpretation may change everything but the outcome and facts of a precedent.[69] Later judges will also flag the general norms represented by determinate formulations for abolition by speaking badly of the precedents that provided them in later opinions. Alternatively, they might make what Melvin Eisenberg calls "inconsistent exceptions" by distinguishing in a way that is clearly inconsistent with the spirit of the general norm as it is formulated in the precedent. Thereby they de-stabilize the precedent's influence and prepare it for later abolishment.[70]

Eisenberg remarks that general norms that are being whittled down through inconsistent distinguishing, re-interpretation and flagging are highly unstable.[71] It is this instability that generates the rule-of-law costs. Arguably, a formulated norm that is constantly being changed through distinguishing and extending does not contribute to the ability to form reliable

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[68] Waldron acknowledges that the making of common-law is an activity not of single courts but of "the court" – it is the outcome of a collective effort of individuals working in the name of an institution (Waldron (2012) n.9, p. 21). But he applies this insight only to courts *applying* precedent and wants to formulate an argument for the *precedent* court that would work even if she did not know how her precedent will be treated later. I think it is a mistake not to consider that a common-law court setting precedent must also think of herself as a member of a larger entity.

[69] Eisenberg argues that this happened in *MacPherson v. Buick Motor Co.* Eisenberg (1988) n.59, p.132

[70] Eisenberg (1988) n.59, p. 136.

[71] Eisenberg (1988) n.59, p. 74.

expectations. Nor does it provide the law's subjects with reasons to believe that they are being governed by the law and not by judges. Rather, it is in danger of the opposite effect:

The clear, determinate formulation of a general norm encourages the formation of expectations because the clear categories demarcated by the formulation are more easily applicable to later cases than properties referred to in the premises of an argument meant to justify only one decision in a single case. According to Schauer, mistaken but clearly formulated norms might not immediately get corrected because appeal is usually sought for the vague aspects of a (line of) precedent.[72] An ill-conceived determinate formulation may be used to regulate actions for a while, giving people enough time to form expectations. But the formation of expectations is not enough – these expectations need also be reliable. That is, later judgements must confirm them. A determinate formulation that represents a general norm which is perceived as mistaken by later judges and gets whittled down through distinguishing, re-interpretation etc. once it finally lands before appeal courts does not do that. It is the common-law equivalent to a broken promise. And a broken promise undermines trust and the willingness to plan based on a person's word more than a promise never made.

A judge that is unsure that she can give a determinate formulation close to the one that should (and likely will) be a relatively stable feature of the common law may therefore have several reasons not to aim at providing one. If she gives a determinate formulation for her precedent's general norm that she fears might be mistaken (or perceived as such), she risks doing one of three things: i) Either, the general norm her formulation represents gets entrenched into the common law and goes on generating bad decisions for years to come; or ii) it generates a few expectations that,

[72] Schauer (2006) n.49, p. 915 f.

after a while, get disappointed when the common-law begins its famous self-purification process, resulting in rule-of-law costs; or iii) both happen: the determinate formulation causes bad decisions for a long while, until it finally gets picked up in the self-purification process of the common law, where it also manages to create rule-of-law costs.

On the other hand, if the judge decides to merely represent her reasoning for her own case in the form of arguments, with the suggestion that, if the reasons presented more or less determinately in the arguments apply again, they should be weighed in favor of following, she also communicates that the common-law is not settled. She makes a rhetorical choice that discourages the formation of expectations just yet, and instead encourages later courts to work out the content of the common law further. When more cases have amassed, chances are that a later judge will be in a better position to foresee which formulated general norm will be able to exist stably in the common law. Not trying to provide a determinate formulation right away may lead to the introduction of the determinate formulation for a general norm that can support reliable expectations sooner than providing a determinate formulation that will only cause trouble.

Schauer's argument that waiting may lead to *better* determinate formulations representing *better* general norms can therefore be supplemented by a further argument:[73] that waiting may also lead to more *stable* formulated general norms, capable of better supporting reliable expectations. There are several reasons that may justify holding off on providing a determinate formulation – and these reasons can be grounded in both the idea that the law should contain *good* norms, and in rule-of-law considerations.

[73] Schauer (2006) n.49, p. 915 f.

To be clear, I do not want to argue that judges should never, or even seldom provide determinate formulations. There are good rule-of-law reasons suggesting that the common-law should provide its subjects with determinate formulations of stable general norms, and they have to be provided by someone, at some point. Rather, I think I have shown that whether those determinate formulations should be attempted in a *specific* opinion may depend on how confident the judge is in her ability to come up with, and formulate general norms that should, and likely will, be integrated in the common-law in a relatively stable way.

3.3 Is Providing Determinate Formulations for Narrow Rulings the Solution?

Several authors, especially those concerned with judges making bad law, suggest that judges should abstain from providing determinate formulations for broad general norms and instead provide determinate formulations that represent narrow norms. A narrow general norm would still provide a list of clear categories, but these categories would be tailored to the precedent case so closely that only cases *extremely* similar to the precedent would fall under the norm.[74] That way, the thought goes, possible mistakes will only affect few cases. While I do think that this is sometimes, maybe even often advisable, I also think that whether it is better to formulate a narrow norm or to formulate arguments falling short of a determinate formulation depends on several factors.

Before I explain what these factors are, I should say this: Narrowness comes in degrees. And the narrower the formulated general norm, the less cases it makes the precedent applicable to.[75] Imagine an absolutely narrow norm, one that includes a category for *every single property* of

[74] See, e.g. Schauer (2006) n.49, p. 916, Sunstein (1999) n37, p.10.

[75] At least in the absence of some gap-filling principle, like the principle that everything that is not forbidden is permitted. But then a narrow norm will incur all the problems of broad norms I discussed above.

the case except maybe time coordinates, so that the judge does not have to make any judgement calls about the normative import of those properties. This norm would presumably make the precedent applicable to extremely few further cases (maybe even none). Therefore, as can be shown by slightly adapting an argument by Greenawalt, a very narrow general norm may not fare better than no general norm at all at fulfilling rule of law requirements.[76] This is so because a general norm formulated in a precedent, chosen specifically not to govern many more cases than the one just decided, makes it so that with respect to most cases the precedent does not apply and can only be extended. To justify extending a precedent, the judge has to compare it with the new case and show that the two cases have the relevantly similar properties or that the arguments of the precedent case also apply to the new case. In other words: the judge must do a very similar thing to figure out whether to extend as she must do if no determinate formulation was provided at all and she tries to figure out whether the precedent is applicable. As a result, the subjects of the law cannot predict whether the precedent will be treated as having any impact on their case and will feel that their fate depends on the will of the judge. This feeling might grow especially strong if the case for which the very narrow norm was formulated turns out to be a core-case for a formulated norm that the common law eventually adopts and that grows quite broad through many little extensions.

So, if the formulated general norm is *too* narrow, it might not actually encourage the generation of expectation any more than if there is no determinate formulation at all, nor create any other rule-of-law advantages that would recommend it against the alternative formulation of arguments while falling short of a determinate formulation.

[76] Greenawalt (2013) n.37, p. 238/239.

For formulated general norm to generate rule-of-law gains, they cannot be too narrow. But this means that choices about what to include must be made. And here, it might again be that the narrower norms create rule-of-law costs. This is so because, first, it is not clear that a judge who is not sure which determinate formulation of which general norm she should offer for her precedent will find it any easier to provide a useful narrow one than a broad one. She might worry that even the attempt to formulate a narrow general norm could result in a general norm that is too broad with respect to one or two fateful aspects. In her decision, she might have relied on a background reason without being aware of it.

Second, there is the possibility that the judge might include irrelevant conditions in the narrow general norm she formulates. This may look harmless because later courts can easily extend the precedent to cover even cases that do not fulfill these conditions. But I think judges might still have some reason to worry over formulating noxiously under-inclusive norms. The confident inclusion of the irrelevant conditions in a determinate formulation could do one of two things: It could discourage the law's subjects from bringing their cases to court because they feel the law is clear. And the clarity of the determinate formulation could lead later courts to unthinkingly refuse to apply the precedent to cases it should really be extended to. Thereby, they would contribute to entrenching the narrowness of the formulated general norm in the law. For these reasons, a judge might sometimes be justified in preferring not to provide a determinate formulation, not even of a narrow norm, thereby avoiding the kind of treacherous clarity that may discourage appeals and instead encourage closer looks by other courts.

4 Making a Contribution Without Offering a Determinate Formulation?

So far, I have argued that a judge may sometimes have good reason not to offer a determinate formulation in her opinion. However, at the beginning of the preceding section I agreed that the

common-law as a whole should provide determinate formulations. I argued that this means that judges should do their best to formulate their opinions so that they contribute to the realization of this goal. But can a judge do so even if she does not provide a determinate formulation? Can she do it just by providing arguments while falling short of providing a determinate formulation for her precedent's general norm? I think that she can. The common law does not only develop through the creation and adjustment of clearly formulated general norms, but also through analogical reasoning.

Some scholars, such as Larry Alexander and Emily Sherwin, have argued that analogical reasoning does not exist as a form of genuine reasoning, and that therefore precedent cannot constrain through analogy.[77] According to these scholars, precedents that do not contain a determinate formulation (they say a serious rule)[78] do not provide judges with any guidance with respect to the legally appropriate decision in other cases. Alexander and Sherwin's argument is a contribution to a larger debate about analogical reasoning and the constraining force of precedent. If it is successful, then it follows that a judge cannot make a meaningful contribution to the development of the common-law as a body of formulated general norms without providing a determinate formulation herself. It is all or nothing: If she refuses to provide a determinate formulation, she stays out of the project of creating the body of available formulated norms altogether. Elsewhere, I argued extensively against this view and for the claim that analogical

[77] See, e.g. Alexander, Larry (1989) "Constrained By Precedent", *S Cal. L. Rev*. 63:1, pp. 1-64; Alexander and Sherwin (2008) n.57, Part 2; see also Posner, Richard A. (2006) "Reasoning By Analogy", *Cornell L. Rev.* 91, pp. 761-774.

[78] Or provide enough unequivocal information that one specific rule can be gleaned from them (Alexander and Sherwin (2008) n.57, p. 52).

reasoning is a legitimate form of reasoning and that precedents can be constraining in the relevant ways even when they are used as analogues.[79] I cannot repeat all these arguments here, especially not the arguments for the idea that analogical reasoning can be constraining. I will therefore only give a very short overview over how analogical reasoning works that will hopefully also show how analogical reasoning is different from reasoning with formulated general norms. I will then proceed on the assumption that it is a form of reasoning and can constrain:[80]

Analogical reasoning works by performing an analogical mapping between a source analogue and a target analogue. Imagine, for example, the question whether the relationship between a mother and her child is relevantly similar to the relationship between a nanny and the child in her care. The source analogy is then the mother/child relationship and the target analogue is the nanny/child relationship. Analogical mapping happens by establishing a set of systematic correspondences between the source and the target. For example, we might say that there is a correspondence between the way mother's typically love their children and the way that nannies love the children in their care. According to the multiple constrain theory of analogical mapping, the *way* in which we establish these correspondences is constrained in several ways. We rate correspondences

[79] REFERENCE OMITTED FOR REVIEW. Alexander and Sherwin's rejection of the possibility of analogical reasoning has also been criticized by Rigoni, Adam (2014), "Common-Law Judicial Reasoning and Analogy" in: *Legal Theory*, 20:2, pp. 133-156; and different ways have been offered of how analogical reasoning may meaningfully constrain decision making by, e.g. Hunter, Dan (2001), "Reason is too large: Analogy and Precedent in Law". in: *Emory L. J*, 50, pp.1197-1264.; and Weinreb, Lloyd (2005), *Legal Reason. The Use of Analogy in Legal Argument*. Cambridge; New York: Cambridge University Press.

[80] What follows is a summary of the multiple constraint theory of analogical mapping as it is described, for example, in Holyoak and Thagard (1999) n. 36. I have given a more detailed description in REFERENCE OMITTED FOR REVIEW.

according to how well they fulfill certain conditions. One such condition is that the aspects of the two analogues share *surface similarities* – that they fall under some of the same already established categories (the narrower the better, the more the better) or give us the same sensual experiences. Another one is that the relations between the aspect in the source analogue to other aspects in the source analogue can also be mapped with the relations that the corresponding aspect in the target analogue has to other aspects in the target analogue. So we might say that the correspondence between "mothers love their children" and "nannies love the children in their care" is strong because there can be a further mapping between "mother love their children *because* they develop intimate relationships to them" and "nannies love the children in their care *because* they develop intimate relationships to them". But we might say that it is not *very* strong because there cannot be made a correspondence between "mothers love their children *therefore* they care for them unconditionally" and any aspect in the typical nanny/child relationship. A highly rated correspondence is a similarity. If there is no highly rated correspondence for an aspect of one of the analogues in the other analogue, we have a difference. Of course, any source and target analogue will be similar and different in many ways. What is interesting is whether they are *relevantly* similar. And this is where the purpose constraint comes in. Usually, we use analogical reasoning for some purpose, for example to solve a problem or to argue a claim. This purpose helps us to determine *which* aspects of our analogues need highly ranked correspondences in the other analogue for us to say that the analogues are relevantly similar. Let's say we ask: Will nannies suffer serious emotional injury from seeing the children in their care die in an accident (more than any person seeing any other person die like that)? We might try to answer this question through analogical reasoning. This might mean that we say: We know that mothers do, so let's see if those two are relevantly similar. We determine this by looking for those aspects in the relationship

between mothers and their children that are inferentially connected to the acknowledged fact that mothers suffer special emotional harm from seeing their children die in car accidents. One of those aspects is that mothers love their children (that is one of the reasons *why* they suffer so much), and therefore it is relevant whether a highly ranked correspondence can be established between the mother/child relationship and the nanny/child relationship with respect to love. We would say that the mother/child relationship is relevantly similar to the nanny/child relationship with respect to emotional harm suffered from seeing the child die in an accident if the relevant similarities we find in this way outweigh the relevant differences.

If we try to answer the question in this way, then we have reasoned differently than if we try to determine whether nannies fall under a formulated norm for when we can expect that individuals suffer serious emotional harm from seeing others die in car accidents. This is so because a formulated norm provides us with a list of already described, clear categories. In order to see whether our nanny case-falls under the formulated norm (under which the mother case also fell), we simply check whether the nanny-case as properties that fall into each of the given categories.

As I said, I will here assume that judges can be constrained in their decision making even when they reason analogically with precedents, something that I have argued at length elsewhere. But this is not yet enough to show that a judge can help fulfill the rule-of-law demand for providing subjects with formulated general norms in cases where she refrains from providing a determinate formulation in her opinion. Jeremy Waldron argues against relying on analogical reasoning on the basis that it is inherently particularistic and therefore cannot help fulfilling the rule-of-law demand

for generality.[81] The problem with analogical reasoning is not that it undermines the ability of precedents to constrain judicial-decision making. Rather, the problem lies in the *kind* of relationship that it presupposes between two cases. A judge who reasons analogously does not treat the precedent case and the present case both as *instances* of a category of cases governed by a general norm. Instead of concentrating on the way the law prescribes decisions for general classes of cases, judge using analogical reasoning only ask what the decision in one specific case means for the decision in one other specific case – they simply try to find correspondences and rate them. They might, for example, find the correspondence between mother-love for children and nanny-love for children, rank it highly, but not bother to determine and formulate a category of the *kind* of love they think should be ranked highly like this, even though they would accept that owners love their dogs but would not rank the correspondence of owner-love for dogs to mother-love for children highly. Rules or tests could theoretically be established through a process by categorizing and listing similarities, but that would be an additional, non-essential step. The use of analogical reasoning is not aimed at producing determinate formulations of general norms for precedents. It leads us from one particular result to the next without necessitating the identification of categories, and that is against the rule-of-law ideal.

I think that this criticism vastly underestimates the element of generality hidden in analogical reasoning. It is true that there are considerable differences between reasoning about a present case by determining whether its properties fall under the clearly delineated categories of a formulated general norm, and reasoning about it by determining whether it is relevantly similar to a past case. However, behind these differences, there lies an interesting similarity that reveals how

[81] Waldron (2012) n.9, pp. 29-31.

every step made through analogical reasoning is also a step towards generality: Both reasoning with formulated general norms and reasoning by analogy operate by making distinctions of relevance between the various properties of the present case. Take reasoning with formulated general norms first. When determining whether the present case falls under formulated general norm, the reasoner concentrates on those properties that fall into the categories provided in the conditions listed by the rule or test. Other properties are not relevant.[82] The same thing happens in reasoning by analogy. When a reasoner determines whether a present case is relevantly similar to a past case, she concentrates on those properties that can be understood to be similar to the legally relevant properties of the precedent case. Other properties fall into the background. In both cases an *abstraction* takes place: the present case is reduced to its relevant properties.[83] Admittedly, the process through which this happens is different depending on the form of reasoning employed. In reasoning with formulated general norms, it happens through the application of an already available set of categories from the list of conditions represented in the determinate formulation. And in analogical reasoning it happens through the comparison to another case. But, importantly, the abstraction through the comparison to another case constitutes a move closer to the formulation of categories fit for a determinate formulation. Through the abstraction, only a subsection of the indefinitely large number of categories into which the present case could fit remains a possibility as a *relevant* category for the decision. With every further abstraction, prompted by every further

[82] In other words, both the analogy and the rule influence the *presence* that certain properties of the case have in the reasoner's mind. (see e.g. Tindale, Christopher (2015), *The Philosophy of Argument and Audience Reception*, Cambridge: Cambridge University Press, p.182 ff.)

[83] See, e.g. Mengel, Peter (1995) *Analogien als Argumente,* Frankfurt am Main; New York: P. Lang. p. 174 ff. for a detailed account of this process of abstraction through analogy.

analogical comparison, this number reduces further. Formulating the outcomes of analogical reasoning in a precedent opinion– even if it does not amount to a determinate formulation – sneaks the law closer to the determination of clear, definite categories. This is so because the process of repeated analogical reasoning in a line of cases can remove exactly those insecurities that may prevent a judge from creating a determinate formulation when she is faced with the first case in what will later become a line of precedent: Think back, for example, to *Dillon v Legg*, and the guidelines that the court provided for figuring out whether emotional injury had been reasonably foreseeable to the defendant. Next to proximity to the accident and whether the claimant had directly observed the accident, the court also listed the closeness of the relationship between the claimant and the victim.[84] Judge Burke complained that this criterion was much too vague – it did not remotely provide enough guidance on the question who could hope to sue successfully.[85] Imagine, however, a later line of cases, involving nannies, grand-parents, best friends, fiancées and aunts or uncles. Imagine further a later court, comparing such cases to *Dillon v Legg*. This court may reach greater clarity on how the factor of "closeness of relationship" should be clarified through a comparison of the relationship between the claimant and the victim in each case with that of a mother to her child. The court in *Dillon v Legg* did not formulate exactly why they thought the relationship between mother and child was a close relationship of the right sort. But it did direct later courts to concentrate on those aspects of their cases that they considered good correspondences to the aspects of the mother/child relationship. Thereby, they determined a direction for the process of further and further abstraction. If, for example, a later court decided that the relationship between best friends is close enough, certain properties of the mother-child

[84] Dillon v Legg, 441 P.2d 912 (Cal. 1968)

[85] Dillon v Legg, 441 P.2d 912 (Cal. 1968) (Burke dissenting).

relationship (like, for example, relation by blood) fall away as candidates for categories listed in the determinate formulation of a general norm for the line of precedent. Through this process, over a line of cases, the courts can come closer and closer to a more precise determination of what makes a relationship close, and they can do so in a way that justifies recognizing future emotional injury claims.

Of course, in each new case the question whether two properties are not only similar but similar *enough* must be answered by the present court. However, the precedent court can do more to influence the gradual abstraction towards general categories that can be used in the conditions listed by a determinate formulation than just to pick out the first properties for comparison. In addition, it can connect these properties to their decision through arguments. Thereby, it can further contribute to fulfilling the rule-of-law demands for predictability and generality. This is because it provides information about which relationships between aspects of the precedent case it considered relevant for the application of the precedent case and therefore for analogical reasoning. It can further the task of fulfilling rule-of-law demands especially well if its argument connects some of the cases' aspects to available legal reasons formulated e.g. in widely recognized legal principles or persuasive precedents.[86] Here is how:

[86] That the court uses available legal reasons in its arguments does not translate into it providing a determinate formulation: The available legal reasons may be used, for example, only to justify listing a certain property of the case as a reason for the decision in the case. The court in *Dillon v. Legg* might have, for example, cited some hypothetical persuasive precedent to support the claim that witnessing something with one's senses should be taken to make a more serious impact on the mind than finding out about it in another way.

Argumentation theorists have identified a special form of analogical reasoning that they have called "arguments from parallel reasoning".[87] Analogies drawn in arguments from parallel reasoning are based on argument structure: relevant similarities are identified by attempting to find equivalents to those properties of the source-analogue based on which an argument was constructed, so that an argument of the same structure can be made for the target-analogue. Jan Albert van Laar offers the following example:

> Suppose, a proponent contends that we should allow camera surveillance with drones by the Amsterdam police, on account of these drones' cost-effectiveness. Suppose further, that the opponent addressed makes it clear that she acknowledges the drones' cost-effectiveness, as well as the relevance of this consideration, but that she remains, nevertheless, critical towards the proponent's thesis for worrying about intrusions on privacy. In such a case, the proponent may consider it to be expedient to put forward an argument such as: "I happen to know that (…) you consent to cameras on satellites on account of their cost-effectiveness, and despite privacy considerations. Well, reasoning from cost-effectiveness to cameras on drones, despite privacy considerations, is comparable to reasoning from cost-effectiveness to cameras on satellites, despite privacy considerations."'[88]

It is important is to see that in analogies from parallel reasoning it is not necessary that the source-argument is successful at providing a reason. For example, in van Laar's example, nothing speaks

[87] See Woods, John, and Hudak, Brent. (1989) "By parity of reasoning" *Informal Logic* 11:125–139., van Laar, Jan Albert (2014) "Arguments from Parallel Reasoning", in: Henrique Jales Ribeiro (ed.), *Systematic Approaches to Argument by Analogy*, Springer. pp. 91-108.

[88] van Laar (2014) n.87, p. 91

against rejecting the argument about cameras on satellites. Rather, what arguments from parallel reasoning suggest is that the same kind of argument can be made in both situations, and therefore the conclusion in both situations should be treated the same: either it should be accepted in both situations or rejected in both.

Of course, where the reasoner is a judge and one of the analogues is a precedent, the decision made is to be treated as being correct. So rejecting the conclusion of both arguments is not an option. Rather, by providing an argument for her decision, the judge identifies those properties that served as the basis of her decision. When, in a later case, the attempt is made to reconstruct a parallel argument, the structure of this argument provides guidance for determining whether a property of the new case can count as similar to the precedent case. In *Dillon v Legg,* for example, the court argued: " (…) obviously defendant is more likely to foresee that a mother who observes an accident affecting her child will suffer harm than to foretell that a stranger witness will do so (…) Surely the negligent driver who causes the death of a young child may reasonably expect that the mother will not be far distant and will upon witnessing the accident suffer emotional trauma."[89] Even though one might claim that the best friend of a grown person is also in a very close relationship with that person, this argument might not work as well for these two – maybe because friendship does not have the surface-visibility of the relationship between mother and child, nor is the best friend usually nearby. If arguments are provided in an opinion, the present judge can examine whether the property of the new case can play the same argumentative role as its equivalent did in the precedent case. The resulting constraint on what can count as similar is especially interesting if the precedent judge's argument has explicitly connected the properties of the precedent case

[89] Dillon v Legg, 441 P.2d 912 (Cal. 1968)

with references to available legal reasons from legal sources. In this case, if a present case will be recognized as similar to a precedent case on the basis of an analogical comparison by parallel reasoning, then because the same general legal reasons from the same sources can be used in an argument regarding the present case that is parallel to one that was used to support the decision in the precedent opinion.

Therefore, providing arguments that connects the decision with general legal reasons from available legal sources does not only show that the judge herself made her decision based on these reasons and thereby reassure the parties that she decided according to law. It also (rhetorically) encourages later judges to determine the applicability of the precedent with reference to the same reasons as they were formulated in the same sources. And when the process of analogical abstraction generates a determinate formulation, it too is still based on the same general legal reasons that already determined the decision back in the first precedent case.[90]

This is the way in which I believe a judge can contribute to the realization of the common law as a body of formulated general norm even without formulating such a norm in her opinion – by preparing guidance for other judges to provide such formulations in later cases. Indeed, insofar as her arguments aid other judges in creating a determinate formulation that can exist stably in the common law, I think that sometimes she can fulfill her obligation to do so better than if she offers

[90] I think that this is a further way to support Horwiz' suggestion that courts should decide cases narrowly but provide a deep structure of reasoning behind them (Horwitz, Paul (2000) "Laws Expression: The Promise and Perils of Judicial Opinion Writing in Canadian Constitutional Law" *Osgoode Hall L. J.* 38, pp. 101-142.). Horwitz describes courts as engaged in a drawn-out deliberation with each other that is carried out through the writing and reading of opinions. By refusing to bind later courts through broad formulations, a precedent court leaves the way the law will crystalize into formulated general norms open but provides guidance towards them as well as she can.

a determinate formulation for a general norm that needs to be removed again, possibly through a long process. Of course, the decision not to provide a determinate formulation might well generate some immediate rule of law costs. But I think that there are cases where judges may reasonably believe that, in the long run, the rule of law gains they forego by not providing a determinate formulation might br outweighed by the avoided rule of law costs of providing a misguided determinate formulation. I conclude that in some cases, and in the long run, making a responsible choice not to provide a determinate formulation might be the most successful available option for fulfilling rule-of-law requirements. After all, a broken promise erodes trust much more than a promise never made – and that includes the trust in the rule of law.