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Integrity and Stare Decisis

*Scott Hershovitz**

Many think that stare decisis binds even the highest court in a jurisdiction to follow precedents that were decided incorrectly. Indeed, the view is commonly held by legal scholars[1] and judges[2] alike. But if that is what stare decisis really requires, it is puzzling. What could justify a principle that requires courts to make the same mistakes over and over again? Surely a better principle (one that most of us endorse) is that people should own up to their mistakes and seek *not* to repeat them. Could legal reasoning really be so different from everyday reasoning that principle requires courts to make mistakes repeatedly rather than correct them?

We need to clarify the question before we can answer it. There are two varieties of stare decisis—horizontal and vertical. Vertical stare decisis requires that lower courts follow the decisions of higher courts. Horizontal stare decisis requires that a court follow its own precedents. Vertical stare decisis is less mysterious than horizontal. The deference lower courts show to higher courts facilitates coordination among judges, and it has the potential to improve judicial decision making to the extent that higher court judges have greater expertise than lower court judges. Neither coordination nor expertise, however, can explain the practice of a court considering itself bound by its own precedents. This essay explores the mystery of horizontal stare decisis. For ease of exposition, I shall use "stare decisis" to refer to horizontal stare decisis.

The view that stare decisis condemns courts to repeat their mistakes neither fits nor justifies our legal practice. Fit is problematic because, with some regularity,

* Thanks to Jules Coleman, William Fetcher, Lewis Kornhauser, Scott Sharpiro, Seana Shiffrin, and Nicos Stavropouls for helpful comments and conversations.

[1] *See*, *e.g.*, L. Kornhauser, *An Economic Perspective on Stare Decisis*, 65 Chi.-Kent L.Rev. 63, 65 (1989) (describing stare decisis as "a practice that, paradoxically, demands that a court adhere to a prior decision it considers wrong"); L. Alexander, *Constrained by Precedent*, 63 S. Cal. L. Rev. 1, 4 (1989) ("I shall focus on those situations . . . in which a subsequent court believes that, though a previous case was decided incorrectly, it must, nevertheless . . . decide the case confronting it in a manner that it otherwise believes is incorrect").

[2] "[T]here is nothing to do except stand by the errors of our brethren of the week before, whether we relish them or not." B. Cardozo, The Nature of the Judicial Process 150 (1921).

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courts overrule precedents that they regard as mistaken. Justification is problematic because, as we shall see, the values most often cited in defense of stare decisis—efficiency and fairness—cannot underwrite a general practice of following incorrectly decided precedents.

The key to understanding the practice of stare decisis, I shall argue, lies elsewhere. Specifically, it lies in the virtue Ronald Dworkin calls integrity. Integrity is a value that is realized by patterns of behavior across time. The unique demand that integrity makes upon both individuals and courts is that they recognize that what they have done in the past affects what they ought to do now. Stare decisis, I aim to show, promotes integrity in judicial decision making.

I also aim to show that stare decisis is a broader practice than we traditionally conceive it. On an integrity-based view, stare decisis is the practice of engaging with history, not just by following precedents, but also by distinguishing them and, when appropriate, overruling them. Overruling a precedent, and sometimes even distinguishing one, are often thought of as acts that run counter to the demands of stare decisis. But if we think of stare decisis as a practice in which courts strive to exhibit integrity in decision making, then we can see that distinguishing and overruling precedents are ways that a court engages with its own history. As we shall see, a court with no concern for the integrity of its own decision making would not need to distinguish or overrule its precedents. It could simply ignore them.

I

Many investigations of stare decisis ask some version of the question, "What justifies adherence to a decision known to be wrong?"[3] The canonical expression of the principle—*stare decisis et not quieta movere*—does not, on its face, require following decisions known to be wrong. The Latin means "to stand by things decided, and not to disturb settled points."[4] Of course, it is reasonable to assume that some things that have been decided were decided incorrectly. So stare decisis will, on occasion, require courts to conform to incorrectly decided precedents.

This observation, however, is insufficient to motivate the idea that to justify stare decisis we need to explain why courts should adhere to precedents they regard as wrongly decided. After all, by the same implication, the canonical formulation also demands that courts follow precedents they regard as correct. Indeed, it demands that courts follow settled points of law without reference to the correctness of the decisions that settled them. So it is somewhat of a puzzle why those investigating stare decisis tend to ask what justifies following incorrectly decided precedents rather than, say, what justifies adhering to a decision irrespective of its merit.

[3] *See e.g.*, J. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI.-KENT L. REV. 93, 94 (1989) ("Professor Kornhauser approaches the issue of stare decisis by pondering the question of what justifies adherence to a prior legal decision known to be wrong") (discussing Kornhauser, *supra* note 1); Alexander, *supra* note 1, at 4.

[4] BLACK'S LAW DICTIONARY (8th ed., 2004).

The answer, I think, lies in a particular view many have of stare decisis. Richard Fallon expresses the view as follows:

> Because a court that believes a prior decision to have been correct can always reaffirm the correctness of its ruling without reliance on its precedential status, the force of the doctrine of stare decisis lies in its capacity to perpetuate what was once judicial error or to forestall inquiry into the possibility of legal error.[5]

Fallon actually expresses two views of stare decisis in this passage. The first is that the force of stare decisis "lies in its capacity to perpetuate what was once judicial error." The second is that the force of stare decisis lies in its capacity to "forestall inquiry into the possibility of legal error." The first view is the one that is of immediate interest.

The view that the force of stare decisis "lies in its capacity to perpetuate what was once judicial error" is a common one. In response to a litigant who argued that a precedent should be overturned because it was incorrect, Judge Posner recently opined that stare decisis would be "out the window" if the incorrectness of a decision was a sufficient ground for overruling it.[6] According to Posner, "no doctrine of deference to precedent is needed to induce a court to follow the precedents that it agrees with; a court has no incentive to overrule them even if it is completely free to do so."[7] On this view, stare decisis has no force—does not make a difference—insofar as it requires courts to follow correctly decided precedents. It is only when stare decisis requires courts to follow incorrectly decided precedents that it makes a difference to judicial reasoning. If this is right, to justify stare decisis, we would need to justify a practice of following incorrectly decided precedents.

The structure of this argument will be familiar to students of jurisprudence. Some argue that legitimate authorities are incapable of making a difference in what their subjects ought to do. Either an authority directs a subject to do something she ought to do anyway, in which case the directive makes no difference in the subject's normative situation, or the authority directs a subject to do something she ought not to do. On the assumption that authorities that direct people to do things they ought not to do are illegitimate, it appears that legitimate authorities can make no difference in what their subjects ought to do. This claim is known as the *no difference* thesis.[8] Proponents of the no difference thesis are apt to hold the view that the normative force of an authority lies in its capacity to bind people to do things they ought not to do.

[5] R. H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1823 n.3 (2005) (citing Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1538 n.8 (2000) ("The essence of the doctrine [of stare decisis] . . . is adherence to earlier decisions, in subsequent cases . . . even though the court in the subsequent case would be prepared to say, based on other interpretive criteria, that the precedent decision's interpretation of law is wrong")).

[6] *Tate v. Showboat Casino Marina Partnership*, 431 F.3d 580, 582 (7th Cir 2005).

[7] *Id*. at 582–583.

[8] *See* J. RAZ, THE MORALITY OF FREEDOM 48 (1986) ("The no difference thesis asserts that *the exercise of authority should make no difference to what its subjects ought to do*, for it ought to direct them to do what they ought to do in any event").

The most important problem with the no difference thesis is that sometimes what a subject ought to do is underdetermined by the reasons she has. For example, drivers have a reason to drive on the same side of the road as everyone else, but no particular reason to drive on the left or right. An authority can make a difference by giving drivers a reason to drive on the right, say, without requiring drivers to do anything they ought not to do.[9]

The argument that stare decisis only makes a difference when it requires courts to follow incorrectly decided precedents suffers from a similar defect. Stare decisis can make a difference by requiring courts to follow precedents that were neither correct nor incorrect when decided. Some dispute that there are such cases, but they are a logical possibility if not a legal one. If a particular precedent represents merely one among a number of permissible decisions that an earlier court could have selected, writing, as it were, on a blank slate, then a principle requiring a later court to follow that precedent makes a difference without demanding that the court follow a precedent that was decided incorrectly.

Another problem with the view that the force of stare decisis lies in its capacity to perpetuate judicial error is that it construes too narrowly the impact stare decisis can have on the outcome of cases. Fallon points out that a court following a precedent it regards as correctly decided can reach the same result without following the precedent. At most, this supports the view that stare decisis makes no difference in what a court *ought* to decide (though we have just seen that even this is not true). But even when a case is governed by a correctly decided precedent, stare decisis may well make a difference to what the court considering it actually decides. Stare decisis, after all, makes the later court more likely to read the earlier, correctly decided precedent, and doing so may save that court from making errors of its own.

The upshot is that the force of stare decisis does not lie in "its capacity to perpetuate what was once judicial error." Stare decisis can make a difference, even when it requires adherence to correctly decided precedent. Thus, there is no reason to think that to justify the practice of stare decisis, we need to justify the practice of following incorrectly decided precedents. We may need to justify following incorrectly decided precedents as part of justifying the broader practice of simply following precedent. However, if we start out by asking what justifies following incorrectly decided precedents, we misconstrue the import of stare decisis and cut ourselves off from the resources necessary to understand it.

II

A better question to ask is "What justifies adherence to a precedent irrespective of its merit?" Adherence to a precedent irrespective of merits would, to use Fallon's words, "forestall inquiry into the possibility of legal error." This second question is

[9] *Id.* at 30.

better than our first, but it is also misleading in that we do not actually have a practice of adhering to precedent without regard to merit. Courts in the United States and (more recently) in the United Kingdom do, from time to time, overturn even long-standing precedent. Below, I shall argue that overturning precedents is part and parcel of the practice of stare decisis, notwithstanding the fact that when a precedent is overturned we often speak as if the demands of stare decisis have been ignored or trumped. However, since much of the best work on stare decisis sets out to explain why courts ought to follow precedent irrespective of merit, we shall continue our inquiry into what might justify such a practice.

To justify adhering to judicial decisions irrespective of their merit, one needs to pull off a challenging trick. One has to show both that judicial decisions are deserving of deference as a class *and* that individual decisions deserve deference even when a subsequent court believes that the earlier, precedential court made a mistake. This is a difficult task, but it is not a task that we are unfamiliar with from other contexts. To justify obeying an authority, one must pull off a similar trick.

Authorities provide merit-independent reasons for action.[10] A mother can order her daughter to play inside or outside. Her order provides a reason for her child to act quite apart from its merit, quite apart from whether it would be better for the child to play inside or out. This general truth is not without limits, of course. A mother who orders her child to ingest arsenic greatly exceeds the scope of her legitimate authority. But within limits, the merit of the order is irrelevant to the question of whether it gives the child a reason to act. Every parent who has uttered the words, "Because I said so" implicitly endorses this view of parental authority.

To explain when and why authoritative orders are deserving of deference, Joseph Raz offers the *normal justification thesis*.[11] Roughly speaking, the normal justification thesis holds that an authority is legitimate for a person if she will do a better job of conforming to the reasons that apply to her by following the authority's orders than she would by following her own lights. Authorities can satisfy the normal justification thesis through, among other things, special expertise, or the ability to solve coordination problems. To illustrate: a doctor is an authority on medical matters in virtue of her special knowledge; the state is an authority on traffic matters in virtue of its ability to solve coordination problems.

When the normal justification thesis is satisfied, one has a reason to give an authority's orders deference as a class, as well as a reason not to deny deference when one believes there is reason to doubt the merit of a particular order. If one refused to follow the order of a legitimate authority whenever one believed that it was in error, the advantage one would get from following the orders as a class would be lost. Thus the normal justification thesis pulls off the trick when it comes to authoritative orders—it justifies deference to authoritative orders as a class, and deference to particular orders even when one has reason to believe they are mistaken.

[10] *See* J. Gardner, *Legal Positivism: 5½ Myths*, 46 AM. J. JURIS. 199, 208–209 (2001).

[11] Raz, *supra* note 8, at 53. For a short introduction to Raz's account of authority, *see* S. Hershovitz, *Legitimacy, Democracy, and Razian Authority*, 9 LEGAL THEORY 201 (2003).

If we were interested in justifying vertical stare decisis, we could invoke the normal justification thesis. Higher courts are authorities for lower courts. The authority is based on an ability to coordinate action, and perhaps (one might hope) on expertise as well. Each lower court judge has reason to decide cases as most other judges would decide them, and a practice of treating higher court cases as authoritative facilitates this aim. To the extent that higher court judges have superior expertise to lower court judges (or even simply more time and resources to bring to bear on a case), lower court deference to the ruling of higher courts will improve lower court decision making.

Raz's trick will not work for horizontal stare decisis, however. There is no reason for the highest court in the land to believe that it will, on the whole, decide cases better by conforming to its own previous decisions than it would by following its own current lights. The coordination justification that works so well for lower courts has no bearing.[12] Expertise cannot do the work either because later versions of a court generally have more information available to them than earlier versions, and (again, one hopes) members of roughly equal skill and knowledge.[13] Thus, if the trick can be pulled off for horizontal stare decisis, it has to be done some other way.

III

One common approach to justifying stare decisis is to argue that the practice is efficient. Justice Cardozo took this tack, suggesting that "the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case."[14] Cardozo's observation, if true, would be a premise in a narrow argument for the efficiency of stare decisis, focusing on the conservation of judicial resources.

One suspects that Cardozo is correct. If you always start with a blank canvas, you spend a lot of time painting the background. But it is not entirely obvious that Cardozo is right. Stare decisis may indeed conserve resources, but it also consumes

[12] When a court is composed of many members, and not all members of the court hear every case, coordination concerns may well support horizontal stare decisis. Thus, circuit courts of appeals in the United States, which typically hear cases in three-judge panels selected at random from a larger set of judges, may use horizontal stare decisis as a means of coordinating action among all the judges on the court. But such an explanation sheds no light on why the United States Supreme Court, for example, would consider itself bound to follow its own precedent, since every Justice typically hears every case. For a discussion of the impact different institutional structures have on the justification of stare decisis, *see* Kornhauser, *supra* note 1.

[13] F. H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 423 (1988) ("In principle, modern judges have all the information available to their forbears, plus any discoveries in the interim, and the benefit of hindsight. Judges often decide cases on the basis of predictions about the effects of the legal rule. We can examine these effects—both for other strands of doctrine and for the world at large—and improve on the treatment of the earlier case").

[14] CARDOZO, *supra* note 2, at 149. *See also*, J. P. Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 2 ("Perhaps the doctrine is of special interest to judges because it provides special benefits for judges. It obviously makes their work easier").

them. In a system with precedent, judges (and lawyers) spend time and money researching prior cases. The revenues of Lexis and Westlaw are a cost of stare decisis, as are the salaries of judicial clerks and many law firm associates.

Precedent allows judges to rely on previous cases, but it also demands that judges distinguish cases, an occasionally laborious task. An armchair investigation suggests that opinions do not grow shorter as the volume of precedent grows larger. If anything, the trend is towards longer opinions with more citation and quotation, and this is in part a consequence of stare decisis. Of course, many controversies are settled without judicial involvement because stare decisis makes the outcome of a case virtually certain. Additionally, stare decisis allows judges to dispose of many cases (and many issues within cases) summarily. So even if published opinions grow longer as a consequence of stare decisis, it may still be that judicial resources are conserved by the practice.

Jonathan Macey has gone so far as to argue that stare decisis allows judges to maximize their own leisure time by allowing them to free-ride on the efforts of earlier jurists.[15] Whatever its effect on judicial leisure time, it seems likely that stare decisis conserves judicial resources, or at least allows those resources to be deployed more efficiently. But the question is more complex than it appears at first glance, and it would require serious empirical study to resolve. Importantly, even if it were established that stare decisis conserves judicial resources, that fact would not go very far towards justifying the practice. Judicial resources are just one kind of resource among many, and if efficiency is to justify stare decisis, we must know that the gains in conserving judicial resources are not offset by losses elsewhere. That is, stare decisis must be efficient for society, not simply efficient for judges.

In an intriguing study of the efficiency of stare decisis, Lewis Kornhauser carefully delineates the potential sources of judicial error that could lead us to regard previous decisions as mistaken (changes in values, changes in the world, improvements in information, and incompetence).[16] Kornhauser provides a nuanced analysis of the value of stare decisis in the face of different sorts of error and in different institutional contexts. Rather than recap Kornahauser's analysis, I want instead to make some general remarks about the conclusions that Kornhauser reaches and the prospects for an economic justification for the practice of following precedents irrespective of their merit.

Kornhauser says that "the desirability of stare decisis will depend on the particular 'facts' of the situation the law seeks to govern."[17] He illustrates this by considering the desirability of stare decisis applied to the liability rules governing accidents between drivers and pedestrians. Suppose that the value of walking is fixed. If the value of driving is low, then strict liability will be preferred to negligence. Conversely, if the value of driving is high, then negligence will be preferred. Suppose further that in a regime with stare decisis, courts stick to the rules they announce regardless of the actual value of driving, whereas without stare decisis,

[15] Macey, *supra* note 3, at 111. [16] Kornhauser, *supra* note 1. [17] *Id*. at 86.

in each case, courts announce the legal rule that is optimal given the value of the injurer's activity.

To know whether stare decisis is desirable in these circumstances, one must know certain facts about the relative valuations of the walking and driving. Kornhauser explains as follows:

> Suppose the valuations of the activities are such that both injurer and victim should adopt moderate (or low) levels of the activity. Under stare decisis, the actor who escapes liability will always adopt a higher level of activity. Under a practice of no stare decisis, however, each actor will be uncertain whether she will bear the cost of an accident. This uncertainty will induce her to adopt an activity level intermediate to the one she would adopt if she escaped liability for certain. For certain relative values of activities, then, the uncertainty over the legal rule induces the actors to adopt activity levels closer to the social optimum.[18]

Kornhauser's illustration shows that to know whether stare decisis is an efficient practice for courts to adopt with respect to the rules governing liability for accidents between pedestrians and drivers, one must know something about walking and driving.

This is hardly surprising. One would expect that the efficiency of a rule that entrenches other rules against change would depend in part on the efficiency of the rules entrenched and the nature of the behavior the rules govern. This has important ramifications for the possibility of an economic justification of stare decisis. The principal of stare decisis applies generally. With limited exceptions, the application of stare decisis does not depend on the substantive area of law involved. Stare decisis applies in contract as well as tort, in family law as well as corporate law. It applies to the rules that govern liability between pedestrians and drivers, as well as the rules that govern liability between farmers and ranchers. Stare decisis is often said to carry less weight in the realm of constitutional law because it takes a legislative supermajority to undo a Supreme Court decision. Notwithstanding that, we do not observe the nuanced application of stare decisis to specific classes of rules that we would expect to find were the efficiency of the practice the driving force behind it. As Macey puts it:

> [I]n Kornhauser's model, the adjustment costs facing the relevant parties determine whether social welfare is being maximized by a legal regime of stare decisis. But courts have exhibited little, if any, ability or inclination to delve into the adjustment costs facing the parties before them . . . .[19]

Efficiency seems a poor explanation of stare decisis as we know it in part because the practice is insensitive to the facts that determine whether or not it is efficient in any given context.

We should be skeptical of attempts to argue that a practice of following precedent regardless of merit is across-the-board efficient because whether or not such a practice is efficient depends crucially on the rules that the practice entrenches and

[18] *Id.* [19] Macey, *supra* note 3, at 95.

on the particulars of the behavior those rules govern. However, one aspect of efficiency that is sometimes appealed in order to justify stare decisis deserves special attention: the value of certainty in the law. If judges were unconstrained by precedent, some say, the law might shift unpredictably and people would be unable to plan their affairs. This would have undesirable consequences (stunted markets, stunted psyches, etc.), and to the extent that stare decisis ameliorates these consequences, it may be instrumentally valuable.

No doubt, for particular areas of law, there is much to be said in favor of certainty. When it comes to the interpretation of insurance contracts, or the rules governing secured transactions, it may well be more important to have a consistently applied rule than to have a good rule. When certainty is sufficiently valuable to outweigh any loss from the entrenchment of a suboptimal rule, the need for certainty will support a practice of adhering to precedent irrespective of merit.

We should be careful not to push certainty explanations too far. As Kornhauser explains: " 'Certainty' justifications for stare decisis often include 'reliance' or 'planning' arguments, but these arguments are only as strong as the value of the planned conduct."[20] To take an extreme but illustrative example, note that *Plessy v. Ferguson*[21] allowed Southerners to plan their affairs in the certainty that the federal government would not interfere with state-created racial caste systems. The value of the activities planned in reliance on *Plessy* was hardly sufficient to warrant continued adherence to the precedent. Indeed, it seems inappropriate to weigh the "benefit" of segregation-based plans against the cost of segregation-caused harms at all. *Plessy* is, as noted, an extreme example, and it represents a paradigm of a case that ought to have been overruled. But the point is this: if one appeals to certainty to justify following precedents irrespective of merit, then one must be prepared to defend the value of the conduct planned in reliance on the rules entrenched. It is easy to defend the value of conduct planned in reliance on stable interpretations of insurance contracts, and impossible to defend the value of conduct planned in reliance on *Plessy*. In the middle lies a vast grey area in which the value of conduct planned in reliance on previously announced legal rules may or may not be sufficient to warrant a practice of deferring to those rules irrespective of their merit. Certainty arguments, like efficiency arguments more generally, may well support stare decisis for particular types of legal rules. But neither certainty nor efficiency can underwrite an across-the-board practice of deferring to precedent without regard to merit.

IV

Fairness is another value commonly thought to underwrite stare decisis. But arguments in favor of the fairness of stare decisis face an objection similar to

[20] Kornhauser, *supra* note 1, at 78. [21] 163 U.S. 537 (1896).

the one that plagues arguments in favor of its efficiency. Fairness may well demand that courts treat the litigants in like cases alike, and stare decisis encourages that. But fairness also makes demands regarding the outcome of particular cases, and stare decisis can entrench unfair results. A practice that accords deference to the rules announced in *Plessy* or *Korematsu v. United States*,[22] for example, entrenches particularly pernicious forms of unfairness against legal change. Whether stare decisis is on the whole fair depends on the relative magnitude of the gains in fairness from treating litigants in different cases alike and the losses from entrenching particular unfair results. It is far from obvious that, on the whole, stare decisis promotes fairness, and the question is, in part, an empirical one.

Fairness does not hold out any more hope of justifying across-the-board stare decisis than efficiency does, even if we accept the idea that litigants in different cases ought to be treated alike. And we should have doubts about that claim, at least as it is relevant to stare decisis. Fairness may demand that we apply the same rules to litigants in neighboring courtrooms, but it does not clearly demand that we apply the same rules to litigants separated by decades. Comparative claims of fairness—claims of the form *A* deserves X because *B* received X—are only persuasive to the extent that the *A* and *B* are similarly situated. Litigants can frequently claim the benefit of stare decisis even though they are far removed in both time and place from the source of the precedent.

There are, of course, non-comparative claims of fairness that might support stare decisis. Non-comparative claims of fairness are claims about how one deserves to be treated irrespective of how others are treated. Many of the norms we associate with due process are norms of non-comparative fairness. For example, it is unfair to detain a person indefinitely without the opportunity for a hearing before an impartial fact finder, and it would not make it fair to do this as a matter of routine practice. It is also unfair to punish a person for violating a criminal statute passed after the alleged violation, and it would not improve the situation if people were commonly punished for ex post violations. More relevant to stare decisis, perhaps as a matter of non-comparative fairness, people ought to be given notice of the rules that will be applied to them, an aim stare decisis could help facilitate. Or perhaps as a matter of non-comparative fairness, courts shouldn't disturb settled expectations. These sorts of claims may well justify stare decisis in delimited areas of the law. But this is subject to the point made above. To determine whether stare decisis is fair, gains in fairness from providing notice or protecting settled expectations must be weighed against the losses from entrenching unfair rules. Because of this, fairness, like efficiency, is incapable of providing justification for an across-the-board practice of following precedent irrespective of merit.

[22] 323 U.S. 214 (1944).

V

We started our inquiry with the question, "What justifies adherence to a decision known to be wrong?" We saw that this question is misleading because it does not accurately capture what stare decisis requires. So we asked a different question: "What justifies adherence to a precedent irrespective of its merit?" This question better captures the canonical formulation of stare decisis, but it still leaves us with an intractable problem. We can explain why lower courts ought to defer to the decisions of higher courts simply by invoking Raz's normal justification thesis. But we cannot find an analogue that explains why the highest court in a land should accord its own previous decisions similar deference. Neither efficiency nor fairness does the trick.

Fortunately, to justify stare decisis, we need not justify adhering to decisions irrespective of their merits. After all, courts do not do that. With some regularity, courts overrule precedents and limit their scope by distinguishing them. We can think of overruling and distinguishing as ways of breaching stare decisis. But we can also see overruling and distinguishing as part of the practice of stare decisis. On this broader view, the central demand of stare decisis is that courts engage with the past and act with integrity.

We owe our understanding of the special connection between law and integrity to the work of Ronald Dworkin. Dworkin was the first to recognize that integrity is central to understanding our legal institutions. This was no trivial observation, because (as we shall see below) integrity may not be a value for all institutions, perhaps not even all law-like ones.

Before we can explore the connection between stare decisis and integrity, we must get a fix on what integrity is. Providing a full account is too large an endeavor to take on here, but some preliminary efforts will help us to get an alternative account of stare decisis off the ground. According to Dworkin:

> We want our neighbors to behave, in their day-to-day dealings with us, in the way we think right. But we know that people disagree to some extent about the right principles of behavior, so we distinguish that requirement from the different (and weaker) requirement that they act in important matters with integrity, that is, according to convictions that inform and shape their lives as a whole, rather than capriciously and whimsically.[23]

Acting with integrity does not require that one act correctly. Rather, it requires that one always act in accord with genuine convictions about what the right way to act is. Integrity may seem like a second-best sort of value, one to be pursued only when one cannot be confident of acting correctly. Indeed, Dworkin seems to invite this understanding of integrity by suggesting that we demand it of others

[23] R. Dworkin, Law's Empire 166 (1998).

because we know that we disagree about what is right. Integrity is not a second-best value, however, and our primary reason for demanding integrity in ourselves and others is not our inability to agree about what is right. Rather, we demand integrity because, whatever doubt we have about particular moral views, we are confident that the demands of morality are coherent.[24] We are also confident that morality does not demand that we act capriciously or whimsically in matters of importance. Thus, if we are striving to act morally, we will act with integrity.

Let me put the point another way. Someone who acts with integrity may nevertheless do something she ought not to do from time to time. But someone who acts without integrity, someone who acts incoherently or capriciously in matters of importance, simply cannot be acting morally except by happenstance. A lack of integrity signifies a lack of a commitment to act morally.

An individual displays integrity when her actions taken as a whole reflect a commitment to a coherent and defensible moral view. The moral view must be coherent because the demands of morality are coherent. However, commitment to an evil moral view is no virtue simply because the view is coherent. Thus, integrity also requires that one act in accord with a defensible moral view. Otherwise, acting with integrity would not be a way of striving to act morally.

Of course, a defensible moral view is not necessarily a true one. This is why Dworkin is right when he says that the demand that we act with integrity is weaker than the demand that we act morally. However, acting with integrity is part of striving to act morally, and that is the source of its value. We respect others for their integrity even when we disagree with their actions because we recognize their genuine commitment to acting morally.

Now we get to the important part for understanding stare decisis. Acting with integrity requires recognizing that what one has done in the past is relevant to what one ought to do now. Integrity requires a commitment to a moral view, and one can only display a commitment to a moral view by a pattern of behavior across time. Constantly shifting moral views are a sign of caprice, not integrity.

Importantly, refusing to change one's moral views in the face of persuasive reason to do so is also inconsistent with integrity. Remember that integrity is valuable because it is an aspect of striving to act morally. If you are genuinely striving to act morally, you will change your beliefs and behavior in response to persuasive argument or new evidence. A rigid refusal to change one's moral convictions in the face of new information is not a sign of integrity; it is a sign of obtuseness.

There are at least two situations in which integrity requires one to repudiate one's past. The first is when one's moral convictions undergo genuine change. Integrity requires acting in accord with one's new moral convictions. If a person's moral convictions are constantly shifting, we will not say that she acts with integrity even if she always acts in accord with her genuine moral convictions. This is

[24] I am using "morality" in its widest sense, in which the demands of morality are coextensive with the demands of reason.

because we doubt that she has any commitment to her moral views or to acting morally. But in the normal case, revisions in one's beliefs and behaviors are not only consistent with integrity, they are required by it.

One should also repudiate one's past when one's past behavior is inconsistent with the moral commitments one has made. This is an all too common occurrence for most of us. Integrity does not require that one repeat one's mistakes; rather, it requires correcting them to bring one's behavior in accord with one's moral commitments.

These remarks are, of course, only exploratory. A full consideration of the nature of integrity demands more space and attention than available here. However, we have made enough progress in understanding what integrity demands of individuals that we can turn our attention to what integrity requires of courts.

VI

Courts are moral actors, and a court can display integrity in much the same way that an individual can. A court displays integrity when its decisions reflect a commitment to a coherent and defensible view of the rights and duties people have under the law. Such a commitment can only be displayed by a pattern of decisions across time. If a court's rulings change capriciously, if it fails to pay heed to its own pronouncements, we will doubt that it has any genuine commitment to the views it expresses. On the other hand, if the court takes seriously what it has said in the past and it displays consistency and coherence in action, we will believe that the court acts on the basis of genuine convictions about the content of the law.

Why should courts act with integrity? For insight, let us turn once again to Dworkin. He writes:

> Integrity becomes a political ideal when . . . we insist that the state act on a single, coherent set of principles even when its citizens are divided about what the right principles of justice and fairness really are. We assume, in both the individual and political cases, that we can recognize other people's acts as expressing a conception of justice or decency even when we do not endorse that conception ourselves. This ability is an important part of our more general ability to treat others with respect, and it is therefore a prerequisite of civilization.[25]

We want the state (and, derivatively, its courts) to act in accord with a single, coherent set of principles for the same reason we want individuals to do so. We are confident that morality provides a coherent vision of what we owe to one another, and that that vision does not demand that the state or its agents act capriciously in matters of importance. If the state acts incoherently or capriciously in matters of importance, it cannot be acting morally except by happenstance. We may disagree

[25] DWORKIN, *supra* note 23, at 166.

about what morality requires of the state, but we want the state to strive to act morally. Acting with integrity is a sign that it does so.

Dworkin breaks down the demands of integrity into two principles: the principle of integrity in legislation and the principle of integrity in adjudication. The latter principle, he says, explains "why judges must conceive of the body of law they administer as a whole rather than as a set of discrete decisions they are free to make or amend one by one, with nothing but a strategic interest in the rest."[26] Stare decisis is a means by which we promote this sort of integrity in judicial decision making.

A court that considers itself bound by the principle of stare decisis recognizes that what it has done in the past affects what it ought to do now. Of course, integrity in judicial decision making is no more a matter of slavishly repeating past decisions, right or wrong, than it is for individuals. Just as individuals must sometimes repudiate their past, courts must do so as well. They must do so whenever their convictions about the content of the law undergo genuine change, and they must do so when they discover that their past decisions conflict with their genuine commitments. Of course, if a court constantly shifts its views, we will doubt that it has any genuine commitment to them, and we will not regard it as acting with integrity. But, in the normal case, a court can overturn a precedent it regards as mistaken without doing any violence to its integrity, and indeed, integrity may demand that it do so.

There is good reason to think of stare decisis as a broader practice than simply following precedent. If a court seeking to act with integrity has previously announced a rule of law, it has three options: it can follow it, it can overrule it, or it can distinguish the case. Overruling and distinguishing are as much ways of engaging with the past as following is. They are ways of saying, "we recognize that our prior decision is relevant in deciding what we ought to do now, but for these reasons we are not following it here." A court that did not consider itself bound by stare decisis would not need to overrule or distinguish cases because it would not recognize what it had done in the past as relevant to what it ought to do now.

An example of such an institution may help to make the point clear. Up until a few years ago, allegations of student conduct violations at the University of Georgia were adjudicated by an organization called the Student Judiciary.[27] The Student Judiciary heard cases running the gamut from trivial infractions like excessive noise in dorms to serious offenses such as DUI and sexual assault. Members of the Student Judiciary sat on panels as judges in what were essentially mini-trials to determine whether a student violated a rule and, if so, to impose an appropriate sanction. Sanctions ranged from reprimand to expulsion.

[26] DWORKIN, *supra* note 23, at 167.

[27] In the mid-1990s I was a member of the Student Judiciary at the University of Georgia, and I served for a year as its Chief Justice. The Student Judiciary has recently been replaced by the University Judiciary, a group similar in function to the Student Judiciary, but somewhat different in form.

The Student Judiciary had no system of precedent. A panel would not consider the decision of a previous panel, even if a previous decision is precisely on point. Thus, no case law grew up around the conduct rules or their implementation. Each panel treated each case as if no others had preceded it.

The Student Judiciary shunned precedent for a variety of reasons. One reason is that it was seeking to avoid some of the accoutrements of real legal systems. It did not want to require student defendants to research previous decisions, nor did it want to expend resources cataloguing them. For the Student Judiciary, efficiency counseled against stare decisis.

The most important reason for shunning precedent, however, was the way the Student Judiciary conceived of its mission. It understood itself to share the educational aims of the broader university. The organization believed that its responsibility was to provide each student who appeared before a panel with the best educational experience it could. A system of precedent might have gotten in the way of tailoring each student's hearing and sanction to their individual educational needs. Without precedent, maximum flexibility was maintained. The system's rejection of stare decisis was so complete that decisions from prior cases were not even considered relevant, let alone dispositive.

Integrity was simply not a value the adjudicative practices of the Student Judiciary recognized. This is interesting, because the Student Judiciary was as court-like as an institution can be without being part of an actual legal system. The Student Judiciary administered a system of conduct rules of general application through adjudicatory bodies with judges and lawyer-like advocates. The Student Judiciary was even an organ of the state.[28]

I suspect that the Student Judiciary was, in fact, concerned with the integrity of its decision making. Stare decisis is not the only way to promote integrity. The Student Judiciary demanded that potential members participate in lengthy training, which promoted consistency and coherence in the decisions of its panels, and members received continuing education as well. Nevertheless, in the individual case, the Student Judiciary was designed to be unresponsive to claims that a prior decision bound it to a course of action. Thus, unlike a court that adheres to stare decisis, the Student Judiciary never had the need to distinguish or overrule one of its prior decisions.

In contrast to the Student Judiciary, a court that adheres to stare decisis is different not simply because it has a commitment to following its prior decisions, but because it has committed itself to the idea that what it has done in the past is relevant to what it ought to do now. Such a court answers to its precedents, by following them, distinguishing them, and, on occasion, overruling them. Following, distinguishing, and overruling are all part of the pursuit of integrity in adjudication.

[28] *Red & Black Pub. Co., Inc. v. Board of Regents*, 427 S.E. 2d 257 (Ga. 1993) (holding that the Student Judiciary is subject to Georgia's Open Records Act, which applies to state agencies).

VII

This essay started with a question: could legal reasoning really be so different from everyday reasoning that principle requires courts to make mistakes repeatedly rather than correct them? Notwithstanding the traditional view of stare decisis, the answer is no. Stare decisis does not require a court to blindly follow incorrectly decided precedents. Nor does it require a court to stand by a precedent irrespective of its merit. What stare decisis does require is that courts engage with the past and act with integrity. They do this when they display a commitment to a coherent, defensible view of the content of the law.

Now that we have an expanded view of the practice of stare decisis, it is reasonable to wonder whether efficiency and fairness might not play a role in justifying it after all. Neither efficiency nor fairness seemed promising as a justification for a practice of following past decisions irrespective of their merit. But the broader practice of engaging with the past by following, overruling, and distinguishing precedent may well be both fair and efficient. Whether it is either, of course, depends on how good a job courts do of it. The efficiency and fairness of stare decisis conceived broadly still depends, in part, on the efficiency and fairness of the decisions in particular cases.

The real place for efficiency and fairness in an explanation of stare decisis is not so much in justifying the practice, but in giving it its contour. This essay has not addressed the conditions under which a court ought to overturn one of its precedents. In any given case, the question of whether a court should follow a precedent depends crucially on matters of fairness and efficiency, and on a multitude of other values as well. The fact that courts bother to engage with precedent at all, however, is best explained by judicial aspirations to act with integrity.