

Note for the Colloquium: Sometimes one has the privilege of writing papers on exciting topics like torture and targeted killing, hate speech and hedgehogs. But sometimes one has to pick up a shovel and go back down to the dank, featureless coalface of basic jurisprudence. This is such a paper. There is nothing exciting about it, except that it addresses an elementary issue that everyone agrees has not been properly resolved and that we still need to think about.

Stare Decisis and the Rule of Law: A Layered Approach

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In an article published in 1987, Fred Schauer made an interesting suggestion, which I think opens the prospect of a better understanding of stare decisis than we have had hitherto. He said this:

An argument from precedent seems at first to look backward. The traditional perspective on precedent ... has therefore focused on the use of yesterday's precedents in today's decisions. But in an equally if not more important way, an argument from precedent looks forward as well, asking us to view today's decision as a precedent for tomorrow's decisionmakers. Today is not only yesterday's tomorrow; it is also tomorrow's yesterday.²

Disappointingly, Schauer himself did not do much with this. But it ought to be a promising perspective. We are familiar, for example, with ways in which people become more cautious about their decisions when they are worried about "setting a precedent."³ It is less easy to see how Schauer's perspective helps us figure out the basis of precedent without already assuming the principle. But it's worth trying. In this essay, I am going to use the forward-looking perspective to explicate the relation between stare decisis and the rule of law. I believe we are unlikely to

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² Frederick Schauer, *Precedent*, 39 STANFORD LAW REVIEW, 571, 572-3 (1986-7).

³ Shakespeare has Portia respond thus to Bassanio's plea to set aside Shylock's bond in Act IV, Scene 1 of THE MERCHANT OF VENICE: "It must not be; there is no power in Venice / Can alter a decree established: / 'Twill be recorded for a precedent, / And many an error by the same example / Will rush into the state: it cannot be." For discussions, see Kenji Yoshino, *The Lawyer Of Belmont*, 9 YALE JOURNAL OF LAW & THE HUMANITIES 183, 209n (1997) and Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE LAW JOURNAL 2031, 2033 (1996).

make much progress in our understanding of stare decisis unless we begin by focusing on the reasoning of the judge whose decision is going to be used as a precedent (I will call her the *precedent judge*, or often just J_P). Are there any rule-of-law constraints on what J_P does and the way she reasons to a conclusion in the case in front of her that affect the position of a *subsequent judge* (J_S) in a manner that looks something like the operation of a principle of stare decisis? Once we have a sense of this, then we can go on to consider any additional rule-of-law constraints that apply specifically to the subsequent judge, J_S , and others in the legal system.

The idea is to consider stare decisis in terms of *layers* of justification. Some considerations apply to J_P , some apply to J_S in light of the considerations that apply to J_P , some require J_S to take notice of J_P 's decision in his own decision-making, some require J_S not to lightly repudiate the principle of J_P 's decision in order to replace it with a decision of his own (which he expects will also function as a precedent), and so on. In each layer, we will see how different considerations of the rule of law can be applied to this issue.

1. Why *Rule-of-Law* Justifications?

We really need a justification for stare decisis. It is not something we're entitled to neglect on the ground that it is too obvious to need spelling-out. Many respected jurists oppose the principle. And its costs are pretty evident. There are costs in terms of justice or efficiency of bad decisions. C might have won his case against D had the court not been constrained to follow $A v. B$. That would have been better for C and maybe better (in terms of justice or efficiency) for society as a whole, if we assume that the court in $C v. D$, unconstrained by stare decisis, could have improved on $A v. B$. There are also process-costs—the immense effort that has to be invested by counsel for C and D , not to mention the court in $C v. D$, to unearth all the precedents and construct laborious arguments about what they mean, whether they can be distinguished, whether this is a rare case in which they ought to be overridden, and so on. All this energy might have been better devoted to considering the just or efficient settlement of the dispute between C and D on its merits. So: justifying stare decisis is not just a matter of saying a few things in its favor in an after-dinner speech. It is a matter of showing why costs like the ones just mentioned are worth bearing.

Let's begin with the state of play. Our jurisprudence is cluttered with a haphazard variety of considerations adduced to justify stare decisis. They include the importance of stability, respect for established expectations, decisional efficiency, the orderly development of the law, Burkean deference to ancestral wisdom, formal or comparative justice, fairness, community, integrity, the moral importance of treating like cases alike, and the political desirability of disciplining our judges and reducing any opportunity for judicial activism.⁴ The justification of stare decisis is a field to which many contributions have been made, but to which little system has been brought.

I too will be less than systematic in this paper; certainly less than comprehensive. I don't want to consider everything that can be said or has been said in favor of stare decisis. My contribution will be to consider a subset of justificatory considerations that fall under the heading of "the rule of law." Is there anything in the idea of the rule of law that requires courts to follow precedent? Are there any reasons among the reasons commonly adduced for stare decisis that we can rightly regard as rule-of-law reasons? Or is the rule of law neutral on the matter, or perhaps even opposed to stare decisis?

Sometimes people say we should follow precedent because we are no wiser than our ancestors. It is a matter of epistemic humility, "the bank and capital of ages," and so on.⁵ This may or may not be a compelling justification but even if it is, it has little to do with the rule of law. The same can be said about justifications that point to such things as agenda limitation, decisional efficiency, and system-legitimacy.⁶ These are all interesting; maybe they are important; but they are not rule-of-law justifications. So I put those arguments aside. Other justifications that are adduced for stare decisis do resonate with rule-of-law ideas: the quest for

⁴ Even *stare decisis* itself has been invoked as a justification. Richard Fallon *Stare Decisis and the Constitution*, 76 N.Y.U. LAW REVIEW 570, 579 and 582 (2001): "[I]t also matters enormously that stare decisis is a principle with deep roots in historical and contemporary practice. ... When practices have become 'thoroughly embedded in our national life' or 'part of our national culture,' courts tend to feel that it would be both hubristic and inappropriately disruptive for the judicial branch ... to mandate their dismantling." The embedded quotation is from *Dickerson v. United States* 530 U.S. 428, 443 (2000).

⁵ EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 87 (L.G. Mitchell ed., 1999). The same can be said about arguments (also Burkean in character) that stare decisis helps preserve our traditions and the character of our community: see Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1043 ff. (1990).

⁶ See, e.g., Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUMBIA LAW REVIEW 723, 744-52 (1988) and Schauer, *Precedent*, 599-600.

constancy and predictability in the law and the importance of generality and treating like cases alike. Those are the justifications I shall consider. There will be some discussion of predictability in section 2, but most of my discussion (in sections 3 and following) will focus in the first instance on the rule-of-law principle of generality—particularly generality understood as a constraint on the decision-making of the precedent judge, and the impact of that on subsequent judicial decisions. In sections 3 and 4, I shall make a case that the rule-of-law constraint of generality is not the same principle as the one that commands us to treat like cases alike. It is not just consistency. Instead it is a principle that commands judges to work together to articulate, establish, and follow general legal norms. Only after developing this theme of generality will I circle back (in section 5) to the importance of constancy and calculability in the law.

Why am I interested in this subset of reasons for *stare decisis*? Partly it is born of my interest in the rule of law as a political ideal. Teaching the subject year after year, I am struck by how little there is on the significance of *stare decisis* for the rule of law. Apart from some inconclusive discussion in the later work of F.A. Hayek, it is not addressed in any of the modern rule of law canon: Fuller, Raz, Bingham, etc.⁷ I would rather like to fill that gap.⁸

Partly, too, it is because the US Supreme Court in one of its most sustained discussions of *stare decisis* cited the rule of law as a reason for not overturning precedents too often. In *Planned Parenthood v. Casey* 505 U.S. 833 (1992) three of the Justices addressed the prospect of overturning the abortion decision in *Roe v. Wade* 410 U.S. 113 (1973).⁹ They devoted a long section of their argument to the

⁷ F.A. HAYEK, RULES AND ORDER, Volume 1 of LAW, LEGISLATION AND LIBERTY, 94-123 (1973); LON FULLER, THE MORALITY OF LAW (1964); Joseph Raz, *The Rule of Law and its Virtue*, in his collection THE AUTHORITY OF LAW 210 (Second edition, 2009); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 270-3 (1980); TOM BINGHAM, THE RULE OF LAW (2010).

⁸ There is quite a good discussion in NEIL MACCORMICK, RHETORIC AND THE RULE OF LAW (OUP 2005), where it is said (*ibid.*, 142) that “[f]aithfulness to the Rule of Law calls for avoiding any frivolous variation in the pattern of decision-making from one judge or court to another.” (I have drawn on this at various points. See notes 31, 47, and 52 below.)

There is also a chapter entitled “Towards a Rule of Law Ideology for Precedents” in RAIMO SILTALA, A THEORY OF PRECEDENT FROM ANALYTICAL POSITIVISM TO A POST-ANALYTICAL PHILOSOPHY OF LAW (Hart Publishing, 2000). Unfortunately, Siltala’s book is not an easy read, but it does give a good account on pp. 165 ff. in Fullerian terms of the rule-of-law difficulties with the system of precedent.

⁹ *Roe v. Wade* had been sustained at least once before on the ground of *stare decisis* in a way that made a connection with the Rule of Law. See *City of Akron v. Akron Center for Reproductive Health* 462 U.S. 416, 419-20 (1983): “[A]rguments continue to be made, in these cases as well, that we erred in

issue of stare decisis, insisting at the outset that “the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.”¹⁰ Everything they said was interesting.

However, the argument in *Planned Parenthood* is not quite what we are looking for, for two reasons. One is that the Court concentrates most of its attention in this passage not on the fundamental reasons that there are for following precedent, but rather—assuming there are such reason—what additional considerations may be relevant to the prospect of overturning a precedent in a system that acknowledges stare decisis. Later I shall argue that it is important to hold these two ideas apart: (i) the justification for following the decision in a previous case (thus making it a precedent in the first place, and (ii) the justification for being cautious before one overturns an established precedent. These are separate layers in our understanding of stare decisis. That they need to be separated in thought is clear from the fact that the overturning of a precedent normally *presupposes* stare decisis: at the very least, it supposes that the principle of the new decision, articulated in overturning the old decision, will henceforth itself be treated as a precedent. So if we really want a *foundational* account of stare decisis, we need to begin by putting the familiar reasons for and against overturning precedents to one side.

The other reason for putting the *Planned Parenthood* argument to one side is that much of it was concerned with issues of legitimacy and appearances. The joint opinion was interested in ways of creating and sustaining the impression that the Court as an institution was operating in accordance with the rule of law. It asserted that too-frequent overturning would undermine that impression:

There is ... a point beyond which frequent overruling would overtax the country's belief in the Court's good faith. ... If that limit should be exceeded, disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term. The legitimacy of the Court would fade with the frequency of its vacillation. ... Like the character of an individual, the legitimacy of the

interpreting the Constitution. Nonetheless, the doctrine of stare decisis, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law. We respect it today, and reaffirm *Roe v. Wade*.”

¹⁰ *Planned Parenthood v. Casey* 505 U.S. 833, 854 (1992).

Court must be earned over time. So, indeed, must be the character of a Nation of people who aspire to live according to the rule of law. Their belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals.¹¹

Maybe the joint opinion is right about this. But, even on its own account, preserving judicial legitimacy is not exactly a rule-of-law argument for following precedent. If there *are* rule-of-law justifications for not overturning established precedents, then overturning precedents too often certainly may create the impression that the rule of law is not being properly attended to. And no doubt that will have an impact on the Court's legitimacy in the eyes of those who worry about these matters. But then we need to look at what exactly those justifications are and why they are important. That's the substance of the matter; all the rest is publicity.¹²

I have one other reason for considering the relation between *stare decisis* and the rule of law. The two ideas sound congruent: they both seem to privilege what the joint opinion in *Planned Parenthood* called principled decision-making. But it is not hard to throw them into opposition with one another.¹³

For example, it is not hard to see *stare decisis* as crystallizing and entrenching the rule of men rather than the rule of law. Some matter arises for decision and a political official, who happens to be a judge, settles it in a certain way in a certain case, deploying his own ideals and his own preferences. And now his decision has to be followed in all future cases where a similar issue arises;

¹¹ *Ibid.*, 866-8.

¹² I am also not going to consider the justification set out in 1787 by Alexander Hamilton in THE FEDERALIST PAPERS (#78): "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them." That too sounds as though it presupposes *stare decisis*. Or, if not, it sounds as though we have had to invent *stare decisis* in order to furnish the judges with more law to be faithful to.

¹³ That opposition has revealed itself concretely in controversy concerning the constitutional status of the abortion decisions. See, e.g., Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?* 109 YALE L.J. 1535 (2000); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARVARD J. LAW & PUBLIC POLICY 23 (1994); Fallon, *Stare Decisis and the Constitution*; and Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 Columbia Law Review, 731, 788-96 (2010).

subsequent generations of judges are to be inhibited from overturning it on the ground that the first judge misconstrued the law. Of course that states it too strongly: stare decisis is not an absolute and even in a system of precedent, earlier decisions can be revisited. But stare decisis is supposed to make a difference and the problem for the rule of law is that the difference it makes is to give a measure of entrenched weight to an earlier decision in a way that may make it more difficult for subsequent generations of judges to apply the law as they understand it.

This difficulty is particularly apparent when stare decisis does its work alongside some source of law which is not itself based on precedent. Consider, for example, the operation of precedent in American constitutional law. The source of American constitutional law is a text framed in 1787-91 and amended a few times subsequently: the text presents itself as (in Article VI) as the supreme law of the land. But its provisions are far from lucid and in many cases their bearing is uncertain or controversial. However if a few decisions establish a particular reading, R_1 , of a constitutional clause, C , then R_1 becomes authoritative by operation of stare decisis and it will be difficult for counsel to argue (and for a court to accept an argument) that an alternative reading, R_2 , would be a more faithful understanding of C . The judge who is faced with this situation may well feel that stare decisis is thus an impediment to the rule of law: it makes it much harder for him to decide on the basis of fidelity to the Constitution; instead he has to submit to the continuing effect of the decisions of people in the past in circumstances where (as he sees it) their decisions are taking us in a direction contrary to that required by the independent source of law (the text of the Constitution).¹⁴

It may be harder to see the same difficulty in areas of law where stare decisis operates more or less alone in the legal environment. It is tempting to say that in common law cases, for example, all we have are precedents, so there is no legal source that can be associated with the rule of law in contradistinction to the demands of stare decisis. But the tension can arise nonetheless. In most areas of common law—such as tort or contract—there are by now plenty of established doctrines and principles that have a well-theorized life of their own apart from the precedents that established them. These doctrines and principles establish a

¹⁴ This argument is particularly powerful if the justification for following precedent is mainly pragmatic (decisional efficiency or the commercial advantages of predictability, etc.).

juridical background, B, relative to which certain problems remain unsettled here and there. If one of these problems crops up in a case, a court may purport to settle it by adopting reading R_1 of the doctrinal background B: on the basis of R_1 , B generates a particular solution to the hitherto unsettled problem. But as in constitutional law, various different readings of the doctrinal background may be possible. Later judges may be much more impressed by a different reading, R_2 , yielding the opposite solution to the problem. As before, they will think that fidelity to the law overall requires them to apply the doctrinal background in accordance with R_2 and to eschew R_1 , which they regard as a distortion. If they feel strongly enough about this they may succeed in getting the earlier precedent overturned. But to the extent that stare decisis has any influence in the matter, it will make this process more difficult: i.e., it will make it harder for them to follow their duty of fidelity to the law as they understand it for it will press them towards (what they regard as) an erroneous reading of the legal background simply because some person enshrined that reading in an earlier decision. As before, stare decisis can pull us in a direction opposite to the commands of the rule of law.

Of course it doesn't necessarily do that in either kind of case. Just as it has the power to entrench erroneous decisions against later correction, so stare decisis also has the power to entrench correct decisions against later temptations and deviations. In both constitutional and common law contexts, stare decisis can be the servant as well as the opponent of the rule of law. Still the possibility of dissonance between the two principles is unsettling. That is why I think it is worth exploring the possibility that the rule-of-law ideal might command fidelity to precedent even for a person who reckons he could do better for the law by not following the principles that others have laid down.

Some may say that following precedent is so much a part of our conception of law and legal practice that any ideal plausibly denominated as "the rule of law" must necessarily involve this. Since stare decisis is, in the words of Cardozo, the "every-day working rule of our law,"¹⁵ it would not be surprising if the rule of law sought to incorporate this technique and the principle that commands it as one of the leading elements of good governance. In his contribution to recent debates about constitutional stare decisis, Richard Fallon argues that establishing and following precedents can be regarded as part of the meaning of "the judicial

¹⁵ BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 20 (1921).

power” that the Constitution authorizes in Article III: “[F]amiliar sources can be adduced to suggest that ‘the judicial Power’ was understood historically to include a power to create precedents of some degree of binding force.”¹⁶ But this won’t quite do. Some systems of law claim not to respect any principle of stare decisis; perhaps the rule of law directs us towards them or is indecisive on the matter. Anyway, even in a given legal system, law means many things. It comprises constitutions, statutes, customs, legislation, precedents, principles, doctrines, agency rules, and so on. We have known since Aristotle (and we see the point reaffirmed in Hayek’s later work) that not all of these are equally privileged under the heading of “the rule of law.”¹⁷ Maybe the authority of precedent is a marginal case of law so far as the rule of law is concerned; or maybe it is central.¹⁸ That’s what I want to find out.

2. The Right Sort of Predictability

There is a cluster of considerations commonly cited in support of the system of precedent that seem to invoke rule-of-law values: these include the importance of certainty, predictability, and respect for established expectations. By commanding that judges follow previous decisions, stare decisis is supposed to make it easier for people facing a new situation to predict how the courts will deal with it: they will deal with it in the way they have dealt with similar situations in the past, rather than striking out unpredictably with a new approach of their own. The predictability that this fosters is supposed to make it easier for people to exercise their liberty, i.e., their autonomous powers of planning and action. The connection between liberty and law’s predictability is a powerful theme in the modern rule-of-law literature. Hayek put it this way in *The Constitution of Liberty*:

¹⁶ Fallon, *Stare Decisis and the Constitution*, 579. Fallon goes on to observe: “[I]t is settled that the judicial power to resolve cases encompasses a power to invest judgments with ‘finality’ ... And there can be little doubt that the Constitution makes Supreme Court precedents binding on lower courts. If higher court precedents bind lower courts, there is no structural anomaly in the view that judicial precedents also enjoy limited constitutional authority in the courts that rendered them” (ibid., 581).

¹⁷ See ARISTOTLE, *THE POLITICS*, Bk. III, Ch. 16: “A man may be a safer ruler than the written law, but not safer than the customary law,” and HAYEK, *RULES AND ORDER*, Ch. 4 (denigrating legislation as a marginal kind of law).

¹⁸ For the distinction between central and marginal cases of law and its significance in jurisprudence, see FINNIS, *NATURAL LAW AND NATURAL RIGHTS*, Ch. 1.

In that they tell me what will happen if I do this or that, the laws of the state have the same significance for me as the laws of nature; and I can use my knowledge of the laws of the state to achieve my own aims as I use my knowledge of the laws of nature. ... Like the laws of nature, the laws of the state provide fixed features in the environment in which [one] has to move.¹⁹

The Supreme Court put it more pithily in *Planned Parenthood v. Casey*: “Liberty finds no refuge in a jurisprudence of doubt.”²⁰

Everyone thinks that considerations of this kind are of great importance in justifying stare decisis. But they are not simple considerations. The use of stare decisis to foster predictability is a complicated idea, and it is in the complications that we find the rule of law doing its hardest work. For consider: we sometimes phrase this justification in terms of a principle about the importance of protecting expectations. But before anyone can follow this principle, there must be expectations to protect.²¹ So there seem to be two elements:

(a) Legal practice and legal decision-making should be such as to give rise to expectations.

(b) These expectations should, by and large, be respected by other legal decision-makers.

The two are inextricably bound up with one another, but take either of them away and the principle collapses. Take (a) away: J_P hears a case and then just points silently to one of the parties, indicating who has won. Is it possible, on this basis, for anyone beyond the two litigants in the case to form expectations about how the courts will reach their decisions in the future? Can this decision foster any expectations for J_S to respect? Subsequent parties may guess at the rationale of the decision in the precedent case by noticing some striking fact and speculating about its importance. But a guess is not an expectation. Consider a case posed by Jeremy Bentham:

A Cadi comes by a baker's shop, and finds the bread short of weight: the baker is hanged in consequence. This, if it be part of the design that other

¹⁹ F.A. HAYEK, *THE CONSTITUTION OF LIBERTY*, 142 and 153 (1960).

²⁰ *Planned Parenthood v. Casey* 505 U.S. 833, 844 (1992).

²¹ Cf. NEIL DUXBURY, *THE NATURE AND AUTHORITY OF PRECEDENT* 164 (2008): “Reliance does not justify precedent-following, but ... emerges out of the fact that precedent-following is already the norm.”

bakers should take notice of it, is a sort of law forbidding the selling of bread short of weight under the pain of hanging.²²

But even to know that, we have to know something of what was in the Cadi's mind. As Bentham puts it, "[i]t is evident enough that the mute sign, the act of punishment ... can express nothing of itself to any who have not some other means of informing themselves of the occasion on which it was given." Officials who were present at the incident and followed the Cadi's gaze and watched what he mouthed as he silently strangled the baker may form some sort of expectation. But other expectations by lawyers and officials who were not present might be all over the place. One might infer, panic-stricken, that all bakers are to be hanged. Another might infer that there is something especially bad about selling bread in daylight hours during Ramadan. A third might infer that the punishment has something to do with short weight, but applies only to egregious cases, and so on. Bentham says that to get anything like a legal rule, you not only have to choose among these grossly disparate speculations, but you also have to figure out

of the boundless group of circumstances with which the act punished must necessarily have been attended, ... which of them were considered as material? what were received as inculcative? what were not suffered to operate in the way of exculpation? to what circumstances was it owing that the punishment was so great? to what others that it was no greater? These and a multitude of other circumstances which it would be needless to repeat must all be taken into the account in the description of the case.²³

His inference from all this was that we should abandon the idea of treating precedent decisions as sources of law and rely on a legislated code.²⁴ Others—more committed than he was to the system of precedent—might infer that expectations are never established by single precedent decisions. The Cadi's mute decision does not make law, but someone subsequently making something of it may. Or putting it more directly in terms that apply realistically to courts: it is not until J_S has made something of what J_P did—inferring and applying a holding, a

²² JEREMY BENTHAM, OF LAWS IN GENERAL 153 (H.L.A. Hart ed., 1970).

²³ *Ibid.*, 184. See also H.L.A. HART, THE CONCEPT OF LAW, Revised edition, 125 (1994).

²⁴ See also GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION__ (1986) and Jeremy Waldron, *Custom Redeemed by Statute*, 51 CURRENT LEGAL PROBLEMS 93 (1998).

ratio decidendi—that we have anything that can form the basis of an expectation. Even so, I am inclined to say that this process cannot really get underway unless the precedent judge, J_P, does something to present her decision in an articulate light that allows subsequent judges to go to work on it.

I said there were two elements: (a) legal practice and legal decision-making should be such as to give rise to expectations; and (b) these expectations should, by and large, be respected by other legal decisionmakers. What happens if we take (b) away? The precedent judge might articulate his decision fastidiously in terms of a general principle that can be perceived as the *ratio decidendi* of her decision. J_P makes this available for future generations of judges. But her doing so will make no sense unless she expects them to cooperate in the respecting of expectations—not necessarily by accepting and applying her formulation as canonical but at least by participating in the creating and sustaining of expectations rooted in decisions like hers. People will not form expectations just because one judge makes an explicit attempt to create them; they will wait and see how subsequent judges respond to J_P's attempt.²⁵

There are two things that subsequent judges may do that undermine predictability in the legal system. (1) One is that they may take no notice of what J_P does in her case: they may approach similar cases in the future with no thought about how the case that came in front of her was decided. (2) The other is that, even after J_P's decision is established as a basis for future expectations, they might decide they can improve on it and establish another better basis of expectations for this kind of case of their own. (What this means is that J_S becomes, as it were, his own J_P in respect of a new expectation; and, like the original J_P he will hope that other subsequent judges will pay attention to and try and follow the decision *he* has made.) This attempt to switch expectations no doubt diminishes predictability, but it need not ruin it altogether. It does not make it impossible for people to form and act on expectations about future legal decisions; it just adds an element of

²⁵ I don't mean that there is no point to a judge articulating reasons for her decisions unless she expects others to follow her *ratio decidendi*. There are other reasons why we value judicial reason-giving. Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARVARD L. R. 353, 388 (1978) says that the requirement that a judge give reasons is there not just to encourage the judge to be thoughtful, but because without such a requirement, the parties would have to "take it on faith that their [reasoned] participation in the decision[-making] has been real, [and] that the [court] has in fact understood and taken into account their ... arguments." It is also a matter of accountability: we want the judge to explain the grounds of her decision to the public, who might otherwise have doubts about the legitimacy of what she has done.

uncertainty to their calculations. How much uncertainty—how much damage it does to the basis of predictability—is a matter of degree and depends on all sorts of surrounding circumstances.

In most discussions of predictability, the focus is on (2). Making a case for respecting expectations involves requiring or counseling judges to limit the number of occasions on which they try to overturn established expectations and replace them with new expectations based in fresh decisions of their own. But obviously none of this is of any importance unless we attend first to (1). Judges who take no notice of previous decisions at all are unlikely to be impressed by attempts to establish new and better expectations. I don't mean that (2) is unimportant. Violations of (2) can become so frequent that they start to affect (1) and undermine the very possibility of established expectations. And even if that doesn't happen, (2) is still important in its own right. But it is secondary in the order of explanation, and I will return to it in section 5.

My point here is about multiple layers. As well as the ways in which the first decision-maker must act in order to make the establishment of expectations possible, there are various ways in which subsequent decision-makers must act as well, and these need to be considered layer by layer as well as in their relation to one another.

I said that the cluster of considerations concerned with predictability occupies a prominent place both in justifications of *stare decisis* and in various conceptions of the rule of law. But I doubt whether they are the final word on the justification of *stare decisis* even on the approach I am taking in this paper. For one thing, we know that the rule-of-law tradition does not treat predictability as the be-all and end-all. On the contrary, for various good reasons, it supports procedures and allows modes of argumentation that make the law much more unsettled and controversial than it would be if predictability were an overriding value.²⁶ What's more, we know that argument about precedent is one of these unsettling modes of argument. People worry, argue and bicker about the meaning of precedents, long

²⁶ I have argued this in several places: see Jeremy Waldron, *The Concept and the Rule of Law* 43 *GEORGIA LAW REVIEW* 1, 54-61(2008); *The Rule of Law and the Importance of Procedure*, in *NOMOS 50: GETTING TO THE RULE OF LAW* 3, 18-23 (J. Fleming ed., 2011); and *Thoughtfulness and the Rule of Law*, *BRITISH ACADEMY REVIEW*, issue 18 (July 2011). In this respect, I am strongly influenced by Dworkin's work on theoretical disagreement in law: see RONALD DWORKIN, *LAW'S EMPIRE* 31-43 (1986).

after any predictability that the precedent might have sponsored has evaporated.²⁷ And they are right to worry, argue and bicker, for the principle of stare decisis seems to introduce its own distinctive uncertainty into the law, particularly insofar as it does not operate as an absolute. Sometimes precedents will be followed; sometimes not; no one really knows when or why. Sometimes cases will be distinguished, sometimes time-honored rules will be overturned; and then just as we are getting used to that sort of flexibility, an ancient precedent will rear up all of a sudden out of its tomb, “overturning the establishments of the intervening periods, like Justinian brought to life again at Amalfi.”²⁸

If we really wanted predictability in law, we would be better off studying the political profiles of our judges in the realist manner rather than looking at precedents. Indeed we might be better off choosing judges who could be relied on not to change their political spots. No more Justice Kennedys. If we can make calculations based on his conservatism (or others’ liberalism), we will expect the Justices to honor precedent when that leads to results they find congenial, and to distinguish, sideline, or overturn them when that suits their politics. Predictability in that sense is easy: what would be the point of cluttering it up with law? Everyone would know where they stand, provided they knew the name and reputation of the man who had power over them. The rule of law is not the only way of introducing calculability into human affairs; the rule of men can do it too, if the men are well enough known.²⁹

It is a particular sort of predictability that the rule of law demands and that following precedent is thought to provide: namely, principled predictability, predictability that results from mapping an official and publicly disseminated

²⁷ See DWORKIN, *LAW’S EMPIRE*, 130ff. and 157-8.

²⁸ BENTHAM, *OF LAWS IN GENERAL* 187. For this indeterminacy in constitutional law, see Monaghan, *Stare Decisis and Constitutional Adjudication*, 743: “Because a coherent rationale for the intermittent invocation of stare decisis has not been forthcoming, the impression is created that the doctrine is invoked only as a mask hiding other considerations. As a result, stare decisis seemingly operates with the randomness of a lightning bolt: on occasion it may strike, but when and where can be known only after the fact.”

²⁹ The Critics always acknowledged this, even in the midst of their arguments about indeterminacy. See, e.g., Joseph Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 *YALE LAW JOURNAL* 1 (1984): “It is perfectly possible for there to be predictable patterns of behavior and decisionmaking even though the arguments advanced to justify the choices do not determine the outcomes. Saying that decisionmaking is both indeterminate and nonarbitrary simply means that we can explain judicial decisions only by reference to criteria outside the scope of the judge’s formal justifications.”

understanding of the various sources of law on to the fact-situations that people confront. I don't want to dismiss the predictability approach altogether. But I want to use the articulation that it has helped us with (in this section of the paper), to develop a different sort of rule-of-law approach to *stare decisis*.

3. The Rule of Law and the Precedent Judge

I indicated in the previous section that the precedent judge's work in a decision has to have a certain character before it can be used as the basis of a precedent, certainly before it can be used as a foundation for people's expectations about future legal decisions. This sounds as though we can justify the following if-then statement, addressed to J_P :

S: If you want your decision to be the basis of a precedent, then you must work on it and present in the following way: you must issue an opinion; you must state reasons; you must try to articulate the basis of your holding as a general norm; and so on.

Fair enough. But statement S will get no grip on anyone who is opposed to or indifferent about precedent. It can't form part of the fundamental argument for *stare decisis*, for that argument has to convince even those who are initially opposed to or indifferent about *stare decisis* that the business of creating, sustaining, and following precedents is a good idea in spite of its costs and its difficulties.

What if we take out the "if"-clause and just address the second part of S as an unconditional imperative to J_P ?

S*: You must work on your decisions and present them in the following way: you must issue an opinion; you must state reasons; you must try to articulate the basis of your holding as a general norm; and so on.

Now J_P is likely to ask "Why?" and we might set about trying to find answers in the rule-of-law tradition, reasons having to do with legality that require judges to act as S* commands. We need not forget the wider context of S, i.e. we need not forget that this is all going to add up eventually to a case for *stare decisis* but we might begin by considering reasons that support S* that so far have nothing to do with that.

So let us consider the rule-of-law principles that bear on a judge's response to a problem that comes before her. A situation presents itself and an official determination or resolution is needed. In a system uncontaminated by rule-of-law requirements, the judge might ask herself: "What is the best way to resolve this dispute?" But in a rule-of-law polity, she must ask: "What does the law require in this situation? Is there, for example, an established rule that bears directly and explicitly on this situation as everyone understands it?" In the situation I am imagining, the answer for J_P is likely to be "No; there is no established rule that bears directly and explicitly on this situation." So what now is to be done?

Some legal philosophers assume that when there is no law applying directly to a case then the judge should decide it using morality. For them, the problem of precedent is: why should the moral solution that J_P imposed on the situation (because there was no law to impose) function as law in a subsequent similar case for J_S ? And for them the most acute version of that question is: why should J_S be constrained by a decision on a moral issue made by J_P if J_P 's moral opinion is (in J_S 's view) morally flawed, both as it applied to the case in front of J_P and as it would apply to the case that J_S has to decide?³⁰ I think this is an unhelpful way of presenting the issue; it makes the problem of stare decisis much more intractable than it needs to be.³¹

So let's go back to the precedent judge, faced with the first case. Once she determines that there is no established rule that bears directly and explicitly on the situation before her, then surely the question she should ask herself is: "What bearing, then, *does* the law have on this situation, even if it is indirect or implicit?" She must stay in touch with the law; she must try "to relate the grounds of the

³⁰ Cf. Lawrence Alexander, *Constrained by Precedent*, 63 SOUTHERN CALIFORNIA LAW REVIEW 1 (1989): "I shall focus on those situations, however frequent or rare, in which a subsequent court believes that, though a previous case was decided incorrectly, it must, nevertheless, through operation of the practice of precedent following, decide the case confronting it in a manner that it otherwise believes is incorrect. In short, I shall be dealing with constraint by incorrectly decided precedents. ... [W]hen I speak of precedents that are 'incorrect' in the eyes of the subsequent court, I am referring to cases of first impression, cases that were directly governed by principles of political morality ... and in which those principles ... were misapplied (in the view of the subsequent court)."

³¹ See also MacCormick's insistence on the same point in RHETORIC AND THE RULE OF LAW, 144: "[I]t must seem doubtful whether any adequate understanding of precedent ... could proceed in the absence of an adequate theory of legal justification. Only by knowing the kinds of justifying reasons which are proper to judicial decisions can we know the possible elements of judicial precedents. Surprisingly, a great deal of writing about precedent has proceeded without full regard to the prerequisites of an articulate theory of legal justification."

present determination in some reasoned fashion to previously established principles and policies and rules and standards”;³² she should not abandon the law for the siren charms of morality at the first sign of difficulty. She must ask herself something like a 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).”³³

I will say more about Dworkin in just a minute, but first let me say *why* J_P must maintain a steady connection with the law, why she should try to figure out a legal answer to her problem, even when the law has no direct or explicit bearing. For one thing, this is what the rule of law requires.³⁴ To decide the matter morally is to submit the case to the rule of man (or in this case woman). We might have to do this in a legal vacuum (a state of nature), but we are not in a legal vacuum simply because law does not bear directly or explicitly on the problem that we face.³⁵ The rule of law is a demanding discipline and it dictates something like a Dworkinian striving for an interpretation of such legal materials as exist in order to decide the problems that come for official decision.³⁶ For another thing (though this amounts to more or less the same point), J_P is to think of herself as deciding in the name of the whole society, not in her own name; not only that, but she is deciding *as a court*, as part of the judiciary.³⁷ The order that is imposed on the case

³² HENRY M. HART, AND ALBERT SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 569 (1994); for this citation I am obliged to Larry Alexander, *Judges as Rule Makers*, in Douglas Edlin (ed.) *COMMON LAW THEORY* 41n (2007).

³³ DWORKIN, *LAW’S EMPIRE*, Ch. 7.

³⁴ Cf. John Gardner, *Some Types of Law*, in Edlin (ed.) *COMMON LAW THEORY*, 66: “Typically judges set about adding to case law by applying existing law.... [T]hey argue that a certain ruling, even if not required by existing law, would be consistent with existing law and a sound development of existing law. They proceed in this way because they have a professional moral duty (usually crystallized in their oath of office) to keep faith with whatever existing law there is on any subject on which they may make a ruling.”

³⁵ *Stare decisis* gets underway when law is already a going concern. Even for analytic convenience, we must not imagine the first step in the establishment of a precedent being taken by J_P in a state of nature.

³⁶ I think this is the position defended in Ronald Dworkin, *Hart’s Postscript and the Character of Political Philosophy*, 24 *OXFORD JOURNAL OF LEGAL STUDIES* 1 (2004), especially in the long section on “Legality” (ibid., 23-37).

³⁷ Joseph Raz insists in *Incorporation by Law*, 10 *LEGAL THEORY* 1 (2004) that even judges are humans and that moral decision-making is the default mode of decision-making by them as by all of us. But for the difference between moral decision-making in one’s own name and various forms of moral decision-

in front of her is not to be regarded as an order of this particular person; it is an order of the court. (This will be quite important when we think about J_S's subsequent relation to that order in section 4.)

The details of Dworkin's view of interpretive reasoning need not concern us here. (I am invoking a view of the kind he sets out, not necessarily every last detail.) He believes there is a moral element to it, and that at various points J_P's quest for the bearing of the law on the case in front of her is likely to involve her having to make moral judgments in her own voice.³⁸ But these moral judgments are entangled with the legal judgments she has to make. Also—and this has proved very controversial—Dworkin believes that there is definitely a right answer to the question of the bearing of the law on the case before J_P. I shall not assume that anything rests on this, except to say that it makes sense for J_P to approach the matter in that spirit. She has to figure out what bearing the law has on this case in fact; she should not think of herself as free to just *opt* for one view rather than another. By saying that J_P has to “figure out” the bearing of existing law on the case in front of her in this spirit, I hope I will not be taken to be subscribing to what Austin called the “childish fiction” of the declaratory approach.³⁹ The main point is that J_P should think of herself as facing a legal problem and trying to figure out the legal solution to it, albeit a solution that she knows has not been directly or explicitly articulated in the law so far and that is likely to be controversial among other jurists applying their minds in the same spirit to the same problem.⁴⁰

making in the name of a whole society, see Jeremy Waldron, *Judges as Moral Reasoners*, 7 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 2 (2009).

³⁸ DWORKIN, *LAW'S EMPIRE*, 256.

³⁹ AUSTIN ON JURISPRUDENCE 321 (Student's edition, 1913) talks of “[t]he childish fiction employed by our judges, that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing, I suppose, from eternity, and merely declared from time to time by the judges.”

⁴⁰ One other rather technical point about Dworkin's work: I am assuming that his account of law as interpretation is not itself a theory of stare decisis (so that I am not smuggling in such a theory at this stage). His account of law as interpretation is a general theory about how to solve legal problems, how to interrogate legal materials, how to determine what the law says on some topic even when it does not speak clearly. I am bolstered in this assumption by the fact that at various points in *Law's Empire*, Dworkin seems to treat stare decisis as a separate issue that he has mostly not discussed. (For examples, see *ibid.*, 337 and 401-2.) Law as interpretation is a way of dealing with precedents (as well as statutes and constitutional provisions); in its application to common law systems, it assumes we are already committed to stare decisis. But it is somewhat complicated by Dworkin's suggestion that precedents have “gravitational force” as well as what he once called “enactment force” (*Hard Cases*, in *TAKING RIGHTS SERIOUSLY* 111ff. (1977)). I think the interpretive method is supposed to be (among other things) a way of accounting for the former. And it is complicated too by his suggestion that what stare decisis amounts to

So: J_P wrestles with the legal materials at hand and in good Dworkinian fashion she finally figures out through interpretation what she thinks those materials require for the case in front of her. She announces her decision: “The plaintiff wins.” Is that enough? We have already seen that it may not be enough to get a precedent underway. But, in my view, it is also not enough from the point of view of the rule of law. We want to know *why* the plaintiff wins and we want that “why” to be an articulate universalizable norm.⁴¹ The two points are not the same. J_P 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.⁴² Either way, she is failing in the duty that I currently trying to explain.

In *Law’s Empire*, Ronald Dworkin indicates that interpretation involves choosing among a number of possible principles (six principles in his account of Mrs. McLoughlin’s case, for example); he seems to assume that an interpretation is something articulable as a general principle, though he doesn’t dwell on the point.⁴³ I think it is important to dwell on it. The rule of law requires generality,

as a principle in a given legal system will itself be a matter of interpretation. (See LAW’S EMPIRE, 24-6.) I am not quite sure about these formulations, but I am confident that neither point introduces any circularity into my discussion.

⁴¹ I use the term “norm” advisedly to include rules, standards, and principles. Part of me believes that it is a matter of judgment whether the general norm presented by J_P as the basis of the decision in a case is more like a standard than a rule: it depends on the circumstances of the case and their relation to background doctrine. After all, some explicit doctrinal norms have a rule-like form while others have a standard-like form; why shouldn’t that be true of the norms embodied in precedents also? (For the distinction between rules and standards, see HART AND SACKS, *THE LEGAL PROCESS*, 139-41.) Stephen Perry has argued in *Judicial Obligation, Precedent and the Common Law*, 7 *OXFORD JOURNAL OF LEGAL STUDIES* 215 (1987) that the norm embodied in a precedent should always be understood as a principle. I don’t think that necessarily conflicts with the first point I make in this footnote. Under the heading of “principle,” Perry wants to pick up on the Dworkinian attribute of “weight” and the fact that the relevant norm does not have a canonical formulation. (On the former point, see RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 26-8 (1977); on the latter point, see note 59 below.) In my view, those two points could be granted and still there would be a matter of judgment whether the relevant “principle” was to be rule-like or standard-like. However, I suspect Perry disagrees; he thinks that the norms embodied in precedents (and principles generally) present their reasons transparently, whereas it is part of the idea of a rule that those reasons are opaque.

⁴² Compare the suggestion in Lawrence Solum, *Equity and the Rule of Law*, *NOMOS* 36: *THE RULE OF LAW* 120 (1994)

⁴³ DWORKIN, *LAW’S EMPIRE*, pp. 240-1.

not in the sense that all law must be general—courts can’t do their job without issuing particular orders: “This plaintiff is to pay this defendant \$100,000”—but in the sense that the making of particular legal orders is supposed to be guided by general norms.⁴⁴

All sorts of reasons can be given for this requirement of generality. In the positivist tradition, the arguments for generality have been crudely pragmatic: “no society could support the number of officials necessary to secure that every member of the society was officially and separately informed of every act which he was required to do.”⁴⁵ But elsewhere the reasons are more elevated. Decision according to general rules simply seems more law-like: law in its essence is, as Burke put it, “beneficence acting by a rule.”⁴⁶ And this sense of law-likeness seems to be connected also, in Kantian fashion, with rationality.⁴⁷ Moreover, referring particular decisions to general rules imparts an element of impersonality to legal administration.⁴⁸ Without such a general basis, Jp’s decision seems to be the rule of a person over the parties appearing in the case in front of her, not the rule of law.

Perhaps the best known argument about the importance of judges presenting their decisions as the upshot of general rules is that of Justice Scalia, in his essay “The Rule of Law as a Law of Rules,” although the interest of this article for us is compromised by the fact that some of the justifications invoked by Scalia already depend on acknowledging the importance of precedent.⁴⁹ His position is that judges deciding hard cases should lay down a rule that is to be followed in cases of

⁴⁴ Cf. Raz, *The Rule of Law and its Virtue*, p. 213.

⁴⁵ HART, *THE CONCEPT OF LAW*, 21. Cf. JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 28-9 (Wilfrid E. Rumble ed., 1995): “To frame a system of duties for every individual of the community, were simply impossible: and if it were possible, it were utterly useless.”

⁴⁶ BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE*, 59.

⁴⁷ See also MACCORMICK, *RHETORIC AND THE RULE OF LAW* 91, insisting that even the most particularistic decision-making always has a universalistic dimension: “The ‘because’ of justification is a universal nexus, in this sense: for a given act to be right because of a given feature or set of features, of a situation, materially the same act must be right in all situations in which materially the same feature or set of features are present.”

⁴⁸ HAYEK, *THE CONSTITUTION OF LIBERTY*, 152-3. Hayek defines law as “a ‘once-and-for-all’ command that is directed to unknown people and that is abstracted from all particular circumstances of time and place and refers only to such conditions as may occur anywhere and at any time” (ibid., 131).

⁴⁹ A. Scalia, *The Rule of Law as a Law of Rules*, 56 *UNIVERSITY OF CHICAGO LAW REVIEW* 1175 (1989).

this kind, rather than saying that they have personally decided simply on the “totality of circumstances” or the “balance of legal considerations” and acknowledging that other judges in future cases might well find the balance tilting slightly the other way. Scalia believes that it is particularly appropriate to accept this discipline when one’s decision is supposed to be rooted in some text that Congress or the Constitution provides: one should be able to state one’s interpretation in a form that matches the form of the statute or the constitutional provision; since they are (abstract) general norms, one’s interpretation should be (a slightly less abstract) general norm. This seems to be a matter of the rule of law, in the sense of respect for the most prominent of the materials one is interpreting.

Scalia is less sanguine about judges arriving at general norms “when one does not have a solid textual anchor or an established social norm from which to derive the general rule.” Then the pronouncement of a general rule appears uncomfortably like legislation.⁵⁰ But those of us who are less uncomfortable with that prospect than Scalia is, may still want to insist on generality. For suppose we say that the law really is indeterminate on the matter that has come before J_P and that although she must strive in Dworkinian fashion to establish the bearing of existing legal materials on the case, still eventually law is going to have to be made, rather than discovered for this case. Suppose we concede that a quasi-legislative response is necessary. Then, just as we would not want a legislature to respond with a “statute” oriented just to the particular case that posed the problem, so we would not want a court involved frankly in the task of judicial legislation to come up only with a legal position tailored for this particular case. So far as legislation is concerned, the duty of generality is familiar to us from the prohibition on bills of attainder etc. We are less familiar with the point applied to judicial legislation, but the rule-of-law arguments seem equally compelling. Even if J_P thinks of herself only as deciding this particular case, we want her to think of it under the auspices of a general norm. Otherwise, as I said, her situation *vis-à-vis* the litigants in front of her is that of the rule of men rather than the rule of law.⁵¹

⁵⁰ Ibid., 1185.

⁵¹ There has always been a problem about prospectivity so far as creative judicial decision-making is concerning. Fresh judicial decisions in areas of law previously indeterminate are always somewhat retroactive so far as the particular litigants are concerned. But notice that J_P would not avoid this by eschewing the formulation of a general rule. For a particularized decision would be in effect retroactive too, or it would suffer from some exactly similar vice. And remember too that, if there is a problem of

I don't just mean that J_P should have a general principle in mind or that she should be disposed to treat like cases alike. I mean that she should cite a general norm or establish it as law (or as though it were law or as though she were making it law) and use that as the basis of her decision in the case. This, I believe, is a primary obligation that she has under the rule of law—to derive her particular decisions from an identified and articulated general norm. And although this is going to be crucial in my argument for *stare decisis*, it is actually something incumbent on her quite apart from her establishment of a precedent.⁵² Even if she knew that no one would follow her, she would have an obligation to decide on a general basis in this sense. To adapt a conceit from Kant, even if J_P knew that the case in front of her was the last case her court would ever decide, she should still identify and formulate as law the general norm that, as she figures, dictates the decision in this case.⁵³

To sum up then: J_P, faced with a case to which existing law does not speak directly or explicitly should attempt to figure out the bearing of the existing law on the case in front of her. Whether or not she understands this as *finding* the legal solution to the problem that faces her or as *creating* a legal solution for it, she should think of herself as applying a general norm to the case. And she should identify and articulate that norm. That is what the rule of law requires of her. And now I want to explain how and why that element of generality in the precedent case should be taken seriously by subsequent judges.

retroactivity in judicial law-making, it is so only so for the first pair of litigants; after that, the judge-made rule operates prospectively.

⁵² See MACCORMICK, RHETORIC AND THE RULE OF LAW, 91, for a similar view about generality: “This does not depend on any doctrine or practice of following precedents. On the contrary, the rationality of a system of precedents depends upon this fundamental property of normative justification.” This is very important, and in this regard my view is pretty close to MacCormick’s.

But I am not sure whether this prior insistence on generality in MacCormick’s work is anything much more than what I call (on p. 24 below) mere notional universalizability. What MacCormick says is:

A justifiable decision of the legal dispute has to make a legal ruling on the issues in contention between the parties as to the relevancy of any proposition adduced as a proposition of law by either party or as to the interpretation of such a proposition ... A ruling of this kind must be logically universal or at least must be in terms which are reasonably universalizable. (ibid. 152-3)

whereas I maintain that J_P (and her court) have to also establish and give actual positive presence to the principle of her decision as a legal norm.

⁵³ Cf. Immanuel Kant, *The Metaphysics of Morals*, in KANT, PRACTICAL REASON (Mary Gregor ed., 1999), 474: “Even if a civil society were to be dissolved ... (e.g. if a people inhabiting an island decided to separate and disperse throughout the world), the last murderer remaining in prison would first have to be executed, so that each has done to him what his deeds deserve....” (6: 333).

4. The Rule of Law and the Subsequent Judge

So let's look at the next layer. A set of facts quite similar to the one that came before J_P now comes before another judge, J_S , in a subsequent case. J_S may think of himself as in the same situation J_P was in: there is a body of existing law which does not directly or explicitly address cases of this kind; nevertheless he should try to figure out what bearing the body of law does have on the case in front of him, even if it is only implicit and indirect. But actually that is not an accurate description of the situation he faces: if J_P did what she was supposed to do (what the rule of law required of her), then she decided the earlier case on the basis of some general norm, R_P , the rule in the precedent case, that addressed it directly and explicitly. Arguably R_P now exists in the law as a norm that can dispose of the case in front of J_S .

How should J_S think about this? A first point is that, like J_P , he should think of himself not as an individual charged with deciding cases but as a member of a court. Any decision he reaches so far as the case before him is concerned is going to have to stand not as his decision but as a decision of the court to which he belongs. Not only that, but it will have to stand in the name of the very court to which J_P belonged and to which her decision must be attributed.⁵⁴ He shares with his fellow judges, including J_P , the responsibility of seeing that cases that come before the court are decided on the basis of the rule of law. They exercise that responsibility together, albeit in sequence.⁵⁵

Now one thing that J_S might infer from all this is he must adopt a Dworkinian attitude towards the case in front of him. Like J_P he must consider the indirect and implicit bearing of existing legal materials on the case even while he acknowledges that they have no direct or explicit bearing. He must try to interpret the law to figure out what to do about his case. The body of law he interprets may include the fact of J_P 's decision in the precedent case. But this does not mean that he treats it as a precedent. It's just one particular outcome attributable to the law, along with all the other materials, particular and general, whose overall bearing he must consider.⁵⁶

⁵⁴ At this stage, I assume for simplicity that J_P and J_S are on the same bench of the same court.

⁵⁵ See Gerald Postema, *Protestant Interpretation and Social Practices*, 6 *LAW & PHILOSOPHY* 283 (1987).

⁵⁶ I remind readers of the argument in note 40 above, that Dworkin's account of law as interpretation is not yet itself a theory of stare decisis.

Is this enough? Is this the only obligation that J_S has to J_P's decision? No. It's no doubt better than ignoring J_P's decision altogether (though aware that he is facing a similar case). But I think that if this is all the attention that J_S pays to her decision then he is failing in his duty (in his part of their shared duty) to the rule of law. For if he did that, he would be selling short the general norm on which J_P predicated her decision. He—and through him the court to which he and J_P belonged—would be giving the lie to any claim that J_P decided her case on the basis of a general rule, R_P. Perhaps J_S will deny this. He might say, "Everyone knows that J_P decided her case on basis of a general norm, R_P. We can't take that away from her, even though I intend to decide the similar case that has come before me on a different basis." But in saying this, he has made the general aspect of J_P's decision into something purely notional. The generality of her decision now has no real presence in the legal environment. At best the rule in the earlier case, R_P, exists simply as a public account of why J_P reached the particular decision she did. Or it is just an assurance of what R.M. Hare used to call the *universalizability* of her decision, as a feature of her subjective decision-making.⁵⁷ Worse still, it takes on the character of something just rigged up by J_P to get the decision she wanted.⁵⁸ One way or another, if J_S takes this approach, then R_P does not exist now as law; it does not stand in a rule-of-law relation to J_P's decision. It is rather as though J_P, the person, decided a particular case that came before her on the basis of a set of good reasons that happened to appeal to her, and the most that R_P does is sum up those reasons.⁵⁹ As J_P presented her decision, indeed as the court in whose name she spoke presented the decision, the general norm she articulated promised to be much more than that. But J_S's approach to a subsequent similar case has sold short that promise.

J_P played her part. She figured out the bearing of existing law on the case in front of her, summed that up in a general norm, and presented that norm as the basis of her decision for one or the other party. She didn't merely have universalizable reasons in mind. She did all she could, all that was legitimately in her power, to identify or establish a general norm, R_P, as the upshot of those

⁵⁷ See R.M. HARE, FREEDOM AND REASON (1963).

⁵⁸ In this respect it is rather like the rigged generality that one finds in legislation that talks in "general" terms about "any city in the state which according to the last census had a population of more than 165,000 and less than 166,000." (See FULLER, THE MORALITY OF LAW, 47n.)

⁵⁹ Of course that's not nothing: see note 25 above.

reasons and show how a particular decision could be derived from that. But as a judge there was only so much she could do in this regard. If no one else picked up R_P and carried it forward as a norm of this legal system, then her part—the work she did for the rule-of-law principle of generality—was in vain.

Affirmatively, then, what is the subsequent judge's responsibility? J_S 's responsibility is to treat R_P as a genuine legal norm to which the court that he belongs to has already committed itself. He is to act as though it was a general norm with a positive legal presence, and not just a notional presence in the world. It is there now, because of what R_P did, as part of the repertoire of legal resources available for dealing with the cases that come before him. And since the case now before is similar to the case that J_P addressed using R_P , then R_P should be used by him as a basis for dealing with that case. That is what is required of him now by the rule of law. If J_S and other subsequent judges behave in this way then the court to which they all belong will be (and be seen as) an institution that decides cases on a general basis, rather than just an institutional environment in which individuals make particularized case-by-case determinations.

That is the core of my position. But here's an objection. Hasn't all this been just a long-winded way of saying that J_P legislates and J_S is bound (to a certain extent) by her legislating? For some legal theorists, like Hans Kelsen and Joseph Raz, the best way to understand the system of precedent is simply to say frankly that it is a form of judicial legislation, which differs in some respects (mostly its ready revisability) from other forms of legislation.⁶⁰ Why not just say that and be done with it? I am convinced there is a difference. J_P has the same rule-of-law obligation in *all* cases to identify and articulate the general norm from which her particular decision is derived,⁶¹ whether these are cases involving what positivists would describe as judicial legislation or not. The fact that she has to firm up the existing law, figure out its implications, to fulfill the duty of generality makes it look as though she is legislating. And as I said in section 3, I don't want to say that her action is purely declaratory or that there is no creative element. But the duty to

⁶⁰ See HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 144 ff. (1945) and Joseph Raz, *Law and Value in Adjudication* in his book *THE AUTHORITY OF LAW* 180 (1979) on judge-made law and (ibid., 194-7) on the differences between judicial and other legislation.

⁶¹ Kelsen acknowledges this in *GENERAL THEORY OF LAW AND STATE* 144: "From the dynamic point of view, the decision of the court represents an individual norm, which is created on the basis of a general norm."

come up with a general norm is, as I have stressed, incumbent on her just in virtue of the fact that she is deciding a case. Because of the way in which J_P 's discharge of her rule-of-law duty implicates J_S 's discharge of his, it has more or less a legislative effect. But for one thing, it is not in any sense a matter of JS submitting to her authority (which is what legislation usually involves).

Also, even if we were to describe all this as judicial legislation, there would be a further question about where it comes from and what authorizes it. Modern positivists, may be content to say that judges have just developed the custom of deferring to general pronouncements of law by other judges in certain circumstances; and that's all that is needed to make it part of a rule of recognition. But we may want to probe deeper and more dynamically than that. There has been certainly no explicit delegation of legislative authority in the constitutional system of those societies that recognize *stare decisis*. Instead it has developed or evolved out of other practices. Raz suggests that it has developed out of the practice of taking judicial decision as final and dispositive even when they are mistaken.⁶² I am sure that is part of it, though it leaves unbridged the gap from finality in one case to authority over other cases. I suggest that what looks like judicial legislation has developed out of this prior commitment to generality: (a) legislation or no legislation, J_P has an obligation to articulate the legal premise of her decision as a general norm, R_P ; (b) J_S has an obligation as part of the same court to keep faith with the generality of R_P . Out of all that, something that looks like judicial law-making emerges.

I have labored these points enough. Now I want to acknowledge and address three complications in J_S 's position. The first is about J_S 's articulation of R_P ; the second is about distinguishing; and the third is about the prospect of overruling.

First, the formulation of R_P . In the model we have been using, R_P is formulated clearly by J_P in her opinion. She explains the Dworkinian reasoning that led to R_P from the existing legal materials, and then she articulates R_P and

⁶² Joseph Raz, *Interpretation: Pluralism and Innovation*, in his collection BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON 299, 320 (2009): "The power of courts to set binding precedents ... [is] no more than an extension of the power to settle authoritatively the litigation before the court."

But Raz goes on to indicate something that is quite like the position I am defending. The power of the courts to set precedents, he says, "an extension of the power of the courts from authoritatively settling a particular cause of action to settling through their interpretive reasoning what is the law which will bind not only the litigants before them, but lower courts in the future, and through them bind all of us."

applies it to the case in front of her. In the real world that we know, however, judges do this more or less well, more or less clearly, or (if several judges are involved on an appellate court) in a more or less coordinated fashion.⁶³ J_P may leave the basis of her decision half-articulated or clumsily articulated. When that happens, then the subsequent judge, J_S, has additional work to do. As part of the responsibility outlined in the previous paragraphs, he has to identify the general rule that J_P should have articulated. He has to bring it to the light of day, show it to the world, and apply it to the similar case in front of him. How he does this—the techniques he uses—is something we will not go into here. There is a massive literature on this: Mel Eisenberg, for example, explains the difference between “minimalist,” “result-centered” and “announcement” approaches and argues (persuasively, in my view) against any approach that confines itself to the first two.⁶⁴ I really don’t want to go into this here, not because I think it unimportant (it is hugely important), but because one can’t do everything, and I don’t think these matters can be resolved without a clear sense of why stare decisis matters, which is more or less what I am trying to establish in this paper.

Even if J_P has had a stab at formulating the basis of her decision, her exact formulation is not canonical.⁶⁵ There is no particular reason to be textualist about the general rules figured out or crafted by judges in the course of reaching their decisions: the reasons that justify textualism in the case of legislation don’t really apply here.⁶⁶ Nor is there any reason to pay attention to J_P’s original intent; her authority in this matter is not that sort of authority. The important thing is for J_S to figure out in broad terms the rule that was reached by the court as the upshot of J_P’s interpretive figuring through the bearing of existing legal materials on the case in front of her, the rule that justified her decision in that case, and to apply that,

⁶³ See Neil MacCormick, *Why Cases have Rationes and what these are*,” in Laurence Goldstein (ed.) *PRECEDENT IN LAW* 155, 171 (1987).

⁶⁴ MELVIN EISENBERG, *THE NATURE OF THE COMMON LAW* 52ff. (1988) and *Principles of Reasoning in the Common Law*, in Edlin (ed.) *COMMON LAW THEORY*, 87-93. See also Alexander, *Judges as Law Makers*, 34 ff.

⁶⁵ See also HART, *THE CONCEPT OF LAW*, 134.

⁶⁶ These reasons include plurality and diversity in the legislature and the politics and compromise that particular formulations involve: see JEREMY WALDRON, *LAW AND DISAGREEMENT* 77-87 (1999) and John Manning, *The Absurdity Doctrine*, 116 *HARVARD LAW REVIEW* 2387, 2409-19 (2002-3). See, generally, Perry, *Judicial Obligation, Precedent and the Common Law*, 235-6 on why courts have no reason to treat common law formulations in a textualist spirit.

however formulated, to the similar case that he (J_S) has to address. The spirit of this exercise is that J_S must think of himself as acting in the name of the self-same entity that decided the case that came before J_P . Depending on the circumstances, and the felicities of J_P 's formulation, this may or may not involve verbal fidelity on the part of J_S to what J_P actually said.

Secondly, distinguishing. One case may seem superficially similar to another, but the judge may be convinced that there are differences that preclude simply subjecting it to the same rule that decided the earlier case. In principle this is no different than recognizing that an existing and acknowledged rule does not apply to a case which does not exactly fit its norm conditions: for example, a given statutory provision may apply properly to one case but not another, even though the second is superficially similar to the first: so we “distinguish” the second case. And similarly the rule that J_P figured out as a basis for her decision in the precedent case may not apply to a subsequent case despite superficial similarities. There may be things about the second case that pose a distinct legal problem, which will require a new and distinct law-like solution to be figured out by J_S , itself in the form of a rule—a solution that will represent the Dworkinian bearing of the existing legal materials (including the gravitational force of J_P 's rule) on the case in front of J_S . To distinguish a case, then, is not just to “come up with” some difference. It is to show that the logic of what J_P figured out does not, despite appearances, apply. It means pointing to some additional problematic feature of the new case that requires additional figuring.

The point is that both these ways of orienting oneself to a rule laid down in an earlier case—reformulating and distinguishing—can be approached in a spirit more or less consonant with the rule of law. Legal realists and critics are fond of pointing out that J_S can formulate the rule he is supposed to be following in any way he likes, to suit his own view about how the case in front of him should be decided. They say he can distinguish any given factual situation from any other. And so he “can,” but the rule of law commands him to approach these delicate judgments in a responsible spirit of deference. He should try to arrive at the formulation that best approaches a norm that solves the problem that confronted J_P and then he should consider whether the acceptance of that solution as a general norm also settles the case that he confronts. If an honest reckoning shows that it doesn't, then the responsible thing to do is to distinguish the case and identify and

solve the distinct issue that it poses. But if J_P 's solution considered as a general norm does also have the capacity to solve what is essentially the same legal problem posed by the second case, then J_S should apply it. That is what keeping faith with the generality of law requires so far as he is concerned.

5. Overruling and Stability

I want to devote a separate section to the third of the complications I mentioned: the possibility that J_S may overturn the rule laid down by J_P in the precedent case. I do so because I want to emphasize as strongly as I can that the issue of constancy, of not lightly overturning the rule laid down in an earlier case, is an *additional* layer in our understanding of precedent. It is an *additional* way in which the rule of law bears on the matter. The argument from generality—and the duty of a subsequent judge to keep faith with the generality of a precedent judge's decision—is what gets precedent going, so far as the rule of law is concerned. But all law is changeable: in no context does the rule of law dictate immutability. But the rule of law does counsel against too frequent changes in the law and this applies to precedent as to other sources of law.

So: J_S may become convinced that the rule laid down by J_P is misconceived or harmful. This conviction may be rooted in a number of considerations. J_S may have come to believe that the rule, R_P , laid down by the earlier judge did not really reflect the background legal materials that were in existence at the time; in a strongly felt case of this kind, he may claim that J_P 's decision was an error, *per incuriam*. Or the background legal materials may have changed subsequently leaving R_P stranded, as it were.⁶⁷ Or it may just be that R_P has worked out badly, leading to considerable injustice, inefficiency, and difficulty in the law. These are all cases for countenancing the prospect of overturning R_P and setting about figuring a new legal solution for cases of this kind. Most systems of precedent permit this, at least where J_P and J_S are judges on the same bench.

One may ask: “Well, why bother formally overturning R_P ? Why not just distinguish it for all future cases? There is enough flexibility, not to say indeterminacy, in the system of precedent as it is to allow future judges to get out from under misconceived precedents.” But acknowledging the possibility of

⁶⁷ Cf. the discussion in *Planned Parenthood v. Casey* 505 U.S. 833, 857 (1992) of the possibility that the law has moved on leaving a given precedent as a doctrinal “remnant.”

formally overturning a precedent has its advantages. When the House of Lords issued its famous practice statement in 1966—

Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules. Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore, to modify their present practice and, while treating formal decisions of this house as normally binding, to depart from a previous decision when it appears to be right to do so.⁶⁸

—this made it possible for counsel to advance explicit arguments that a precedent should be overturned, and it allowed such arguments to be candidly considered by the court so that it could give public reasons for and against a change. No doubt people continued the practice of sometimes distinguishing cases disingenuously or in bad faith. But there was a considerable advantage of transparency in the new approach.

(In some cases it may be a matter of judgment whether full-scale overturning is appropriate. RP may need tweaking or amending rather than repudiation. Something akin to distinguishing may be appropriate for a case of this kind.⁶⁹ Analogies with legislation are not always appropriate, but in that domain one sees a variety of possible measures taken with regard to statutes that have come to seem unsatisfactory. Some, like enacting anew statute to supersede an old, are analogous to full-scale overturning. Others, like small-scale amendment, are more like this latter kind of distinguishing.)

So far as full-scale overturning is concerned, the 1966 Practice Statement is quite clear about the need for caution. The House of Lords' decisions will be treated as normally binding and the power to overturn will not be used lightly, and

⁶⁸ *Practice Statement* [1966] 3 All ER 77, per Lord Gardiner LC.

⁶⁹ Consider Eisenberg, *Principles of Legal Reasoning*, 93: “In the mode of legal reasoning known as distinguishing, the court begins with a rule that was explicitly adopted in a precedent and is literally applicable to the case at hand. The court does not reject the rule, but neither does it apply the rule. Instead the court determines that the adopted rule should be reformulated by carving out an exception that covers the case at hand.”

it will be used more cautiously in some areas than others.⁷⁰ This again is what the rule of law requires: the laws should be relatively stable; if they are changed too often “people will find it difficult to find out what the law is at any given moment and will be constantly in fear that the law has been changed since they last learnt what it was.”⁷¹ The need for this constancy is perhaps particularly important in regard to judge-made law. So far as legislation is concerned, the processes are cumbersome and hard to mobilize (though this is more true in the United States than in parliamentary systems). But there are judicial decisions every day, each one with a potential to change the law. In the case of legislation, one usually has notice that change is in the offing: this is apparent from the beginning of a bill’s passage until the end. But in judicial decision-making, one may not know that the law has changed until one scrutinizes a myriad of opinions.

Many of the rule-of-law arguments for constancy involve the values of certainty, predictability and respecting established expectations that I mentioned in section 2. But it is not just about calculability. It is about people having time to take a norm on board and internalize it as a basis for their decision-making. Aristotle argued that “the habit of lightly changing the laws is an evil,” and based this claim on the proposition that “the law has no power to command obedience except that of habit, which can only be given by time.”⁷² The vastly increased coercive apparatus of the modern state means that this is less the case now than it was in Athens 2300 years ago. We *can* if we want enforce laws that the citizenry have not gotten used to. But in doing so we show contempt for the dignity of ordinary agency and the ability of people to be guided by the law, internalizing it and self-applying it to their conduct. Upholding dignity in this sense is one of the things the rule of law requires.⁷³

I have emphasized that refraining from overruling is not the same as the basic respect for the principle of a previous decision that is the essence of

⁷⁰ The Statement concluded: “In this connection [their Lordships] will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlement of property, and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.”

⁷¹ Raz, *The Rule of Law and its Virtue*, 214.

⁷² ARISTOTLE, *THE POLITICS*, Stephen Everson (Cambridge University Press, 1988). Bk. II, ch. 8.

⁷³ See FULLER, *THE MORALITY OF LAW*, 162. Also Jeremy Waldron, *How Law Promotes Dignity*, presented at NYU Faculty Workshop, October 10, 2011; forthcoming *CAMBRIDGE LAW JOURNAL*, 2012.

following a precedent.⁷⁴ It is an additional layer, with its own distinctive rule-of-law rationale. It is possible, however, that the two layers may collapse into one another. A court whose members overturn a precedent rule almost as soon as it is recognized not only fail in the rule-of-law discipline of constancy, but they come close to making it impossible for there to be anything to be constant to. The subsequent judge, J_S, may say that he respects the idea of precedent and that he is just trying to get the right principle established. But if every subsequent judge responds as he does—overturning the principle that a precedent judge has acted on and purporting to replace it even before it has gotten established—then there will be no precedents whatsoever. And the rule-of-law defect here will switch from being accounted as inconstancy to being accounted as a failure to establish and act on general principles at all. However, the possibility of this sort of collapse should not lead us to ignore the distinction between the two layers and the distinct ways in which rule-of-law principles are engaged.

6. Against Particularism and Analogy

I am conscious that the approach I have taken is different from that favored by a number of writers. Here is what Neil Duxbury says about precedent:

A precedent is a past event—in law the event is nearly always a decision—which serves as a guide for present action. ... Understanding precedent therefore requires an explanation of how past events and present actions come to be seen as connected. ... To follow a precedent is to draw an analogy between one instance and another; indeed legal reasoning is often described—by common lawyers at least—as analogical or case-by-case reasoning.⁷⁵

If the rule of law supports *stare decisis*, on this account of *stare decisis*, it must be because the rule of law commands something like analogical reasoning. Perhaps the rule of law requires like cases to be treated alike; and we engage in analogical reasoning and subject the relation between any two given cases to analogical scrutiny in order to ensure that like cases *are* being treated alike and that when

⁷⁴ Maybe the term “*stare decisis*” refers to one of these rather than the other. Sometimes its gist is paraphrased as “Follow the principle of the decision in an earlier case.” Sometimes it is paraphrased as “Don’t overrule existing precedents.” Mostly it is used to mean an undiscriminated bit of both.

⁷⁵ NEIL DUXBURY, *THE NATURE AND AUTHORITY OF PRECEDENT* 1-2 (2008).

cases are treated differently there is some significant difference between them. An account along these lines would not require us to focus specifically on the general norm from which the precedent judge, J_P , drew her decision, nor would it focus on J_S 's obligation (the obligation of a subsequent judge) to keep faith with the fact of her having worked with that general norm. That there should be such a norm and that the two judges should work together to give it positive presence in the law would not be the key to the matter. Instead the key would be the relation between the two decisions, J_P 's decision and J_S 's decision, considered as particulars. We might identify a principle as summing up the relation of normative similarity between the two decisions: the features in respect of which they were alike and the appropriate response to those features. But the establishing of such a principle would matter less than the discernment of relevant similarities and differences between particular cases and the appropriate responses to them.

I don't want to disparage the principle of treating like cases alike⁷⁶ nor do I deny that it has a role to play in the processes I have been outlining: I think it is particularly important in the kind of Dworkinian figuring out of the bearing of existing law on a new case that we discussed in section 3. Nor do I deny that a lot of what I have said in this paper could be recast using the language of analogical reasoning: though it would be a bit of a strain.⁷⁷

Maybe treating like cases alike has a role to play in the justification of something like *stare decisis* in a subset of cases—cases in which a more or less arbitrary drawing of lines or setting of numbers is involved. Judge J_P has to decide the appropriate sentence for an offense (and there are no guidelines of any sort in place): she decides that the appropriate sentence is x years imprisonment. J_S in a similar case some months later, with an equally deserving offender, may feel bound to sentence him to x years as well, even though with a free hand J_S might have chosen a higher number y . The idea of treating the two like cases alike on the basis of comparative justice is what seems to do the work here, particularly in cases

⁷⁶ I make a great deal of it in JEREMY WALDRON, "PARTLY LAWS COMMON TO ALL MANKIND": FOREIGN LAW IN AMERICAN COURTS (forthcoming, 2011); also Jeremy Waldron, *Treating Like Cases Alike in the World: The Theoretical Basis of the Demand for Legal Unity*, in HIGHEST COURTS AND GLOBALISATION 99 (Sam Muller and Sidney Richards eds., 2010).

⁷⁷ EISENBERG, THE NATURE OF THE COMMON LAW, 83, denies that reasoning by analogy is "qualitatively different from reasoning from precedent ... which ... turn[s] on reasoning from standards." He says it differs from reasoning from precedent "only in form."

where everyone knows that J_P was not really arriving at a substantive norm when she chose x as the appropriate number.⁷⁸ J_S may be more confident that he has a duty (based on fairness) to treat the defendant in front of him in exactly the way in which the defendant in front of J_P was treated than he has in any content-laden principle that is supposed to apply to them both.

Professor Duxbury may say that his particularist account keeps faith with the fact that the job of a court is to settle a particular case, not to legislate: “The primary objective of the court which produced the precedent was to decide a dispute, not issue an edict which later courts can readily identify and accept.”⁷⁹ Therefore, he might say, a respectable account of stare decisis must be formulated as an account of the relation between dispute-settling in one particular case and dispute-settling in another. But actually Duxbury is not quite right in his account of the judicial function. The primary objective of the court which produced the precedent was to decide a dispute *according to law*; and it is the “according to law” that is and ought to be the focus of subsequent judges’ decision-making. They too have to decide disputes according to law, and the argument I have made in this paper is that the general norm articulated as the basis of decision in the first case is necessarily part of the law with which the second case is properly addressed. Whether J_P thinks of herself as declaring the law, figuring the law out, or making the law, she must be credited—or rather the court to which she belongs must be credited—with deciding the matter on the basis of a general norm. And subsequent judges must play their part in crediting her decision in these terms, showing in their own decision-making that there was a general norm in play.

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Even if I haven’t convinced you in this argument about the importance of generality in the case for stare decisis (and about the distinction between generality, as I outlined it in sections 3 and 4 and the principle of treating like cases alike), I hope I have convinced you of two other things. First, the rule of law generates a distinctive perspective on stare decisis. It is possible to exaggerate: I do

⁷⁸ Cf. David Lyons, *Formal Justice, Moral Commitment, and Judicial Precedent*, 81 JOURNAL OF PHILOSOPHY 580, 585 (1984), quoted in Theodore Benditt, *The Rule of Precedent*, in Goldstein (ed.) PRECEDENT IN LAW, at 92. For the idea of comparative justice, see Joel Feinberg, *Noncomparative Justice*, in RIGHTS, JUSTICE AND THE BOUNDS OF LIBERTY: ESSAYS IN SOCIAL PHILOSOPHY (1980).

⁷⁹ DUXBURY, THE NATURE AND AUTHORITY OF PRECEDENT, 150.

not endorse the position of the Supreme Court in a 1987 case, where it was said that “[t]he rule of law depends in large part on adherence to the doctrine of stare decisis.”⁸⁰ But it might be true the other way round: the justification of stare decisis might depend to a large extent on the rule of law.

And secondly, if the justification of stare decisis does depend on the rule of law, it is best to understand the impact of rule-of-law principles on this matter in layers. One principle, the principle of constancy, counsels against lightly overturning such precedents as we have. Another principle, the principle of generality, requires all judges to base their decisions on general norms and not just leave them as free-standing particulars. Another (a principle of institutional responsibility) requires subsequent judges not to give the lie to the use by precedent judges of certain general norms to determine their decisions. And finally a fundamental principle of fidelity to law requires the precedent judge to approach her decision as far as she can by trying to figuring out the implicit bearing of such existing law as there is on the case in front here. She figures that out; she formulates it in a general norm; a subsequent judge takes note of the general norm that she has used and he plays his part in establishing it as something whose generality is more than merely notional; and then judges generally try to maintain the constancy and stability of the body of law that emerges from all this by not overturning precedents lightly or too often. That is the layered way in which, it seems to me, the rule of law bears on this question of stare decisis.

⁸⁰ *Welch v. Texas Department of Highways and Public Transportation* 483 U.S. 468, 479 (1987); I am obliged to Jane Pek, *Things Better Left Unwritten? Constitutional Text and the Rule of Law* 83 New York University Law Review 1979, 1998 (2008) for this reference.