Justifying Precedent in Law

Thesis Submitted for the Degree of Doctor in Philosophy

Word Count: 78,029



University of Oxford

Faculty of Law

Candidate: Sebastian Lewis

Supervisor: Prof. Timothy Endicott

Date: 6 March 2023

ABSTRACT

This thesis aims to provide a philosophical foundation for the practice of following precedent in law. It argues that legal systems should adopt a practice of precedent that advances the Rule of Law instead of one that advances other values at the cost of undermining this ideal. This practice is called 'precedent-following'. In virtue of precedent-following, later courts treat relevant precedents as normative legal facts favouring, and sometimes requiring, the same decision as before. A distinctive feature of precedent-following is that later courts always have a legal reason for following relevant precedent, even if the precedent is morally suboptimal, so long as it is not evil. This reason is by default non-obligatory. But a legal system may further advance the Rule of Law by imposing an obligation on later courts, in some cases, to follow relevant precedent. Thus, depending on whether courts have a non-obligatory legal reason or a legal obligation to follow relevant precedent, two modes of precedential reasoning may be distinguished. These are the persuasive and the authoritative modes. The thesis explains the pros and cons of the two modes and shows how some of their drawbacks can be managed in order to realise conflicting values, such as the value of not entrenching morally deficient decisions in the law. The thesis argues that, in a jurisdiction under the authoritative mode, the law should authorise a later court that is bound by a morally deficient precedent to either follow the precedent or exercise an equitable in conformity with certain conditions. This power, it is argued, would contribute to the justification of the authoritative mode, as courts would have an additional mechanism for dealing with morally deficient precedents. Thereby, it is argued, this power might also allow courts to avoid distinguishing morally deficient precedents in a disingenuous way, which is a way of enhancing the legitimacy of the common law.

TABLE OF CONTENTS

TABLE OF CASES 3
TABLE OF STATUTES AND CONSTITUTIONAL PROVISIONS 7
ACKNOWLEDGMENTS 8
INTRODUCTION 12
A. A THRESHOLD CHALLENGE: RONALD DWORKIN 16
B. THIS THESIS: AIMS, SCOPE, AND STRUCTURE 23
C. COMPARTMENTALISATION, METHODOLOGY, AND TERMINOLOGY 31
CHAPTER I: THE VALUE OF FOLLOWING PRECEDENT IN LAW 39
A. INTRODUCTION 39
B. PRECEDENTS AS SOURCES OF LAW 39
C. THE NULL MODEL 49
D. THE RULE OF LAW 58
1. Stability and Reliability 63
2. Equality 66
E. SUMMARY 69
CHAPTER II: A FRESH START 71
A. INTRODUCTION 71
B. ADVANCING THE RULE OF LAW 72
1. The Rule of Law as a Directed Ideal 74
2. Distinctiveness 78
3. The Distinctiveness of Following Precedent in Law 81
C. THE TYPE OF REASON WE NEED 84
1. Pro Tanto and Normative 85
2. The Challenge: Content-Independence 87
D. WHY FOLLOW SUBOPTIMAL DECISIONS? 98
E. AN INSTITUTIONAL APPROACH TO THE RULE OF LAW 103
F. JUDICIAL DUTY 106

G. SUMMARY 111
CHAPTER III: TWO MODES OF PRECEDENTIAL REASONING 113
A. INTRODUCTION 113
B. THE PERSUASIVE MODE 117
1. Factors of Weight 117
2. Final Remarks on the Persuasive Mode 123
C. THE AUTHORITATIVE MODE 126
1. Protected Reasons and Conclusive Reasons 127
2. Stare Decisis: Protected Reason or Conclusive Reason? 132
3. Rule-Based Theories and Analogical Theories 138
4. Three Consecutive Steps 145
a) Material Facts 147
b) Legal Significance 148
c) Necessary and Sufficient Conditions 151
d) Conclusion 154
D. SUMMARY 154
CHAPTER IV: JUSTIFYING THE AUTHORITATIVE MODE 157
A. INTRODUCTION 157
B. FRAMING THE PROBLEM 162
C. A MORALLY DEFICIENT PRECEDENT 168
D. THE TRADITIONAL APPROACH 177
E. MY PROPOSAL: AN EQUITABLE POWER 185
F. OBJECTIONS 191
1. Vertical Discipline 192
2. Slippery Slope 197
3. Fairness 200
G. SUMMARY 204
FINAL REMARKS 206
BIBLIOGRAPHY 216

TABLE OF CASES

Court of Justice of the European Union

Köbler v Republik Österreich, C-299/95

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TABLE OF STATUTES AND CONSTITUTIONAL PROVISIONS

Canada

Canadian Charter of Rights and Freedoms

Section 11(g)

Chile

Código Civil

Article 3

Colombia

Código Civil

Article 17

Mexico

Constitución Política
de los Estados Unidos Mexicanos

Article 94

European Union

Treaty on the Functioning
of the European Union

Article 288

Germany

Zivilprozessordnung

Section 325 (1)

Italy

Codice Civile

Article 2909

France

Code Civil

Article 4

Article 1335

Uruguay

Código General
del Proceso

Article 218

ACKNOWLEDGMENTS

This thesis has changed over the past years, partly because my theoretical ambitions moved from the supposedly value-free enterprise of defeasibility in law to the value-laden project of thinking how a legal system should treat decisions based on equity. But this thesis has mainly changed thanks to discussing my work with friends, colleagues, and academics, whom I would like to thank.

It is a common tendency, in this type of acknowledgments, to leave those who deserve the most special attention for the end. I am happy to depart from precedent, at least for thanking my DPhil supervisor, Prof. Timothy Endicott. Timothy deserves my most special gratitude for his unconditional support over the past years. He saved me from gross errors, spotted unhelpful obscurities, and corrected awkward linguistic expressions. He is responsible for excellent contributions to this thesis, much-needed clarity, and superb style. I have learnt a great deal from Timothy. He is, no doubt, the type of academic I wish to become one day.

Four friends deserve a special mention: Crescente Molina, Donald Bello, Hafsteinn Dan Kristjánsonn, and Manuel González. Crescente has been a source of friendship and academic inspiration. I have discussed with him much of what I have written over the past years, including part of the arguments here defended. I owe Donald much of the clarity, simplicity and maturity with which, I hope, I can present my ideas in law and philosophy today. Hafsteinn, also known by everyone in the Oxford jurisprudence community as 'Steini', has also been a great support to me, both as a friend and colleague. Manuel, who has provided crucial feedback on British law and secondary literature, has also been a great friend over the past years.

I would also like to mention three other names: Josh Pike, Tom Kohavi, and Gehan Gunatilleke. Together with Steini we entered Oxford in the same year (2017), eager to begin our careers as professional legal philosophers in a truly inspiring academic environment. We mutually benefitted from reading and discussing each other's works—many times the discussion became a hot grill! It

was, all in all, a great school for learning how to do analytical legal theory, particularly for someone coming from the civil law tradition, in which the uncritical memorising of statutes and the unquestioned treatment of scholars as epistemic (and sometimes practical) authorities is often a setback in the students' learning. I am very grateful to these friends, who many times saved me from important mistakes.

Adam Perry, Felipe Jiménez, Grant Lamond, Jeremy Waldron, Katharina Stevens, Li-Ki-Chen, Maris Köpcke, Mike Macnair, Mikolaj Barczentewicz, Nina Varsava, Paolo Sandro, Richard Ekins, and Sandy Steel, all have read part of my work and provided very helpful comments. I am very grateful to them. Benjamin Shoemaker, Nathan Van Wees and Nick Grant have given me excellent feedback as well, and they have contributed to making the English much stronger.

I spent three months doing remote research at the Department of Philosophy of King's College London. I thank David Owens for having invited me to be part of King's wonderful philosophical community—and for providing excellent feedback on Chapter II of this thesis. His comments made the argument much better.

I have presented part of my research to various discussion groups: the ICON-S Conference in Santiago, Chile (2019); the Edinburgh Legal Theory Discussion Group (2019); the UCL Legal Theory Discussion Group (2020); and the Cambridge Jurisprudence Discussion Group (2020). I am very grateful to the participants in those seminars, and especially to the convenors of these groups.

I would also like to thank participants of the 2021 Workshop on the Philosophical Foundations of Precedent—which I had the privilege to co-organise with Timothy Endicott and Hafsteinn Dan Kristjánsson. This two-day workshop proved to be a unique opportunity for discussing the wonders of precedent. I benefitted enormously from reading and discussing the participants' essays. I am particularly indebted to Jeremy Waldron, who carefully read my contribution and provided very challenging comments. I thank Nina Varsava, Hillary Nye, and Timothy Endicott for excellent questions and feedback during the Q&A.

Part of the material presented in Chapter I has already been published as S Lewis, 'Precedent and the Rule of Law' (2021) 41 *Oxford Journal of Legal Studies* 873, and part of my discussion on the distinction between sources of law and legal norms (in Chapter I) will be published as S Lewis, 'Making Law Possible' (Review Article of P Sandro, *The Making of Constitutional Democracy: From Creation to Application of Law*, Hart Publishing, 2022), *The Modern Law Review* (2023, forthcoming). Part of the material presented in Chapter IV is currently under review. Part of the material presented in Chapter II has been published as S Lewis, 'Towards a General Practice of Precedent' (2022) *Jurisprudence* (online version). And part of the material presented in the Introduction and other parts of this thesis is to be published as S Lewis, 'On the Nature of Stare Decisis' in T Endicott et al (eds) *Philosophical Foundations of Precedent* (OUP forthcoming).

It has probably been my greatest academic honour to share my ideas with the late Joseph Raz. He was kind enough to invite me to his place in London to talk about law, philosophy, life, and (of course) photography. I treasure those hours of chat with him. I also would like to thank the late John Gardner; he did not read my work, and probably he didn't know who I was—I was just another student in his class. Standing in his office at All Souls College while watching him do philosophy 'on the spot' has been one of the greatest academic joys while studying at Oxford.

It will probably not do justice to them, but I would also like to thank the following people for fruitful conversations about my work: Achas Burin, Alberto Madero, Alvaro Pereira, Alice Schneider, Andrea Dolcetti, Annalise Acorn, Andreas Vassiliou, Carla Sepúlveda, Cécile Degiovanni, Damian Cueni, Ewan Smith, Francisco Urbina, George Nikolou, Giordanna Campagna, Jeff King, Julie Dickson, Leah Trueblood, Luciana Morón, Mauricio Garetto, Micha Gläesser, Michele Boggiani, Nick Barber, Nick Lennings, Pablo Rapetti, Paul Yowell, Philipp Lassahn, Sebastián Soto, Tarek Yusari and Ursula Smartt.

Somerville College, my first home in Oxford, is a place full of good memories. I am grateful to Somerville for having welcomed me in Oxford, and for showing

me life as an Oxford student. I made wonderful friends there. I am also grateful to Julie Dickson, who was always a very supportive College Tutor with me.

My sponsor throughout these years has been ANID (former CONICYT), Government of Chile. It goes without saying that none of this would have been possible without its generous support—*Becas Chile Doctorado Extranjero* 2017.

My family deserves special gratitude. I was very lucky to be born and raised in an environment full of support and love. My parents, siblings and grandparents are a crucial part of my life. I thank them deeply for all they have given me.

Finally, my wife, Ignacia Azócar, has been my emotional support and best friend over these years. She left Chile and joined me in this academic adventure knowing very little about life in the UK—let alone in the great neighbourhood of Cowley Road, where we spent some months before moving to London. I am always grateful to her for this. I am dedicating this thesis, for what it is worth, to her.

INTRODUCTION

‘We face unprecedented challenges’; ‘the measures introduced by the government are unprecedented’, ‘there is precedent supporting the government’s decision’, and so on. These are familiar expressions we hear almost every day on TV or read in the written press—they have become increasingly common since the COVID-19 pandemic began. These expressions reflect common parlance over the notion of a precedent. In this colloquial language, a precedent is a past decision that bears on what we do—and sometimes ought to do—today. If the past bears on the present, one important way in which it does so is through the idea of a precedent.

But what exactly is a precedent? And how does a precedent bear on what we do today? To answer these questions, we need to look at the temporal side of a precedent—its relation with the past—and some of the ways in which the past is important to us. We know the past matters—and it does so in various ways and for various reasons. The past matters at least for epistemic and normative reasons. Epistemically, the past is an indispensable source of information; it illuminates, informs, and contextualises both our present and future. We find epistemic value in the past insofar as we value knowledge for its own sake—i.e., not only because it is instrumentally important for deciding what to do. We want to situate ourselves and our political communities within a larger historical context; we want to know what others have done in the past when they have faced similar challenges; and we value this information even if it is not necessarily conducive to action.

In countless other situations, the past matters because of its normative implications. What has happened before, either by our own actions, the actions of other people, or even the events of nature, bears on what we do and how should we behave today. That yesterday I promised you I’ll pay you my debt this week matters if I want to spend my money doing something different. If your mother has recently bought a new house—hoping you’ll spend more time with her—that matters for

you even if you never promised her that you will be visiting her more often. If your friend's dad has suddenly passed away you should give her a call or text her, even if you two had an uncomfortable argument recently. Actions or events taking place in the past bear on what we ought to do, or have reason to do, today.

One important way in which the past has normative implications is when our past decisions, and sometimes the past decisions of others, constitute precedents. But not every past decision is a precedent. At the very least, such a decision must resemble, in a non-trivial way, the present case for which that decision stands as a precedent. A precedent is, for this reason, best understood as a relational concept. A decision is a precedent only in relation to another, relevantly similar situation. Sometimes the value of this relation is purely epistemic—such as when a precedent is a factual baseline providing information to better understand today's events. Other times that value is normative, i.e., a precedent serves as a guide for action. In both cases, a past decision stands as a precedent in relation to another, relevantly similar event. It is in relation to that event, considered to be relevantly similar, that a past decision serves as a precedent. That is why it is important to determine what makes two cases relevantly similar (or different). I will say more about this in due course; for now, let us proceed with this very basic notion of a precedent, namely a past decision that bears on our practical and epistemic reasons.

Notice one aspect in common that both the epistemic and normative use of a precedent have so far. In both cases, a precedent allows us to reflect upon what has happened *in the past*. Yet a precedent matters not only in relation to the past. A precedent may also matter in regard to how we should act *today*, especially when our actions might be used as precedents *in the future*. Consider, for example, an authority who denies permission to an employee to work remotely in order *not* to set a precedent. Although there may be good reasons for allowing this individual to work remotely, the mere prospect of an indefinite number of other employees relying on the authority's current decision as a precedent may justify denying permission this time. In general, scholars have paid more attention to the question

of how precedents (as past decisions) recommend and sometimes even require a particular decision today. To a lesser extent, they have also analysed how the decisions of courts today will be treated as precedents in the future.[1] In this thesis, I shall be mostly concerned with understanding the reasons we have to consider what has been done in the past, though some of what I shall say also applies to the reasons we have for setting or declining to set a precedent for the future.

Turning our attention to the past, an appeal to precedent is usually a way to support or justify a particular decision—and to criticise decisions that are not supported or justified by precedent. When, for instance, there is precedent supporting a particular policy, we naturally think that such a measure is more justified *because* of the precedent. Conversely, when such a decision stands alone, i.e., when it does not find a precedent in its support, the decision is less justified. The existence of a precedent, thus, is usually a comparative measure for assessing the (*pro tanto*) soundness of a decision. To the extent that there is precedent, a decision is more justified; to the extent that there is not, the decision is less justified. But the corresponding evaluation always tends to be scalar—that is, one of degree allowing for variations (in terms of more or less support) on the basis of precedent.

In adjudication, the normative use of precedent is somewhat different. Here is one notable difference—the list is of course not exhaustive. Whereas it is not generally the case that people or institutions have a legal obligation to follow precedent, many courts have this obligation, particularly in the common law. And this notion of legal obligation affects the type of evaluation we make on the basis of precedent. If an institution—be it the government, a court, or an administrative agency—is not legally required to follow precedent, we do not usually have a sufficient reason for robustly criticising one of its decisions because it failed to follow precedent. We may think of such a decision as being *more* supported had it

[1] See, e.g., N MacCormick, *Legal Reasoning and Legal Theory* (Revised edn, Clarendon 1994) ch IV; F Schauer, 'Precedent' (1987) 39 *Stan L Rev* 571, 572-575; J Waldron, 'Stare Decisis and the Rule of Law: A Layered Approach' (2012) 111 *Mich L Rev* 1; and K Stevens, 'Setting Precedents Without Making Norms?' (2020) 39 *Law and Philosophy* 577.

followed precedent—or being *less* supported if the contrary holds. But these scalar measures of evaluation—more or less—cannot ground claims of breach of duty. As such, we cannot claim that an institution has acted wrongly, legally speaking, because it has failed to follow precedent. We could say that there were moral or prudential reasons for following precedent in a particular context, but not a legal obligation purporting to control with authority the action of the corresponding institution. Things are different when it comes to institutions legally bound by precedent, such as a lower court in the US dealing with US federal law. If that court, legally bound by a controlling precedent (say, of the US Supreme Court), fails to comply with its obligation to follow precedent, we would not say that its decision is *less* justified. We have, rather, a ground for thinking that such a decision is unlawful.

So the notion of a legal obligation plays a crucial role in our evaluation of an institution's action on the basis of precedent. But to evaluate the actions of an institution on the basis of whether it has a legal obligation to follow precedent is to put somehow the cart before the horse. Whether an institution is legally bound by precedent is not a natural fact of the world. We do not find, outside the law, people or institutions legally bound by precedent. Insofar as every legal obligation is a legal fact, a legal obligation to follow precedent is a legal fact as well that exists in virtue of the law. So we want to know the reasons for the law to create such a legal fact. And any satisfactory analysis cannot be reduced to the notion of a legal reason either, for we would still want to know where those legal reasons come from, and how they obtain. We need to go outside the legal domain and find out, elsewhere, in morality, whether there are moral reasons that recommend making certain facts (such as precedents) legally relevant. I think of this thesis as an attempt to conceptualise that journey.

A. A Threshold Challenge: Ronald Dworkin

But someone might object that I have begged too many questions—and too many important questions—in suggesting a two-systems view of the problem, i.e. one in virtue of which we can distinguish between 'legal' and 'moral' domains.[2] Recall, I proposed we look outside the law (at morality in particular) in order to better account for the legal significance of judicial precedent. Contrary to this view, someone might object that this type of (two-systems) analysis is mistaken—or at any rate misleading—for the legal and moral realms are ultimately both parts of the same domain. Thus, we should not analyse questions of law as though they were distinct, and metaphysically independent, from questions of morality. Ronald Dworkin, for one, explicitly rejected the two-systems approach to the problem of the normativity of law. In *Justice for Hedgehogs*, his last major work, Dworkin argued that

[2] It is important to distinguish this claim (about the possibility of distinguishing between legal and moral domains) from two different but related questions: (1) whether the law needs to satisfy or reproduce certain moral requirements, and (2) whether law and morality are *necessarily* connected. These two questions have been often associated with legal positivism. In the words of HLA Hart, *The Concept of Law* (3rd edn, Clarendon 2012) 185-186, according to legal positivism 'it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have done so'—question (1) above. Some years before the publication of *The Concept of Law*, Hart argued that a possible meaning of positivism is 'the contention that there is no necessary connection between law and morals or law as it is and ought to be'—question (2) above; see HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harv L Rev* 593, 601 fn 25 (2). Understood as a claim about legal validity, the first question is clearly different from the question of whether law and morality are necessarily connected. It is possible to answer the first question in negative terms while affirming that law and morality share indeed some necessary connections; see, e.g., J Gardner, *Law as a Leap of Faith* (OUP 2012) ch 2, arguing that there is 'one and only one proposition' that is distinctive of legal positivism—i.e., that 'In any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on it sources, not its merits' (at 19). At the same time, Gardner claims that the thesis according to which 'there is no necessary connection between law and morality' is 'absurd' (at 48). For a rejection of the second thesis by two scholars often associated with legal positivism, see also L Green, 'Positivism and the Inseparability of Law and Morals' (2008) 83 *NYU L Rev* 1035, 1044-1054 and J Coleman, 'Beyond Inclusive Legal Positivism' (2009) 22 *Ratio Juris* 359, 383.

> Once we take law and morality to compose separate systems of norms, there is no neutral standpoint from which the connections between these supposedly separate systems can be adjudicated.[3]

For Dworkin, an analysis aiming to isolate the moral reasons that a court has for following precedent from the legal reasons is question-begging. For this type of analysis would presuppose a form of legal positivism that treats questions of law as distinct, and metaphysically independent, from questions of morality. According to Dworkin, positivism considers a question of law as one that can be answered by looking at the relevant legal rules *exclusively*—i.e., without attending to 'the principles necessary to justify those rules'.[4] Thus, an analysis on which purely legal grounds—ultimately to be explained by social facts—are sufficient to ground, say, legal obligation is a positivist analysis.[5] For this analysis would treat moral facts as neither necessary nor sufficient to ground legal obligation—thus establishing a sort of metaphysical independence between legality and morality. By treating moral facts—such as justifying moral principles—as neither necessary nor sufficient to ground legal obligation, I have begged an important question: Why did I exclude the justifying moral principles in the first place? That is why Dworkin argues that we should reject this type of two-systems analysis and treat questions of law *as* moral questions. According to Dworkin,

> The doctrinal concept of law can only be understood as an interpretive concept… So defending an analysis of that interpretive concept can only mean defending a

[3] R Dworkin, *Justice for Hedgehogs* (Harvard UP 2011) 402.

[4] Ibid, 403.

[5] We could easily make room for Inclusive Legal Positivism—the view according to which (roughly) legality can incorporate morality as part of the criteria of legal validity. If some moral grounds are also necessary for grounding legal obligation, that necessity ultimately obtains in virtue of some more fundamental, grounding social facts, such as official acceptance of the rule of recognition.

> controversial theory of political morality. An analysis of the concept [of law] *must assume from the start an intimate connection between law and morality.* The supposed escape from the circularity problem is no escape at all.[6]

There are two different issues at stake. One concerns the conceptual possibility of distinguishing a question of law from a question of morality; the other consists in explaining a legal fact (such as legal obligation) on social facts alone, or on a mix of both social facts and moral facts. Call the former the 'Difference Thesis' and the latter the 'Metaphysical Independence Thesis'. A natural lawyer can agree that a question of law is conceptually different from a question of morality, and thereby subscribe to the Difference Thesis. At the same time, she will most likely be sceptical that we can explain legal facts on social facts alone, and would thus reject the Metaphysical Independence Thesis. A legal positivist, on the other hand, would distinguish a legal question from a moral question—thus endorsing the Difference Thesis—but maintain that legal facts are ultimately explainable by social facts. In doing so, the legal positivist would subscribe to the Metaphysical Independence Thesis. While both theorists disagree on the Metaphysical Independence Thesis, they agree nevertheless on the Difference Thesis. On Dworkin's view, however, the Difference Thesis must also be resisted. As Hillary Nye puts it,

> In *Justice for Hedgehogs*, Dworkin claims that we cannot accept the 'two-systems view', which treats law and morality as separate domains. Rather, we must adopt the 'one-system view', according to which law is a branch of morality. This means legal questions must be understood as moral questions. It is not that answering legal questions requires taking a moral stance, but that to understand legal questions at all we have to frame them as *questions in morality*.[7]

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[6] Dworkin (n 3) 404.

[7] H Nye, 'The One-System View and Dworkin's Anti-Archimedean Eliminativism' (2021) 40 *Law and Philosophy* 247, 250; emphasis in original.

Yet according to some scholars, Dworkin's invitation—to embrace the one-system view from the outset—is as question-begging as the two-systems approach he firmly criticises.[8] Why should we assume that the only non-circular answer rests in treating legal questions as moral questions? Shouldn't this correspondence—between law and morality—be established as well? Dworkin thinks there is no need for this, since his alternative, namely the one-system view, is the only approach that can remain immune to what we could call the 'Neutrality Objection'. To cite Dworkin again,

> Once we take law and morality to compose separate systems of norms, there is no neutral standpoint from which the connections between these supposedly separate system can be adjudicated.[9]

If someone asked me, 'how can we know whether a court is legally bound by precedent', and I responded: 'by looking at the relevant legal rules', my answer would be, on Dworkin's view, biased. For I have excluded moral reasons from the picture. If, on the other hand, I answered: 'by looking at the moral reasons the court has for following precedent', my answer would be equally biased. For I have excluded the relevant legal rules. Either answer, says Dworkin, 'yields a circular argument with much too short a radius'.[10] The only way to escape from this self-defeating scenario is, for Dworkin, by collapsing both questions into the one-system approach, in which case 'The supposed escape from the circularity problem is no

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[8] See, e.g., L Sager, 'Putting Law in its Place', 118: 'Conceiving of law as a branch of morality is at least as loaded a beginning as it would be to embrace the two system view…'. I owe this reference to Nye (n 7) 59.

[9] Dworkin (n 3) 402-403.

[10] Ibid, 403.

escape at all'.[11] Otherwise we are confronted with the Neutrality Objection, accusing us of being non-neutral adjudicators.

To be sure, what is at stake is neither Dworkinian integrity nor a debate concerning the ultimate grounds of law. We have, rather, a debate concerning the conceptual possibility of distinguishing a question of law from a question of morality—the Difference Thesis. And the main problem with endorsing the Difference Thesis is, as seen above, Dworkin's Neutrality Objection, stressing the importance of remaining neutral (i.e., of not begging the question) when it comes to theory-adjudication. But it is far from clear whether this neutrality has any value in its own right. If someone has, on good grounds, sided with one of two competing theories, it is no objection (against her) to say that she has lost the neutrality necessary to adjudicate whether that theory should, after all, be preferred to the competing candidate. That claim simply does not pass muster.[12]

Now, even granting, for the sake of the argument, Dworkin's point, it should be noted that his proposal faces serious challenges as well. The main problem with the one-system view rests in what Hasan Dindjer has recently called the 'Correspondence Thesis'.[13] According to Dindjer, the Correspondence Thesis, entailed by Dworkin's one-system view, provides that:

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[11] Ibid, 404.

[12] And if the objection bites, wouldn't it also apply, by extension, to other areas? If someone asked me, 'how can I know the time, and I answered 'by looking at the watch', wouldn't I also be taking a stance between two rival theories as to how to know the time? Dworkin could of course object that whereas nobody denies that we know the hour by looking at the watch, things are notoriously more controversial when it comes to the concept of law. But this move wouldn't take us too far either. Things wouldn't be any different if we could find indeed two rival theories as to how to know the time.

[13] H Dindjer, 'The New Legal Anti-Positivism' (2020) 26 *Legal Theory* 181, 185.

> wherever one has a legal obligation, there exists a moral obligation with the same content… For legal and moral obligation to correspond is just for them to have the same content.[14]

The Correspondence Thesis, Dindjer argues, is entailed by the 'Identity Thesis', in virtue of which there exists 'a metaphysical connection between legal and moral norms: the former just are (a type of) the latter'.[15] For Dindjer, the Identity Thesis is subscribed to by proponents of the one-system view, who by implication must also subscribe to the Correspondence Thesis. The upshot is that, if one has a legal obligation to pay a certain tax, one not only has a correlative moral obligation, but *both obligations have the same content.* If the Correspondence Thesis were false, then according to Dindjer the Identity Thesis could not be true: 'For there could then be a legal obligation that corresponded to no moral obligation, and hence could not be a moral obligation'.[16]

If a court is legally required to follow precedent, then the court is also, on the Correspondence Thesis, morally required to follow precedent—both obligations having the same content. Yet at least as applied to precedent, as I hope to show in this thesis, the Correspondence Thesis is false. In a nutshell: there can be situations in which a court is legally required to follow precedent, without being morally bound to do so. This is the case of many common-law courts. Conversely, a court may be morally required to follow precedent, without being legally obliged to do so. This is the case of many civil-law courts. But even setting aside these cases, the mismatch between moral input and legal output becomes even more apparent once we consider the rules on vertical and horizontal *stare decisis*. In cases where lower courts have consistently upheld a particular doctrine—and where there might be

[14] Id.

[15] Id.

[16] Id.

thus a pressing need to protect the values of stability and reliability—a higher-court may be morally required to defer to lower-court precedent.[17] Yet, as we will soon see, under *stare decisis* that court would never be *legally* bound by lower-court precedent.

This mismatch puts proponents of the one-system view in a difficult position: how can they account for the non-correspondence between moral and legal obligation in cases such as these? More generally, how can they account for the fact that many judges are torn between their moral and legal obligations? If for any legal obligation there exists a correlative moral obligation of equal normative content, it is doubtful that both obligations might conflict. Yet we know that judges do experience this type of normative conflict. One answer is to say that, while judges believe they are torn between their moral and legal obligations, their belief is mistaken. If a higher judge is morally required to follow lower-court precedent, that judge is also legally obligated to do so—and if she thinks she is not, then that belief is mistaken. Another answer is to say that current practice is deficient or needs serious reinterpretation. Although a rigorous answer to these replies would take me too far,[18] I fear both moves would come at too high a price. They are difficult to reconcile with central features of practice. As I will argue in the next section, these features constitute a minimum descriptive requirement on precedent, and so they are crucial elements that any serious account should consider. For this reason, I suggest we bracket for now Ronald Dworkin's threshold challenge (or plainly reject it) and proceed instead with a two-systems approach to the normativity of judicial precedent.

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[17] See, e.g., HY Levin, 'A Reliance Approach to Precedent' (2013) 47 *Ga L Rev* 1035, 1075: 'there are circumstances in which the decisions of sister and lower courts may well generate substantial reliance, and in these circumstances, they should be accorded precedential weight. For example, if the courts are unanimous or near-unanimous in their opinions concerning a particular issue, if these decisions are longstanding, and if they have become woven into the fabric of a larger body of law, then people may justifiably rely on these decisions. Under these circumstances, such decisions should be considered precedential even among higher courts and courts of other jurisdictions'.

[18] For careful criticism of the one-system view, see Dindjer (n 13).

B. This Thesis: Aims, Scope, and Structure

I have spent significant time dealing with Dworkin's threshold challenge because I will be adhering to the Difference Thesis. Accordingly, I will distinguish, and treat differently, the legal reasons a court might have for following precedent from the moral reasons. Dworkin's legal philosophy, it goes without saying, has been enormously influential—his one-system view is no exception. That is why I thought it convenient to deal with this possible Dworkinian challenge from the outset. I should clarify, though, that while I shall subscribe to the Difference Thesis, I will not necessarily endorse the Metaphysical Independence Thesis. Whatever consequence follows from this thesis for my analysis, it should be scrutinised carefully. Mine is a work on the theory of precedent, not in general jurisprudence.

My aim in this thesis is to provide a philosophical foundation of the practice of following precedent in law. My argument is that the use of precedent by courts is a distinctive means by which a legal system may advance the Rule of Law. The Rule of Law is an ideal we hold most dear, particularly in western democracies. But we should be careful about what is at stake when we say that courts honour the Rule of Law in a distinctive way when they follow relevant precedent. First, there is considerable disagreement as to what the Rule of Law is—and the values it comprises. This disagreement will affect our analysis; that is why, in order to seek more consistency and avoid unnecessary disagreement, I will give the Rule of Law a modest meaning, usually associated with 'formal' conceptions of this ideal. Second: there are various ways in which courts may honour the Rule of Law by following precedent. A court may advance the Rule of Law by treating a relevant precedent as a normative legal fact in favour of reaching the same decision as before. But that normative treatment can have at least two forms; a court can have either a non-obligatory reason (or bare reason) for following relevant precedent, or it can have a protected reason in favour of the same result. These are different ways

to honour the Rule of Law, which shall be explained in detail. Third, it is commonplace that one way of advancing the Rule of Law is by placing courts under a defeasible legal obligation to follow precedent (roughly *stare decisis*). But what exactly is the content of that legal obligation? Are courts legally required to treat precedents as providing binding legal rules or as sources of analogies? These and related questions bear on our analysis of advancing the Rule of Law via following relevant precedent. I shall thus say something about each of them in due course.

This thesis is structured as follows. Every chapter provides an introduction and a summary of the discussion. I begin the first chapter by offering, in Section B, a working understanding of what makes a precedent a 'relevant precedent'. The topic of the relevance of similarities (and differences) is both technical and contested, not only in the literature on precedent but also on analogical reasoning and the maxim that like cases ought to be treated alike. Arguably, this is a topic that merits a doctoral thesis in its own right. My aim in discussing the relevance of similarities will therefore be secondary. I want to offer a plausible view of what makes a precedent relevant, with an eye to navigating through the rest of this thesis in a fairly consistent way. Section C posits what I call the Null Model of precedent. The Null Model is a thought experiment aiming to capture how a legal system would look if courts did not pay attention, in a legally significant way, to relevant precedent. Although the Null Model is best understood as a thought experiment, we can conceive of arguments supporting it. In fact, it is even plausible to think that some of the brightest legal minds of the 18th century would have had some sympathy for the Null Model. Thus, although the Null Model is a thought experiment, the conditions for its conceptual possibility are plausible, from the point of view of legal theory and judicial practice. The value of the Null Model is mainly theoretical: it allows us not to take for granted the practice of following precedent in law. But reflection on the Null Model also invites us to ask why is it

that courts pay attention, in a legally significant way, to relevant precedent.[19] It is here where the Rule of Law, together with other considerations, come into play.

Section D shows the extent to which the Null Model runs counter to the Rule of Law—in particular to the values of legal stability, reliability, and equality in the judicial application of the law. I provide an account of these values, while showing the ways in which the Null Model runs counter to them. I conclude the chapter arguing that though the Null Model could in principle be lawful, and supported by attractive philosophical arguments, the Rule of Law provides good reasons for rejecting it. I argue, therefore, that we should adopt a practice of precedent that advances the Rule of Law instead of one that undermines it. Section E offers a summary of the discussion.

There is an important gap between the Null Model, on the one hand, and a practice of precedent that advances the Rule of Law in an institutionalised way, on the other. Chapter II aims to lay out the foundations for bridging this gap. Section B offers a view of the various ways in which the Rule of Law may be advanced, arguing that precedent-following is one distinctive way to do so. But here is one interesting question about the normativity of the Rule of Law. Are the reasons for advancing this ideal moral or legal? I shall argue that the Rule of Law is a moral ideal—for it is composed by various moral values—so that its advancement gives rise to *moral* reasons for action. However, since what makes the Rule of Law a *unified ideal* (hence the capitalised, 'Rule of Law') is the directedness of this ideal towards the law, the reasons for action the advancement of this ideal gives are of a special kind. They are *rule-of-law* reasons that matter for the law. This special significance (the fact that these reasons matter for the law) can, on certain conditions, ground a *legal* reason for following relevant precedent. And this legal reason need not have the same normative content as a *moral* reason in favour of the same result. Thus, I seek to show, first, how a moral and rule-of-law reason for

[19] In other words, I shall use the Null Model as a useful baseline against which we can better assess the value of following precedent in law. That is the role the Null Model will play in my discussion.

following relevant precedent can ground an approach to precedent that advances the Rule of Law in an institutionalised way. And second, I want to provide a possible explanation of how that moral and rule-of-law reason can ground a *legal* reason for following relevant precedent.

The purpose of Section C is to address the first problem. An approach to precedent that advances the Rule of Law in an institutionalised way needs to deliver a special type of reason for action: a normative, *pro tanto*, non-contingent, and content-independent legal reason for following relevant precedent. That is, of course, a huge task. A first challenge we face is that reasons, in general, are content-*dependent*. They recommend an action based on its specific merits and the facts surrounding the agent. On plausible assumptions, though, a content-dependent reason for following relevant precedent is not enough for advancing the Rule of Law in an institutionalised way. On this view, the advancement of the Rule of Law cannot hinge on whether the action to be performed is advisable. As I will argue, sometimes performing an otherwise inadvisable action can be a way of honouring the Rule of Law as well. Following a morally suboptimal precedent can be precisely one of these ways. So we face an important challenge: how can a later court have a reason for following a morally suboptimal precedent if reasons, in general, recommend performing *sound* actions? I will argue that, in order to advance the Rule of Law, we need to drop the content-dependent character of the legal reason for following relevant precedent and make it content-*independent.* To do this, I will proceed in two steps.

First, in Section D, I will defend a view of what makes it reasonable, in certain cases, to knowingly follow suboptimal decisions. This discussion will serve as a basis for the claim that, within certain limits, the content-independent character of the legal reason for following relevant precedent is justified. Secondly, to meet the challenge of content-independence, I shall argue, in Section E, that we first need an institutional approach to advancing the Rule of Law via precedent. Section F will articulate the content of the institutional approach I propose, namely a judicial duty

to always put in the balance of reasons the legal reason for following precedent. This duty, I argue, contributes to honouring the Rule of Law in an institutionalised way by reducing the *potential* lack of motivation of judges in honouring the Rule of Law. Section G concludes with some reflections on the price of content-independence and the challenge in implementing *stare decisis*.

The aim of Chapter III is to articulate two modes of precedential reasoning that can be derived from a practice of precedent that advances the Rule of Law in an institutionalised way. There is, on the one hand, the *persuasive mode*, and on the other the *authoritative mode.* What distinguishes these two modes is the type of legal reason for following relevant precedent that each posits or presupposes. Whereas in the persuasive mode such a reason is *non-obligatory*, the authoritative mode is characterised by the fact that courts have a defeasible legal *obligation* to follow relevant precedent.[20] I call this this type of legal obligation *stare decisis.* My principal argument in this chapter is that whereas the persuasive mode is necessary for advancing the Rule of Law, the existence of various legal systems operating under *stare decisis* may suggest that it is not sufficient. The authoritative mode, on the other hand, is not necessary (for advancing the Rule of Law) but it is sufficient. The question whether a legal system should adopt one or the other mode is, of course, a question of value. Departure from the persuasive mode to the effect of placing courts under a defeasible legal obligation to follow relevant precedent may require further justification. Chapter III brackets that problem and proceeds on the assumption that the authoritative mode is justified *if* the legal obligation to follow relevant precedent (at least at the highest court in the land) takes the form of a protected reason for action. Standing in contrast to this approach, we can conceive of *stare decisis* as grounding a *conclusive reason* to follow relevant precedent. But this approach, I will argue, is hard to justify. A protected-reason approach, by

[20] As I will explain in due course, by an 'obligation' I shall understand a categorical requirement deriving from a *protected reason* for action.

contrast, allows a legal system to realise values that may be in tension with advancing the Rule of Law via *stare decisis*. As such, it is easier to justify.

Chapter III is divided in two parts. The first part explains the persuasive mode and the second part addresses the authoritative mode. In the first part, I try to explain in detail the various factors that may hinge on the exact weight of the non-obligatory legal reason for following relevant precedent. Among them we find: (1) whether the later court agrees with how the precedent was decided; (2) the institutional position of the earlier court; (3) whether the precedent was a fragmented decision; and (4) the legal area in question. My discussion concludes with a note on the possibility of distinguishing between two types of persuasive modes (weak and strong) and the differences between the persuasive mode and the Null Model.

The second part articulates the authoritative mode. A distinction is drawn between the *form* and the *content* of the defeasible legal obligation to follow relevant precedent. The form points to the type of (obligatory) legal reason for following relevant precedent—as suggested, this type can be either a protected reason or a conclusive reason for action. I explain both kinds of reasons for action in detail, and show then what *stare decisis* would look like under either of them. The content, by contrast, points to what exactly the legal obligation to follow relevant precedent consists of. I summarise two important candidates in the common-law literature, namely the 'rule-based theories' and the 'analogical theories'. I explain their claims and part of their agreement, with a view to offering, in the final part of the chapter, my own account of the authoritative mode. I call this the 'three-steps' account of the authoritative mode. On this view, the later court is legally required to respect three decisions of the earlier court, namely: (1) to treat certain facts as material; (2) to give these facts a particular legal significance; and (3) to treat certain facts as necessary and sufficient conditions for reaching a justified decision. It is submitted that this view of the authoritative mode will benefit from further discussion and constructive criticism.

The final chapter addresses the problem of justifying the authoritative mode. The need to provide further justification arises from the fact that, under this mode, later courts have a defeasible legal obligation to follow precedent. Accordingly, a court that does not follow relevant precedent, in circumstances where it is legally required to do so, is a court that acts unlawfully. This legal obligation to follow relevant precedent may need thus some extra justification, and the aim of the chapter is to offer a view of what the corresponding justificatory project should look like.

The chapter argues that part of the task of justifying the authoritative mode consists in identifying reasons for and against this mode. It is argued, in Section B, that one reason favouring this mode of precedential reasoning rests in its potential for advancing the Rule of Law *vis-à-vis* the persuasive mode. At the same time, it is argued that one of the reasons against this mode lies in its potential conflict with the principles of democracy and institutional capacity—namely, with the idea that law of general application should have both democratic pedigree and proper institutional support. It is acknowledged that, for some scholars, exceptions may be made to these two principles for the sake of advancing the Rule of Law (via *stare decisis*), just as exceptions may be made to the Rule of Law as well for the sake of advancing some conflicting values.

Arguably the main reason for not having the authoritative mode is that, in some cases, it may lead to the entrenchment of morally deficient decisions in the law. When a later court can neither distinguish nor overrule a precedent that is morally deficient but nevertheless relevant, then under the authoritative mode the court is under an *undefeated* legal obligation to follow precedent. And here the question arises as to what the court should do taking into account considerations of good institutional design. Section C offers one answer to this question that we often find in the literature. For simplicity, I call it the 'traditional approach'. On this view, the later court must follow relevant precedent, even if doing so leads to the entrenchment of a morally deficient decision in the law. One reason often given in support of the traditional approach is the belief that if courts have the power to

depart from precedent—in those cases where there is an undefeated legal obligation to follow precedent—the resulting consequences will be worse for the legal system than if the courts are legally required to follow a morally deficient precedent. On this view, it is preferable, on balance, to preserve the undefeated character of the legal obligation to follow relevant precedent than to allow the court bound by an evil or morally suboptimal precedent to depart from it.

I will question this approach on the grounds that it offers an unnecessarily strict interpretation of precedential constraint—that is, an all-or-nothing situation in which precedential constraint will deliver the values it promises to advance *if and only if* we have the authoritative mode. This criticism will then provide the basis for proposing an alternative approach for answering the question under analysis. I will argue that when a later court can neither distinguish nor overrule a precedent that is morally deficient but nevertheless relevant, the court should have the power to either follow the precedent or suspend its application to the parties by ordering a temporary stay of proceedings in the lower court and referring the case to a higher court with power to overrule the precedent. I call this approach 'equitable' because the law authorises the court to make an exception to the application of an otherwise binding legal requirement on grounds of a sound moral consideration.

The first consequence of my proposal is to drop, in some cases, the undefeated character of the obligation under *stare decisis*, particularly with respect to a morally deficient precedent (I explain in detail, in Section C, what I understand by a 'morally deficient precedent'). The second consequence is that, by adding a mechanism that seeks to accelerate the revision of a morally deficient precedent, my proposal contributes to the justification of *stare decisis.* When a later court exercises the equitable power, the legal system hastens the revision of the morally deficient precedent by the higher court. This revision, I argue, contributes to the justification of the authoritative mode in preference to the *status quo*, whereby the legal system often relies on the interested party having both the time and money to bring litigation up to an apex court.

In the final part of the chapter, I defend my proposal against three possible objections, namely that my equitable power (1) undermines vertical discipline; (2) may entail a slippery slope; and (3) can be unfair to the party who relied on the morally deficient precedent.

I finish with a concluding chapter in which I summarise the main claims defended throughout this thesis, and in which I also reflect upon some interesting questions that those claims, in turn, generate.

It is important to note from the outset that mine is a thesis on precedent and not on other sources of law. Accordingly, the claims I shall defend on the judicial use of precedent should not be extended to questions relating to how judges should treat other sources of law—e.g., legislation, customary law, and so on. I will not attempt to make general claims about the nature of law—except insofar as they relate to judicial precedent. Thus, if I defend an equitable power with respect to *stare decisis*, it doesn't follow that judges should also exercise equity when they deal with hard statutory cases. Likewise, if I argue that one way to understand the legal obligation under *stare decisis* is according to Raz's notion of protected reasons for action, it doesn't follow that one way to understand the legal obligation of judges *vis-à-vis* statutory law is according to the same notion. Each source of law deserves an analysis in its own right; we cannot, and should not, think that all legal sources respond to the same realities, necessities, values, and principles.

C. Compartmentalisation, Methodology, and Terminology

It would be hard to tell whether this thesis is an essay in normative jurisprudence, analytical jurisprudence, or something else. As suggested before, this is definitively not a work on general jurisprudence, but on the jurisprudence of precedent—by which I mean the philosophical analysis of precedent in law. I am particularly interested in the moral underpinnings of precedent-following in law, and to that

extent, following Scott Shapiro,[21] this thesis qualifies as an exercise in *interpretive normative jurisprudence.* At the same time, I am not only interested in offering a view of the moral foundations of precedent-following—I also want to defend claims about what courts *should do*, irrespective of whether they in fact do so. Thus, this is a work on *critical normative jurisprudence* as well.

Is this thesis on *analytical jurisprudence*? According to Shapiro, analytical jurisprudence 'is not concerned with morality. Rather, it analyzes the nature of law and legal entities, and its objects of study include legal systems, laws, rules, rights, authority, validity, obligation, interpretation…, and so on. Analytical jurisprudes [says Shapiro] want to determine the fundamental nature of these particular objects of study…'.[22] Since I am interested in understanding the nature of precedent in law, this work thus qualifies as an essay in analytical jurisprudence. But I find it quite difficult to establish a clear-cut division between normative and analytical jurisprudence if what motivates that distinction is the presence or absence of morality. To be sure, analyses of morality, and of practical reasoning in particular, have provided vital insight into the concept of law. Joseph Raz, for example, argues that it is a necessary truth of law that it claims authority.[23] To that extent, following Shapiro, Raz's work would be on analytical jurisprudence. Yet according to Raz law claims *moral* authority, i.e., authority to prescribe what ought to be done.[24] Is Raz's work, therefore, on normative jurisprudence?

I am not sure, because I am not sure if there is much to be gained in maintaining strict taxonomical boundaries in jurisprudence. It is better to take each argument for what it is: sometimes a normative claim on how things should be; other times a

[21] S Shapiro, *Legality* (Harvard UP 2011) 2-3.

[22] Ibid, 3.

[23] See, e.g., J Raz, *The Authority of Law* (2nd edn, OUP 2009) 30; J Raz, *The Morality of Freedom* (Clarendon 1986) 77; and J Raz, *Ethics in the Public Domain* (OUP 1994) 215.

[24] An excellent articulation of Raz's thesis that law claims moral authority can be found in J Gardner, *Law as a Leap of Faith* (OUP 2012) ch 5.

descriptive claim on how things are or tend to be. And still other times an argument could be a combination of both. It is particularly troublesome to include, in my view, morality as a demarcation criterion. In effect, as the case of Raz's work clearly suggests, we would do better to drop morality from the list. I shall therefore say that my work is about the jurisprudence of precedent, and will leave it for others to judge if some of my claims are, on Shapiro's taxonomy, part of normative or analytical jurisprudence—and if they are part of the former, whether they are part of interpretive or critical jurisprudence.

One fundamental goal I have is to offer an analysis that is general enough to make room for central features of precedent-following in the two main legal traditions we find on the globe: the common law and the civil law. At first blush, though, this seems a very ambitious project to pursue—to the point perhaps of being unrealistic. But whether this is so depends, to a great extent, on the general goal of the author, and on the particular level of specificity one claims to achieve. I will deliberately avoid claiming that my account offers a depiction—let alone the best depiction—of how courts in either of these traditions reason using precedent. To depict a practice is already a quite misleading goal. Does it mean to offer an interpretation of the practice? Or does it commit one to describe, as faithfully as possible, the way things are done—i.e., how courts adjudicate using precedent? If it is the former, how do we judge whether an account provides a good depiction of practice? If it is the latter, shouldn't the inquiry rely primarily on quantitative data and empirical analysis?

It seems to me that depicting something entails offering a fine-grained portrayal of that which is being depicted, together with a value-free analysis from the author. At the same time, a sound depiction does require at least some degree of empirical assistance. Even if we lower these methodological constraints, claims on how courts adjudicate are, and will always be, particularly difficult to ascertain. This is also true of precedent-following. Grant Lamond, for example, tells us a good deal about how common-law courts approach legal reasoning:

> Courts regard the interpretation of rules as easier to justify than the recognition of exceptions and thus prefer to base their decisions on that approach. They also think, however, that there are limits to reinterpretation so that it is not always possible to interpret a statutory rule in such a way that it avoids a result that the court regards as unsatisfactory. And they also think that the fact that they would have decided the case differently if they had been deciding on the basis of the underlying reasons is not in itself sufficient to make the result unsatisfactory.[25]

Unfortunately, Lamond does not specify which are those courts he mentions—he only says he is interested 'in the operation of the doctrine of precedent in the common law'.[26] But to describe the operation of common law is already quite an ambitious project—for this legal tradition covers jurisdictions as diverse and complex as the United States, England & Wales, New Zealand, Canada, Australia, Singapore, Bahamas, Hong Kong, Myanmar and so on. One natural way to read Lamond is by taking him to be interested not in practice-description, but in practice-*interpretation.* Accordingly, guided by some minimal descriptive requirements, his is a philosophical reconstruction of how common-law courts reason using precedent. This project is not the project of identifying what John Finnis, following Aristotle and others, famously called the 'central case' of a practice.[27] The central case, to be sure, has increasingly become a normative strategy—although this fact may be easily concealed by using descriptive terminology.[28] The central case presupposes showing the good or value of a practice (portrayed in its best light),

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[25] G Lamond, 'Do Precedents Create Rules?' (2005) 11 *Legal Theory* 1, 18.

[26] Ibid, 4.

[27] J Finnis, *Natural Law & Natural Rights* (2nd edn, OUP 2011) 9-19.

[28] For example, R Ekins, *The Nature of Legislative Intent* (Oxford: OUP, 2012) 244: 'in the central case of interpreting a statute interpreters will aim to infer and understand the legislature's lawmaking intention'.

then treating that version as *the* healthy instance of every practice that shares relevant similarities, in order to finally criticise deviations from it.[29] That is not, I take it, Lamond's project; but engaging in fine-grained depiction is not his project, either. So Lamond appears to be a middle ground, so to speak. And so is Katharina Stevens, who writes:

> I want to ensure that I can plausibly claim to describe the legal practice of reasoning by precedent, and not some other hypothetical form of reasoning that involves past cases. Therefore, I will assume that an adequate account must be able to meet some minimal descriptive requirements.[30]

Among these requirements, Stevens identifies a distinction between following and distinguishing precedent, and recognition that this distinction is central to precedential reasoning.[31] Adam Rigoni, for his part, has summarised some of these methodological caveats—on the interpretation of the practice of following precedent—as follows:

> One might think that judges should never reason using precedent or that they should never overrule or distinguish precedents. Yet a theory using those principles misses the mark, as it ignores too much of judicial practice… Instead, a philosophical theory of judicial reasoning is an attempted explanation, *at a particular level of description*, of the reasoning employed by common-law judges in deciding cases.[32]

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[29] Cf. J Gardner (n 24) 152: '… a paradigm or central case is simply the case that shows how the other cases—including those supposed counter-examples—ought to be'.

[30] K Stevens, 'Reasoning by Precedent—Between Rules and Analogies' (2018) 24 *Legal Theory* 216, 219.

[31] Id.

[32] A Rigoni, 'Common-Law Judicial Reasoning and Analogy' (2014) 20 *Legal Theory* 133, 135; emphasis added.

Practice-interpretation appears thus to be a middle ground between practice-depiction and the central case strategy. It is guided, as seen above, by some minimal descriptive requirements, which cannot be ignored on pain of 'missing the mark', as Rigoni puts it. It is this type of project I want to engage in. Crucially, given the variety of practices, the difficulties in capturing what the civil law and common law are—as legal traditions[33]—and the huge number of courts involved, I shall deliberately avoid claiming that mine is a description of what courts in the world do. If some claims, particularly in the first chapter, have a descriptive flavour, they should be read in the light of this methodological proviso. Normative claims, on the other hand, should be taken to be that: statements of value recommending a certain state of affairs. The most normative-oriented chapter will be Chapter IV, since I will address, and contribute to, the project of justifying the authoritative mode. And I will do this by defending an equitable power that invites moderate legal change. But this type of normative analysis is, admittedly, different from the strategy of appealing to Finnis' central case strategy.

The constraints imposed by the minimum descriptive requirement are features of practice whose importance cannot be showed other than by highlighting their vital role in shaping that practice. Some of the central features I shall consider are as follows. In the common law, the notion of *legal* obligation to follow precedent; the fundamental difference between vertical and horizontal precedent; the fact that courts often distinguish cases; and the limited power of courts to overrule precedent. In the civil law, these features include: the relative force of judicial decisions—i.e., as a general rule, decisions bind parties to the conflict only;

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[33] On the notion of a legal tradition, see JH Merryman & R Pérez-Perdomo, *The Civil Law Tradition* (4th edn, Stanford UP 2019) 2: a legal tradition is a 'set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught. The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective'.

absence, in the civil law, of a *general* legal obligation to follow precedent (again, there are exceptions, as the case of Mexico shows);[34] and a variety of ways in which civilian courts can use precedent without being legally obligated to do so. These central features, to be explained in due course, will guide my analysis by offering minimum constraints derived from practice.

Crucially, if the methodology is sound, and if I succeed in being sensitive to these central features, my discussion can depart from practice (to a reasonable extent of course) in order to reach a more general level of analysis. This is, I take it, Rigoni's point above (in emphasis): the level of abstraction will be that appropriate to philosophical analysis. I will rely, in particular, on broad conceptual categories with a view to capturing salient features of practice and, eventually, defending normative claims. But since these categories are abstract generalisations, there is always the possibility that they are over-inclusive or under-inclusive *vis-à-vis* practice. Of course, an account that suffers from widespread under-inclusiveness or over-inclusiveness will be seriously defective. But setting aside this scenario, the account can tolerate a reasonable degree of mismatch with practice if it remains sensitive to that practice's central elements. The upshot: I will assume that, if my account remains sensitive to these elements, I can succeed in delivering my main point even if I fall short from fully accounting for what some specific courts in the world do.

A note on terminology. Throughout this thesis I shall be giving a technical meaning to some expressions I will be using frequently. Without exhausting the list—to be expanded in due course where necessary—these are some them. The expression 'precedent-following' aims to capture the two modes of precedential reasoning I will defend in Chapter III: persuasive and authoritative. Thus, when I speak of precedent-following, I do not necessarily have in mind the doctrine of *stare decisis*, in virtue of which later courts have a defeasible legal obligation to follow

[34] See, *infra*, Chapter I, fn 27.

relevant precedent. By the expression 'precedent-following' I want to capture, instead, a judicial practice (covering the two modes of precedential reasoning mentioned before) in virtue of which later courts treat relevant precedents as normative legal facts favouring the same decision as before (and sometimes requiring it).

Second, I will speak of the 'earlier court' to refer to the court that decided a case in the past that is relevantly similar to the one being decided by the 'later court'. Third, the expression 'case', should be taken to mean a set of facts which give rise to a dispute between two parties and which a judge or court is asked to authoritatively decide on the basis of the applicable law. By a 'case' I also refer to the name a particular judicial decision receives, e.g., *Roe v. Wade*.[35] For ease of exposition, I will use the expressions 'case' and 'dispute' interchangeably, mindful of course that not every case need be a dispute. I will, fourth, ignore alternative ways of speaking of precedent, such as the *erga omnes* force of judicial decisions,[36] the constant jurisprudence of courts, and the common law. Here a precedent should be taken to mean a past decision or past case that is relevantly similar to the case at hand. That is why I will usually employ the qualification 'relevant precedent'. Fifth, the expressions 'case at hand', 'present case', 'subsequent case', and 'precedent-governed case' aim to capture the current dispute the later court must adjudicate. I will use, finally, the expressions 'relevantly similar' and 'legally the same' as equivalents. The latter stresses the idea that the similarities between the two cases are relevant in the eyes of the law.[37]

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[35] 410 US 113 (1973). By a 'case', therefore, I have in mind the fourth and fifth senses in which that expression can be used in legal discourse—according to the list provided by L Duarte d'Almeida, 'What is it to Apply the Law?', (2021) 40 *Law and Philosophy* 361, 382-384.

[36] Many legal systems give *erga omnes* force to the decisions of specific courts. Thus, these rulings are *universally* authoritative—namely, on *all* future cases that happen to be legally the same. Hence, we loosely say e.g., 'this case is governed by precedent'. My notion of a precedent is prior to this universal authoritative force. A precedent may have *pro tanto* persuasive force, or it may have no force at all.

[37] See Stevens (n 30) 217.

CHAPTER I
THE VALUE OF FOLLOWING PRECEDENT IN LAW

A. Introduction

The purpose of this chapter is to show the value of following precedent in law. Because I shall try to put together topics as diverse as precedent, sources of law, and the Rule of Law, it might take a while for my discussion to start connecting the dots. But it is vital to argue for these claims—they are small steps towards the main argument of this thesis. For that reason, I will consider them carefully—and also because I will be referring to them frequently in the rest of the chapters.

Section A considers the relation between precedent and sources of law. I aim to show, in particular, the extent to which some precedents in the common law can constitute sources of law, and the conditions under which this is so. It will be argued that, in the common law, some precedents (particularly those that are 'relevant') constitute sources of law. As such, this type of precedents may provide later courts with an authoritative legal norm by which they can decide disputes in a legally justified way. Section B shall draw a contrast between the common law and the civil law. It will be argued that, on certain conditions (offered by some central features of adjudication in the civil law), precedents, even relevant ones, can only be non-normative legal facts—meaning they do not provide later courts with a legal reason for action. This conclusion shall be the basis for a thought experiment that I will also propose in Section B. I will argue that it is possible to conceive of a legal system in which courts do not pay attention, in a legally significant way, to relevant precedent. I will call this possibility the Null Model. Section C will show the extent to which we have good reasons to reject the Null Model, for it fails to live up to three values that are part and parcel of the Rule of Law. These are the values of stability, reliability, and equality in the judicial application of the law. I will explain

these values and then show the extent to which the Null Model runs counter to them. Section D concludes and introduces the purpose of Chapter II.

B. Precedents as Sources of Law

Justice and courts have always had a complex relationship. John Gardner wrote that 'judges should first and foremost administer justice',[1] and before him HLA Hart held that we naturally think of justice as being administered according to the law.[2] This complex relation has contributed to the way we have historically called courts, shifting between courts of *justice* and courts of *law*.[3] Today it is not controversial to say that, when courts decide disputes, and thereby attempt to deliver justice, they do so by applying the law to the case at hand. But what exactly is 'the law' that courts apply—and that, in many cases, are duty-bound to apply?

The answer to this question inevitably varies across different legal systems, as it depends on the sources of law in the particular legal system under consideration. For current purposes, I shall say that a 'source of law' is a fact which, in virtue of a norm accepted and practised by a sufficient number of officials may provide, by an act of interpretation, an authoritative legal norm.[4] When it comes to adjudication, I

[1] J Gardner, *Law as a Leap of Faith* (OUP 2012) 192.

[2] HLA Hart, *The Concept of Law* (3rd edn, Clarendon 2012) 7.

[3] Cf. R Pound, 'Justice according to Law' (1913) 13 *Colum L Rev* 696.

[4] It is crucial to distinguish between a source of law, such as legislation or precedent, and the norms that can be identified by an act of interpretation from a specific source of law. A source of law, e.g., a statute, contains a norm-sentence, which is different from the resulting norm, understood as the legal meaning of the norm-sentence. The difference is that the resulting norm is the legal meaning of the norm-sentence. On the difference between a source of law and a legal norm, see, e.g., JW Salmond, *The First Principles of Jurisprudence* (Stevens & Haynes, 1893) 228 ('A source of law is, as has been seen, a fact or event which is the cause or occasion of the recognition by the courts of justice of any principle as a principle of law'); R Pound, 'Hierarchy of Sources and Forms in Different Systems of Law' (1933) 7 *Tulane L Rev* 475, 477 ('For the most part it is used [the term 'source of law'] to mean the literary shapes, official or otherwise, in which the authoritative materials are to be found'); J Gardner (n 1) 58: 'the legislative formulation should not be identified with the norm that it formulates. For two rival norms can be identically formulated. That is why the

shall then say that a source of law is a fact which, in virtue of a norm accepted and practised by a sufficient number of *courts*, may provide, by an act of *judicial* interpretation, an authoritative legal norm. It is the application of this resulting legal norm that allows courts to reach legally justified decisions—that is, decisions permitted, although not necessarily required, by the law.[5]

The sources of law may vary across jurisdictions. Legislation, for instance, is typically a source of law, meaning judges can reach legally justified decisions by

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legislative formulation often needs to be interpreted to find out which of two rival norms it formulates'); F Shecaira, 'Sources of Law Are not Legal Norms' (2014) 15 *Ratio Juris* 15, 17 ('a source of law is something, most commonly a piece of text approved by law-making officials, from which legal norms can be derived'); S Vogenauer, 'Sources of Law and Legal Method in Comparative Law', in M Reimann and R Zimmermann (eds) *The Oxford Handbook of Comparative Law* (2nd edn, OUP, 2019) 878 ('Whether a source of law is successful in producing a particular result, indeed, whether it makes any impact at all, depends to a great extent on the way it is applied and interpreted. In a given legal system, the law does not simply consist of the raw legal sources. The law in force is the product of their refinement by the competent authorities applying and interpreting them. Law without interpretation, as Frederick Pollock said, "is but a skeleton without life, and interpretation makes it a living body"'); G Pino, 'Sources of Law', in J Gardner, L Green and B Leiter (eds) *Oxford Studies in Philosophy of Law*, Volume IV (OUP, 2021) ch 3 (see in particular the section titled 'Sources of Law vs Legal Norms', and especially at 68: 'Sources do not produce, and even less are, legal norms. Sources produce—or, rather, are—texts, and only through the interpretation of these texts may we know what legal norms they convey. Strictly speaking, then, a legal norm is not itself produced by a source, but rather by the interpretation of a source'; P Sandro, *The Making of Constitutional Democracy: From Creation to Application of Law* (Hart Publishing, 2022) 189, 197-198, 206-209, 229-230; F Shecaira, 'Precedent and the Source-Norm Distinction', in T Endicott, H Kristjánsson and S Lewis (eds) *Philosophical Foundation of Precedent* (OUP 2023), forthcoming; and HD Kristjánsson, 'Elements of Precedent' in Endicott, Kristjánsson and Lewis (ibid), forthcoming: 'As a source *of law*, a precedent is the kind of thing that could be a reason for the existence of a legal norm. Law can have a basis in the precedent. Of course, it could fail as a source, for example because it is too unclear. In at least some situations, a legal norm is determined by interpreting a source of law… The source is the object of interpretation and the legal norm is the outcome. For example, a statutory provision is interpreted in its context and the outcome is a statutory law. The same applies to precedent. The precedent is the object of interpretation and the legal norm, which has its basis in the precedent, is the outcome'. In a similar way, see also R Guastini, 'Rule-Scepticism Restated' in L Green and B Leiter (eds), *Oxford Studies in Philosophy of Law*, vol 1 (OUP 2011) 141, arguing that (cognitive) interpretation 'consists in identifying the various possible meanings of a legal text—the meanings admissible on the basis of shared linguistic (syntactic, semantic, and pragmatic) rules, accepted methods of legal interpretation, and existing juristic theories').

[5] A legally justified decision need not be a legally *required* decision. Here I shall follow L Duarte d'Almeida, 'What is it to Apply the Law?' (2021) 40 *Law and Philosophy* 361, 373-374: 'A court's decision *d* is legally justified in one of two scenarios: (a) if *d* is the decision that the court legally ought to issue in the relevant decision-making context; or, if there is no single decision the court legally ought to issue in that context, (b) if *d* is not a decision the court legally ought *not* to issue - if, that is, the court is legally permitted (in one sense of the word) to issue it'.

applying statutory law to the case at hand. Many legal systems recognise some customary practices as sources of law—thus allowing courts to uphold or enforce these practices when they decide disputes. Certain jurisdictions, on the other hand, treat constitutions as sources of law, while others treat them as political instruments only—meaning constitutional provisions are not to be judicially enforced. International agreements, to be sure, may also be sources of law, pursuant however to the domestic rules of incorporation of the same treaties into the corresponding legal system. But what about judicial decisions? Are they sources of law as well?

In a trivial sense, every judicial decision is a source of law, for it creates law for the parties to the dispute. But this *relative effect* of every judicial decision is not what we are looking for. We want to know, rather, whether judicial decisions are, or can be, sources of law of *general* application—that is, valid for both parties and non-parties to a dispute. If every judicial decision creates law for the parties, can it also create law for non-parties? There is one sense in which a judicial decision can affect the legal status (the legal rights, obligations, etc.) of non-parties. Consider, to illustrate, section 325(1) of Germany's *Zivilprozessordnung*, according to which:

> A judgment that has entered into force shall take effect for and against the parties to the dispute and the persons who have become successors in title of the parties after the matter has become pending….

According to this provision, successors in title might be bound by a court's decision even if they did not litigate as parties to the dispute. And there are plenty of other examples as well where the law extends a judicial decision's binding force to non-parties who have a special legal relationship with one of the parties. But this limited sense of a decision's binding force—affecting non-parties—is not what we are looking for either. We want to know, rather, whether a judicial decision can create law in an extensive sense—namely, even for non-parties who might not have

any legal relationship whatsoever with one of the parties. Let me distinguish two ways in which a decision can have this extensive, law-creating effect.

Some courts might have, first, a quasi-legislative power. They might render decisions whose main purpose is to affect the law in a systemic way—potentially affecting everyone in the legal system. What is important is that the court rendering such a decision *intends* to affect the law this way. Some constitutional courts, for example, might have the power to initiate proceedings aiming to repeal specific statutory provisions on grounds of unconstitutionality. These proceedings need no facts that are in dispute between parties. The decision, typically repealing a statute *erga omnes*, will have an extensive effect: that statute will no longer be part of the law. As such, the decision will potentially affect everyone in the legal system.[6]

In many other cases, a court will exercise its quasi-legislative power in connection with disputed facts. The court—typically the highest court in the land—will hand down a regulation that is not strictly necessary for the resolution of the instant case. It is true that later courts might often treat such a regulation as *obiter dicta*—meaning it will not be binding but later courts might treat it as persuasive. But in many other cases, such a regulation will be treated as legally binding, meaning it will create law on which people may later rely, and on which later courts may decide future disputes.[7]

In a sense, every decision affecting the law in this systemic way, i.e., via an exercise of quasi-legislative power, sets a binding precedent. The decision will have

[6] This is the case, for example, with the Constitutional Court of Chile; see S Lewis, 'The Rule "Pay First, Litigate Later" or *Solve et Repete* in Chilean Law' (2013) 8 *Journal of Comparative Law* 105, 111-112.

[7] Consider by way of a familiar example: Was establishing a period of three months—for lawfully performing an abortion—necessary for deciding *Roe v Wade*, 410 US 113 (1973)? It was not. That period, established as law of general application by the US Supreme Court, could have been different. Or the court may have avoided deciding that particular question, leaving it for other institutions. Yet the court handed down this new regulation intending it to affect the law of the United States. That period is currently the law of the land—upheld by courts, recognised as the law by other officials, and relied on by private individuals.

universal legal validity—*erga omnes*—and this is why people may reasonably think of this decision as setting a binding precedent. The decision will establish law everyone ought to comply with. But—and here is the second part of the distinction—a court *need not* intend to affect the law in this extensive way for it to set a binding precedent. A court may only intend to decide the dispute between the parties, and yet the legal system may still treat that decision as universally valid.[8] This is so in virtue of the doctrine of *stare decisis.* It is this specific, second way of creating law of general application, that I shall consider in the rest of the chapter.

The full Latin expression reads *stare decisis et non quieta movere*—'stand by things decided and do not disturb settled points'. In common-law legal systems, *stare decisis* is also known as the 'doctrine of precedent'. For simplicity, I will refer to this doctrine interchangeably as '*stare decisis*' or the 'doctrine of binding precedent'. Where *stare decisis* exists, *some* past judicial decisions are sources of law—a norm accepted and practised by a sufficient number of courts allows a later court to identify, by an act of judicial interpretation, an authoritative legal norm. It is on the basis of this norm that the later court can reach a legally justified decision.

The doctrine of *stare decisis* is both a power-conferring norm and a duty-imposing norm. It gives certain courts the power to set a binding precedent, whilst imposing on some others courts (and on the same court that set the precedent) a defeasible legal obligation to follow relevant precedent.[9] Typically, the doctrine of *stare decisis* establishes two threshold conditions for a precedent to count as a mandatory source of law—a source, as we will see, that an agent is *required* to apply. First, the court rendering the decision must be either hierarchically

[8] Cf. G Lamond, 'Do Precedents Create Rules?' (2005) 11 *Legal Theory* 1, 25-26: 'Precedent does not give earlier decisions a certain status by endowing the court with a power *in order for it to be able* to alter the law—it simply gives those decisions a certain legal effect that stretches beyond the dispute before the court'; emphasis in original.

[9] For purposes of the current chapter, I will understand *stare decisis* as a defeasible legal obligation to follow relevant precedent. I will elaborate on this formulation in *infra*, Chapter IV.

superior—*vis-à-vis* the later court—or a court of co-ordinate jurisdiction. This means, *sensu contrario*, that lower-court precedents cannot be mandatory sources of law for higher courts—though they may have persuasive force, and thus may be *permissive* sources of law (more below). But crucially, no *authoritative* legal norm can be derived, for a higher court, from a lower-court precedent.[10] Mandatory sources of law produce, we may say, *authoritative legal norms*: norms that authoritatively prescribe a certain conduct.[11]

The second condition concerns the relevance of a precedent. As suggested in the Introduction, a precedent is a relational concept. A past case stands as a precedent always *in relation* to another, relevantly similar case. Thus, for a precedent to count as a mandatory source of law, both the past and present cases must be relevantly similar. But here is the crucial thing: What does it take for two cases to be relevantly similar? As suggested before, this a difficult question, though much of what makes two *judicial* precedents relevantly similar (or relevantly different) consists in determining what makes them *legally the same*—that is, identical *in the eyes of the law.* And what makes two cases legally the same is determined not so much by their natural, pre-legal similarities, but by considerations showing why the law *should* treat them as identical.[12] As Frederick Schauer has recently put it,

> precedential constraint is about treating cases that are somewhat alike and somewhat different as being alike for purposes of precedential constraint. It is about treating the similarities as relevant and the differences as irrelevant, and

[10] This first threshold condition is a central feature of *stare decisis* in the common law. My claim will not therefore be undermined if there is a legal system in which a higher court is legally bound by lower-court precedent. See, *supra*, Introduction, 36.

[11] For simplicity, I will bracket for a minute the issue of whether the norms produced by legal sources are morally justified or not. I can proceed on the assumption that the law *claims*, through its various sources of law, that its norms are morally justified, although that claim may turn out to be false. For an excellent elaboration on law's claim to moral authority, see Gardner (n 1) ch 5.

[12] See F Schauer, *Thinking Like a Lawyer* (Harvard UP 2009) 44-54.

> about deciding which similarities matter and which do not. Thus, identifying what is a precedent for what is about *attributing* or *ascribing* likeness… Determining precedential similarity…entails the question of what a decision-maker in the instant cases *deems* to be similar, and not about what is actually similar in some deep ontological sense.[13]

How does the law, on this view, establish that two cases are relevantly similar—such that one of them stands as a relevant precedent in relation to another? Let us answer this question by considering a famous decision. In *MacPherson v. Buick Motor Company*,[14] the New York Court of Appeals decided that the defendant, a manufacturer of automobiles (Buick), was liable to Mr Donald MacPherson for injuries arising in connection to a defective automobile. MacPherson had purchased a defective automobile from a retail dealer who had, in turn, acquired the same product from the manufacturer itself. The question was whether, absent a contract between the manufacturer (Buick Motor Company) and MacPherson, the former owed a duty of care and vigilance to the latter. Writing for the court, Judge Benjamin Cardozo held that Buick Motor Company did owe such a duty to MacPherson. To reach such a conclusion, the court relied on the principle of 'imminent danger', previously laid down in *Thomas v. Winchester*,[15] whereby the customer of a poison falsely labelled recovered damages from the original producer despite the fact that there was no contract between them. According to the court in *MacPherson*,

[13] F Schauer, 'On Treating Unlike Cases Alike' (2018) 33 *Constitutional* Commentary 437, 446; emphases in original.

[14] 17. 111 NE 1050 (NY 1916).

[15] 6 NY 397 (1852).

> the principle of *Thomas v. Winchester* is not limited to poisons, explosives, and things of like nature, to things which in their normal operation are implements of destruction. If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger.[16]

The court decided that no relevant difference existed between poison and automobile cars provided that 'it is reasonably certain to place life and limb in peril when negligently made'. Thus, for purposes of deciding *MacPherson*, the court held that the manufacturing of both *poison* and *automobiles* was relevantly similar. Thereby, the court treated both of them as *legally the same*. In doing so, the court *attributed* or *ascribed* likeness—using Schauer's words. But what about, say, airplanes? Would the law trat airplanes and automobiles as relevantly similar?

This question was not answered by the court in *MacPherson*—arguably by 1916 there was no litigation on airplane manufacturing. But in 1963 the same New York Court of Appeals decided that the manufacturer of an airplane allegedly causing a crash *is* liable to a passenger for breach of implied warranty. In *Goldberg v. Kollsman Instrument Corp.*,[17] the court ruled that the principle underlying both *Thomas* and *MacPherson* applies as well to the manufacturing of airplanes. This extension suggested that, for the court, whatever natural or pre-legal difference existed between poisons and automobiles, on the one hand, and airplanes, on the other, was not legally relevant. The court, therefore, treated all of them as legally identical for the purposes of deciding the dispute at hand.

This judicial construction of what counts as relevantly similar (or different) in the eyes of the law reflects what Schauer has called the process of 'attributing' or 'ascribing' likeness. Now, there is no denying that Schauer's claim might appear controversial to some, particularly to those who think that later courts only *discover*

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[16] *MacPherson* (n 14) 389.

[17] 12 NY2d 432 (NY 1963).

relevant similarities (or differences) between two cases.[18] But this potential objection need not stop us here. Schauer's claim offers a sufficiently plausible view of how the law, via adjudication and the work of courts, forms a view as to whether certain similarities or differences are legally relevant. Sometimes, the law *has already determined* that a specific difference is not legally relevant; this is the case, in our example, with the differences between poison and automobiles for any court after *MacPherson*. Other times, the court deciding the case, and speaking *ex novo* and on behalf of the law, will have to decide whether a specific difference is legally relevant. This is the case with airplanes in *Goldberg.* It comes as no surprise, then, that to an important extent common-law litigation consists precisely in arguing whether a specific difference is—or more precisely, *should be treated as*—legally relevant.

To conclude: in certain legal systems, some past judicial decisions can be sources of law in an extensive sense—that is, sources of law of general application which might even affect non-parties to a dispute. Where this is so, a later court can reach a legally justified decision by following relevant precedent. In the process of determining whether a past decision is a relevant precedent, the later court will in many cases have to determine whether the law *should* treat two cases as legally the same. In many other cases, that determination will have previously been made by an earlier court with sufficient authority. The upshot is that, if a later court (in a system with *stare decisis*) follows relevant precedent, the law will normally treat the resulting decision as legally justified. In the next section, I shall argue that in many other legal systems later courts are not able to reach legally justified decisions solely by following relevant precedent. This reality will serve as a basis for showing

[18] There is an interesting connection between those who argue that judges only discover similarities between cases, and those who defended the so-called 'declaratory theory of law'—according to which judges do not create but merely state what the law is. If judges do not make but only state the law, one could think that judges should not impose but only discover likeness. For imposing likeness is a way—though admittedly a modest one—of creating law. On the declaratory theory of law, see R Cross & J Harris, *Precedent in English Law* (4th edn, Clarendon 1991) 27-34.

the value of following precedent in law—via what I will call the Null Model. The Null Model, in particular, is a thought experiment that I shall use as a useful baseline against which the value of precedent-following can be better appreciated. I turn to this now.

C. The Null Model

Some past judicial decisions, it was argued before, can be sources of law.[19] This reality explains why, when common-law courts look for 'authorities' to support their decisions, they are not only looking for sound opinions favouring their case. Courts look for authorities as a shortcut for showing that the law has regulated a particular matter. And again, that caveat ('particular matter') suggests that what counts as a source of law is not merely a random precedent. It is, rather, a *relevant* precedent: a precedent that is relevantly similar—or legally the same—to the case at hand. Thus, insofar as a relevant precedent can be a source of law, common-law courts can reach legally justified decisions by following relevant precedent.[20] They can, by an act of judicial interpretation, identify an authoritative legal norm in virtue of which they can decide the precedent-governed dispute in a legally justified way.

But the same cannot be said, or at least not as simply, with respect to various countries in the civil law tradition. In many of these countries, it is generally the case that judicial decisions are authoritative with respect to the parties to the dispute *only*, and this effect is commonly known as the 'relative force' of judicial

[19] In England, J Raz, *The Authority of Law* (2nd edn, OUP 2009) 184 fn 8 writes: 'In English Law [the doctrine of precedent is] in fact part of the rule of recognition'. S Legarre & JC Rivera, 'Naturaleza y dimensiones del "*stare decisis*"' (2006) 33 *Revista Chilena de Derecho* 109, 112 extend this claim to all common law countries.

[20] For now, I suggest we bracket those specific rules which add further conditions for precedents to provide later courts with authoritative legal norms. These rules change depending on the country in question. In some countries, if a precedent is to provide an authoritative legal norm—for deciding the case at hand—it should come from a particular court (say, a court higher in hierarchy), or should have been rendered by a unanimous court, and so on.

decisions.[21] This means, first, that as a general rule,[22] only the parties to the dispute may benefit from the authoritativeness of the decision—for example, to demand conformity with its terms. (And, to this extent, the relative force of judicial decisions is also present in the common law). But, secondly, if a relevantly similar dispute arises between *other* parties in the future, the later court—in the civil law tradition—may be prevented from reaching a legally justified decision *solely* by following relevant precedent. As Eva Steiner writes concerning French law:

> Explicit reference by a court to its own *jurisprudence* when giving a decision and, more generally, citation of previous cases is not allowed when these are meant to serve as a legal basis for the court's decision.[23]

Of course, French law does not exhaust the civil law tradition. The point is that the relative force of judicial decisions entails that precedents are not generally treated as sources of law, *even if they are relevant.* As such, a court cannot decide a dispute *solely* by following relevant precedent—if it does, the decision will not be necessarily justified by law. As Merryman and Pérez-Perdomo observe: [in the civil law] 'prior judicial decisions are not "law"'.[24] Unlike in the common law, a relevant precedent is not generally a source of law in the civil law. What is missing

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[21] In Europe, examples of this relative force are provided by: Article 1355 of France's *Code Civil*; Section 325 (1) of Germany's *Zivilprozessordnung*; and Article 2909 of Italy's *Codice Civile*. In Latin-America, similar examples can be found in: Article 3 of Chile's *Código Civil*; Article 218 of Uruguay's *Código General del Proceso*; and Article 17 of Colombia's *Código Civil.*

[22] There are exceptions that could be classified as follows: (*i*) non-parties that may also benefit from the authoritativeness of the decision—e.g., lawful successors; and (*ii*) courts whose decisions bind *erga omnes*, e.g., constitutional courts.

[23] E Steiner, *French Law: A Comparative Approach* (OUP 2010) 91 (emphasis in original). See also D Pugsley, 'Two Systems of Precedent' (1981) 15 *The Law Teacher* 7, 7: 'Indeed French courts cannot even simply rely on a precedent; they must justify their own decisions themselves'.

[24] JH Merryman & R Pérez-Perdomo, *The Civil Law Tradition* (4th edn, Stanford UP 2019) 84. In a similar way, see Legarre & Rivera (n 19) 112; and B Spaić, 'The Authority of Precedents in Civil Law Systems' (2018) XXVII *Studia Iuridica Lublinensia* 27, 28.

is a norm accepted and practised by a sufficient number of courts which allows later courts to identify an authoritative legal norm from the relevant precedent.

In order to reach decisions justified by law, civilian courts usually rely on undisputed legal sources. Legislation, again, presents itself as a good example of an undisputed legal source, but in some jurisdictions the constitution also serves as a legal basis—as well as ratified international treaties. For this reason, if a later court (in the civil law) relies on a legal source, but in doing so it contravenes or otherwise ignores relevant precedent, the decision may nonetheless be legally justified. Put differently, if a relevant precedent is contravened or otherwise ignored, the resulting decision will not be, for that reason, legally unjustified. As Michele Taruffo and Massimo la Torre write concerning Italian law:

> A judgment not applying a relevant precedent may be lawful in itself, since its lawfulness depends on its consistency with the statutory and constitutional provisions, not on its coherence with precedents.[25]

To some readers, especially in the common law, this conclusion might seem striking—particularly given the contrast between the civil law and the common law. Notice, though, that a relevant precedent may still play an important role in the civil law—despite not being, strictly speaking, a source of law.[26] And notice, more importantly, that certain civilian jurisdictions are changing towards giving certain precedents a conclusive role in the resolution of a dispute. Possibly the best example is Mexico, where legislation recently passed makes some decisions of the Supreme Court binding upon all federal jurisdictional authorities in Mexico.[27] But these

[25] M Taruffo & M La Torre, 'Precedents in Italy' in N MacCormick and R Summers (ed) *Interpreting Precedents* (first published 1997, Routledge 2016) 155.

[26] See, e.g., A Peczenik, 'The Binding Force of Precedent' in MacCormick & Summers (n 25) 463.

[27] The amended Article 94 of the Mexican Constitution provides that the reasons supporting a decision adopted by eight judges of a Plenary Supreme Court are binding upon all federal

changes do not yet reflect, in my view, the reality of the civil law. [28] In a sense, that reality can better be summarised as follows: *unless* otherwise provided by law, precedents do not in general constitute sources of law—although they may perform other roles. Amongst these other roles, the existence of a relevant precedent may offer a reason for decision, it may be a source of epistemic guidance, or it may reflect a good example of how the law has dealt with a particular problem before. But again, these roles are different from *stare decisis*, in which a relevant precedent is typically a mandatory legal source giving rise to a binding legal requirement.

I shall not delve any further into the differences between the common law and the civil law. I have briefly considered the relation between precedent and legal sources in both legal traditions in order to advance the following claim. There are courts in the world that can reach legally justified decisions *even if* they contravene or otherwise ignore relevant precedent, as the example of Italy and France shows. Thus, if we consider the reality of both the common law and the civil law (as suggested above) it follows that a relevant precedent:

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jurisdictional authorities and federal entities. The same happens with respect to the reasons supporting a decision adopted by four judges sitting on a Supreme Court Chamber.

[28] Many civil law countries have shown a tendency to depart from the classic civilian understanding of precedent to one where courts, at least in certain matters, are *required* to follow precedent. Possibly good examples are Colombia, Mexico and Italy; see, respectively, C Bernal Pulido, 'El precedente en Colombia' (2008) 21 *Revista Derecho del Estado* 81; V Fernández Fernández, 'La justicia de los precedentes. ¿Invasión a la independencia y autonomía del juzgador? (2016) XXIX *Revista de Derecho (Valdivia)* 9; and A Cadoppi, *Il valore del precedente nel diritto penale* (2nd edn, Giappichelli Editore 2014). This tendency has led some scholars to consider where the civil law and the common law intersect; see Cadoppi, ibid, 199. The tendency is undeniable, at least with respect to *some* civil law countries. But I would hesitate to call this tendency a full-blown system of *stare decisis*. To begin with, in many civil law countries the binding effect of precedent is usually reserved for specific courts only—typically higher courts and constitutional courts. Moreover, this effect is piecemeal, i.e., applicable to specific areas of law, e.g., constitutional law and criminal law. In many countries, furthermore, there is still considerable disagreement as to whether precedents *should* bind later courts—for a list of scholars who, in Spain, reject this view, see T García-Berrio Hernández, 'La Controversia sobre el Precedente Judicial: un Clásico del Derecho en Constante Renovación' (2006) 4 *Foro, Nueva Epoca* 127, 145-146. Given this disagreement and variety of practices, and also bearing in mind that the argument in this part is not about what the civil law is or is not today, I will rely on a rather classic approach to precedent in the civil law. The argument, to be sure, is about what we *may* learn from such an approach, i.e., that the null model is conceptually possible.

(i) Can be a *permissive* source of law;

(ii) Can be a *mandatory* source of law; and

(iii) Can be neither a permissive nor a mandatory source of law.

Permissive legal sources are those the agent (in our case the court) has discretion to rely on.[29] If the court relies on a permissive legal source, the resulting decision will most likely be legally justified. If the court does not rely on a particular permissive legal source, the decision will not *necessarily* be legally unjustified—if, for example, the court has relied on another, mandatory or permissive source of law, then the resulting decision will usually be legally justified. Mandatory sources of law, by contrast, are those the court is legally required to consider and eventually apply in the resolution of a dispute. If the court neither considers nor applies one of these mandatory legal sources, then the resulting decision will most likely *not* be legally justified.

Admittedly, the tendency in the common law is for a relevant precedent to fall within (*i*) and (*ii*), but it is in principle possible (though unlikely) that a relevant precedent can fit with (*iii*). In the civil law, by contrast, the tendency is for a relevant precedent to fall within (*i*) and (*iii*), and a relevant precedent will only exceptionally fall within (*ii*). But it is a reality of the world (particularly in the civil law) that a relevant precedent can fall within (*iii*), meaning this type of precedent is neither a permissive nor a mandatory source of law. On plausible assumptions, sources of

[29] The distinction between *permissive* and *mandatory* legal sources is already present, although in slightly different terms, in Hart (n 2) 294: 'In systems where a statute is a formal or legal source of law, a court in deciding a case is bound to attend to a relevant statute though no doubt it is left considerable freedom in interpreting the meaning of the statutory language… But sometimes much more than freedom of interpretation is left to the judge. Where he considers that no statute or other formal source of law determines the case before him, he may base his decision on e.g. a test of the Digest, or the writings of a French jurist… The legal system does not *require* him to use these sources, but it is accepted as perfectly proper that he should do so… Perhaps we might speak of such sources as "permissive" legal sources to distinguish them from "mandatory" legal or formal sources such as statute and from historical or material sources'.

law are exhausted in this twofold division: they are either mandatory or permissive sources of law. Therefore, a fact which is neither is not a legal source at all.

In the remainder of the section, I want to explore one possibility that follows from the fact that a relevant precedent may not be a source of law at all—namely, the existence of such a precedent may not be a legally normative fact for the later court. Put differently, the existence of a relevant precedent may not give the later court a legal reason for action.[30] I will call this situation the 'Null Model'. The Null Model, in particular, is characterised by the fact that a relevant precedent is a non-normative legal fact. It is, first, a *legal fact* because a relevant precedent is a past judicial decision which exists and derives its *intra partes* force in virtue of the law. That legal fact, second, is *non-normative* because it does not give the later court a legal reason for action.

Notice though that the Null Model does not aim to capture the reality of the civil law. While the civil law, as I said, is changing towards giving precedents a more decisive role, a precedent there may still give the later court a legal reason for action—i.e., even if the precedent does not constitute a source of law. The Null Model, thus, should not be conflated with absence of a doctrine of binding precedent (*stare decisis*). Neil Duxbury argues that the doctrine of *stare decisis* is relatively new in England's history.[31] But it doesn't follow that, before this doctrine was fully implemented, England had a Null Model of precedent. The Null Model is characterised by the fact that a precedent is a non-normative legal fact—a relevant precedent does not give the later court a legal reason for action. As we will see, a relevant precedent can give the later court a legal reason for action even absent *stare*

[30] I have been careful in using the caveats 'may' and 'may not' because a precedent, despite not being a source of law, *may* indeed give the later court a legal reason for action. Admittedly, that relevant precedent will not give a *binding* legal reason for action—a reason the later court *must* act upon. Now, whether a precedent of this type—which does not constitute a source of law—gives a legal reason for action or not depends on many contested points on the normativity of law. I don't want to enter into this technical literature—nor is it necessary for my argument. I need to make room only for the possibility that a precedent may, *but need not*, give a legal reason for action *even if* it does not constitute a source of law. This is the assumption I shall rely on.

[31] N Duxbury, *The Nature and Authority of Precedent* (CUP 2008) 31-37.

decisis. That is what the persuasive mode of precedential reasoning, under which later courts have a non-obligatory legal reason for action, aims to capture. The Null Model is, for this reason, better conceived of as a thought experiment, insofar as it depends on one possible but admittedly unlikely scenario: a relevant precedent being a non-normative legal fact, i.e., a legal fact that gives the later court no legal reason for action. To make the thought experiment more attractive, I shall expand the situation which the Null Model seeks to capture so as to reflect the reality of an imaginary legal system. The Null Model, thus, aims to capture the conceptual possibility of a legal system actively making it the case that a relevant precedent is a non-normative legal fact. How would a legal system look under the Null Model?

First, it would be different from cases in which the later court offers reasons for not following relevant precedent. In this situation, the precedent makes a normative difference, since the later court has to meet a justificatory burden for failing to conform to it. The Null Model, by contrast, seeks to capture those situations in which the existence of a relevant precedent does not even tip the balance of reasons in favour of reaching the same outcome as before. These could be, for instance, cases where the later court knows about the existence of a relevant precedent, but it does not show why the precedent will not be followed. Similarly, the Null Model could also exist in cases where one of the parties shows the court that there is relevant precedent, but the court does not explain why the case at hand is relevantly different—in the eyes of the law. Although the Null Model is compatible with later courts *knowing* about the existence of a relevant precedent, in a legal system in which cases are not reported, and in which later courts might not know about a precedent's existence, the Null Model is more likely to arise. Thus, failure to report cases contributes to the emergence of the Null Model. Finally, there could be a widespread practice of not paying attention, in a legally significant way, to relevant precedent. We may hypothesise the grounds on which this practice may arise by thinking of possible arguments in favour of it. Let me offer some of them.

An advocate of the Null Model may argue, first, that legal systems have an interest in preventing judges from making creative innovations in the law. In order to keep the law pure, the influence of judicial decisions on future cases should be limited as much as possible. The Null Model, whereby a relevant precedent is a non-normative legal fact, would be one way doing this. Second, judges have a duty to treat parties impartially and objectively. Since the practice of following precedent is normally affected by factors external to the law—such as the prestige of the earlier court or judge, or the specific facts on which the precedent was reached[32]—these factors may introduce bias in the court's decision. In order to avoid this bias, judges should not follow precedent. And again, the Null Model would be one way of achieving this. Finally, the law should have a democratic character. Precedents, as we saw with respect to the common law, are often given legal status, but it is doubtful whether they are created by a democratic process. Even when they are not given legal status, a practice may arise (as we will see in Chapter III, Section B) of treating precedents *as if* they were part of the law. One way to avoid deciding disputes by non-democratic legal sources (or sources that behave *as though* they were legal sources) is by giving judicial decisions relative force *only*, and stating this proviso explicitly in a democratic source of law such as a statute passed by Parliament. One example would be Article 3 of Chile's *Código Civil* (written by Andrés Bello in 1855):

> Judicial decisions are not binding except with respect to the disputes in which they are currently reached.[33]

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[32] The advocate of the Null Model could think that these facts, alien to the case at hand, may open the door for taking into account considerations that should not play a part in deciding the case.

[33] Article 3, Chile's *Código Civil*. This is the first civil code written in Latin-America—by Andrés Bello. Its influence over civil codification in the region (and elsewhere) is undeniable. The original provision reads as follows: '*Las sentencias judiciales no tienen fuerza obligatoria sino respecto de las causas en que actualmente se pronunciaren'*.

By giving past judicial decisions relative force only, the law signals that those decisions are not legally binding upon later courts. Of course, those decisions may exert persuasive authority—thus giving later courts a legal reason for decision. But in a legal system in which courts try to minimise as much as possible the influence of non-democratic legal sources in the resolution of disputes, the persuasive authority of these sources should be restricted as well. Treating relevant precedents as non-normative legal facts (the Null Model) is precisely one way of doing this.

These are some of the grounds on which the Null Model could be defended. Possibly, they were indeed part of the reasons Andrés Bello considered for proposing such a straightforward statutory provision on the limited effect of judicial decisions. And one may only wonder whether Jeremy Bentham, whose firm rejection of *stare decisis* in the common law is but too well-known,[34] had some of these reasons in mind. I shall not explore the history of precedent here.[35] I have posited the Null Model for two reasons only. It reminds us, first, that the values brought by judicial conformity to precedent, soon to be studied, should not be taken for granted. The Null Model, thus, is a useful baseline against which we can better appreciate the value of following precedent in law—in particular, by conceiving of a possible legal system where the same practice does not exist.[36]

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[34] See, e.g., J Bentham, *Constitutional Code*, vol 1 (Robert Heward ed., 1830) 566: [Acting by precedent] is acting without reason, to the declared exclusion of reason, and thereby in declared opposition to reason…'.

[35] It would be fascinating, for example, to attempt an historical reconstruction of the jurisprudence of precedent in the 18th and 19th centuries, together with their historical development.

[36] In fact, one may even go one step further and think of a possible legal system in which courts have a prohibition against paying attention, in a legally significant way, to relevant precedent. In this system, courts would be required to ignore the existence of a relevant precedent. Similarly, one could think of a legal system in which a relevant precedent is a normative legal fact, but one giving the later court a reason for reaching a different outcome than was given in the precedent. Because these two possibilities reveal such an evil commitment to destroying the Rule of Law, one could think of them as belonging to a fictious novel, such as a spin-off of Alice in Wonderland. Cf. T Endicott, H Kristjánsson and S Lewis, 'Introduction' in T Endicott, H Kristjánsson and S Lewis (eds) *Philosophical Foundations of Precedent* (OUP, 2023, forthcoming), exploring the possibility of a 'Negative Model' of precedent.

Second, the Null Model confront us with the following challenge. If nothing in law's nature would prevent courts from lawfully adjudicating disputes under this model,[37] then why doesn't any legal system have it—at least officially? (To be sure, by 'officially' I mean an institutional declaration, positively laid down in a legal source of sufficient hierarchy, in virtue of which the legal system *actively* deprives a relevant precedent of any legal normativity. The precedent, as it will be clear in the next section and the next chapter, may nevertheless exert moral normativity).

What causes many later courts to pay attention, in a legally significant way, to the ways in which earlier courts have decided relevantly similar cases?

D. The Rule of Law

In this section, I argue that the Null Model fails to live up to three values that I take to be part and parcel of the Rule of Law. To that extent we have good reasons for rejecting the Null Model and prefer instead one of the modes of precedential reasoning that I will articulate in the following chapters. These rule-of-law values are maintaining legal stability, allowing people to rely on the law more easily to plan their affairs, and equality in the judicial application of the law.[38] I will call them respectively 'stability', 'reliability' and 'equality'. For brevity, I will refer to

[37] If courts can lawfully adjudicate disputes without paying attention, in a legally significant way, to relevant precedent, then it is doubtful whether something in law's nature requires the practice of following precedent. It could be objected that nothing in the nature of the *civil law* would require this practice, but it would be part of the *common law.* Against this view, see Duxbury (n 31) 34, for whom 'the common law does not need the doctrine of precedent in order to function'. Cf. EM Wise, 'The Doctrine of Stare Decisis' (1975) 21 *Wayne L Rev* 1043, 1057-1058.

[38] I have borrowed part of this terminology from various contributions on the value of precedent-following. See, e.g., D Lyons 'Formal Justice and Judicial Precedent' (1985) 38 *Vand L Rev* 495; F Schauer, 'Precedent' (1987) 39 *Stan L Rev* 571, 595-602; L Alexander, 'Constrained by Precedent' (1989) 63 *S Cal L Rev* 1, 26 and 51; Cross & Harris (n 18) 11-12; Duxbury (n 31) ch 5; L Alexander & E Sherwin, *Demystifying Legal Reasoning* (CUP 2008) 35-37; J Waldron, 'Stare Decisis and the Rule of Law: A Layered Approach' (2012) 111 *Mich L Rev* 1, 31; and N Varsava, 'How to Realize the Value of Stare Decisis: Options for Following Precedent' (2018) 30 *Yale J L & Huma* 62, 70-73.

them collectively as the 'Rule of Law'.[39] Although my approach may appear to some as a commonplace justification of following precedent in law, I hope that by relying on the Null Model as a useful baseline I can offer my arguments in a novel way.

To be sure, I will not attempt, in this section, to provide an exhaustive list of all the values that may justify following precedent in law—the list is long.[40] I have various reasons for focusing on the Rule of Law only. First, the Rule of Law is a moral ideal every legal system has good reasons to advance, and so it provides the right kind of reason for justifying following precedent in law. This type of reason, to be sure, is particularly fit for the evaluation of current legal practices. In fact, for some authors, moral ideals such as justice—and the specific reasons for action that justice might provide—are at the centre of how we evaluate and eventually reform our institutions. 'Justice [writes John Rawls] is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust'.[41] This is a remarkable opening by Rawls, which captures very nicely the thought of those of us who give priority to moral virtues (or ideals), such as justice and the Rule of Law, in the evaluation of our current social institutions and legal practices. That is

[39] One may account for stability, reliability and equality in terms of rule-of-law values by looking at some of the most influential accounts of this ideal—see, e.g., *infra* note 43. It goes without saying that this *ad hoc* terminology does not prevent *other* values from being part of the Rule of Law. The point is that, to the extent that there is considerable agreement in the literature in identifying stability, reliability and equality as rule-of-law values, we can call these values collectively—and for current purposes only—the 'Rule of Law'.

[40] Many considerations may support following precedent in law—see, e.g., Duxbury (n 31) ch 5 and Varsava (n 38). Among them, the epistemic guidance that later courts may receive from knowing how earlier courts have dealt with statutes that are vague. Similarly, we may find arguments relying on the overall efficiency of the system's adjudicatory process. I will not explore these other approaches, but I do not think my account is incompatible with them.

[41] J Rawls, *A Theory of Justice* (first published 1971, Harvard UP 1999) 3.

why, in what follows, I would like to focus exclusively on the moral reasons the Rule of Law provides in favour of following precedent in law.

Second, I am interested in achieving consistency while being conceptually parsimonious. Conceptual parsimony is valuable for two reasons: first, it facilitates simplicity and consistency—and thereby one can connect the dots more easily. Second, it allows us to have a more fruitful debate by locating possible sources of disagreement in specific claims. The bigger the menu of values favouring following precedent in law, the broader the scope of possible disagreement we may face.

Finally, I do not want to be exhaustive because I think that, in general, when it comes to practice-justification, the initial burden lies in showing sufficiency, not necessity. We can justify a practice by showing how certain values are sufficient to support it, without having to establish that these values are also necessary for the practice. Value-necessity is, I think, one step further. The debate would require too high a degree of normative argumentation if value-necessity were required. I, for one, would be required to provide arguments for why any other account that aims to justify precedent-following on *other* values fails. I have no intention of pursuing that type of robust normative project here. For a similar reason, I will avoid claiming that the values I shall offer are sufficient to justify the practice of following precedent in law either collectively or individually. I have no intention to take a stance on this point.

With these methodological caveats in mind, let me offer a general view of what the Rule of Law is before turning to the specific values of stability, reliability, and equality. Many ideas are usually associated with the expression 'the Rule of Law'. It is often said, for example, that the Rule of Law is first and foremost a requirement of good governance. People exercising positions of political authority should be subject to mandatory rules aiming to minimise the potential for arbitrary government and eventually tyranny.[42] The Rule of Law is also identified with a set

[42] See, e.g., Raz (n 19) 224; B Tamanaha, *On the Rule of Law. History, Politics, Theory* (CUP 2004) 33-34; J Waldron, 'The Concept and the Rule of Law' (2008) 43 *Ga L Rev* 1, 6; and Waldron (n 38) 3-4. Recently, C Sunstein & A Vermeule, *Law and Leviathan* (Harvard UP 2020), have provided a

of demands that seek to allow individuals to better anticipate what the law may require from them. Accordingly, the standards by which the law will guide conduct should be clear, public, general, prospective and stable, so that people may know in advance how to plan their lives under the law.[43] Similarly, the Rule of Law requires minimum procedural conditions that courts should observe when they administer justice, in order to ensure parties a 'fair hearing'.[44] Finally, the Rule of Law is also associated with substantive conditions for the existence of the law. Some say, for example, that the law should meet basic demands of fundamental rights.[45] Others claim that the Rule of Law should go one step further and secure basic social rights.[46]

These various—and very different—ways of conceiving of the Rule of Law have led many scholars to distinguish between 'formal' and 'substantive' versions of this ideal.[47] According to Brian Tamanaha, 'formal theories focus on the proper sources and form of legality, while substantive theories also include requirements about the content of the law'.[48] However, as Tamanaha also notes, the distinction is

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defence of both administrative law and administrative state on grounds of their conformity, least in the US, with the Rule of Law—with Fuller's rule-of-law *desiderata.*

[43] This is the view associated with the well-known accounts of L Fuller, *The Morality of Law* (Yale UP 1969) ch 2; Raz (n 19) 213-214; J Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 270-273; and Rawls (n 41) 235-243. See also Tamanaha (n 42) 34, 66-67, 71, 93-94, 96, and 119; Waldron, 'The Concept…' (n 42) 6; and J Raz, 'The Law's Own Virtue' (2019) 39 *OJLS* 1, 3-5.

[44] See, e.g., Tamanaha (n 42) 119; T Bingham, *The Rule of Law* (Allen Lane 2010) ch 9; Waldron, 'The Concept…' (n 42) 7-8; and J Waldron, 'The Rule of Law and the Importance of Procedure' (2011) 50 *Nomos* 3, 6.

[45] See, e.g., Tamanaha (n 42) 102-104 and 109-111; Bingham (n 44) ch 7; and J Waldron, 'The Rule of Law', *The Stanford Encyclopedia of Philosophy* (Summer edn, 2020) <https://plato.stanford.edu/archives/sum2020/entries/rule-of-law/> accessed 20 June 2020.

[46] See, e.g., Tamanaha (n 42) 112-113.

[47] See, e.g., P Craig, 'Formal and Substantive Conceptions of the Rule of Law: an Analytical Framework' (1997) *Public Law* 467; Tamanaha (n 42) chs 7-9; Waldron, 'The Rule of Law…' (n 44) 4-5; Waldron, 'The Rule of Law' (n 44); and A Zanghellini, 'The Foundations of the Rule of Law' (2016) 28 *Yale J L & Human* 213, 214.

[48] Tamanaha (n 42) 92.

informative, and should not be taken at face value. The reason is that 'formal versions have substantive implications and the substantive versions incorporate formal requirements'.[49] Other scholars have shared similar worries.[50]

Importantly, for our purposes, I will adopt a modest understanding of the Rule of Law—one usually associated with formal versions. The reason is not because I reject substantive versions of the Rule of Law—a point we need not settle here. The point, rather, is related to the methodological caveats mentioned before. While I want to be conceptually parsimonious and thereby avoid the deep disagreement entailed by substantive versions of the Rule of Law,[51] a modest understanding of this ideal is sufficient for grounding precedent-following. My account will not stop being a rule-of-law defence of precedent-following if I avoid exploring how more substantive versions of this ideal bear on this practice. I am not troubled if someone else can justify precedent-following on a more substantive account of the Rule of Law, such as Dworkinian integrity.[52] The reason, again, is that whereas nobody denies that formal accounts are necessary for the Rule of Law, this is exactly what is under dispute concerning substantive versions of this ideal.[53]

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[49] Tamanaha (n 42) 92.

[50] Gardner (n 1) 198-204.

[51] A famous example of this disagreement can be found in Raz, *The Authority of Law* (n 19) 210-211. On the disputed nature of the rule of law, see J Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' (2002) 21 *Law and Philosophy* 137, 159; and P Burgess, 'The rule of law: beyond contestedness' (2017) 8 *Jurisprudence* 480, 481.

[52] See R Dworkin, 'Hard Cases' (1975) 88 *Harv L R* 1057, 1087-1101 and R Dworkin, *Law's Empire* (Harvard UP 1986) ch 7. A Dworkinian view of *stare decisis* was articulated by S Hershovitz, 'Integrity and Stare Decisis' in S Hershovitz (ed) *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (OUP 2006) ch 5. A critical examination of Dworkin's views on precedent can be found in D Pannick, 'A Note on Dworkin and Precedent' (1980) 43 *MLR* 36. Discussing Dworkin's views on precedent, see also S Perry, 'Judicial Obligation, Precedent and the Common Law' (1987) 7 *OJLS* 215, 223-226.

[53] Tamanaha (n 42) 102 and 111.

In particular, I will argue that there are three rule-of-law values the advancement of which gives us reason to support the practice of following precedent in law. The advancement of these values is a reason for rejecting the Null Model and for choosing instead one of the two modes of precedential reasoning I will elaborate in later on. Let me briefly explain what these values are, and the extent to which the Null Model runs counter to them.

1. Stability and Reliability

Stability is a state of affairs in which the content of the law of one country is settled over a considerable amount of time. The proviso of time is important because it would not seem plausible to think that a legal system has achieved stability in relation to a specific matter if the content of the law on that matter changes too frequently. Achieving stability is a matter of degree, for there is no threshold indicating how much time is required for the content of the law to become stable. This depends on many factors, such as the area under examination, where in some cases one specific change in the content of the law may have a much more systemic impact than changes in other, less sensitive areas.

It is not clear to me whether stability has value in its own right.[54] It seems that, if we value stability, we do it not for the sake of stability. To be sure, we may find aesthetic value in things remaining stable—e.g., the three in my garden that every year amazes me with beautiful flowers after the winter. Similarly, stability may be valuable for scientific purposes. To the extent that many scientific discoveries are inductive, some regularity is required for us to discover certain patterns of behaviour so that we may offer a theory aiming to explain them. Finally, there can

[54] Now, because some may think that stability has value in its own right, I have decided to keep stability and reliability as separate values. Nothing in the main argument turns on this point. That stability is instrumentally valuable to reliability is a view also present in T Benditt, 'The Rule of Precedent' in L Goldstein (ed) *Precedents in Law* (Clarendon 1987) 91; and in Duxbury (n 31) 160-161. Traces of this view can also be found from Lord Mansfield in Bingham (n 44) 38 and Hayek in Tamanaha (n 42) 66.

be affective value in stability. I can develop a friendship with someone if he or she does not show too erratic a behaviour. Similarly, I can love someone of erratic behaviour so long as I am aware of this feature of their personality. But in all these cases the value of stability seems to be rather instrumental. Is there intrinsic value in a tree flowering every year after the winter? Is there intrinsic value in a natural phenomenon remaining stable over time? Is there intrinsic value in someone being consistently erratic?

I am not sure. That is why I prefer to think of the value of stability as instrumental to the decisions we make in our daily lives. To the extent that we know that something is stable (or that ought to remain stable, given our current information of it), we can rely on this fact as valuable information for future decision-making or simply aesthetic appreciation. When it comes to the law, the instrumental value of stability becomes apparent. The law plays a fundamental role in shaping our lives, determining our rights and obligations, determining how coercion may be legitimately employed, and so on. Our interest in the law remaining stable is therefore evident. But we don't want the law to be *too* stable either. We want the law to change and to adapt itself to the new realities of life. And, above all, we want the law to change so as to reflect our current moral views. The key, then, lies in striking a balance—however clichéd this may sound. Institutionally, this balance may be achieved by giving legislation a more progressive role, while keeping adjudication rather conservative. But, on top of the correct institutional design, we have a crucial interest in the law allowing us to anticipate events, plan our lives, and be psychological confident. Stability and reliability are thus two sides of the same coin. What may advance stability may also promote reliability, and what may undermine the former may also affect the latter.

Since stability and reliability are intimately connected, I will focus on reliability to offer reasons against the Null Model. Recall, under the Null Model, the fact that a relevant precedent exists is a non-normative legal fact. That specific precedent does not give the later court a legal reason for action. It is safe to assume that, should

courts in a legal system adjudicate under the Null Model, precedents—not even relevant precedents—would not constitute sources of law. It is crucial, for this reason, that we identify sources of law that would allow later courts to decide disputes on which there is relevant precedent in a legally justified way. Consider the case of legislation. If the case is governed by statute, and the application of the relevant norm is straightforward enough, it is safe to assume that, in terms of reliability, the parties have a reason to believe that such a case should be decided in the way prescribed by the statute. (Assuming, of course, that courts have a duty to give effect to the content of statutes). But where the application of the relevant norm entails a 'hard case', this reason for belief might become weaker, or even disappear, if the court adjudicates under the Null Model.

Take cases of statutory vagueness, or where there are various candidates for a correct interpretation of the relevant statute, or where applying the norm would conflict with a moral consideration. For current purposes, a hard case is one where there are good reasons to believe that the court may arrive at different conclusions concerning the statute's application. All these outcomes, further, are justified by law—the law permits, although does not necessarily require, these outcomes. In a hard case such as this, the Null Model entails a probabilistic lottery for the parties. If there are two correct ways of deciding the case, but the fact that one of them is supported by relevant precedent does not count in the balance of reasons, then *ceteris paribus* parties have a fifty percent chance of anticipating the court's decision rightly. This number decreases when the amount of possible justified scenarios increases. If, say, there are four possible correct answers, the chances of parties getting things right is twenty-five percent, again *ceteris paribus*.

This probabilistic lottery runs counter to the Rule of Law *provided* that there are alternative modes of deciding precedent-governed disputes that can offer more reliability to the parties. As I will argue in the next chapter, one of these ways is by making it the case that courts *always* have a legal reason to decide disputes on which there is relevant precedent by following precedent. The existence of this reason

increases the degree of reliability given to parties *vis-à-vis* the Null Model. Parties can rely, before litigation, on the fact that courts always have a legal reason to decide disputes in conformity with relevant precedent. But since this reason does not exist in the Null Model, parties are left to whatever assessment of the correct scenarios the court deciding the case makes. It is for this reason that the Null Model runs counter to the value of reliability—and, *pro tanto*, to the value of stability.

2. Equality

Equality is a contested notion, and some have shown genuine scepticism about whether there is something distinctive in equality other than the generality presupposed in every norm-application.[55] But the existence of a norm is one thing; its application is another. Thus, for reasons external to the norm itself, there can be cases that fall within the norm's scope, but which may receive a different treatment—despite the fact that in virtue of the norm's generality they should not.[56]

This difference of treatment can be explained by the discretionary element entailed in the application of every norm. To begin with, applying a norm requires determining, and eventually justifying, whether certain facts of the world fall within the norm's scope of application. This process is generally known as *subsumption*, and though the margin for discretion might be reduced, adjudication will often require sensible judgment by the decision-maker. It is here where judges come into

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[55] See, e.g., C Perelman, *The Idea of Justice and the Problem of Argument* (J Petrie tr, Routledge & Kegan Paul 1963) 38; H Kelsen, *Pure Theory of Law* (M Knight tr, 2nd edn UCP 1967) 141-142; P Westen, 'The Empty Idea of Equality' (1982) 95 *Harv L Rev* 537, 551; J Raz, *The Morality of Freedom* (Clarendon 1986) 220-221; and FH Easterbook, 'Stability and Reliability in Judicial Decisions' (1988) 73 *Cornell L Rev* 422, 432.

[56] On this point, see, e.g., K Winston, 'On Treating Like Cases Alike' (1974) 62 *Calif L Rev* 1, 22: 'the assessment of the *applicability* of a rule to a case—judged by the fitness of the description in the rule—is not sufficient to determine the *warranted application* of the rule to that case'. Likewise, see E Chemerinsky, 'In Defense of Equality: A Reply to Professor Westen' (1983) 81 *Mich L Rev* 575, 580: 'Once there is discretion in applying laws, we can no longer simply say the law applies to the cases to which it applies. It is imperative to develop a concept of equality to insure consistent, nondiscriminatory application of the laws'.

play. Judges are trusted with the power to determine, *inter alia*, whether facts before them can count as instances of the norm's material scope of application. If they count, then we often say that judges have an obligation, though not necessarily a conclusive one, to decide the case according to the result provided by the norm.[57]

Subsumption can be a straightforward or complex process depending on whether it is clear or disputed that the facts of the case fall within the norm's scope of application. When it is clear, we can think of the case, at least in respect to subsumption, as an easy one. But subsumption does not exhaust the adjudicatory work of judges: they still have to determine whether the norm should be applied all things considered. As Kenneth Winston notes, judges may 'refrain from applying a law to a case that it clearly covers, for example, on the ground that there are features to the case that were not anticipated'.[58] Conversely, complexity in subsuming facts, and thereby in justifying this process, is a reason for the case to be a hard one.

As it relates to precedent, equality requires courts to limit the menu of possible correct answers that, absent relevantly similar cases decided before, they would otherwise have. This means that, if the earlier court reached a decision that was initially justified, the later court is prevented from reaching a different decision without justification. For example, suppose it was an open question for an earlier court whether to treat a particular object as an instance of the statutory term 'wheelchair'. In a relevantly similar case, a later court would not be able to say, at least not without justification, that the same object is not a wheelchair had the earlier court decided that it was. Later courts are thus required to provide at least a justification for why they will depart from the earlier court's decision when there is relevant precedent.

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[57] On the various duties of judges, see, e.g., L Green, 'Law and the Role of a Judge' in K Ferzan & S Morse (eds) *Legal, Moral, and Metaphysical Truths: The Philosophy of Michael S. Moore* (OUP 2016) ch 22.

[58] Winston (n 56) 18. Winston seems to have in mind *epieikeia*—equity, a corrective to law's generality. See Aristotle, 'Nicomachean Ethics' in J Barnes (ed), *The Complete Works of Aristotle: The Revised Oxford Translation* vol II (Princeton UP 1984) 1796 ($1137^{b}17$-18).

But equality, in this constraining sense, can also play a role in the equitable dispensation of legal requirements—assuming, of course, that courts have the corresponding powers. If on grounds of equity an earlier court had made a particular exception in favour of a party, then the later court is prevented from denying the same exception without justification.[59] It is, in other words, contrary to equality to make equitable exceptions and then deny them, without justification, to future parties whose dispute is relevantly similar to the equitable precedent.[60]

The Null Model authorises courts precisely to dispense with this justificatory requirement—namely, of having to argue why they will depart from the decision of the earlier court. The final decision, which affects equality but does not offer a justification, is legally justified. The reason, as we have seen, is that under the Null Model courts are authorised to reach legally justified decisions without paying attention, in a legally significant way, to relevant precedent. Contrary to this state of affairs, as I have argued, equality requires later courts to give reasons why they will depart from relevant precedent. I have considered the examples of legal interpretation and equitable dispensation, but these do not exhaust adjudication.

In sum, the Null Model can be lawful, and one may think that it can also be supported by various reasons. But, crucially, there are reasons as well for thinking that it fails to live up to the Rule of Law. And, barring the case of evil regimes,[61]

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[59] The requirement of justification is particularly stringent when the relevant party has showed to the court that there is precedent regulating the matter at hand, but also if it happens that the later court is aware of this precedent—or others that are relevant.

[60] This is, I think, one of the reasons why the early English equity was heavily criticised: it would provide an unequal treatment to people similarly situated. This situation changed dramatically in the 17th century with the Chancery's use of precedents as a way to stabilise equity and make it more predictable. See, e.g., D Klink, *Conscience, Equity and the Court of Chancery in Early Modern England* (Routledge 2010) 255-261; and M Macnair, 'Arbitrary chancellors and the problem of predictability' in E. Koops & W.J. Zwalve (ed) *Law & Equity: Approaches in Roman Law and Common Law* (Martinus Nijhoff, 2014) 95-98.

[61] On some substantive conceptions of the Rule of Law, this ideal is incompatible with evil regimes—for example, with regimes that systemically undermine fundamental rights. But someone might reject substantive conceptions of the Rule of Law, adhering to formal conceptions instead—for example, in order to reduce potential disagreement in relation to what the Rule of Law requires.

the Rule of Law is an ideal worth pursuing. It has been said, for example, that the Rule of Law is 'law's own virtue, respect for which is needed for the law to have any other virtue'.[62] Others think of it as 'the specific virtue of legal systems'.[63] Still others see it as 'the morality that makes law possible'.[64] These various ways to think about the Rule of Law suggest that a legal system has important reasons to live up to this ideal, including the advancement of stability, reliability and equality. These reasons might not outweigh all competing values, as some scholars have rightly noted,[65] but all else being equal they do recommend a commitment to the Rule of Law. In virtue of this commitment, departures from the Rule of Law, as Tom Bingham has argued, should have a 'clear justification'.[66]

E. Summary

The purpose of this chapter has been to show the value of following precedent in law by conceiving of a possible legal system where the practice does not exist. Admittedly this has been a peculiar strategy: to argue for the value of X by showing how the world would look *without* X. But there is value in this type of thought experiment: it is a reminder,[67] to be sure, that we should not take the value of this distinctive practice for granted.

Hence the explicit proviso on evil regimes in the main text. Cf. Endicott, T, 'The Impossibility of the Rule of Law' (1999) 19 *OJLS* 1, 3.

[62] Raz, 'The Law's Own Virtue' (n 43) 15.

[63] Finnis (n 43) 270.

[64] Fuller (n 43) 33.

[65] Raz, *The Authority of Law* (n 19) 229; Gardner (n 1) 192; and L Green, 'Should Law Improve Morality?' (2013) 7 *Crim Law and Philos* 473, 487.

[66] Bingham (n 44) 8.

[67] I heard Timothy Endicott once referring to thought experiments in jurisprudence as reminders; and because I agree with Endicott's appreciation, I have borrowed his terminology.

The Null Model, it was argued, runs counter to three values that are necessary conditions of the Rule of Law: stability, reliability, and equality. To reach this conclusion, I have discussed the extent to which certain precedents can be sources of law, and in doing so I paid attention to salient features of both the civil law and the common law tradition. Although I have not claimed that the Null Model exists as a matter of fact, my discussion has showed that a legal system in which a precedent is a non-normative legal fact is at the very least conceptually possible. Thus, the Null Model is not a theoretical exaggeration unworthy of attention. Once we analyse the conditions under which this model may exist, we may realise that it doesn't take much to live under a legal system in which a relevant precedent is another non-normative legal fact of the world. The upshot of the Null Model is that a relevant precedent does not give the later court a legal reason for decision, and this situation runs counter to the Rule of Law.

To summarise: when a precedent is a normative legal fact in favour of deciding as before, later courts have an opportunity to advance the Rule of Law. This possibility suggests that a legal system has good reasons to make it the case that courts always have a legal reason to follow relevant precedent. But what does it take achieve this state of affairs? The purpose of the next chapter will be to lay out the conditions under which a precedent can be a non-contingent normative legal fact, thus allowing courts to advance the Rule of Law by following relevant precedent. I will argue, in particular, that a practice of precedent aiming to advance the Rule of Law in an institutionalised way should make it the case that courts always have a legal reason for following relevant precedent. I will argue that, on this view, such a reason obtains even if the precedent is morally deficient, so long as it is not evil.[68]

[68] On the distinction between evil and morally suboptimal precedent, see *infra* Chapter II, text to notes 33 and 34, and Chapter IV.C).

CHAPTER II
A FRESH START

A. Introduction

In the previous chapter, I tried to show the extent to which the Null Model runs counter to the Rule of Law, and I argued that we have good reasons to reject this model. When, by contrast, a precedent is treated as a normative legal fact in favour of deciding as before, later courts have an opportunity to advance the Rule of Law. For simplicity, I will call 'precedent-following' the practice by which later courts treat relevant precedents as normative legal facts recommending, and sometimes requiring, the same decision as before, precisely in order to advance the Rule of Law. Note, as suggested before, that 'precedent-following' is not necessarily equivalent to *stare decisis*. A relevant precedent can be the type of normative legal fact we are looking for, and yet the later court might *not* have a defeasible obligation to follow it. *Stare decisis* is thus one step further in the argument—see Chapters III and IV. Rather, 'precedent-following' aims to capture the two modes of precedential reasoning that I will defend in the next chapter: persuasive and authoritative.

Here is the current challenge we face. There is an important gap between the Null Model, on the one hand, and an approach to precedent that advances the Rule of Law in an institutionalised way, on the other. How can a legal system make it the case that later courts *always* have a legal reason in favour of following relevant precedent? In this chapter, I aim to provide an answer to this question. Section B will offer a general account of the various ways in which the Rule of Law may be advanced, arguing that precedent-following is one distinctive way in which courts may do so. Section C will show the type of reason that is needed in order to advance the Rule of Law via precedent in an institutionalised way; that is, a normative,

content-independent, non-contingent, and *pro tanto* legal reason for following relevant precedent. Section C will also explain some of the difficulties in establishing this type of reason, namely the content-independent character of this reason. Section D defends a view about what makes it reasonable, in certain cases, to knowingly follow suboptimal decisions. This discussion will serve as a basis for the claim that, within certain limits, the content-independent character of the legal reason for following relevant precedent is justified. Section E argues that a first step in establishing this type of content-independence is an institutional approach to advancing the Rule of Law via precedent. Section F specifies the content of the institutional approach I will propose, namely a judicial duty to always put in the balance the legal reason for following precedent. Section G concludes with some reflections on the price of content-independence and the challenge in implementing *stare decisis*.

B. Advancing the Rule of Law

The Rule of Law, I shall argue in this section, can be advanced in various ways and by various distinctive means. Precedent-following, in particular, is one distinctive means by which a legal system may advance the Rule of Law.

Possibly one may draw useful distinctions to capture a variety of ways in which the Rule of Law may be advanced. Private individuals, for example, may advance this ideal in ways that are distinctive to their private capacity, and which are not typically available to public officials. Think, for example, of a group of private citizens exerting political pressure on public officials to better comply with the law, or to demand higher rates of probity. You may of course doubt whether there is something distinctive in that form of political pressure, since officials may also advance the Rule of Law by exerting pressure on *other* officials. For instance, a Labour MP may criticise the Tory government for failing to disclose highly sensitive information—important for the well-functioning of a democracy—and

may thus advance the Rule of Law. Although there is some truth to this argument, there is one difference to bear in mind. Private individuals lack crucial legal powers that public officials, including our Labour MP, do possess. For example, our Labour MP can sit in Parliament and eventually propose legislation; our MP can obtain sensitive information only available to members of Parliament; and so on. These powers and privileges, one may argue, bring together special forms of accountability that private citizens do not normally possess. This mismatch suggests a difference in the way in which the Rule of Law may be advanced. The difference, to be sure, lies not in the degree of effectiveness through which the Rule of Law may be advanced—for the political pressure exerted by our Labour MP can clearly be more effective. The difference, rather, lies in the legal position held by the individual seeking to advance the Rule of Law.

Crucially, officials have their own ways to advance the Rule of Law. These ways are not typically available to private individuals, since they presuppose, as I said, the exercise of legal powers (or the performance of legal obligations) that are exclusively held by public officials. When a police officer, for example, orders me to pull over my car for driving above the maximum speed permitted by law, there are ways of ticketing me that would show more respect for the Rule of Law than other ways. If she offers reasons for ticketing me and points me to the applicable legal norms, her action would show more respect to the Rule of Law than a police officer who just gives me a lawful ticket but refuses to say why. The difference, to be sure, can be accounted for in terms of rule-of-law values such as better knowing the legal norms bearing on our rights and obligations, and the corresponding conduct officials may lawfully require from us.[1]

[1] See, *supra*, Chapter I, fns 42 and 43 (together with accompanying text) for well-established claims in the literature on the Rule of Law from which we can derive the more precise formulation in the text. An example, for current purposes, can be found in Raz's revised account of the Rule of Law—see, J Raz, 'The Law's Own Virtue' (2019) 39 *OJLS* 1. According to Raz, the Rule of Law states 'conditions whose satisfaction is required to make it possible for those subject to the law to find out what it is, and thereby make it possible for the government (which aims to guide people's behaviour) to know how to govern, and for those subject to it to know how they are governed' (ibid, 3). Therefore, it could be argued that, in our example, the police officer who offers reasons for ticketing

But here is one question that we should analyse from the outset. What makes a particular value, such as that advanced by the police officer in our example, a *rule-of-law* value?

1. The Rule of Law as a Directed Ideal

Consider, to better illustrate the problem, the following contrast. If I discipline my eight-year-old son for beating our innocent dog, and I do this showing him the grounds for my sanction, it would be odd to say that I am advancing the Rule of Law. At the same time, I would be honouring the same values (or roughly the same values) the police officer advances when she indicates to me the norms in virtue of which she will ticket me. Why is the Rule of Law only advanced in the latter example, but not in the former?

For simplicity, I shall call the value of exercising authority in a way that provides reasons and shows the applicable grounds of punishment, 'Ideal Authority'. Ideal Authority, thus conceived, is present in the two examples above: in the case of police authority and parental authority. Widely conceived, Ideal Authority is a moral value: it is good or desirable to exhibit openness when holding positions of authority. What makes Ideal Authority (in the case of the police officer) also a rule-of-law value is the fact that, by exercising a legal power, that official has created a legal context in which she may (or may not) advance the Rule of Law. In this particular legal context, advancing Ideal Authority is a shortcut for advancing the Rule of Law. In effect, having ordered me to pull my car over, the specific legal context of law-application the police officer has brought about offers her an opportunity to exercise authority in a way that advances the Rule of Law. But the police officer may well fail to live up to that opportunity. It is that choice-situation,

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me while pointing to the applicable legal norms honours the Rule of Law. That official, to be sure, allows me to better know the law and my rights and obligations under the law. Her actions, again, are more respectful of the Rule of Law than those of a police officer who lawfully gives me a ticket but refusing to say why—or refusing to show me the legal rules in virtue of which she is ticketing me.

triggered by the exercise of a particular a legal power, that gives the police officer an opportunity to foster the Rule of Law. If that official makes transparent the grounds of punishment, she allows me to better know my rights and obligations under the (traffic) law, and the corresponding conduct she (*qua* law-applying official) may lawfully require from me.

This legal context does not exist in the example of parental authority. As a parent striving to educate my son (sometimes, regrettably, with recourse to legally permitted sanctions) the imposition of a parental punishment does not entail the exercise of a legal power. No power-conferring norm (on the side of the law) is at play here. There might be, to be sure, a duty-imposing (legal) norm. The law can, and typically does, bar physical punishment of children. But I think it would be to stretch our notion of advancing the Rule of Law too much if we included, in that notion, the passive conduct of not breaching a legal duty. That passive conduct, to be sure, only *respects* the Rule of Law by not undermining it. But that scenario is different from *advancing* the Rule of Law. Even if you disagree with me on this, and I concede your objection, I would still argue that there is a difference between advancing the Rule of Law via not breaching a legal duty and via exercising a legal power in a specific way. The former is weak rule-of-law advancement, whereas the latter is robust. I will be mostly concerned with robust rule-of-law advancement.

To recap. It is sensible to think that, when someone exercises Ideal Authority without breaching a legal duty, that person lives up to a *moral* value. Whether she also advances the Rule of Law depends on whether that passive conduct—of not breaching a legal duty—is a way to advance this ideal. I have shared my scepticism, but in order to avoid a superficial discussion I have distinguished between weak and robust rule-of-law advancement. Let me treat as established, then, the following claim. When officials exercise legal powers (whether solely in virtue of a power-conferring norm or constrained by a duty-imposing norm *requiring* them to exercise those powers), a particular legal context obtains. And that legal context provides officials with an opportunity to advance the Rule of Law. It is that combination of

legal powers, legal context, and opportunity to advance the Rule of Law, that makes Ideal Authority in one context (of police authority) a rule-of-law value but not in another (of parental authority). If parental authority is a way to advance the Rule of Law, then it is only in a weak sense—i.e., not breaching a legal duty.

But what about the reasons for action the advancement of the Rule of Law gives? On plausible assumptions, values are the kinds of things (i.e., moral entities, moral facts, etc.—the ultimate nature of a moral value need not stop us here) that can give us reasons for wanting them.[2] Whether having a reason for wanting a particular value is sufficient to ground a practical reason for acting in a way that realises such a value may depend on factors which I cannot explore here. For example, on complex and contested issues concerning motivation, *akrasia* and so on. I will thus assume—for otherwise this would be a work on metaethics—that values can give reasons for action. Thus, the fact that X is valuable for you gives you a reason to act in a way that realises such a value (call it a reason to Φ)—assuming, as well, that you have a reason to believe that Φ-ing is a means for realising X. I am aware this proposition might sound controversial to some, but I am not alone in assuming the reason-giving capacity of value.[3] But to mitigate possible disagreement, I will allow for the possibility that X can be valuable for an agent, and yet she might fail to Φ for various reasons. What I shall assume, though, is that if X obtains then the agent has at least a reason to Φ if Φ-ing is a way to realise X.

Accordingly, I will defend the following claim: the type of value in play determines the type of reason the agent has for realising such a value. If Ideal Authority is a moral value, then I have moral reasons for realising it. If, by contrast,

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[2] Although some authors, e.g., S Darwall, 'Authority and Reasons: Exclusionary and Second-Personal' (2010) 120 *Ethics* 257, 269 fn 32 may doubt that someone has a reason to perform an action (or have a certain attitude) if performing that action (or having that attitude) would make that person comply better with reasons. The value of X does not entail, on Darwall's view, X's being reason-giving.

[3] See, e.g., J Raz, *The Morality of Freedom* (Clarendon 1986) 397: 'some people hold that some kinds of values, e.g. aesthetic ones, provide no reasons for action: that they are relevant merely to appreciation. In this chapter "value" is non-relativized and is understood to constitute or imply the existence of reasons for action'.

Ideal Authority (in the case the police officer) is a rule-of-law value (as argued above), then that official has rule-of-law reasons for advancing it. But notice—and here is another important thing to bear in mind—that those rule-of-law reasons are ultimately genuine *moral* reasons. Police authority exercised in a rule-of-law way is nothing but Ideal Authority displayed in a legal context triggered by the exercise of a legal power. So why does the Rule of Law have this transforming capacity—a philosopher's stone, as it were? How can the Rule of Law turn an otherwise moral value into a rule-of-law value?

I think one plausible answer rests on the directedness of the Rule of Law. The Rule of Law is a *directed ideal*. As a unified ideal, the Rule of Law exists *for* (or *only in virtue of*) the law. It is an ideal that receives meaning and finds justification when we think of it as providing vital guidance on how the law (with its institutions and assisted by coercion) can be legitimately employed as a means of social control. Without the law—towards which the Rule of Law *qua* unified ideal is directed—this ideal quickly evaporates into those multiple moral values it is made of. With the law, however, we can think of those values as being normatively tied under the same ideal: the Rule of Law—capitalised, to signal that it is one unified ideal and not a handful of values).

Back to our example. Absent the law, the value advanced by the police officer is simply the moral value of Ideal Authority. With the law, that value maintains its original, moral meaning—for it would be metaphysically dubious to say that the law *deprives* Ideal Authority of its true moral meaning. (Can the law, a human creation, do such a thing?) At the same time, the existence of the law gives Ideal Authority a new, rule-of-law meaning, making its original, moral character, perhaps less visible. It is because of the directedness of the Rule of Law that we can think of the specific values of this ideal—which, when relevant conditions obtain, can give rise to rule-of-law reasons—as values and reasons that matter for the law. These rule-of-law values and rule-of-law reasons are *legally relevant*. But it does not follow that a legally relevant value or reason is, in itself, a *legal* value or reason.

Something else is needed for the law to absorb, and make its own, as it were, a value that originates from an external (though directed) normative source such as the Rule of Law. In Section F, below, I will defend a view of how the law can absorb a rule-of-law value and make it a legal value—and likewise how the law can turn a rule-of-law reason into a legal reason for action. That is, via the notion of a judicial duty. For now, let us only bear in mind that the reasons the police officer has for exercising Ideal Authority are both rule-of-law reasons and moral reasons. Though these reasons are ultimately moral, the directedness of the Rule of Law gives them a rule-of-law meaning thus making them legally relevant. In virtue of the Rule of Law, the police officer has legally relevant reasons for living up to Ideal Authority when she exercises her legal powers under the traffic law.

2. Distinctiveness

Importantly, when the police officer in our example, orders me to pull my car over, that official has a *distinctive* opportunity to advance the Rule of Law. This distinctiveness derives from the fact that such an opportunity presents itself to the police officer only. Neither a court nor a legislature would have the same opportunity to advance the rule of law in the way the police officer can in that particular situation. Presumably, a legislature would never be in a position to advance the Rule of Law in specific cases, because this would not arguably be part of what legislatures do and ought to do—namely to enact laws of general application. But surely a court may have such an opportunity, by having the power to decide an appeal against the police officer's use of power. But the way in which a court may, in that case, advance the Rule of Law is still different from the opportunity the police officer has. For one thing, the power of the court to review the action of the police officer is different from the police officer's power to ticket someone for breaking the traffic law. For another, the specific facts which motivate the exercise of either type of legal power are also different. A person driving in

excess of the speed limit, on the one hand, and the same person filing an administrative action against the police officer's exercise of legal powers, on the other, are different material facts which contribute to the creation of different but equally distinctive opportunities to foster the Rule of Law.

When it comes to public officials, it is plausible to think that the opportunity to advance the Rule of Law is shaped by the context in which officials may exercise their legal powers or perform their legal obligations. Perhaps the police officer has both the power and obligation to ticket someone who drives unlawfully. Possibly the law may give that official discretion, meaning she has the power but is not legally required to exercise it. And perhaps a public official who performs obligations that do not involve any corresponding power, such as a public employee who patiently collects the trash every day, also advances the Rule of Law. The context creates the opportunity to advance the Rule of Law; and that context is determined by the factual scope of the corresponding norm—whether duty-imposing or power-conferring. If we think that all powers and obligations of public officials exist in virtue of the law, then the law would determine, at least indirectly, the context in which certain officials may advance the Rule of Law. The law gives the police officer the opportunity to advance this ideal by ticketing someone; and the law gives courts *another* opportunity (to advance the same ideal) via adjudication.

Now, it would be imprecise, I think, to say that the law also determines *how* the Rule of Law should be advanced. For one thing, the law may, but need not, tell officials how to advance the Rule of Law in specific cases. The Rule of Law will be an ideal worth pursuing independently of what the law says—which is not to deny the directed nature of the Rule of Law. Sometimes it may be wise for the law to tell officials how to advance the Rule of Law; sometimes, it may not. Examples of the former are those constitutional provisions that prevent legislatures from

enacting retroactive penal offences.[4] Examples of the latter are those where the law considers that officials are better placed to determine how the Rule of Law should be advanced. Presumably, in these cases, the stakes are less high than in prohibiting *ex post facto* penal legislation. Although there may be rule-of-law reasons for the law to instruct a police officer on how she should ticket me, there may be other, overriding reasons for leaving that determination to the police officer herself.

Judges, *qua* officials, have their own distinctive ways to advance the Rule of Law. The law gives them that opportunity by conferring on them the power and (sometimes also the duty)[5] to adjudicate disputes. The Rule of Law may be advanced, or may be not, precisely by how judges adjudicate these disputes. It is conceptually possible that, for a legal system to exist, judges need only have the power to decide disputes with the force of *res judicata*—that is, with final and non-reviewable practical authority. Conversely, it is at least conceptually possible that a legal system could exist without judges being required to provide reasons for their decisions. Yet there is a clear rule-of-law difference between adjudication supported by reasons made public and adjudication where the contrary holds. The same could be said regarding the many powers judges have to adjudicate disputes. Surely there can be rule-of-law reasons for interpreting statutes or constitutional provisions in a particular way and not in another way.[6] Likewise, the exercise of

[4] See, e.g., Section 11(g) of the Canadian Charter of Rights and Freedoms, which provides as follows: '[Any person charged with an offence has the right] not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;'.

[5] Admittedly not every legal system imposes a duty on courts to decide disputes, but this is an important principle in the civilian tradition, possibly due to the influence of France's *Code Civil*, whose Article 4 establishes a judicial duty for deciding disputes (even where legislation is silent, obscure or insufficient) on pains of denial of justice: '*Le juge qui refusera de juger, sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice*'.

[6] I am referring to well-known debates over the legitimate methods of interpretation, be it statutory, constitutional or otherwise. Should the interpreter attend to the text of the constitution or statute? Or should she rather uphold the spirit or purpose of the law? Answer to these and related questions bear on the functions and goals of a legal system—and thus rule-of-law considerations come into play.

equity can be more or less rule-of-law compliant depending on whether judges offer reliability and, after exercising equity, treat like equitable cases alike.[7] In all these cases, judges may (or may not) advance the Rule of Law in a distinctive way—i.e., in the light of how they exercise their legal powers or perform their legal obligations.

To summarise. By giving legal powers to public officials, the law gives them an opportunity to advance the Rule of Law. Many factors hinge on what makes that opportunity distinctive: the material facts motivating the exercise of a legal power, the specific type of legal power at stake, the nature of the powerholder, and so on. In the remainder of this section, I shall argue that following precedent is also a distinctive way to advance the Rule of Law.

3. The Distinctiveness of Following Precedent in Law

And we finally arrive at precedent. The existence of relevant precedent, as the term was technically defined in the previous chapter,[8] provides the later court with an opportunity to advance the Rule of Law. My discussion in the previous chapter showed the extent to which a court may fail, when confronted with a relevant precedent, to advance this important ideal. That is, by adjudicating under the Null Model. Under the Null Model, courts miss the opportunity to advance the values of reliability, stability, and equality in the application of the law. By contrast, precedent-following is precisely one way in which courts (and legal systems more generally) may advance these values while adjudicating disputes on which there is

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[7] As revealed by the history of English equity; see, e.g., S Worthington, *Equity* (Clarendon 2006) 11: 'The impetus to convert Equity from bounty to law was itself partly political. The power struggles between the Chancellors and the King's Judges put Equity under inevitable pressure to become more law-like; its decisions would never be entirely politically acceptable unless they could be characterized as rational, predictable, and objective'.

[8] See, *supra*, Chapter I, 44ff.

relevant precedent. If, as some have argued,[9] every legal system necessarily possesses law-applying institutions whose duty is to decide disputes with final authority; and if, as I have argued, the Rule of Law is an ideal worth pursuing, then we have reason to prefer those adjudicatory practices that advance the Rule of Law over those which do not. Accordingly, we have reason to prefer a practice of precedent that advances the Rule of Law over the Null Model. A legal system should make it the case that courts treat a relevant precedent as a normative legal fact in favour of deciding as before.

What I want to add, in order to conclude this section, is that following precedent is not the only one way to advance the Rule of Law—for there are many ways to do so, as we have seen—but also a *distinctive* way. Its distinctiveness derives, first, from the fact that adjudication is itself a distinctive way to decide disputes. There are many ways to settle conflicts: mediation, arbitration, and so on. What makes modern adjudication a distinctive approach to dispute-resolution is the existence of an independent and impartial court (or judge) with the power to settle the matter with final and non-reviewable authority—and by applying pre-existing legal norms to the case at hand. Adjudication, it is submitted, may not be the more effective way to decide disputes—and I remain agnostic as to whether it is the most virtuous one, i.e., the more just, transparent, democratic, fair and so on. But whatever its shortcomings, adjudication is certainly a distinctive approach to dispute-resolution. To that extent, then, the distinctiveness of adjudication contributes to the distinctiveness of following precedent in law.

[9] HLA Hart famously accounted for these law-applying institutions in terms of secondary rules of adjudication aiming to solve problems of inefficiency arising from diffused social pressure; see HLA Hart, *The Concept of Law* (3rd edn, Clarendon 2012) 96-97. Secondary rules of *adjudication*, together with secondary rules of *change* and *recognition*, supplement, according to Hart, primary rules of conduct. In the combination of these two types of rules (primary and secondary) lies what Hart conceived of as 'the heart of a legal system' (ibid 98). See, also, J Raz, *Practical Reasons and Norms* (first published 1975, OUP 1999) 126-129, 134-137; and S Shapiro, *Legality* (Harvard UP 2011) 15, for whom it is a 'truism about law' that all legal systems have judges. We need not take this claim at face value; there is sufficient empirical support for the claim that legal systems generally have law-applying institutions. The possible existence of an imaginary legal system where these institutions do not exist does not affect, let alone undermine, my claim in this chapter.

But crucially, the distinctiveness of following precedent derives from the fact that time should not make a difference in the treatment that two disputes that are relevantly similar should receive. As we shall soon see, in virtue of the idea of advancing the Rule of Law, a relevant precedent becomes a normative legal fact (*pro tanto*) that recommends delivering a particular decision: that is, deciding the present case by following relevant precedent. Accordingly, the current decision-maker has a legal reason for action she would not have absent the Rule of Law. But a relevant precedent cannot become a normative legal fact *solely* because it is a relevant precedent. A morally suboptimal precedent, as we will see, has no claim to be repeated solely because it is relevant. As I will soon argue, though, a relevant precedent may indeed have such a claim if what is at stake is advancing, in an institutionalised way, this very ideal.

On the contrary, without precedent-following, time could make a difference in the treatment that two disputes that are relevantly similar ought to receive. We saw in the previous chapter that hard cases give courts various choices, all potentially justified by law. Without precedent-following, a hard case could be treated at T^1 in some way, but at T^2 in some other way. Neither outcome would be better justified by law. Precedent-following puts a constraint on such a difference of result. The practice gives a later court a legal reason to decide in T^2 as another, relevantly similar dispute, was decided in T^1. That constraint is the hallmark of precedent-following—and its most distinctive contribution for advancing the Rule of Law.

I argued that a legal system has important reasons for advancing the Rule of Law. Precedent-following is one distinctive way a legal system can do so. But it is crucial to acknowledge that this advancement is *ceteris paribus*; for conversely, as some scholars have noted,[10] cases might arise in which following precedent will *not*

[10] See, e.g., D Lyons 'Formal Justice and Judicial Precedent' (1985) 38 *Vand L Rev* 495, 511-512; F Schauer, 'Precedent' (1987) 39 *Stan L Rev* 571, 597-598; N Duxbury, *The Nature and Authority of Precedent* (CUP 2008) 163; and J Waldron, 'Stare Decisis and the Rule of Law: A Layered Approach' (2012) 111 *Mich L Rev* 1, 9-14.

advance the values the practice is meant to advance *in general*. And this can be so for many reasons—including epistemic reasons. Barring these cases, though, following relevant precedent is a distinctive means for advancing the Rule of Law.

In what follows, I will proceed on that assumption, not only because I believe it has been sufficiently defended in the previous chapter (in particular, by relying on the Null Model as a useful baseline) but also because I believe it finds sufficient support in the literature.[11] Accordingly, to the extent that a legal system has a reason to advance the Rule of Law, and to the extent that precedent-following is one distinctive means to do so, later courts have, *pro tanto*, a reason for following relevant precedent. I turn now to the specific features of this *pro tanto* reason.

C. The Type of Reason We Need

I argue in this section that a practice of precedent that advances the Rule of Law in an institutionalised way needs to deliver at least a *pro tanto*, normative, content-independent and non-contingent legal reason for following relevant precedent. In other words, that practice needs to make it the case that later courts always have a legal reason for following relevant precedent—even if the precedent is morally suboptimal, so long as it is not evil.

In Section F, I will explain why I think this reason is *legal*—roughly, because it is the product of a duty the law imposes on judges dealing with relevant precedent. The grounds for making this reason legal, instead of keeping it purely moral, have to do with the need to advance the Rule of Law in an institutionalised way, thereby by-passing the complex and highly casuistic moral evaluation by the individual judge of whether to follow relevant precedent in the case at hand. Let us bracket, for a moment, the legal character of this specific reason and start with its first two

[11] On the various values supporting the use of precedent by courts, including rule-of-law values, see Duxbury (n 10) ch 5 and Nina Varsava, 'How to Realize the Value of Stare Decisis: Options for Following Precedent' (2018) 30 Yale J L & Huma 62.

features, namely that it is a *pro tanto* and normative reason for action, and then move on to the third feature—content-independence.

1. Pro Tanto and Normative

I shall say, first, and following conventional terminology, that if a reason is *pro tanto*, then the course of action that it favours is not necessarily what the agent ought to do *all things considered*. The distinctive mark of a *pro tanto* reason is that it can be weighed against other reasons. Of course, a *pro tanto* reason may turn out to make a conclusive difference to what the agent ought to do all things considered, provided that the reasons favouring some other course of action do not outweigh it. When it comes to advancing the Rule of Law via precedent, following relevant precedent might *not* be what the later court should do all things considered. Sometimes, as we shall see, later courts may have reasons *against* following relevant precedent—such as rendering a decision that is morally superior to the precedent. When these reasons are strong enough to defeat all conflicting considerations, we can think that the later court has an all-things-considered reason in favour of *departing* from relevant precedent.

Second, I am interested in *normative* reasons for action—that is, I will consider neither *motivational* nor *explanatory* reasons. Normative reasons are those considerations that favour a particular action—not from the opinion of the agent, but, as Maria Alvarez puts it, 'as judged by a well-informed impartial observer'.[12] Motivational reasons are those considerations that recommend, in the opinion of a specific agent, a particular action. Explanatory reasons, finally, are those by which we can explain the action of an agent without necessarily attending to her own

[12] M Alvares, 'Reasons for Action: Justification, Motivation, Explanation', *The Stanford Encyclopedia of Philosophy* (Winter edn, 2017) <https://plato.stanford.edu/entries/reasons-just-vs-expl/.> accessed 17 November 2021.

motivations, nor to the viewpoint of an impartial observer.[13] I will focus on normative reasons alone because I am interested in offering a view of what a well-functioning legal system looks like concerning the use of precedent. And doing so requires showing that precedent-following is valuable *for the legal system*—i.e., without attending to what is valuable for specific agents within that system, such as a judge or a court. Thus, when someone argues that something is valuable for the legal system, she makes a detached value-judgment: *qua* well-informed impartial observer, and not *qua* specific agent participating within that system (deciding what to do), that person argues that a certain action is worth doing. This valuable action is recommended by the reason; what the reason does, as David Owens puts it, is to 'make sense of a course of action by recommending it, by highlighting some good or desirable feature of it which could move a reasonable agent to perform it'.[14]

It is, of course, another problem whether that person succeeds in convincing you that some agent has a normative reason to perform a certain action. The theoretical value of the Null Model, as a thought experiment, is precisely to show what a legal system looks like when courts do not pay attention, in a legally significant way, to relevant precedent. That system fails to protect the values of stability, reliability, and equality in the judicial application of the law. Thereby, that system fails to live up to the Rule of Law. Conversely, when courts follow precedent, the Rule of Law is advanced, *ceteris paribus.* If courts have a reason to advance the Rule of Law, then courts also have, *pro tanto*, a normative reason in favour of following relevant

[13] Alvarez (ibid) is well-aware that motivational reasons can be conflated with explanatory reasons, and that considerations of conceptual parsimony may suggest not distinguishing between them. At the same time, and for reasons that seem wholly sensible, she argues that both reasons play fundamentally different roles; as such, they should be distinguished.

[14] D Owens, 'Rationalism about Obligation' (2008) 13 *European J Phil* 403, 403. Owens speaks of 'practical reason', but I think that, given the context, it is fair to say that he is referring to normative reasons for action.

precedent.[15] This reason is neither an explanatory nor a motivational reason, and it is not necessarily what the later court ought to do all things considered.

Importantly, without law's intervention, the normative character of the reason for following precedent might fall away if it is shown that following relevant precedent in the case at hand will *not* advance the Rule of Law. What the *ceteris paribus* clause does (cf. text to note 10) is to give a *prima facie* character to the normative reason for following precedent in order to avoid discussing in every case whether following relevant precedent advances the Rule of Law. When the law comes into the picture (by making this reason a legal reason), that *prima facie* normative character drops away: the law, bluntly, treats this reason as normative. This explains why, for example, under *stare decisis* judges have a legal reason for following relevant precedent even if morality recommends departing from precedent in the case at hand. I will get back to this possible mismatch in sections F and G.

2. The Challenge: Content-Independence

But how can a normative and *pro tanto* reason be content-*independent*? Shouldn't we first determine, prior to claiming that later courts have a *pro tanto* reason for following relevant precedent, whether the precedent is a recommendable decision such that following it is also desirable? What if the precedent is an unsound decision? As it stands, something needs to be added—for it does not seem correct to say that a normative reason can recommend an action (or an outcome) that is

[15] Should other institutions, such as administrative agencies, follow relevant precedent in order to advance the Rule of Law? The answer to this question requires analysing the goals and aims of the corresponding institution and whether, and the extent to which, they can be balanced against the value of advancing the Rule of Law. For example, C Sunstein & A Vermeule, *Law & Leviathan* (Harvard UP 2020) make plenty of room for trade-offs between rule-of-law principles and other considerations bearing on what the administrative state ought to do. They argue that 'The internal morality of law [of administrative law in particular] is important, but it does not point to the only consideration that institutional designers and legal decision makers must take into account' (ibid 97).

unsound—namely, following an unsound precedent. That 'something' is arguably the most distinctive feature of precedent-following and possibly its most controversial. As such, I will examine it carefully.

Let me restate the problem as follows. Does a court have a reason to follow a relevant precedent regardless of its correctness? Or does a court have this reason *only if* the relevant precedent is a commendable decision? Note that what is at stake is not whether following precedent is sound or unsound from the legal point of view. For reasons soon to be explored, it is possible to think that the law may recommend following a precedent that, judged from another, non-legal point of view, is unsound. For example, an unjust, inefficient, or undemocratic precedent. A precedent may have these characteristics, and yet (on plausible assumptions) the law may still instruct judges to follow it. Where this is the case, following a morally suboptimal (unjust, undemocratic, etc) precedent may be the correct thing to do from the legal standpoint. Let me distinguish, then, between the legal and moral correctness of a precedent—I will articulate this distinction in more detail in Chapter IV, Section C. In what follows, I shall set aside the problem of the legal correctness of the precedent,[16] for I take it that, on the jurisprudential outlook I have adopted,[17] it is possible that a precedent's moral correctness deviates from its legal

[16] To be sure, by setting aside the legal correctness of a precedent, I do not want to overlook its complexity. The moral reasons a later court has for following precedent can be affected by whether the earlier court, e.g. a Supreme Court, got the law right or wrong—independently of whether the later court is *legally* bound by Supreme Court precedent. If the precedent is legally incorrect, the law may nevertheless impose a legal obligation on the later court to follow it, even if morality recommends departing from that precedent in a particular case. Cf. T Endicott, 'How Judges Make Law' in E Fisher et al (eds) *The Foundations and Future of Public Law: Essays in Honour of Paul Craig* (OUP 2020) 130. The demands of the Rule of Law on precedent also extend to aspects concerning the legal correctness of the precedent. It is worth exploring, for example, whether the Rule of Law grounds a content-independent reason for *not* following precedent if the precedent was given *per incuriam*, i.e., in ignorance of a relevant statutory provision or binding precedent. My decision to focus on moral correctness is motivated by the need to narrow down the scope of this thesis and by the problem of the reasons the later court has for following *morally* suboptimal precedents. I hope nothing of what I say here commits me to a particular view on legal correctness.

[17] That is, one where it is not a mistake, *pace* Dworkin, to distinguish the legal and moral reasons a later court may have for following relevant precedent. See, *supra*, Introduction, Section A.

correctness. Moral correctness is a wide category including various non-legal considerations such as economic efficiency, justice, democratic legitimacy, etc.

The question I want to tackle is whether a normative reason can recommend following a relevant precedent independently of its moral correctness. It will be useful, at this point, to distinguish between two types of precedential constraint. I will call them 'weak' and 'robust'.[18] According to *weak* precedential constraint, a later court has a reason for following relevant precedent *only if* the precedent is not morally suboptimal. On weak precedential constraint, then, whether a later court has a reason for following precedent depends on the moral correctness of the precedent. Only if the relevant precedent is not morally suboptimal will the later court have a *pro tanto* reason for following it. By contrast, under *robust* precedential constraint, a later court has this normative reason *independently* of the precedent's moral correctness. When a precedent is treated as having robust precedential constraint, usually the mere fact of its existence is a *pro tanto* reason for the later court to follow it. That reason recommends following a particular precedent just in virtue of the fact that it is relevant. It is robust precedential constraint that Frederick Schauer has in mind when he argues that

> if we are truly arguing from precedent, then the fact that something was decided before gives present value despite our current belief that the previous decision was erroneous.[19]

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[18] This distinction is based on K Stevens, 'Case-to-Case Arguments' (2018) 32 *Argumentation* 431, 435-437, who distinguishes between weak and strong versions of the principle 'treating like cases alike'. Now, one should be careful not to conflate precedent-following with treating like cases alike, and not to ground the former in the latter. Both have been a debated topic in the literature; see, e.g., Lyons (n 10); and F Schauer, 'On Treating Unlike Cases Alike' (2018) 33 *Const Commentary* 437.

[19] Schauer, 'Precedent' (n 10) 575; cf. F Schauer, *Thinking Like a Lawyer* (Harvard UP 2009) 90; Varsava (n 10); K Stevens, 'Reasoning by Precedent—Between Rules and Analogies' (2018) 24 *Legal Theory* 216, 219; and R Kozel, *Settled Versus Right: A Theory of Precedent* (CUP 2017) 6. G Postema, 'On the Moral Presence of Our Past' (1991) 36 *McGill L J* 1153 is somewhat ambivalent on this point. He argues (ibid 1169) that 'The moral force of precedent *must be*, at least to some degree, *independent* of the merits of the decision'—and he calls that the 'independence thesis' (first emphasis added, second in original). Later though (ibid 1163) he appears to moderate this content-independent feature of precedent: 'The independence thesis maintains only that the moral force of

Notice the expression 'despite *our* current belief that the previous decision was erroneous' (emphasis added). I want to suggest that, for Schauer, the possessive 'our current belief' does not refer only to the later court disagreeing with the precedent. The expression suggests, in my view, that a sufficient number of people considers, on good grounds, that the precedent is morally unsound. Even in this, more pressing scenario, later courts would have a *pro tanto* reason for following relevant precedent. After all, as Schauer himself has argued, 'maintaining a serious regime of precedential constraint entails some number of suboptimal decisions'.[20] Those decisions are not suboptimal just because the later court views them as such—otherwise there would be as many suboptimal decisions as there are cases in which a later court disagrees with a relevant precedent. These decisions are suboptimal because a sufficient number of people so judges it on good grounds.[21] And, again, these decisions are not suboptimal from the legal point of view (although if a court sets a legally mistaken precedent, then following it *may not* be the legally correct thing to do). But that is not what is at stake here. Our focus, rather, lies on precedents that are legally sound but morally suboptimal.

In virtue of this robust form of precedential constraint, then, the fact that a relevant precedent is morally suboptimal does not prevent the later court from having a *pro tanto* reason for following it. Because moral correctness is not a necessary condition for following relevant precedent, then under robust precedential constraint the reason for following relevant precedent is content-*independent*—in respect of its moral correctness. A later court has this reason regardless of the precedent's moral content, whereas on weak precedential

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past actions or decisions is not reducible to reasons for the decision regarded timelessly. A consequence of this is there *may be* cases in which one has a reason to follow precedent in spite of doubts we may have about the merits of the decision regarded timelessly'; emphasis in original.

[20] F Schauer, 'Precedent' in A Marmor (ed) *Routledge Companion to Philosophy of Law* (Routledge 2012) 124.

[21] I will say more about this epistemic caveat in Chapter IV.C.

constraint the moral correctness of a relevant precedent matters for grounding the same reason. But we still need to account for the normativity of robust precedential constraint. How can a morally suboptimal (but relevant) precedent give the later court a *pro tanto* and normative reason for action? For we have only *claimed* so far that on, robust precedential constraint, this reason indeed obtains. But this claim may well be mistaken such that a later court *never* has a normative reason for following a morally suboptimal precedent. There are thus two options: either to account for the normativity of robust precedential constraint or else reject it and adopt the weak version of precedential constraint, instead. Let me explain why there are reasons for resisting the latter approach.

The problem with weak precedential constraint is that it faces three important objections. First, someone could argue that this approach is under-inclusive: it leaves out *too* many courts from the account. Think, to begin with, of all those courts in various common-law jurisdictions that follow relevant precedent regardless of their moral correctness—or that have done so in the past. Weak precedential constraint cannot account for this salient fact of the common law, and this is already a good reason for resisting it. In effect, as I mentioned in the Introduction (Section C), mine is a work on practice-interpretation, and as such I am guided by central features of the practice under analysis. I take robust precedential constraint, at least in the common law, to be one of these features—to be accounted for rather than rejected. Otherwise, to cite Adam Rigoni again, my account would 'miss the mark', as it would 'ignore too much of judicial practice'.[22] The account, therefore, needs to provide a minimum descriptive basis for accommodating various courts in the world, and this includes common-law courts.

Secondly, there are considerable institutional costs associated with weak precedential constraint. Judges would be required to determine whether a precedent is correct under the political morality in question in order to know whether they

[22] A Rigoni, 'Common-Law Judicial Reasoning and Analogy' (2014) 20 *Legal Theory* 133, 135; emphasis added.

have a reason for following it. And arguably this determination would require judges to be highly competent moral practitioners, possess adequate institutional capacity, and so on. In order to avoid these institutional costs, someone might argue that the reason for following relevant precedent cannot depend on the precedent's moral correctness.

Thirdly, someone could object that, by making moral correctness a necessary condition for following relevant precedent, weak precedential constraint contributes very little to advancing the Rule of Law. If two cases are relevantly similar, a reason that applies to one case also applies to the other.[23] If in one case it is morally correct to adopt that decision, then that is the decision to be adopted in a relevantly similar case. What work would precedent-following do if not merely mirroring the generality of reasons? By collapsing precedent-following into the generality of reasons, the weak version of precedential constraint contributes very little to advancing the Rule of Law. For precedent to make a meaningful contribution to the Rule of Law, moral correctness cannot be a condition for following relevant precedent. And this means, crucially, that precedent-following entails the possibility of having a reason for following precedents that are morally suboptimal. This possibility explains Schauer's claim that 'maintaining a serious regime of precedential constraint entails some number of suboptimal decisions'.[24] Or similarly, in the words of Barbara Baum Levenbook,

> It is crucial to the idea of a precedent that it has this sort of justification-independent exemplar force… A decision may be wrongly decided, may even

[23] Cf. Stevens, 'Case-to-Case Arguments' (n 18) 435.

[24] Schauer, 'Precedent' (n 20) 124. Cf. Schauer, 'Precedent' (n 10) 576: 'When the strength of a current conclusion totally stands or falls on arguments for or against that conclusion, there is no appeal to precedent, even if the same conclusion has been reached in the past. If precedent matters, a prior decision now believed erroneous still affects the current decision simply because it is prior'.

be without justification for any practical purposes, and yet function as a precedent nonetheless.[25]

Both Schauer and Levenbook have in mind *stare decisis*, which as we will see in chapters III and IV is characterised by the fact that later courts have a general and defeasible *obligation* to follow relevant precedent. By contrast, when courts have a non-obligatory reason for following precedent, the possibility of entrenching suboptimal precedents in the law is reduced (more below).[26]

I have no quarrel with these possible objections—though I shall very soon suggest that there are limits to robust precedential constraint. In fact, I think the first objection already gives us sufficient reason to resist weak precedential constraint; too much important data is left out of the account if we make moral correctness a necessary condition for following relevant precedent. I will therefore set aside weak precedential constraint, and attempt instead to account for the normativity of robust precedential constraint.

How can we recommend performing an action (or reaching an outcome) that is morally suboptimal? Surely if a court follows a morally suboptimal precedent this will not make the new decision morally commendable. A morally suboptimal precedent cannot become morally optimal solely in virtue of being followed by a later court. Consider the case of lies or any other objectionable action. If I lied to you in the past, lying to you again will not make my new lie right simply because I already did it once. Likewise, if I have stolen a delicious piece of Dutch cheese from the supermarket, that fact will not make it right to steal one again. And stealing Dutch cheese repeatedly, or lying to you repeatedly, will not make any difference

[25] BB Levenbook, 'The Meaning of a Precedent' (2000) 6 *Legal Theory* 185, 191.

[26] See also S Lewis, 'Precedent and the Rule of Law' (2021) 41 *OJLS* 873, 897-898.

in the moral assessment of my action. As Katharina Stevens observes, the mere performance of an action is not sufficient to alter its moral quality.[27]

The same happens in law. If an earlier court set a morally deficient precedent, following it will not make the new decision morally optimal. The new decision will be morally deficient no matter how many times the precedent is followed and no matter by how many later courts. In *R v Clarence*,[28] for example, the Queen's Bench Division of the UK's High Court quashed a criminal conviction in favour of a man charged with having assaulted his wife. One of the grounds for quashing the conviction was that a married woman (in this case the victim) has irrevocably consented to sexual intercourse, and thus there cannot be rape within marriage. The decision set a lawful precedent: by denying that that there can be rape within marriage, the common law protects a husband who has sexual intercourse with his wife against her will. At least three subsequent cases upheld this doctrine,[29] until it

[27] Stevens, 'Case-to-Case Arguments' (n 18) 436-437.

[28] (1889) 22 QBD 23. Some judges, e.g., Wills J, appear to reject the view that as a matter of law there cannot be rape within marriage on grounds of implied consent. But careful reading of the majority's opinions suggests that, for the court, a woman entering the contract of marriage gives irrevocable consent to sexual intercourse—and, at most, there can be exceptions that would make the sexual intercourse (initiated by the husband) a criminal offense. Let me cite three crucial passages: Stephens J writes: 'I wish to observe on a matter personal to myself that I was quoted as having said in my Digest of the Criminal Law that I thought a husband might under certain circumstances be indicted for rape on his wife. I did say so in the first edition of that work, but on referring to the last edition (p. 124, note), it will be found that the statement was withdrawn'. Hawkins J, who voted for upholding the conviction, thought that 'By the marriage contract a wife no doubt confers upon her husband an irrevocable privilege to have sexual intercourse with her during such time as the ordinary relations created by such contract subsist between them. For this reason it is that a husband cannot be convicted of a rape committed by him upon the person of his wife... Rape consists in a man having sexual intercourse with a woman without her consent, and the marital privilege being equivalent to consent given once for all at the time of marriage, it follows that the *mere act of sexual communion is lawful*; but there is a wide difference between a simple act of communion which *is lawful*, and an act of communion *combined with infectious contagion* endangering health and causing harm, which *is unlawful.*' (emphases in original). Finally, Pollock J writes: 'As is said by Lord Hale in his Pleas of the Crown…: "By their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract". Such a connection may be accompanied with conduct which amounts to cruelty, as where the condition of the wife is such that she will or may suffer from such connection, or, as here, when the condition of the husband is such that the wife will suffer'.

[29] *R v Clark* [1949] 2 All ER 448, 33 Cr App Rep 216; *R v Miller* [1954] 2 QB 282; and *R v Sharples* [1990] Crim LR 198.

was finally repealed by the House of Lords in *R v R*.[30] This kind of morally repugnant precedent presents thus a challenge for robust precedential constraint. Take Schauer again: 'maintaining a serious regime of precedential constraint entails some number of suboptimal decisions'.[31] How can those morally repugnant decisions be accounted for? Are we to say that even a precedent as evil as that set by *R v Clarence* ought *pro tanto* to be followed in order to advance the Rule of Law? Unfortunately, we need to muddy the waters a bit.

Evil precedents are at one side of the 'morally sound-unsound' spectrum. At the opposite extreme we have commendable precedents, such as the House of Lords' decision in *R v R* ruling that under British criminal law a husband who rapes his wife *is* subject to criminal conviction. In between on the spectrum, as I will explain in more detail in Chapter IV, Section C, we may have *many* types of precedents. We may find precedents that, without being evil or morally egregious, may nevertheless be morally suboptimal. For instance, a precedent can be deficient because it establishes too many (or very demanding) conditions for exercising certain moral rights recognised by the law. This is a moral problem: the judicial enforcement of these moral rights becomes burdensome. Or a precedent could be deficient just because the contrary holds: the law provides no conditions for exercising moral rights recognised by the law. A precedent, further, can be suboptimal from various points of view, which may conflict with each other. *Uber BV v Aslam*,[32] decided by the UK Supreme Court in 2020, could be a good approach for *judicially* improving the labour situation of thousands of workers; but whether that is the best solution from an institutional or economic standpoint is *yet* to be known. A precedent may thus be suboptimal because it covers matters that should

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[30] [1992] 1 AC 599.

[31] Schauer, 'Precedent' (n 20) 124.

[32] [2021] UKSC 5.

have been regulated by the legislature in the first place. These remarks suggest that determining whether a precedent is evil, mistaken, or otherwise morally suboptimal can be a lengthy and complex process. We may need considerable time to grasp the real impact of a precedent, and the extent to which it undermines sound moral considerations to the contrary. We might judge, under the moral lenses of today, that a precedent is morally optimal (or, perhaps, morally irrelevant); yet nothing rules out the possibility that, with time, our judgement might be affected by different factors, to the point that we might even consider that such a precedent is indeed morally suboptimal. Many reasons can explain this change, for example technological advancements, scientific progress, moral refinement, new information not previously available, etc. As a result, the evaluation of whether a particular decision is morally suboptimal can be lengthy, burdensome, and contested, as the *Uber* case may show. But that this type of evaluation can have these characteristics is not a reason for thinking that there cannot be other precedents that are morally suboptimal the minute they are set by the court.

Be that as it may, when the moral practices of a community are so distant from the legal regulation they receive (or are claimed to receive) by precedent, the waters will be less muddy. And this could be the case with evil precedent. Arguably, by 1991, the year in which the House of Lords declared that a husband who raped his wife is criminally responsible under British law, the political morality in the UK was dramatically different from 1888, the year in which *R v Clarence* was decided. Arguably, by 1991, a significant part of British population, officials included, thought that *R v Clarence* was too evil a precedent to count as part of British law—and hence the judicial repeal of the evil doctrine. Accordingly, it may well have been the case that people and officials doubted whether following *R v Clarence* advanced any value. Perhaps people would have been highly surprised, and even shocked, to learn that the doctrine recognised in *R v Clarence* was part of British law by 1991. In regard to evil precedent, then, robust precedential constraint should be carefully scrutinised. It may well be that later courts *never* have a reason,

not even a *pro tanto* reason, for following evil precedent. Precedents that directly undermine human dignity, for example by denying the possibility of rape within marriage (*R v Clarence*) or by drawing utterly immoral, unjustifiable distinctions, do not appear to meet a minimum threshold for falling within robust precedential constraint.

The obvious consequence of the continuous threat of evil precedent is that we are forced to acknowledge that judges can never *fully* dispense from moral correctness. Confronted with relevant precedent, judges must make an initial (perhaps almost intuitive) moral assessment of whether the precedent is not evil to determine whether they have a reason for following it. But the enduring possibility of evil precedent should not lead us into thinking that the idea of content-independence is doomed to fail. Even Joseph Raz, one of the main torchbearers of content-independence in law, recognised that content-independence can be a matter of degree: 'there can be degrees of content-independence (make any law, make any law that does not violate human rights, make any law… necessary to the implementation of a fair rent act, etc').[33] It is possible, thus, to bracket out evil precedent for the purposes of drawing the boundaries of what falls (and what does not fall) within content-independence, and leave instances of evil precedent out of the account.[34] In what follows, I will proceed on that basis. I will not say more about evil precedent at this stage, but I will return to this topic when I defend the equitable power of later courts under the authoritative mode—in Chapter IV.

So let us bracket for a moment evil precedents and the problem of whether they give rise to any kind of normative and *pro tanto* reason for decision. That still leaves

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[33] J Raz, 'Two Views of the Nature of the Theory of Law: A Partial Comparison' (1998) 4 *Legal Theory* 275. I am grateful to Julie Dickson for pointing out to me this quote by Raz.

[34] Can we draw a clear-cut threshold for robust precedential constraint? If we can recognise instances of evil law, and if we can also recognise the grounds that make such law evil (e.g., it directly undermines human dignity), then those instances would fall outside the boundaries of robust precedential constraint. For an illuminating discussion of evil law, see Anna Lukina, 'Making Sense of Evil Law' (SSRN, 3 August 2022) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4180729> accessed 14 November 2022.

us with the task of accounting for the normativity of many other precedents—those that, although not being evil, are nonetheless morally suboptimal. Should we analyse them under the lens of weak precedential constraint? As suggested before, we have good reasons to resist this route. But robust precedential constraint needs further normative backup. How can a morally unsound precedent give rise to a normative and *pro tanto* reason for action? Surely if the precedent is morally unsound then there are reasons for *not* following it. Notice though that what is at stake is not an all-things-considered reason but only a *pro tanto* reason. The fact that there may be reasons against following a suboptimal precedent does not show that there may not be reasons *in favour* of doing so. After all, this is what *pro tanto reasons* are about.

But what could those reasons be? And how can we establish them in a way that does not depend on the precedent's moral correctness (which would lead back to weak precedential constraint)? If robust precedential constraint is to be successfully accounted for, what needs to be shown (again, evil precedent aside) is that a later court *always* has a *pro tanto* reason in favour of following relevant precedent. That reason exists *even if* the relevant precedent is morally suboptimal. It is only by establishing the content-independent character of this *pro tanto* reason that we can pull the discussion off the ground.

In the remainder of this chapter, I will argue that an institutional approach to advancing the Rule of Law via precedent can do the type of normative work we are looking for. My claim, in particular, is that this institutional approach can ground robust precedential constraint and thereby establish the content-independent and non-contingent character of the type of reason we need.

D. Why Follow Suboptimal Decisions?

We saw above that, on weak precedential constraint, courts have a reason for following precedent on the condition that the precedent is not morally suboptimal.

At the same time, we also studied some of the problems with this approach. If my discussion is sound, we need to make room for the claim that, evil precedent aside, courts always have a reason for following precedent, even if it is morally suboptimal. How can this be so? To answer this question, we need to briefly address the problem of what makes it reasonable to follow suboptimal decisions knowingly.

Let us consider a stock example. Suppose you are a teacher and you have set your students a two-day deadline for handing in their essays. One of your students asks you for an extension because (she thinks) you didn't give enough time. Based on the fact that you've already set a deadline you consider sufficient, you deny the extension. Another student approaches you with the same request, and you deny the extension again on the same reason plus the additional reason that you've already said no to one of your students—which you take to be a precedent though of course not binding. A third student approaches you for yet another extension, and you start wondering whether you gave your students enough time. A fourth student asks you for an extension, and this time you've come to believe that the initial deadline was not enough.[35]

In this example, you have, I think, four options. The first option is to stick to your initial decision knowing it to be suboptimal. The second option is to write an email to all the class and extend the deadline for everybody. The third option is to give the extension only to those students who approached you and remain silent with respect to the rest of the class. The fourth option is to give the extension only to *some* of those students who approached you.

The extent to which the fourth option means acting wrongly should be apparent; you would be treating more favourably one or more of your students while denying that same treatment to other students who are alike in all relevant respects. The third option may appear sounder ('give the extension only to those who requested it, as they are the ones who you have *prima facie* reason to believe need it') but I think

[35] To keep the example simple, let us assume that your students are not acting in a concerted way in order to put more pressure on you to change your mind.

you would be acting wrongly with respect to the rest of the class. If a student who struggled to meet the deadline but eventually delivered finds out you were giving extensions on demand but without having communicated your policy to the rest of the class, she has a reason for being morally disappointed in you. While the initial deadline is supposed to be the same for everyone, your silence with respect to the class is a setback for her, as she could have planned differently. She could have, for example, attended an important family gathering, which she was forced to skip in order to write the essay. Let us consider, therefore, the first two options you have.

The main challenge in the first option is to explain what makes it rational for you to decide to stick to your initial decision once you've come to realise it is suboptimal. You need to identify some values that are advanced by your being faithful to your suboptimal decision, which can thereby ground a reason to act accordingly. What could these values be? One good candidate is, of course, the value of reliability: many of your students, even those who disagreed with the initial deadline, relied on your initial decision and made plans on that basis, giving up other commitments and so on.

Another candidate is the value of consistency. You want to let your students know that you are a consistent teacher. Changing your mind might only show your tendency towards erratic behaviour. If you've already changed your mind a few times, then doing so again will only intensify your students' assessment of you, namely as an unpredictable and erratic teacher. Even if you have not changed your mind before, it is perfectly sensible that you do not want to change your mind now (despite the fact that you know that a two-day deadline is not enough) because e.g. the course has only started and if you extend the deadline at this early stage of the course, then your students will suspect that subsequent changes might follow.

Can the mere fact of you having made a decision give you a sufficient reason for adhering to it? Suppose the decision was a good one; suppose you gave your students ten days for handing in their essays, which is plenty of time—the proof of this is that nobody requested an extension. The optimal character of this decision

makes it reasonable to adhere to it *if* doubts arise as to its merits—doubts might not arise. But notice, to be sure, that here the value of following the optimal decision is the value that makes the decision optimal in the first place, not the value of adhering to a decision just for its own sake.[36] Can a *suboptimal* decision, on the other hand, give you a sufficient reason for following it? Adhering to this decision may only be instrumentally valuable for advancing *other* values, such as reliability and consistency; and, to that extent only, a morally suboptimal decision might ground a reason for action. These other values make it reasonable for you to perform an action which would be otherwise hard to justify, namely following a decision you know to be suboptimal—and doing so just for its own sake.

In relation to the second option you have, what makes it rational for you to change your initial decision is, of course, the rationality of correcting a mistake or amending a suboptimal decision—in this case, failing to give your students enough time. But, as anticipated before, even when it is reasonable to change your mind thus, doing so might upset those students who relied on the initial deadline and made plans accordingly. So rectifying your decision brings costs in reliability (and perhaps in consistency) which you will need to weigh accordingly.

With some differences,[37] and without intending to reduce legal reasoning to practical reasoning, courts facing morally suboptimal precedents are in a similar

[36] I want to leave open the possibility that someone might think there is value in adhering to an optimal decision just for its own sake, i.e., independently of the value which makes the decision optimal in the first place. This is what a conservative spirit would look like: to see intrinsic value in the decisions we have made which is to be added to the value that makes the decision optimal. But this possibility does not affect the main argument, namely that it make little sense, if any, to adhere to a *suboptimal* decision just for its own sake. On the other hand, it is perfectly sensible to follow decisions that are difficult to categorise as suboptimal or optimal; they reflect a choice amongst possible candidates, neither of which is more justified than the others. Here, the value of following that decision relates to the value of having made a particular decision, which in turn relates to the value of not re-opening the issue to consideration again. These decisions are ubiquitous in law—they are instances of *determinatio*—e.g. whether to drive on the right-hand side of the road, etc.

[37] One important difference is that, in adjudication, courts ought to at least pay attention to what *other* courts in the same legal system have done in relevantly similar cases. Whereas in our example you don't have a reason for adhering to the same deadline that other teachers have set for your students, courts have a reason for following the decisions of other courts in relevantly similar cases. Another difference is that many courts already have a *legal* reason for following precedent, based

situation. Many courts do not have the power to overrule precedent, meaning they *must* follow a precedent even when they know it to be suboptimal—unless they can distinguish it, but in many cases they cannot. And although a few courts can overrule suboptimal precedent, the decision to exercise this power needs to be weighed against the value of reliability—many people have conducted their affairs relying on the law set by a suboptimal precedent. Legal stability, which is instrumental to the value of reliability, and equality in the application of the law, are rule-of-law values capable of providing reasons for knowingly following a morally suboptimal precedent.[38] Of course, to say that these rule-of-law values provide this type of reasons is not to say that they ground a general legal obligation to follow relevant precedent—*stare decisis.* The move from a non-obligatory reason to a general obligation means going one step further in the analysis, because establishing an obligation (to act in a certain way) is more demanding than showing that someone has a bare or non-obligatory reason for action. Reasons and obligations are, as we will see in the next chapter, different normative concepts.[39]

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on their legal obligation to abide by *stare decisis*. Where this is so, the moral reasons for following precedent (as in our example) might not be necessary for explaining precedent-based adjudication in that legal system.

[38] S Hershovitz, 'Integrity and Stare Decisis' in S Hershovitz (ed) *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (OUP 2006) 111 cites *Plessy v Ferguson*, the US Supreme Court decision that 'allowed Southerners to plan their affairs in the certainty that the federal government would not interfere with state-created racial caste systems', as a decision that 'was hardly sufficient to warrant continued adherence'. I have no quarrel with Hershovitz because I take *Plessy* to be an instance of evil precedent and thereby outside the protection afforded by robust precedential constraint. Where Hershovitz and I might have a disagreement, though, is in relation to those precedents that without being evil are nevertheless morally suboptimal. He argues that 'Certainty arguments, like efficiency arguments more generally, may well support stare decisis for particular types of rules. But neither certainty nor efficiency can underwrite an across-the-board practice of deferring to precedent without regard to merit' (id). My argument in this chapter is that, in order to advance the Rule of Law in an institutionalised way, the law can provide judges with a non-contingent legal reason for following relevant precedent—even if the precedent is morally suboptimal, so long as it is not evil.

[39] On plausible assumptions, obligations, unlike bare reasons, are categorical requirements whose existence typically depends neither on the content of the obligation nor on the attitude or disposition of the person obligated. See, e.g., Joseph Raz, 'Promises and Obligations' in PMS Hacker and J Raz (eds) *Law, Morality, and Society: Essays in Honour of H.L.A. Hart* (Clarendon 1977) 223.

What our example is meant to capture is that there is little point, if any, in following a decision known to be suboptimal just for its own sake. It is the advancement of another, independent value that justifies adhering to a decision known to be suboptimal. Whereas in our example that value is reliability and consistency, in adjudication it is the Rule of Law. As Neil Duxbury writes, 'Even a decision widely considered wrong might continue to be followed if people have reasonably relied on it arranging their affairs'.[40] Duxbury, to be sure, does not equate the value of reliability with the Rule of Law, but this does not affect, I think, the gist of his claim, namely that sometimes individuals might knowingly follow suboptimal decisions when doing so advances another value.

The Rule of Law has this normative potential of giving courts a reason they would not otherwise have. As we saw in Section B, these rule-of-law reasons have a *moral* character, as they are grounded on moral values such as reliability and treating people equally under the law. But, as I will argue, these ultimately moral reasons ought to be treated as *legal* reasons. For that is the best way to ground content-independence. Before doing so, let me address one fundamental question about the reason-giving potential of the Rule of Law. This question concerns the judicial motivations for honouring this ideal.

E. An Institutional Approach to the Rule of Law

As suggested in Chapter I, barring the case of evil regimes complying with the Rule of Law for wicked purposes (and possibly benefitting from its rhetorical pull), this is an ideal worth pursuing.[41] To that extent, the Rule of Law is reason-giving and all the more so for officials. Of course, that reason-giving potential cannot guarantee that individual judges will indeed honour the normativity of the Rule of Law when they adjudicate disputes. By honouring the normativity of the Rule of

[40] Duxbury (n 10) 128.

[41] See, *supra*, Chapter I, text to notes 61-64.

Law, I mean putting in the balance of reasons the specific reasons for action the Rule of Law provides. It is entirely possible that a particular judge thinks that the Null Model is the best approach to precedent, and that therefore a relevant precedent should be treated as a non-normative legal fact. That judge might think that the Null Model is supported by good reasons, such as reducing the non-legal influence of precedent (e.g., the prestige of the earlier court or a judge sitting in that court) or avoiding the judicial creation of norms of general application by handing down binding precedent.

Precisely because of this motivational issue, it is important that the decision to honour the Rule of Law via precedent is not left to the contingencies of the legal system. That is why, I think, Jeremy Waldron correctly argues that the various rule-of-law demands on *stare decisis* need to be addressed to judges in the form of an unconditional imperative, for otherwise these demands 'will get no grip on anyone opposed or indifferent about precedent'.[42] What the Rule of Law requires, in other words, is an institutional approach to the question of how officials should advance this ideal, with the *potential* to motivate those officials who take their institutional duties seriously to act accordingly.

When a written constitution, for example, establishes some of the ways in which legislatures should enact statutes—for example, in general and prospective terms—that constitution displays an institutional approach to complying with those specific rule-of-law demands.[43] Legislators, never mind who they are, are bound to respect these requirements when they enact legislation. This institutional approach, one may argue, contributes to honouring the normativity of Rule of Law. Legislators have institutional reasons (based on their institutional duty) to enact legislation in a way that honours the Rule of Law. The Rule of Law is not left alone,

[42] Waldron (n 10) 14. I am grateful to Katharina Stevens for reminding me of this argument by Waldron.

[43] Another example is a constitutional provision prohibiting the legislature from passing *ex post facto* laws on criminal matters, such as (as we saw before) Section 11(g) of the Canadian Charter of Rights and Freedoms.

as it were, for the legal system actively instructs officials to honour this ideal. Admittedly, no legal device, not even a robustly coercive one, will solve the issue of potential lack of motivation—ultimately an empirical point. But an institutional approach does contribute to reducing *potential* lack of motivation, by making it a duty of officials to act in ways that advance this ideal.

The same applies to precedent. It pays lip service to the Rule of Law to leave the determination of *whether* to advance this ideal via precedent to individual judges. It does not honour the Rule of Law that one judge in one court thinks that the Rule of Law ought to be advanced via precedent while another judge in the same (or another) court disagrees. What is required, as Barbara Baum Levenbook has put it, is an 'institutional commitment to precedent'—aimed, if I may add, at advancing the Rule of Law.[44] That is why Waldron again correctly argues that a judge who has to either deal with a precedent or set one for the future should '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'.[45]

To have an institutional approach to precedent is for the legal system to speak, *a la* Dworkin, with 'one voice' on this matter. (It goes without saying that to accept this claim of Dworkin does not commit me to endorsing Dworkin's other controversial views on the nature of law, as seen in the Introduction).[46] Of course, to speak with one voice assures neither simplicity nor that the approach to be institutionally adopted will hold the same always and everywhere. The approach can be quite complex, and this is why, as we have seen in Chapter I, in some countries we find a strict doctrine of *stare decisis* whereas in other countries precedents are treated in a non-binding way. Even within a single jurisdiction there may be a piecemeal approach to precedent. Some decisions by certain courts might

[44] Levenbook (n 25) 188.

[45] Waldron (n 10) 16, emphasis in original.

[46] See, *supra*, Introduction, Section A.

constitute binding precedents, while other decisions might not. Many factors come into play here, but what the Rule of Law requires, at a minimum, is that the legal system speaks with one institutional voice in regard to the question of how courts should advance the Rule of Law when they deal with disputes on which there is relevant precedent.

With an institutional approach in the background, the issue of potential lack of motivation becomes less pressing. For one thing, even if a particular judge thinks the Rule of Law is absurd or otherwise normatively irrelevant, her office requires her to adhere to the institutional approach adopted by her legal system. It is the legal system, through its various legal sources, that adopts a particular institutional approach to honouring the Rule of Law. Thereby, judges are duty-bound to respect such an approach—the unconditional imperative Waldron has in mind. That duty, and the specific institutional reasons for action it provides, contribute to reducing the issue of potential lack of motivation *vis-à-vis* leaving the Rule of Law alone, as it were. In the next section, I will say more about this unconditional imperative (in my terminology, a judicial duty), and in the following section I will return to content-independence.

F. Judicial Duty

It was argued in Section B that the Rule of Law gives moral reasons for action, and the explanation is related to the fact that the Rule of Law is ultimately a moral ideal. The Rule of Law is an ideal made of various moral values, such as reliability and treating people equally under the law. Of course, these values are legally relevant, as they matter for the law. It is, as we saw above, because of the directedness of the Rule of Law (an ideal directed towards the law) that we can speak of this ideal as being normatively tied together—as opposed to a handful of moral values

independent and indifferent to one another.[47] But the crucial presence of the law should not lead us into thinking that the various values of the Rule of Law are legal; they are *moral* values that are legally relevant.

The Rule of Law may thus provide a moral reason for judges to follow suboptimal precedent. But there are two problems with keeping this reason exclusively moral, instead of turning it into a *legal* reason. We have, first, the complexity of determining what morally ought to be done in a particular case. There are many factors that must be considered in order to make a proper moral evaluation of how to decide a dispute on which there is relevant (suboptimal) precedent. The upshot is that this type of evaluation is particularly difficult. The analysis must take into account, among other things, the amount of reliance produced by the suboptimal precedent, the moral competence of both the earlier court and the later court, the specific grounds that make the precedent morally suboptimal, and whether following precedent will advance the Rule of Law. This complexity, second, makes the corresponding moral analysis highly casuistic, to the extent that it becomes difficult to reconcile it with the idea of a legal system having one institutional approach to advancing the Rule of Law via precedent.[48] If we leave the question of whether to follow suboptimal precedent in order to advance the Rule of Law to the moral analysis of each individual judge, then we have reasons to suspect that courts, and thereby the legal system as a whole, will not speak with one voice, particularly in light of the deep and pervasive moral disagreement we find.

The need for an institutional approach to precedent makes it reasonable to want the moral reason for following precedent that the Rule of Law provides to be a *legal*

[47] And this normative unity explains why it is meaningful to speak of the 'Rule of Law' (capitalized)—not only to avoid, as J Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 270 argues, 'confusion with a particular norm within a legal system'. Cf. Raz, 'The Law's Own Virtue' (n 1) 3. The capitalized expression denotes, first and foremost, normative unity; by contrast, the purpose that Finnis gives to this use of capitals is, I believe, secondary.

[48] Unless, of course, that the legal system's approach to honouring the Rule of Law via precedent is something like 'honour the Rule of Law via precedent whenever morality so recommends it'. But here we are back again into the problem of the complexity of moral evaluation.

reason. Thereby, the legal system (via courts) may also by-pass the complexity of the moral question whether to follow suboptimal precedent. If my discussion is sound, we need to show how an institutional approach to advancing the Rule of Law via precedent should look, and how it can be materialised. In regard to the *content*, the institutional approach should deliver an intermediate position between the Null Model and *stare decisis*—because, as I will argue in Chapter IV, *stare decisis* needs extra justification. This institutional approach is a minimum requirement of the Rule of Law; without it, we run the risk of falling back into the Null Model—or, what might be worse, a piecemeal pattern of judges adhering to different models in an unprincipled way. But nothing prevents, as I said, a legal system from wanting a more robust institutional approach to precedent, and hence *stare decisis*, with all of its virtues and problems—I will say more about this in the final section; and in Chapter IV I will address in more detail the challenges of *stare decisis*.

The institutional approach I have in mind is a judicial duty, positively laid down in a legal source, in virtue of which judges are always required to put in the balance the reason for following relevant precedent. Evil precedent aside, this judicial duty applies even when the precedent is morally suboptimal. Notice that this judicial duty comes from the law. In virtue of a legal source, the law requires judges to always put in the balance the reason for following relevant precedent. In virtue of the law, then, that reason, which we saw is moral (as it finds justification in the Rule of Law) becomes a *legal* reason, as it obtains in virtue of a legal duty. Judges have that specific and demanding reason *because* of their legal duty. Of course, one could always press more and argue that this is not a legal reason, because what is at stake is not a legal duty but the voluntary undertaking of judges when they are sworn in. Since this voluntary undertaking grounds a *moral* duty, then judges have a moral reason for always putting in the balance the reason for following precedent.

But I am not sure if the objection offers a more fruitful interpretation of the problem. Perhaps it all comes down to a semantic point of how we understand

judicial duty. It seems to me that the duties judges have in virtue of the law—duties they have because they are law-applying officials—are genuine legal duties. The judicial duty to give effect to the law exists because the law has authorised an official to adjudicate disputes. The duty to always put in the balance the reason for following precedent, which obtains in virtue of a legal source, is not very different. It is a duty judges have because they are law-applying officials—i.e., it is not a moral duty judges have in their non-official capacity. That is why I prefer to conceive of this as a legal duty giving rise to a legal reason.

The obvious consequence of this judicial duty is that judges may have two types of reasons for following relevant precedent; a moral reason, as a shortcut for advancing the Rule of Law, and a legal reason, which *the law* provides them as a means for advancing the same ideal. Importantly, judges can have this legal reason even when morality does *not* recommend following relevant precedent, for example because the Rule of Law will not be honoured. But this non-correspondence is a consequence of the fact that there can be a mismatch in fulfilling the moral aims of the law (here, adopting an institutional approach to honouring the Rule of Law via precedent) and deciding a dispute in a morally correct way. Even if morality recommends not following precedent, adopting an institutional approach to advancing the Rule of Law via precedent may recommend the reverse, which should be taken to be a moral cost entailed by seeking an institutional approach in the first place. Notice, though, that this moral cost is not exclusive to my account; the law can get things morally wrong; sometimes in abstract (e.g., a statutory provision with an evil content), other times as applied (a straightforward application of a norm to facts not anticipated leading to injustice—Aristotelian *epieikeia*).[49]

Importantly, the judicial duty I have in mind does not entail that judges are *required* to follow relevant precedent unless they can distinguish it or else overrule

[49] Aristotle, 'Nicomachean Ethics' in J Barnes (ed) *The Complete Works of Aristotle: The Revised Oxford Translation* vol II (Princeton UP 1984) 1796 ($1137^{b}17$-18).

it (*stare decisis*). *Stare decisis*, as suggested before, needs further justification, and that is why at this stage of the argument I am only arguing for a softer requirement in regard to precedent. The duty, rather, only means requiring judges to always put in the balance the *non-obligatory* reason for following relevant precedent. The law, via this duty, requires the judge to treat a relevant precedent as offering a (non-obligatory) reason for action. While this duty honours the normativity of this reason, it does not by itself require judges to follow precedent, for a judge may well decide the dispute by acting on a reason leading to departing from relevant precedent. If a judge departs from relevant precedent, it does not follow that she did not honour the normativity of the reason in favour of following precedent provided that she has put this legal reason into the balance of reasons. That reflects the limits of the duty I have in mind. The natural way of showing that the judge has been faithful to her duty (even if she departed from relevant precedent) is by giving reasons, in her decision, for why she did not follow relevant precedent. This means explaining the extent to which she is justified in acting on a more compelling reason leading to departing from precedent. We might think of the duty I have in mind as a duty of 'normative consideration': judges are required to treat relevant precedent as always providing a (non-obligatory and legal) reason for action or decision.

How can this duty, and thereby an institutional approach to the Rule of Law, be established? Legal systems are typically structured around a hierarchy of legal sources, where the constitution usually sits at the top, followed by legislation and sometimes international agreements, then supreme court precedents, customary law, and so on. The higher the legal source in which the judicial duty is established, then arguably the higher the normative status the institutional approach will have. What is crucial, of course, is that individual judges are not able to dispose of this duty; the duty must be out of their reach, as it were. Some entrenchment is required even if the legal source under which the duty is established is attached to a particular court, such as by judicial precedent.

G. Summary

On the grounds of an institutional approach to honouring the Rule of Law via precedent, a legal system, through its various sources of law, can require courts to always put in the balance the *pro tanto* and normative legal reason for following relevant precedent. In order to advance the Rule of Law, then, a legal system can require courts, on the grounds of a specific judicial duty, to put this legal reason in the balance of reasons. That reason obtains even when the precedent is morally suboptimal, so long as it is not evil. It is this institutional approach, namely a judicial duty, that can, as a legal means for advancing the Rule of Law, establish the content-independent character of the legal reason for following relevant precedent. Moral correctness is not a condition for following relevant precedent if judges have, in virtue of a legal duty, a legal reason for advancing the Rule of Law via precedent. That judicial duty makes the reason for following precedent both *legal* and *non-contingent*: evil precedent aside, courts *always* have a legal reason for following relevant precedent, even if the precedent is morally suboptimal.

Can the institutional approach I argue for lead the later court to decide a dispute in a way that is different from the decision that morality would recommend in that case? As suggested before, yes. But this possibility is not exclusive to the institutional approach I have argued for, but more generally of the ways in which the law secures its moral aims. Just as there is a price for using legal rules to guide the behaviour of a society,[50] the institutional approach I have defended, under which courts always have a non-obligatory legal reason for following relevant precedent, has the cost of a potential mismatch with morality. While courts always have a legal (non-obligatory) reason for following precedent, morality may recommend the reverse—i.e., departing from precedent.

[50] In terms, for example, of entrenchment, over-inclusiveness, and under-inclusiveness. See Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Clarendon Press, 1991) chs 2-5.

This possibility is all the more problematic when it comes to *stare decisis*, which gives a general legal *obligation* to follow precedent. As we will see in Chapter IV, under s*tare decisis* a court may avoid following a morally suboptimal precedent if it exercises a power to overrule the precedent, or if it distinguishes the case at hand from the precedent. But these can be demanding conditions. With respect to overruling, many courts do not have this power, and even when they have it the conditions for exercising it might not obtain. In this scenario, the only alternative left for the court is to distinguish the precedent, as every court can under *stare decisis*, so long as it identifies a relevant difference which is important enough to merit a different treatment. Sometimes, though, that relevant difference does not exist on a *genuine* analysis—the court may always impose a difference it takes to be relevant (either disingenuously, or when the judges sincerely persuade themselves of its relevance) and this is why some authors think that courts should not distinguish.[51] In this scenario, if the court cannot genuinely distinguish, the court is *legally required* to follow a morally suboptimal precedent.

The costs of a potential mismatch with morality are higher in *stare decisis*. This is why, at this stage of the argument, I have only argued for an institutional approach to precedent whereby this potential cost might be reduced by not following precedent—a non-obligatory reason that must be nevertheless put in the balance. A successful defence of *stare decisis* needs to deal with the problem of legally requiring courts, in some cases, to follow morally suboptimal decisions. In Chapter IV, I will argue that an equitable approach can contribute to resolving the problem of how a legal system should deal with morally deficient precedents. If my proposal is sound, then it would contribute to the overall justification of *stare decisis.*

[51] See, e.g., Larry Alexander and Emily Sherwin, *Demystifying Legal Reasoning* (CUP 2008) 122-123.

CHAPTER III
TWO MODES OF PRECEDENTIAL REASONING

A. Introduction

An institutional approach to the Rule of Law, I argued in the previous chapter, can make room for courts to adjudicate under robust precedential constraint. Thus, evil precedent aside, the mere fact that an earlier court set a relevant precedent gives the later court a legal reason for following it. Under robust precedential constraint, then, the existence of a relevant precedent provides the later court with a *pro tanto* and content-independent legal reason for action. Since the later court *always* has this reason—bearing in mind, again, the proviso concerning evil precedent—this reason is also *non-contingent*. Later courts *always* have a legal reason for following relevant precedent, even if the precedent is morally suboptimal, so long as it is not evil.

This non-contingent legal reason is a minimum requirement of the Rule of Law in regard to precedent. In order to establish it, it was necessary to account for the normativity of robust precedential constraint, and I did this by appealing to the idea of an institutional approach to advancing the Rule of Law via precedent. In doing so, I rejected weak precedential constraint. The arguments defended in the previous chapter come to bridge the gap between the Null Model and an approach to precedent that advances the Rule of Law in an institutionalised way.[1]

Now, once the non-contingent legal reason in favour of following relevant precedent has been secured—thereby establishing a minimum rule-of-law requirement in regard to precedent—there is a further question that needs to be asked. The answer to this question may divide legal systems. The question is

[1] Needless to say, I am not interested in arguing that this is the only way—let alone the best way—to address this problem.

whether that non-contingent reason should stay as a minimum requirement of the Rule of Law, or whether it should be reinforced. One way to reinforce that legal reason is by adding to it an exclusionary element—thus converting it into a *protected reason* for action. Protected reasons, as we shall soon see—are capable of grounding obligations. Thus, whereas in one case the institutional approach to advancing the Rule of Law grounds a non-obligatory legal reason in favour of following relevant precedent, in the other that legal reason grounds a legal obligation, insofar as it is protected by an exclusionary reason. What divides legal systems, thus, is the *type* of legal reason later courts have for following relevant precedent. Whereas in one case later courts are not legally required to follow relevant precedent, that can be indeed the case under the other approach. The purpose of this chapter is to explain both approaches in detail.

I shall refer to each of these ways of structuring the non-contingent legal reason for following relevant precedent as *modes of precedential reasoning.* There is a subtle semantic difference in calling them *modes* instead of *models*. By a *mode*, I want to capture a type of legal reasoning displayed by a later court on the basis of relevant precedent. Therefore, the focus is on the particular way in which the later court reasons using precedent. By contrast, I tend to think of a *model* as a rather detached picture of how various courts in a legal system reason on the basis of precedent. A *mode* may give rise to a *model*, but I shall leave for another occasion the specifications of the conditions under which this can be so. Part of the reason I want to speak of *modes*, again, is to focus on the specific legal reasoning displayed by a court that faces a precedent-governed dispute. For simplicity, I shall assume that if a court's general approach to precedent can be identified under one or the other mode, then that court *generally* adjudicates under that mode. I shall further assume that *it is the legal system* that dictates the mode under which a specific court adjudicates, though I will leave room for cases in which the later court itself switches between modes in order to live up to some other, pressing values. Not much is at stake (in terms of the main arguments of this thesis) on whether a court

that switches to another mode acts unlawfully—i.e., against the authoritative prescriptions of the legal system—or within the boundaries permitted by the law.

Let me recap. Depending on the type of legal reason a later court has for following relevant precedent—as a shortcut for advancing the Rule of Law—we can identify two modes of precedential reasoning. The first mode is characterised by the fact that such a non-contingent legal reason is non-obligatory—and, as such, can be outweighed by a more compelling reason. The second mode is characterised by that reason being a protected reason—meaning later courts are prevented from acting on certain excluded reasons. Unlike the Null Model, these two modes are consistent with the Rule of Law—in fact, they are derived from this ideal. I will call the former the *persuasive mode* and the latter the *authoritative mode.* I shall argue that the persuasive mode is necessary for advancing the Rule of Law, although the existence of legal systems operating under the authoritative mode may suggest that it is not sufficient. The authoritative mode, on the other hand, is not necessary but sufficient. Thus, my argument is that the Rule of Law requires *at least* the persuasive mode. The authoritative mode (a reinforced version of the persuasive mode) is not required by the Rule of Law, but legal systems may adopt it as a way to further advance this ideal, keeping in mind though the additional challenges I will explain in the next Chapter.

As you will soon notice, this chapter will focus more on the authoritative mode than on the persuasive mode. Let me explain some of the reasons why. First, what ultimately characterises the authoritative mode is the existence of a defeasible legal *obligation* to follow relevant precedent. Since many courts in the common law have this obligation, a significant amount of jurisprudential progress has been achieved by scholars working in the common law tradition. I seek to benefit from that progress while engaging with common-law scholars. The civilian treatment of precedent is, by contrast, less developed, and part of the reason why is that civil law courts are not generally required to follow relevant precedent. Although precedent plays an increasingly important role in the civil law tradition, I venture to say that

the stakes are less high *vis-à-vis* the common law. In the civil law, unlike in the common law, courts do not *in general* act unlawfully if they depart from relevant precedent; and, moreover, neither do they, in general, have the power to change the law *erga omnes* by setting binding precedents. My discussion of the persuasive mode, therefore, offers one way in which we may understand the civilian treatment of non-binding precedent. But I shall not claim that mine is an exhaustive treatment, let alone a *depiction* of what civil-law courts do. As mentioned in the Introduction, I am interested in practice-interpretation, not in practice-depiction.

This is a long chapter, because I judged it convenient to analyse the two modes of precedential reasoning in one chapter instead of breaking down the discussion into two chapters. Section B explains the persuasive mode in detail. It will be argued that, under this mode, precedential constraint comes in degrees, because later courts are ultimately responsible for determining the weight of the non-obligatory legal reason for following relevant precedent. And they do so on the basis of various factors of weight, many of which shall be explained. Section B concludes by showing some of the conceptual benefits of my account of the persuasive mode, while also distinguishing this mode from the Null Model.

Section C is devoted to explaining the authoritative mode. It begins by discussing the nature of protected reasons for action, and the extent to which they can be distinguished from conclusive reasons for action. The distinction between protected reasons and conclusive reasons is important because it makes it possible to differentiate two forms that the legal obligation to follow relevant precedent may have. That is, this obligation may have the form of a protected reason or a conclusive reason for following precedent. I will argue that while the latter approach is difficult to justify, the former can be justified so long as there are a set of non-excluded reasons action on which allows the realisation of important but conflicting values. My discussion then considers the *content* of the legal obligation to follow relevant precedent. By summarising a well-known debate in the common-law literature on precedent, I aim to show that such a content can be either (1) to

apply the precedent rule provided for by the *ratio decidendi* of the precedent, or (2) to determine whether the precedent and present cases are relevantly similar. I shall then advance my own account of the authoritative mode, according to which the later court *must* respect three decisions adopted by the earlier court. These are: (1) to treat certain facts as material, (2) to give certain material facts a specific legal significance; and (3) to treat certain facts as necessary and sufficient conditions for reaching a justified decision.

B. The Persuasive Mode

Under the persuasive mode, whenever a precedent-governed dispute arises, the later court has a non-obligatory legal reason for deciding the same dispute by following precedent. Possibly the most notable feature of the persuasive mode is that it is flexible, because it allows for different degrees of precedential constraint depending on the weight to be given to the reason for following relevant precedent. This weight, in turn, depends on various factors the later court is called to take into consideration. It is the later court that determines the exact weight to be given to the legal reason for following relevant precedent; that is why, under the persuasive mode, precedential constraint comes in degrees. The exact weight of the legal reason for following relevant precedent varies on the basis of some of the factors that I will explain now.

1. Factors of Weight

One crucial factor of weight is whether the later court has a particular view on the moral correctness of the precedent. It was argued in the previous chapter that robust precedential constraint is necessary for advancing the Rule of Law. This means that both the persuasive mode and authoritative mode are built upon this type of precedential constraint. At the same time, robust precedential constraint demands

that later courts set aside their own assessment of the moral correctness of the precedent. Whereas in weak precedential constraint moral correctness was a necessary condition for following relevant precedent, robust precedential constraint requires later courts to set aside such a moral evaluation. So there appears to be a tension: how can it be the case that, under the persuasive mode, the weight of the legal reason for following relevant precedent depends on whether the later court has a particular view on the precedent's moral correctness? Was not that analysis barred in the first place?

This tension, to be sure, is merely apparent. Robust precedential constraint does not prevent the later court from determining the exact weight of the legal reason for following relevant precedent. It only seeks to establish the *existence* of this legal reason without requiring an evaluation of whether the relevant precedent is morally correct. That is why, it was argued, the legal reason for following relevant precedent is both non-contingent and content-independent. But the existence of this reason is not undermined by the fact that later courts can determine its exact, final weight. Thus, whereas the existence of such a legal reason is not at stake, its exact weight may vary.

Nothing in the notion of a content-independent reason, to be sure, prevents this reason from gaining *extra* weight by reference to some of its substantive moral merits.[2] The idea of content-independence guarantees the reason a normative minimum: a nucleus that cannot be reduced but which can become weightier. Thus, to the extent that the later court has a legal reason for following relevant precedent, that reason has a normative nucleus that will not be affected by whether the precedent was rightly or wrongly decided. But on top of this nucleus, the later court may add extra weight if it considers that the dispute was, say, rightly decided, or it may add no further weight at all if the reverse holds. Under the persuasive mode,

[2] I think G Lamond, 'Persuasive Authority in the Law' (2010) XVII *The Harvard Review of Philosophy* 16, 17 would agree with me: 'Obviously the second approach [i.e., that certain sources have content-independent normative weight] does not rule out considering the persuasiveness of the view. *The view could carry even more weight where it is found to be convincing*' (emphasis added).

then, although later courts always have a legal reason for following relevant precedent, they can add more weight (or add no weight at all) if they agree with the moral correctness of the precedent. If the later court agrees with how the precedent was decided, then the legal reason for following precedent will be weightier than in a scenario where the reverse holds. The moral correctness of the precedent is thus one of the factors bearing on the final weight of the legal reason for following relevant precedent.

Another factor is the position the earlier court occupies within the judicial hierarchy. In many civil law jurisdictions, as I explained in Chapter I, precedents are not formal sources of law—not even those originating in the highest court in the land. But it does not follow that later courts do not have a non-obligatory legal reason for following relevant precedent. They do have this reason if what is at stake is advancing the Rule of Law in an institutionalised way. And it is open whether a later court gives *more* weight to such a reason on grounds that the precedent originates in a court higher in the judicial structure. Often the result is that, if the earlier court is above the later court in the judicial structure, the legal reason for following relevant precedent gains extra weight. But why is this so? I doubt the law is the place to find the right kind of answers. Possibly showing more deference to higher-court precedent is a way to signal institutional respect for officials or institutions that play a more fundamental role in the legal system. Possibly later courts pay deference to higher-court precedent because they know these courts have, one way or another, an important say in their chances of judicial success. Possibly there is an implicit bias towards giving more deference to higher-court precedent because, as humans, we have a natural tendency to seek the approval of our superiors. Deferring to our superior's past decisions is a way to capture their attention and eventually gain their respect and esteem.

Another factor is the prestige (or lack of it) of a particular judge sitting within a court. It should come as no surprise that judges gain prestige by their official and private conduct, by their professional and moral credentials, by the respect they

generate among their peers, by the opinion that legal practitioners have about them, and, of course, by how persuasive their legal opinions (particularly their dissents) are. A judge who regularly writes persuasive opinions will tend to be treated as a theoretical or epistemic authority on a particular field or area of law. Sometimes a judge will gain epistemic respect because of the technical legal skills she displays in her opinions, reinforced by a sound interpretation of the moral aims of the legal area in play. A judge, particularly one sitting at a high court, may often gain respect because of her sound and moderate moral views backed by her technical legal expertise. When these two factors combine over time, a judge will most likely not only occupy an important position in the judicial hierarchy, but she will also gain social prestige in the community she lives in. She will address educated audiences, offer inaugural lectures, and play an important role in prestigious international conferences. The prestigious and influential judge can, in a nutshell, be a source of epistemic authority for other judges; her opinions can provide later courts with a reason to believe that what the judge opines or thinks is correct. And that reason for belief can affect the weight of the practical legal reason for following relevant precedent; as such, it can also affect the final outcome of the precedent-governed dispute.

Courts integrated by various judges (panels) often reach decisions by securing a majority of votes. Those judges who did not concur with the majority can write dissents—which are meant to provide these judges with an opportunity to elaborate on why they are departing from the majority's decision. Concurring judges can also write separate opinions to justify their decisions on *other* reasons, to depart from one particular aspect of the majority's decision, to create an *obiter dictum* for later courts, and so on. What matters is the epistemic value these possible combinations (of concurring opinions, dissents, etc) may have on later courts. One epistemic difference between a fragmented decision and one reached by a unanimous court is that the latter has a greater prospect than the former of being treated as *persuasive authority* by later courts. Unanimous decisions can provide later courts with a

reason to believe that such a decision was correct—morally, legally, etc. That theoretical reason (i.e., reason for belief) might evaporate, or might not even exist, when the precedent was reached by a fragmented court—say, a decision where one judge eventually tilted the balance for reaching a particular outcome. The support a decision receives in the earlier court, then, contributes to the weight of the legal reason for following relevant precedent.

Judges mindful of their institutional role see themselves as members of one collective of public officials bound by institutional means and ends. The 'maverick judge', as it is often called, does not fit well within this moderate and restrained picture of judges. One way to characterise the maverick judge is by her tendency to see adjudication as a means for securing ends she feels deeply touched by. The restrained judge, by contrast, might agree that such an end is valuable, but will nevertheless not agree that adjudication is the right place for securing it. Whereas the maverick judge will pay less attention to what other judges before her have done (if doing so means steering away from the valuable end), the restrained judge will pay attention to what other judges have done in the past. For this judge, past judicial decisions exert normativity on the sufficient ground of their institutional value. These decisions represent attempts, by someone who is part of the same collective body, to reach an institutional goal via the right means. For the restrained judge, then, the institutional value of a precedent's existence is a factor of weight; it is *further* weight to be added on the sufficient ground that the earlier judge is part of the same collective body of officials bound by the same means and ends.

Legal scholars play their part as well. They are a source of systematisation, articulation, justification, and eventually criticism of the legal materials. By 'legal materials' I have in mind a wide category that someone used to a rather technical notion of it may find over-inclusive. I want to capture formal sources of law such as pieces of legislation, judicial precedent, constitutional provisions, international agreements, and so on. But I also have in mind material sources of law such as commentaries, written opinions by judges in their non-official capacity (e.g.

explicative notes of certain rulings), and so on. Scholars, very much like judges, gain epistemic authority by how persuasive their comments are; to that extent, then, they can be sources of epistemic authority for later courts. Furthermore, in arguably every serious legal system, judges went to law school before taking up a judicial career. As students, their legal and moral views were influenced by their teachers, and that influence can be reflected in how they decide cases. Many courts, particularly in civilian jurisdictions, cite legal scholars as a way to provide further support to their decisions. In some cases, those scholars constitute unscrutinised support—i.e., support that comes *after* the judge had reached a particular decision. Other times, a scholar's opinion can be a genuine source of persuasive authority—meaning the legal reason for following relevant precedent becomes weightier *after* the judge has carefully scrutinised the scholar's opinion. In some legal systems, such as Germany, the fact that there is commentary on a particular point is *highly* relevant.[3] Although a judge is not legally required to take a particular comment into account, there is a serious expectation (in the legal community) that she will in fact do so. Her decision will find more support, in the law, if it is favoured by the commentary.[4] Within one body of commentary, say the *Grüneberg*, judges will often give more deference to some authors over others precisely on grounds of their epistemic authority.

The area of law under consideration is a factor of weight as well. In some areas, judges feel more compelled to follow relevant precedent because of the amount of reliance produced by those decisions on the legal community. That is the case, for example, with certain contracts—in which part of the reasons investors had for entering into them rests in the belief that later courts will honour past decisions by

[3] See, e.g., D Kästle-Lamparter, *Welt der Kommentare. Struktur, Funktion und Stellenwert juristischer Kommentare in Geschichte und Gegenwart* (Mohr Siebeck 2016) 2-6; and D Kästle-Lamparter, 'Kommentarkulturen? Einführung und historische Einordnung' in D Kästle-Lamparter et al (eds) *Juristische Kommentare: Ein internationaler Vergleich* (Mohr Siebeck 2020) 2-5. For a critical perspective, see, e.g., F Brachthäuser, 'Standardkommentare zwischen Hegemonietheorie und Pragmatismus' (2017) 50 *Kritische Justiz* 448.

[4] Cf. Kästle-Lamparter, *Welt der Kommentare* (n 3) 4; and Brachthäuser (n 3) 450.

following relevant precedent. A judge who wants to live up to the value of reliance—say, in order not to deter other investors from entering into such agreements—can do so by giving extra weight to the reason for following relevant precedent. But the same judge may find that, in other, less sensitive areas of law, the value of protecting reliance can be outweighed by more compelling reasons, in which case she will tend to add very little weight (or add no weight at all) to the reason for following relevant precedent. On the other hand, there are cases where the value of following precedent (for specific areas of law) hinges not on the amount of reliance but on the moral aims of a certain compartment of law. Consider the criminal law. It is true that, in this area of law, judges may follow relevant precedent on grounds of reliance—or on the basis of any of the factors explored above. But perhaps it would be more precise to say that there is an important principle at stake recommending the addition of further weight to the reason for following relevant precedent. Adding more weight becomes then a shortcut for honouring that important principle. Take the principle providing that among the various criminal sentences a judge has discretion to apply, she should select that which gives more liberty to the offender. If with a lawful range of length of imprisonment, an earlier court selects the most favourable for the offender, then the later court can add weight to the legal reason for following precedent as a shortcut for living up to that principle.

2. Final Remarks on the Persuasive Mode

I have considered some of the factors a later court can ponder in determining the exact weight of the legal reason for following relevant precedent. The list is, of course, not exhaustive, but it is sufficiently generous to suggest that this mode of precedential reasoning is structurally flexible. Although there is always a normative nucleus in favour of following relevant precedent—secured, as seen, by robust precedential constraint—the later court can, on top of this nucleus, add further

weight (to that legal reason) or add no weight at all. Again, under the persuasive mode, precedential constraint comes in degrees.

One thing worth noticing is that all of these factors of weight (and others that might bear on the case at hand) may be combined or balanced against each other in order to produce one final weight. That the earlier court, for instance, happens to be the Supreme Court of the land, which court reached a unanimous decision written by a very prestigious judge in a delicate area such as the criminal law, are factors that combined will most likely produce a very weighty legal reason in favour of following relevant precedent. One might even think that, in a scenario such as this, the later might even be *morally* required to follow relevant precedent. Crucially, though, that moral requirement will not have a legal correlative, since the later court will not be *legally* required to follow relevant precedent—at least not under the persuasive mode. In the Introduction, I argued that it is important not to collapse legal obligation into moral obligation. What I said there applies here as well in case Dworkin's one-system objection bubbles up to surface again.[5]

One benefit of my account (of the persuasive mode) is that it is conceptually parsimonious. I am able to accommodate various factors of weight bearing on the case at hand and channel them (i.e., their normativity) through *one* legal reason for action. These factors, the specific weight of which (as we saw) may often be a function of their epistemic value for later courts, do not give rise to different legal reasons for action. There can be various reasons for belief at stake; it does not follow, however, that these reasons cannot converge into one practical legal reason—i.e., one non-contingent, *pro tanto*, and content-independent legal reason for following relevant precedent. Of course, there might be *other* reasons for action bearing on the dispute as well; sometimes they will recommend following relevant precedent, other times they will favour the opposite outcome. But my account is capable of channelling, into one practical legal reason, all those factors bearing on the specific question of whether the later court should follow relevant precedent.

[5] See, *supra*, Introduction, Section A.

Since there might be *other* questions bearing on the dispute at hand—not just whether to follow relevant precedent—there might be other reasons for action in play as well—i.e., in respect to those other questions. Accordingly, the later court will have to balance these other reasons with (or against) the legal reason for following relevant precedent, no matter how weighty this reason ends up being.

Certain courts may reveal, through their decisions over time, a certain pattern in how they address the question of how much weight they should give to the legal reason for following relevant precedent. That a court is not legally required to follow relevant precedent does not prevent such a court from upholding, over time, a consistent view concerning the weight of the legal reason for following relevant precedent. Thus, in a legal system in which later courts do exhibit such a pattern, a distinction can be drawn between two versions of the persuasive mode: *weak* and *strong*. Within the latter, the legal reason for following relevant precedent is weighty enough so that the threshold for acting on another, conflicting reason, is usually demanding. But at the same time, courts applying the strong version of the persuasive mode will not see themselves as being legally bound to follow relevant precedent. The weak version, by contrast, would make room for those courts (or judges) for whom the legal reason for following relevant precedent can easily be outweighed by another, conflicting reasons.

Finally, there are two important features that distinguish the persuasive mode from the Null Model. Firstly, in the persuasive mode, whenever a relevantly similar dispute arises, later courts *always* have a legal reason for following relevant precedent. This non-contingent legal reason does not exist in the Null Mode. In order to secure this reason, it was necessary to establish robust precedential constraint, and back it with a judicial duty to always put in the balance of reasons the legal reason for following relevant precedent. Neither robust precedential constraint nor such a specific judicial duty exist in the Null Model. Secondly, in the persuasive mode, the principles of judicial transparency and good government strongly recommend that courts explain why the legal reason for following relevant

precedent has been outweighed. This is because, as explained in Chapter I, it is contrary to the Rule of Law (all else being equal) to depart from relevant precedent without explaining why. Accordingly, it is strongly recommended that courts under the persuasive mode explain why they are not following relevant precedent—when there is more compelling reason in play—so that they can show publicly in their decisions that they are not undermining the Rule of Law when they decide not to follow relevant precedent.

C. The Authoritative Mode

It was argued in the Introduction that a sensible detachment from practice is methodologically beneficial since it allows distinguishing between two modes of precedential reasoning—or ways in which courts may reason using precedent. The purpose of the previous section was to articulate the *persuasive mode*—which is characterised by the fact that courts have a non-obligatory legal reason for following relevant precedent. The purpose of this section is to explain the *authoritative mode*, and some of the ways in which courts may be legally *required* to follow relevant precedent. As said in the Introduction, I shall refer to the authoritative mode interchangeably as *stare decisis* ('stand by what was decided'). There may be many ways to conceptualise the doctrine of *stare decisis*, i.e., what it demands, which courts are bound by it, and so on. But as will soon be clear, no matter how we conceptualise *stare decisis*, one common fact tends to characterise this doctrine: later courts have a defeasible legal obligation to follow precedent. And, as we will see in more detail in the next chapter, in some cases that legal obligation can become undefeated. Because that legal obligation is the gist of the authoritative mode, I will be referring to this mode also as *stare decisis.*

This section is structured as follows. Subsection 1 elaborates on the idea of protected reasons and conclusive reasons for action, because they are important for how we classify the authoritative mode. Subsection 2 offers a second way in which

we could classify the authoritative mode—namely by examining what exactly the legal obligation to follow relevant precedent consists of—its content. I will analyse a debate that has taken place in the common-law literature on precedent to the effect of elucidating whether such an obligation consists in applying the *ratio decidendi* of a precedent or in determining whether the precedent and the present case are relevantly similar. Subsection 3 provides what I take to be a novel account of the authoritative mode, namely one that benefits from the valuable contributions in the literature on precedent but that aims to articulate specific features of this mode that have not been exposed before. Subsection 4 provides a summary of the discussion.

1. Protected Reasons and Conclusive Reasons

In Joseph Raz's well-known structure of reasons for action, it is possible to distinguish between 'first-order reasons' and 'second-order reasons'—which in turn can be either 'positive' or 'negative'. Roughly, first-order reasons are considerations that favour performing or refraining from performing a certain action. *Positive* second-order reasons are considerations in favour of acting on one of these first-order reasons, whereas *negative* or 'exclusionary' second-order reasons are considerations that support *not* acting on some first-order reasons.[6] The combination of a first-order reason plus an exclusionary second-order reason is what Raz calls a 'protected reason'.[7] Authorities, according to Raz, are characterised by the fact that they give protected reasons for action to their addressees. When these authorities are justified or legitimate,[8] their addressees have

[6] J Raz, *Practical Reasons and Norms* (first published 1975, OUP 1999) 39; and J Raz, *The Authority of Law* (2nd edn, OUP 2009) 17.

[7] Raz, *The Authority of Law* (n 6) 18.

[8] On Raz's justification of authority, see J Raz, *The Morality of Freedom* (Clarendon 1986) ch 3; J Raz, *Ethics in the Public Domain* (OUP 1994) 211-220; and J Raz, *Between Authority and Interpretation* (OUP 2009) ch 5.

obligations derived from the protected reasons in question. Obligations, Raz argues, are categorical requirements deriving from protected reasons for action.[9]

In this subsection, I would like to elaborate on protected reasons for action since they are important for our understanding and categorisation of *what it means* to have an obligation to follow precedent. I am interested in capturing some of the specific features that characterise being required or obligated to act in a certain way. To do so, I shall focus on the idea of *exclusion*. When one is required (or has an obligation) to φ, one has, at least in principle, a range of reasons action on which is not permitted. The expression 'not permitted' should be given more precision. It does not necessarily point to an authoritative command by another person. Sometimes, as in certain voluntary undertakings, obligations may arise without there being an authority empowered to change my normative situation by his say-so. Sometimes one's voluntary undertakings presuppose that acting on certain reasons *must* be excluded in order for an obligation to obtain. And that 'must' is not semantically value-laden—in the sense that it is good or advisable to exclude such reasons. That 'must' points, rather, to a logical feature of any obligation: obligations entail or presuppose, in order to be normatively effective, the exclusion of certain reasons. Why would obligations entail this exclusion? They do so, I think, in order to secure their purpose of being categorical requirements hinging neither on the content of the obligation (say, an action or omission) nor on the attitude or disposition of the person obligated.[10] In practical deliberation, the exclusion of

[9] See, e.g., Raz, *The Authority of Law* (n 6) 234-235: 'an action is obligatory only if it is required by a protected reason'. In a similar way, see, e.g. J Raz, 'Promises and Obligations', in PMS Hacker and J Raz (ed) *Law, Morality, and Society: Essays in Honour of H.L.A. Hart* (Clarendon 1977) 223, arguing that 'An action is obligatory if it is required by a categorical rule, i.e. a mandatory rule which applies to its subjects not merely because adherence to it facilitates achievement of their goals'. Later, in Raz, *The Authority of Law* (n 6) 234-235, Raz seemed to refer to such a categorical rule in terms of a protected reason: 'I have argued elsewhere [i.e., the work just cited] that 'an action is obligatory only if it is required by a protected reason'.

[10] Of course, there are limits to this feature of obligations, such as promissory obligations to perform deeply immoral acts—or to promise to surrender one's autonomy.

those reasons means that the agent has a reason *not to* act on those excluded reasons. If she does, she frustrates the purpose of her obligation.

Exclusionary reasons, to be sure, are not bare reasons one weighs according to how one sees correct. If you are both my friend and neighbour, and while you are abroad I see that the rubbish you left outside your house before leaving for the airport hasn't been collected, I have a reason to collect it myself and dispose of it. It will keep the neighbourhood clean and nice, and arguably as your friend I have a reason to look after your property. To that extent, then, I have a first-order reason for action (in short, to φ) which I may weigh according to the normative and non-normative circumstances of the situation. This means that it may be reasonable for me not to φ, because (let us assume) I have a ground for believing that the binman has deliberately left the trash outside your place until the truck is emptied (call this reason Ψ). However, if I promised you that I would pick up the trash and dispose of it elsewhere no matter what so long as it is not collected within one day, I have an exclusionary reason not to act on reasons against φ-ing. This exclusionary reason, as argued above, entails that I must not act on Ψ.

Second, and relatedly, the expression 'not permitted' may, in principle, mean that one *ought not* or *must not* act on an excluded reason. My view is that obligations are robust—in their normative character—precisely because they entail that one *must not* act on certain excluded reasons—in the mandatory, not the value-laden sense. To be sure, that one *ought* to fulfil one's obligations points to the value or reasons in favour of the action being required. That one *must* fulfil one's obligations points, as I said before, to a logical feature of obligations that is ultimately connected to their practical purposes in life. When that purpose serves the interest of someone other than the person obligated—say, the promisee—failure to comply with an obligation may give rise to particular emotions and attitudes that can reasonably be judged as *appropriate* or *fitting.* For example, my promise to collect your trash and dump it elsewhere makes it appropriate or fitting that I feel moral

remorse for failing to fulfil my promissory obligation—say because I acted on Ψ.[11] Likewise, my breaching of my promissory obligation makes it appropriate or fitting for you to *blame* me for having failed to keep my promise. It gives you, in a nutshell, a sufficient ground for criticising me for failing to do what I had an obligation to do.

Whatever the consequence that follows from acting on an excluded reason—and thereby breaching an obligation—we can say that there are grounds for thinking that one has acted, at least *pro tanto*, wrongly. I say *pro tanto* because one may ultimately be justified in failing to comply with one's obligations. For example, if I fail to collect the trash and dump it elsewhere because I rushed for the hospital after receiving a call from my wife who had an accident, it would be false to say that I acted wrongly in failing to comply with my promissory obligation. At the same time, it is not the case that my obligation ceases to exist *because* my wife is at the hospital. My promissory obligation survives my knowing of my wife's accident. What this unforeseen circumstance does is to *justify* my failing to collect your trash because I caught a taxi and rushed for the hospital. Although I have not acted wrongly in failing to collect your trash when I left for the hospital, it is still fitting or appropriate for me to give you an explanation for why I couldn't comply with my promise to collect your trash and dispose of it elsewhere.

Another way of putting it: what one has a protected reason to do need not match what one has a *conclusive* reason to do. By a 'conclusive reason' I shall understand what one has all-things-considered reason to do.[12] In my example above, it is apparent that there is a mismatch between what I have a protected reason do to (namely collecting your trash) and what I have all-things-considered (or conclusive) reason to do, namely rushing to the hospital to see my wife who had an accident.

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[11] See, D Owens, 'Rationalism about Obligation' (2008) 13 *European J Phil* 403, 405 and 419.

[12] I will assume that both situations, i.e., my obligations under both a protected reason and a conclusive reason are justified, and they are not mere claims someone else is making on me.

Accordingly, action on an excluded reason may not be sufficient to establish that one has acted wrongly all things considered.[13] That determination obtains when my obligation under a protected reason matches with what I must do all things considered. Here, my failure to comply with what I have a protected reason to do is a failure to comply as well with what I have most reason to do all things considered.

One possible way of understanding this mismatch, i.e., between what one ought to do under a protected reason and a conclusive reason, lies in the scope of the reasons excluded. Protected reasons do not exclude *all possible* reasons for incompatible action.[14] They only exclude *certain* reasons for incompatible action. Typically, authorities may expressly state those reasons the agent must not act upon. After all, determining whether a particular authority is justified is, to a large extent, a matter of determining whether that authority is justified in excluding certain reasons from being acted upon. But it can also happen that a particular practice determines, in advance, the scope of exclusion. In these cases, it matters less whether an authority has expressly excluded some reasons, since those reasons can be excluded *implicitly*. Admittedly this is highly context-dependent,[15] and I doubt whether there is a clear-cut answer that can state the necessary and sufficient conditions for excluding reasons implicitly. Much of it will hinge on pragmatic considerations, such as attending to the specific purpose of the action (or practice)

[13] In fact, this is how Raz aims to solve Wolff's paradox between autonomy and authority, by arguing that authorities only exclude acting on the balance of reasons—which is different from surrendering one's all-things-considered judgment. See Raz, *The Authority of Law* (n 6) 23: 'If all valid reasons are first-order reasons then it is a necessary truth that the principle of autonomy entails the denial of authority, for then what ought to be done all things considered is identical with what ought to be done on the balance of first-order reasons. But since there could in principle be valid second-order reasons, there is nothing in the principle of autonomy that requires the rejection of all authority'.

[14] Although Raz, particularly in his early work, allowed for the possibility that authorities can exclude *all* conflicting reasons; see, e.g., *The Authority of Law* (n 6) 22; Raz, *Practical Reasons and Norms* (n 6) 100. We need not follow Raz here.

[15] See, for the case of promissory obligations, Owens (n 11) 428.

in question and the way in which certain obligations contribute to the realisation of that goal.[16]

In sum, what defines having an obligation to φ is that there is a set of reasons action on which is excluded for the sake of fulfilling the obligation. If they were not based on exclusionary reasons, our obligations could be weighed in the balance of reasons together with the rest of reasons in play. In this scenario, obligatory reasons would amount (at most) to strong considerations in favour of performing an action.[17] On the view adopted here, however, obligations derive from protected reasons for action. The consequence is twofold: first, what one has reason to do under a protected reason need not match what one ought to do under a conclusive reason. Second, when one acts on an excluded reason, one acts *pro tanto* wrongly. Accordingly, some emotions and attitudes are *pro tanto* fitting or appropriate, such as feeling moral remorse, demanding explanations, and holding another person blameworthy.

2. Stare Decisis: Protected Reason or Conclusive Reason?

The previous discussion has one direct consequence for our analysis of *stare decisis*. If the law can place later courts under a legal obligation to follow precedent,

[16] Some practices, such as pursuing a career in the military, usually take place within a framework of social conventions and practices that significantly reduce the scope for practical deliberation. Soldiers should be generally obedient to the instructions of their military superiors. They need not obey the commands of their superiors *blindly*, but arguably a solider who wants to succeed and ascend in the military chain will have to decline exercising her own judgment on what the balance of reasons might suggest. Many times, the correct decision will be to assume that acting on a particular reason, which has not expressly been excluded by the superior, is implicitly excluded. If in the middle of a dangerous operation the captain of a team commands a soldier to keep watch over night, but without expressly commanding him not to sleep, it would be an error, and arguably a gross one, if the solider took a two-minutes nap because the situation looked rather calm. Other practices, like genuine friendship, are more deliberation-friendly, in the sense that the obligations arising from the practice presuppose that the scope of excluded reasons should be expressly communicated.

[17] This would be, roughly, the 'weighing model' of reasons. For an overview, see N Gur, *Legal Directives and Practical Reasons* (OUP 2018) 15-16.

what form can that obligation take? A brief study of two historical events in the House of Lords' use of precedent will allow us to answer this question.

In 1898, the House of Lords decided *London Tramways Co v London City Council*. In this opportunity, the House was asked to reconsider and overrule two of its decisions that turned on the construction of section 43 of the Tramways Act of 1870. One of the issues under consideration was whether, as a matter of law, the House of Lords had the power to depart from precedent. One decision appeared to suggest that the House had indeed such a power, but there was also precedent to the contrary. Writing for the court, Lord Halsbury declared that:

> a decision of this House upon a question of law is *conclusive*, and nothing but an Act of Parliament can set right that which is alleged to be wrong in a judgment of this House.[18]

In Lord Halsbury's view, the values of closure and reliability would justify a full prohibition on later courts from reconsidering a matter on which there is relevant precedent by the House of Lords. In his own words,

> I do not deny that cases of individual hardship may arise, and there may be a current opinion in the profession that such and such judgment was erroneous; but what is that occasional interference with what is perhaps abstract justice as compared with the inconvenience—the disastrous inconvenience—of having each question subject to being reargued and the dealings of mankind rendered doubtful by reason of different decisions…?[19]

That was the doctrine concerning the conclusive effect of precedent laid down by *London Tramways* in 1898. The expression '*nothing but* an Act of Parliament'

[18] [1898] AC 375, per Lord Halsbury; emphasis added.

[19] Id.

(in the first quote above) suggests, quite plausibly in my view, that whenever there was relevant precedent on the matter at hand, the later court (either the House of Lords or a lower court) would have, in the eyes of the law, a conclusive reason to follow relevant precedent. *London Tramways* did not provide for a non-excluded reason action on which would allow the later court to depart from precedent. Only Parliament could change the law made by a House of Lords decision by enacting new legislation. What this historical example shows is that it perfectly possible conceive of an authoritative mode (*stare decisis*) under the form of a conclusive reason for action. On this view, the later court would have an all-things-considered legal reason to follow relevant precedent.

Of course, from the fact that the authoritative mode *can* have the form of a conclusive reason for action, it does not follow that the law is justified in giving this mode such a form. The natural way to understand the doctrine laid down in *London Tramways* is, I think, to say that in such a decision the law (through the House of Lords) only *claimed* that later courts were under a conclusive reason to follow relevant precedent. Given that it is difficult to think that the law can ever be justified in establishing, *ex ante*, that later courts have a conclusive reason to follow relevant precedent, the claim laid down in *London Tramways* was arguably false or at any event unjustified. Of course, this is not to say that, in *some* disputes, later courts can indeed have a conclusive reason to follow relevant precedent. In this scenario, as we saw above, following relevant precedent is what the later court ought to do all things considered. But this situation is very different from a case in which the law requires, *ex ante*, that later courts follow relevant precedent from an all-things-considered perspective. The latter is only a claim—which I for one think is clearly unjustified. The former, by contrast, is a conclusion that will obtain after a case-by-case moral and legal analysis.

If it is doubtful that the law can ever be justified in putting courts, *ex ante*, under a conclusive reason to follow precedent, can the obligation under the authoritative mode take the form of a *protected reason*? Let us illustrate again with the history

of the House of Lords. In 1966, more than half a century since *London Tramways* was decided, the House of Lords issued the Practice Statement, in which it was acknowledged that the use of precedent is

> 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.[20]

Yet at the same time the House of Lords made room for the possibility of departing from precedent when 'too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law'. The upshot of the Practice Statement is that the decisions of the House of Lords, today the UK Supreme Court, are 'normally binding' on the same court, but they allow for departures 'when it appears right to do so'. The Practice Statement, in other words, contemplates that there may be a non-excluded reason action on which allows the UK Supreme Court to depart from relevant precedent.

The Practice Statement represents current doctrine under British law. Now, the Supreme Court has been rather conservative in departing from relevant precedent, but cases exist where that court has acted on non-excluded reasons to depart from precedent 'when it appears right to do so'.[21] One important thing to bear in mind though is that acting on such non-excluded reasons does not of course undermine the obligation under the authoritative mode. As we saw in the previous subsection, it is consistent with the idea of having an obligation—in the form of a protected

[20] [1966] 1 WLR 1234.

[21] According to N Duxbury, *The Nature and Authority of Precedent* (CUP 2008) 128, 'only rarely since 1966 has the House of Lords used the power that it created for itself'. On the House of Lord's Practice Statement, see *ibid* 123-149 and W Twining & D Miers, *How to Do Things with Rules* (5th edn, CUP 2010) 283-285.

reason—to act on a reason leading to an otherwise incompatible outcome *provided* that such a reason has not been excluded—either implicitly or explicitly. The Practice Statement sets out, explicitly, that there may be a non-excluded reason action on which allows the Supreme Court to depart from relevant precedent, when it appears right to do so. Since the Practice Statement does not specify when there is such non-excluded reason, the Supreme Court has significant discretion in making this determination. The particular instances in which the Court has departed from precedent themselves constitute precedent on which the House may rely in future cases with a view to deciding whether to depart from precedent in accordance with the Practice Statement.

On the other hand, in *Young v Bristol Aeroplane Co Ltd*,[22] the Court of Appeal (Civil Division) declared itself to be bound by its own precedent, with three exceptions: (*i*) where two of these precedents conflict with each other; (*ii*) where one of these precedents is incompatible with a decision of the House of Lords—UK Supreme Court; and (*iii*) where a precedent was given *per incuriam*. All of these are non-excluded reasons, contemplated in advance by the same court that may act on them for the purpose of departing from relevant precedent. Since the list is, or appears to be, exhaustive, one may argue that action on *any* other reason leading the Court of Appeal to depart from precedent is incompatible with its obligation under *Young v Bristol.* If, for example, that court were to overrule one of its precedents because 'it appears right to do so' (as in the Practice Statement), then one might think that such a decision would be incompatible with *Young v Bristol*. As such, the decision would be incompatible with authoritative mode, at least as this mode was originally laid down in *Young v Bristol*, i.e., with the specific grounds for overruling precedent recognised in that decision.[23]

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[22] [1944] KB 718.

[23] According to Twining & Miers (n 21) 286-287, the Court of Appeal has restated aspects of the doctrine laid down in *Young v Bristol Aeroplane Co Ltd*. Crucially, in *Limb v Union Jack Removals* [1998] 1 WLR 1354, at 1364 (para 34), the court declared that 'Any departure from a previous decision of the court is in principle undesirable and should only be considered if the previous

As we have seen, the agent that excludes a reason explicitly can be the same court that sets a precedent, as shown by both the House of Lords in the Practice Statement and the Court of Appeal in *Young v Bristol*. But nothing prevents another agent, such as Parliament or a higher court, from authorising the later court to depart from a precedent otherwise binding. Arguably, this process of excluding certain reasons requires constitutional authority. In the case of Parliament, that authority derives from the principle of Parliamentary sovereignty. In the case of a higher court, constitutional support must be found in specific features of the legal system in question. If, for example, the legal system allows a higher court to demand conformity with its own precedents, it is in principle possible to think that court can exclude specific reasons action on which justifies *not* following precedent.

In sum, the authoritative mode can be one that allows for a set of non-excluded reasons, or one that entails an all-things-considered reason in favour of following relevant precedent. I have shared my scepticism that the law can ever be justified in adopting the latter approach. Is the law justified in placing courts under a protected reason to follow relevant precedent? This brings us to the problem of justifying *stare decisis.* Although I will be saying more about this in the next chapter, let me proceed on the assumption that *stare decisis* is justified if *at least the highest court in the land* can act on a non-excluded reason for departing from relevant precedent. Action on this non-excluded reason would allow the legal system, via its highest court, to advance other important values. For example, as the

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decision is manifestly wrong'. Now, one may doubt whether this decision is compatible with *Young v Bristol*, insofar as the court departed from the latter decision in respect of the grounds for departing from precedent, by allowing departures from precedent when the precedent is 'manifestly wrong'. Hence, one may doubt whether *Limb v Union Jack* was supported by law, insofar as the conditions for departing from precedent (as originally laid down in *Young v Bristol*) were not, strictly speaking, respected. It does not follow, of course, that *Limb v Union Jack* is legally invalid. As T Endicott, 'How Judges Make Law' in E Fisher et al (eds) *The Foundations and Future of Public Law: Essays in Honour of Paul Craig* (OUP 2020) 130 argues, 'there can be very good reasons for the system to treat a decision as valid, and final, even if it was contrary to the law, and even if the court was not authorised to make it. The reason is the rule of law requirement of resolution, which depends on finality in the creation of norms'.

Practice Statement shows, a legal system can advance the value of 'proper development of the law'.[24]

3. Rule-Based Theories and Analogical Theories

Another way of understanding the obligation to follow relevant precedent under the authoritative mode is by considering its content instead of its form. There are two main candidates I would like to consider: the rule-based and analogical theories. They represent prominent views in the common law literature on precedent. In the remainder of this subsection, I will briefly outline their main claims, and part of their disagreement, with a view to offering, in the next subsection, what I take to be a novel understanding of the authoritative mode.

Rule-based theories, or, we may say, the traditional approach to the authoritative mode, argue that many but not all precedents provide later courts with authoritative rules.[25] These rules were either handed down or relied upon by earlier courts when setting the precedent. The rules, further, resemble rules provided by statutes, in the sense that both are entrenched generalisations that pre-empt acting on their underlying motivations. Consequently, according to rule-based theories, the rule in a precedent is a reason for action in its own right.[26] The existence of this rule, and not its soundness, provides a sufficient reason for following relevant precedent. And the form of that reason can change depending on whether there are non-

[24] See, *supra*, this chapter, fn 20.

[25] I have reconstructed various claims associated with the rule-based theories taking into account, as a useful guide, the following contributions: L Alexander, 'Constrained by Precedent' (1989) 63 *S Cal L Rev* 1, 17-28; G Lamond, 'Do Precedents Create Rules?' (2005) 11 *Legal Theory* 1 1-2; L Alexander & E Sherwin, *Demystifying Legal Reasoning* (CUP 2008) 40-63; F Schauer 'Precedent' in A Marmor (ed) *Routledge Companion to Philosophy of Law* (Routledge 2012) 127-130; A Rigoni, 'Common-Law Judicial Reasoning and Analogy' (2014) 20 *Legal Theory* 133, 137-139; and K Stevens, 'Reasoning by Precedent—Between Rules and Analogies' (2018) 24 *Legal Theory* 216, 216-217 and 222-224.

[26] Again, this is a *pro tanto* reason for action: it exists only as a means to advance certain values via the practice of following precedent.

excluded reasons against following relevant precedent. If there are, then it is a protected reason; if there aren't, then it is a conclusive reason (or so the law can claim).

Now, where exactly does a later court find the rule in a precedent? On the view we are considering, this rule is provided by the *ratio decidendi* of the precedent, which is the proposition of law for which the precedent is authoritative. To the extent that a precedent either sets or follows an existing proposition of law, that proposition is its *ratio decidendi*. The *ratio* is the prescriptive part of the precedent that binds later courts. Accordingly, scholars in this tradition argue that the obligation of a later court is to decide the precedent-governed dispute by applying the rule provided by the *ratio* or *rationes* of the precedent. On this view, case-law adjudication, very much like cases governed by statutes, is another form of rule-based adjudication. When a later court follows precedent, the court *applies* an authoritative legal rule. The resulting decision is, accordingly, legally justified.

This familiar picture has internal complexities and has faced external objections. Many of the internal complexities have concerned determining the *ratio* of the precedent. They are *internal* to the extent that they represent practical and conceptual challenges derived from the very notion of the *ratio decidendi.* What happens, for example, in those situations where a precedent does not have a *ratio*? Or what if a precedent has not one, but various *rationes*, with conflicting requirements? Finally, what if the later court finds it difficult to determine the precise meaning of the *ratio*? From a historical standpoint, these internal difficulties prompted two attitudes concerning the *ratio*. First, scepticism about the *ratio*'s role in explaining precedential constraint.[27] Second, a commitment to the role of the *ratio* in constraining later courts. Accordingly, proponents of this view have

[27] American Legal Realism for example—see, e.g., R Cross & J Harris, *Precedent in English Law* (4th edn, Clarendon 1991) 78-79; and Schauer (n 25) 132-133.

thought that scholars and courts should strive to overcome these internal difficulties in order to make the *ratio* more determinate.[28]

As I said, the familiar picture has also faced external objections. These are external objections to the extent that they are not concerned with conceptual and practical problems derived from the *ratio.* Rather, they argue that the traditional, rule-based approach does not offer a sound account of what common law courts *do* when they reason using precedent. Possibly the most powerful objection argues that rule-based theories leave little, if any, room for the judicial practice of distinguishing. When a later court distinguishes, the court shows that the instant case presents a relevant fact not reported in the precedent whose existence justifies a different treatment. Some rule-based theories argue that distinguishing entails modifying the precedent rule, because the later court either adds new conditions for the *ratio*'s application, or drops conditions that had been part of the *ratio*.[29] While the former entails narrowing the *ratio*'s scope of application, the latter entails enlarging it. Since these two interventions lead to a change in the precedent rule, some scholars have noted that distinguishing gives judges the power to develop the law:

> Since 'distinguishing' means changing the rule which is being distinguished, the power to distinguish is a power to develop the law even when deciding regulated cases and even by courts which have no power to overrule.[30]

Thus, the challenge that distinguishing poses on rule-based theories is as follows: How can later courts be constrained by binding legal rules—provided for

[28] See, e.g., Cross & Harris (n 27) 52 and 72; and Duxbury (n 21) 90-92.

[29] As noted by S Perry, 'Judicial Obligation, Precedent and the Common Law' (1987) 7 *OJLS* 215, 239.

[30] Raz, *The Authority of Law* (n 6) 185.

by the *rationes* of the precedent—if every court has the power to change these rules via the practice of distinguishing? Raz, on the one hand, tried to meet the challenge by imposing two further conditions on how judges ought to distinguish cases. First, judges should only add conditions for the *ratio*'s application—meaning they cannot enlarge the *ratio*, i.e., by dropping conditions already present in it. Second, according to Raz, the modified rule must be 'a possible alternative basis for the original decision',[31] meaning the new rule must support the result prescribed by the rule in the precedent. Raz's proposal has not been without its critics.[32]

A second, more radical way of meeting the challenge is to reject the practice of distinguishing altogether. An example is Larry Alexander and Emily Sherwin, two prominent defenders of the rule-based theory, for whom:

> The rule model of judicial decision making has no conceptual room for the practice of distinguishing rules[33]… distinguishing rules is logically equivalent to repealing rules at will.[34]

Against this view, critics argue that any account of precedential reasoning in the common law that leaves out the practice of distinguishing fails to meet a minimum descriptive requirement. This objection was first raised by Grant Lamond, for whom: 'Any satisfactory view of precedent must see distinguishing as an integral

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[31] Ibid, 186.

[32] For example, according to Perry (n 29) 238: 'The problem with this attempt … is that depends on too narrow a characterization of the ways in which, even short of overruling, the common law can be revised. Judges do not limit themselves, in reassessing the justificatory principles which were employed in a previous case, to restricting the reach of those principles; very commonly a court will recognize that the true scope of the relevant principles require that their range of potential application be extended beyond what had been contemplated by the court which made the original decision'.

[33] Alexander & Sherwin (n 25) 122.

[34] Ibid, 123.

part of it rather than as an add-on or quirk of the common law'.[35] Accordingly, if distinguishing is an essential part of the practice of following precedent, the obligation of later courts must be restated in a disjunctive form: namely, to determine whether the precedent should be *either* followed or distinguished.[36] While for Lamond distinguishing involves acting for a non-excluded reason against following precedent, for Alexander and Sherwin acting on the reason involved in distinguishing *should be* excluded.

Interestingly, as we can see, this debate hinges on methodological aspects of jurisprudence: whether distinguishing *is*, as a matter of current practice, done for a non-excluded reason; and whether, as a matter of *ideal practice*, it *should be* done for a non-excluded reason. And whether, in order to move forward, we should or should not assume that certain features of a practice are justified because they are pervasive. For Lamond, it seems that we can bypass the problem of justification *because* distinguishing is pervasive enough. Alexander and Sherwin, by contrast, believe that distinguishing is unjustified, no matter how pervasive it is. My view is that pervasiveness does not, and cannot, guarantee justification. But this is not what is at stake. As mentioned in the Introduction, much of this methodological issue comes down to the particular aims of the theorist. If the theorist aims to engage in practice-interpretation, then it is sensible to think that some pervasive elements of a given practice cannot be ignored on pain of explaining another practice or object of study. If, on the other hand, the theorist wants to engage in normative theorising, then it seems that some central features of a practice can be critiqued by showing the extent to which they run counter to the central case of the practice under study.

Be that as it may, the second candidate I want to analyse is the analogical approach. Proponents of this view argue that reasoning with precedents is, in many important respects, the same as, or an instance of, reasoning with analogies. In

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[35] Lamond (n 25) 15.

[36] Raz, *The Authority of Law* (n 6) 185; Lamond (n 25) 3; and F Schauer, *Thinking Like a Lawyer* (Harvard UP 2009) 58.

analogical reasoning there is a 'source' and a 'target' of analogies; in precedent-based adjudication, the precedent is the source of an analogy, while the present case is the target. The obligation of the later court is then to follow precedent whenever the facts of the instant case are relevantly similar to those of the precedent. Courts draw analogies precisely in order to determine whether the two cases are relevantly similar. If they are, then both cases should receive the same treatment. Conversely, if the same facts present relevant differences, then the later court may distinguish. As seen in Chapter I, two cases are relevantly similar when they are *legally the same*: when their differences, if any, are not relevant *in the eyes of the law*.[37]

For example, that the defendant in the precedent was bald is a difference if the defendant in the present case exhibits abundant hair. In some contexts, this difference may be relevant, e.g. in casting for a particular movie, but it may not be relevant in the eyes of the law. (Of course, the law could make baldness a relevant property). That the defendant in the present case, by contrast, used a knife to kill someone, while the defendant in the precedent used an assault rifle, may be legally relevant. Thus, for analogical theories, while in the first example the later court must follow precedent, in the second the later court may distinguish—all else being equal. The benefit of analogical theories, as we can see, is that they can easily incorporate and account for the practice of distinguishing. It is, in fact, part and parcel of the idea of having an obligation to follow relevant precedent that when two cases are not legally the same the court should distinguish them. Naturally the stakes are therefore high when it comes to determining the differences that are legally relevant. Who makes this decision? In Lamond's own words: 'This question must be answered from the point of view of the *later court*'.[38] For rule-based theories, this is exactly the Achilles' heel of all analogical theories.

[37] Cf. *supra*, Introduction, 37, and Chapter I, 44ff.

[38] Lamond (n 25) 16.

Rule-based theories advance two main objections against analogical theories. The first objection argues that analogical reasoning cannot by itself provide sufficient tools for the resolution of a dispute. This kind of reasoning depends on a judgement of relevance (*viz* of similarities) for which the theory does not offer any guiding criteria. In order for the later court to determine whether two cases are relevantly similar, the court must appeal to a higher-order standard, e.g. a rule or principle, whereby the criterion of relevance is provided.[39] Only thereby can the judge determine whether two cases are relevantly similar. But whenever the judge proceeds this way, the normative work is done by the higher-order standard, not by the precedent. The precedent, as such, becomes normatively inert. The second objection argues that analogical theories leave precedential constraint almost entirely up to the determination of the later court. If all that it takes to distinguish is to find a difference which the later court finds relevant enough to justify a different treatment, then 'we can assume that the judge will be tempted to manipulate factual assumptions in this way to avoid a result the judge thinks is wrong'.[40]

I have so far summarised only what we could regard as the first half of the debate between rule-based theories and analogical theories. The second half consists of the corresponding amendments made by the proponents of each view to meet the respective objections. To summarise these amendments: while rule-based theories have tried to make room for the practice of distinguishing, analogical theories have tried to show that analogical reasoning can constrain later courts as much as rule-based theories can.[41] The upshot is that there does not seem to be a significant disagreement in terms of the content of the obligation to follow relevant precedent. Whether it means to apply the rule laid down in a *ratio*, or to determine whether two facts are relevantly similar, in both cases the court *must* decide the present case in a way that is normatively consistent with the precedent.

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[39] Alexander & Sherwin (n 25) 69-71.

[40] Ibid, 78.

[41] Stevens (n 25) 226ff.

In the next and final subsection, I want to offer my own account of the authoritative mode. I shall call it the 'three-steps account'. It is an account that seeks to capture some necessary features of adjudication under the authoritative mode, but that will benefit from constructive criticism and further reflection.

4. Three Consecutive Steps

The key to understanding the authoritative mode, I argue in this subsection, lies in the way in which the decision of the earlier court in respect of the reported facts of the precedent is authoritative for the later court. My claim, in particular, is that any plausible account of the authoritative mode should view *at least* the following decisions of the earlier court as authoritative for the later court:

(i) The decision to treat certain facts as material;
(ii) The decision to give a particular legal significance to specific material facts;
(iii) The decision to treat certain facts as the necessary and sufficient conditions for reaching a justified decision.

These are necessary conditions of the authoritative mode. They might not be sufficient, because rule-based theories may argue that I have not paid enough attention to the authoritativeness of the *ratio*. While this objection might be true, it depends on the position we adopt concerning the debate between rule-based and analogical theories. Since it is not my purpose to adjudicate this debate—this would arguably require a doctoral work in its own right—I will rely on the assumption that, if my account is able to ground a robust form of precedential constraint, then it is sufficient for establishing another way of understanding the authoritative mode.

To see how each of the three decisions listed above play out, let us consider a simple hypothetical example. I will rely on this kind of example instead of a real-life dispute only for the sake of simplicity and brevity. I trust that the reader will

agree that the example I will offer, adjusted perhaps to raise the stakes and make litigation worthwhile, may easily give rise to a real-life dispute.

Suppose Clara, the judge in a small town, has to decide a dispute between Rita and Oliver. Assume that we can state the facts of the case (f) as follows:

f1: Rita and Oliver are both *owners* of adjacent lands;
f2: Rita had a pet, an emu, that rested on Rita's lawn every morning;
f3: Billy, Oliver's dog, never showed aggressive behaviour before; thus, he was allowed to freely enter and exit Oliver's house;
f4: Rita visited Oliver one day to have breakfast. After leaving Oliver's house, she forgot to shut the gate that connects her land with Oliver's;
f5: Billy entered Rita's house through the open gate and killed the emu;
f6: Rita seeks compensation from Oliver for emotional harm.

Based on these facts, Clara decides in favour of Oliver. The *ratio* of Clara's decision can be summarised as follows: (*R*) 'Oliver does not owe compensation to Rita, because although Oliver is the owner of Billy, and thus responsible for him, Rita left open the gate through which Billy entered her land. Rita is therefore responsible for the death of her emu'. Now, it is admittedly possible for a defender of the rule-based theory to argue that this *ratio* is sufficient for making Clara's decision normatively intelligible. Consequently, in a subsequent dispute, all that the later court should do is to make a straightforward application of the *ratio* in the light of a set of similar facts. Again, I think it is important to set aside the debate concerning the sufficiency of the *ratio*. Were the *ratio* sufficient, we would miss important normative features of the facts reported in the precedent, and it is these features that I want to capture in a way that is compatible with rule-based theories.

How would the three decisions presented at the beginning of this subsection play out in the light of this imaginary example? Let us consider step by step.

a) Material Facts

The six facts listed above do not exhaust the many facts this case might present. That Rita, for instance, had green tea while Oliver had orange juice may be a fact, but may not be a material one. Material facts are those the court finds relevant for deciding the case at hand. That Rita had green tea while Oliver had orange juice is, for Clara, irrelevant. Nothing in her decision turns upon these facts. As such, she can treat them as *immaterial.* This is commonplace. What might be more controversial, however, are the consequences that follow, for the later court, from the fact that the earlier court decided to treat certain facts as material or immaterial.

Suppose years after *Rita v. Oliver* a relevantly similar dispute arose,[42] this time between different parties and with Tom as the judge, who is bound by Clara's precedent—according to the relevant rules of the town. What does it mean to say that, for Tom, the material facts reported in *Rita v. Oliver* are authoritative? First, that Tom could not treat as *material* facts reported in that decision that were *immaterial* for Clara. Tom could not say, e.g., that Clara should have paid more attention to the reported fact that Rita had green tea, which some studies (arguably ignored by Clara) have found to contain a relaxing property. This property may explain why Rita forgot to shut the gate. Had Clara treated this fact as material, Rita's case may have been stronger. The reason is because the imputation, to Rita's own fault, of Billy having entered Rita's land, may be undermined.

Tom cannot proceed this way because doing so would entail *directly* changing the proposition of law for which the precedent is authoritative. On some analogical theories, it is submitted, Tom may change *indirectly* the same proposition via the

[42] Someone might complain, rightly, that by asking the reader to assume that a relevantly similar dispute has arisen I am precisely begging one of the crucial questions that is at stake, namely how does the later court determine whether the case at hand and precedent are relevantly similar? Is it according to the tools of analogical reasoning or by looking at the rule laid down in the precedent? For current purposes, we can proceed on the assumption that a sufficient number of people in this imaginary town—either lawyers or otherwise—believe that the two cases are similar in relevant ways. Again, I am not interested in adjudicating between rule-based theories and analogical theories. I thank Damian Cueni for this observation.

practice of distinguishing. The difference, however, is that while distinguishing is a judicial intervention that takes place from the point of view of the *later court*, adding material facts in the way just described proceeds from the point of view of the *earlier court*. Now, you might think that this is only an analytical difference, and that in the long run both situations have a similar effect. However, as I will show in part C below, the distinction is important, because in some scenarios the power of the later court to distinguish can be affected precisely by whether the earlier court treated certain facts as material or not.

Secondly, Tom could not treat as *immaterial* facts which were for Clara *material*. Tom could not say, e.g., that Clara should *not* have given much relevance to the fact that Rita forgot to close the gate: 'that can happen to anybody!'. Tom is prevented from doing this, *even if* he is convinced that there are good grounds supporting him, such as a reported fact that should have been treated as material by Clara. Suppose it is a reported fact that Rita received an emergency call because her mother had a car accident, meaning she had to leave urgently for the hospital. We know, however, that Clara did not treat this fact as material, and arguably this was a mistake on her part. But since from the first rule above it follows that Tom cannot make this reported fact material, it also follows that Tom cannot make immaterial the material fact of Rita having left the gate open because she had to rush to the hospital. Again, where Tom proceeds this way, he *directly* changes the precedent—as though he were Clara, the earlier judge.

b) Legal Significance

In 1930, Arthur Goodhart famously claimed that 'It is by his choice of the material facts that the judge creates law'.[43] Goodhart's claim is not the whole story, because more is required to make law under the authoritative mode. To begin with, the court

[43] A Goodhart, '*Determining the Ratio Decidendi of a Case* (1930) 40 *Yale L. J.* 161, 169.

has to give a particular legal significance to certain facts already treated as material by the same court.

It is, in effect, one thing to determine that certain facts are material; it is another to determine whether a specific fact, already treated as material by the same court, favours one of the parties. By 'legal significance' I mean, following John Horty,[44] the idea that a specific fact, previously treated as material by the same court, favours either the claimant or the defendant. In other words, the decision to treat a reported fact as material does not by itself establish whether that fact has any legal significance—whether it favours *necessarily* either the claimant or the defendant. Giving legal significance is, for this reason, another decision the court has to make.

Take f1 above: 'Rita and Oliver are both *owners* of adjacent lands'. Clara, the judge, treated this fact as material, because it mattered for her decision. But in what sense did it matter? Well, Clara may have decided differently if, say, Oliver was a *tenant* of the house. Because in that case Clara may have looked, in Oliver's tenancy agreement, for a prohibition against having pets. Had she found one, Oliver's breach of agreement may have made Rita's case stronger, and the reason is because Billy was never supposed to live in the house in the first place. But since *ownership* entails specific legal consequences—e.g., owners can lawfully have pets in their property—it was important for Clara to treat this fact as material. Her decision triggers specific legal consequences worth keeping in the background.[45] Now, does the decision to treat f1 as material—that Rita and Oliver are both *owners* of adjacent lands—say anything about whether it favours Oliver or Rita?

[44] J Horty, 'The Result Model of Precedent' (2004) 10 *Legal Theory* 19, 30.

[45] Why? For justificatory purposes. In our example, Clara, having treated ownership as a material fact, is dispensed from having to show that Oliver was allowed to keep Billy in the house—at least *prima facie.* Things may change if someone shows, for example, that Billy belongs to a breed possession of which is prohibited by law.

I want to leave open the possibility that certain facts, treated as material by the court, *may* necessarily entail a particular legal significance.[46] But I think it is plausible, and also analytically valuable,[47] to say that there can be material facts that, absent a particular decision on their legal significance, might neither favour nor disfavour any of the parties. If this is true, then we can state our first rule concerning legal significance as follows. The later court cannot give legal significance to a fact that that the earlier court treated as *legally insignificant*. Tom could not say, e.g., that Clara should have balanced, *in favour of Rita*, the fact that she and Oliver were owners of adjacent land. Why would Tom think this material fact deserved a particular legal significance? Well, the menu of possibilities is as generous as the creativity of the later court. Nothing would prevent Tom from saying, e.g., that owners of adjacent lands have particular duties towards each other, such as adopting reasonable precautions for the harmonious coexistence of their pets. What the rule we are considering seeks to prevent is precisely this kind of creativity. The reason, again, is that the later court cannot directly change the proposition of law for which the precedent is authoritative.

The second rule concerning legal significance is the following: the later court cannot change the *particular* legal significance given by the earlier court to a material fact. We know that, for Clara, it was a material fact that Rita forgot to shut

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[46] For example, if for mitigation purposes the law is not indifferent as to whether a criminal has mental problems, then if in a given case it happens that a murderer has a mental issue, and if this fact is treated as material, it would follow that it favours his or her case.

[47] Goodhart (n 43) 171 seems to conflate the statement of a fact, which for him is different from whether that fact is material, with the legal significance of the same fact. Citing *In Re Poemis and Furness, Withy & Co* ([1921] 3 KB 560), he says that 'the Court of Appeal was bound by the arbitrator's finding of fact that a reasonable man would not have anticipated that a plank falling into the hold of a steamer filled with petrol vapour might cause an explosion'. Goodhart discusses this case as an example lending support to his first rule concerning the determination of the material facts. But this finding is not merely a statement of fact: it also reveals a particular legal significance—arguably favouring the person responsible for the falling of the plank. One option is to say that, for Goodhart, this example counts as a material fact, and not only as a statement of fact. But, again, we would be conflating a fact being material with the same fact having legal significance. Maybe this conflation explains why Goodhart seemed to think that treating a fact as material is a sufficient condition for making law under the authoritative mode; ibid, 169.

the gate (f4). But this fact was not only material; it also favoured, in Clara's view, Oliver's case. Accordingly, Tom, the later judge, could not say that this material fact should have remained *neutral*, i.e., favouring neither Rita nor Oliver. Likewise, Tom could not say that a fact which for Clara favoured one of the parties should have in reality favoured the other party. Examples of this latter kind are less common; to some extent, they entail opposite ways of perceiving the normative significance of facts. But suppose that for some mistaken reason Clara decided to count in favour of Rita the fact that she forgot to shut the gate. Having noticed this mistake, Tom could still not remedy it by counting the same fact in favour of Oliver.

c) Necessary and Sufficient Conditions

Finally, a decision has to be made on the necessary and sufficient conditions for reaching a justified decision in *this* particular dispute.[48] For example, that Rita had green tea while Oliver had orange juice is, for Clara, neither necessary nor sufficient for deciding. That Rita and Oliver are both owners of adjacent lands is possibly necessary but presumably not sufficient. That Rita, finally, forgot to shut the gate seems necessary and, together with ownership of adjacent lands, sufficient for deciding in favour of Oliver. The third step of my account of the authoritative mode provides that the later court cannot decide in a way that is incompatible with the decision of the earlier court to treat certain facts as necessary and sufficient conditions for reaching a justified decision in the precedent case.

Judgments about the necessary conditions matter, because to some extent these conditions provide the structural boundaries of the precedent. If in order to decide

[48] Some scholars, notably N MacCormick, 'Why Cases have *Rationes* and What These Are' in L Goldstein (ed) *Precedents in Law* (Clarendon 1987) 161; and J Waldron , 'Stare Decisis and the Rule of Law: A Layered Approach' (2012) 111 *Mich L Rev* 1, 17 argue that judges must also consider the impact of their decisions in the law. Their claim, in particular, is that judges have a duty to formulate, in clear and general terms, the norms they create in their precedent-setting decisions. Recently, K Stevens, *'*Setting Precedents Without Making Norms?*'* (2020) 39 *Law and Philosophy* 577, has offered a critical examination of this claim, arguing that sometimes judges have good reasons to *avoid* articulating these norms in a determinate formulation.

in favour of Oliver, Clara thought it necessary that Rita forgot to shut the gate, then in a subsequent dispute Tom—the later judge—could not decide in favour of the party equivalent to Oliver absent this condition. Tom may think it is an absurd condition, which leads to very bad outcomes, and accordingly it would be good to get rid of it. However, *qua* later judge, Tom cannot do this. On the other hand, necessary conditions also provide some of the grounds for distinguishing. Assume ownership of adjacent lands was, for Clara, a necessary condition for deciding in favour of Oliver. In the subsequent dispute, Tom could distinguish, and decide in favour of the party equivalent to Rita, if the party equivalent to Oliver was not the owner but a tenant who had a contractual prohibition against having pets. Why? First, because Clara never considered *tenancy* as a necessary condition for deciding in favour of Oliver. Second, because the clause against pets makes a difference relevant enough to decide this time in favour of the party equivalent to Rita.

Judgments about the sufficient conditions also matter, because these conditions set the threshold for deciding the dispute in a way the court thinks justified. The court may think that certain conditions are sufficient either *individually* or *jointly*. We know, for example, that the fact that Rita forgot to shut the gate is *individually sufficient* for deciding in favour of Oliver. Call this 'scenario 1'. Now suppose it is both a reported and material fact that Oliver *never saw* Rita leaving the gate open. Had Oliver noticed this fact*, and still decided not to shut the gate*, Rita's case may have been stronger. The reason is because Oliver had a chance to save the life of Rita's emu, but deliberately failed to do so. Assume Clara states this hypothetical condition in her opinion. Call this 'scenario 2'. Unlike scenario 1, scenario 2 provides a *jointly sufficient* condition for deciding in favour of Oliver: (*a*) that Rita forgot to shut the gate, and (*b*) that Oliver was never aware of condition (*a*). Conditions (*a*) and (*b*) are thus individually necessary conditions and are jointly a sufficient condition.

Finally, there is a third possibility worth analysing, because it shows the extent to which sufficient conditions matter as well for the practice of distinguishing.

Assume condition (*b*) above never obtained: Oliver *saw* Rita leaving the gate open, and yet decided not to do anything. Suppose that, despite this fact, Clara still treated Oliver's awareness as immaterial. It follows that condition (*a*) is again individually sufficient for deciding in favour of Oliver. The same would happen had Clara treated Oliver's awareness as material, but decided not to give it a legal significance in favour of Rita. Call both situations 'scenario 3'. Now compare scenario 1 and scenario 3. Is there any difference between them? At first glance there is not, for in both cases condition (*a*) is individually sufficient for deciding in favour of Oliver. Yet for a later court there is a crucial difference—and this is the difference I referred to in part a) above on material facts.

If Tom, the later judge, has to decide a dispute where a party equivalent to Oliver knew about condition (*a*), Tom would be allowed to distinguish, and possibly decide in favour of the party equivalent to Rita, *only if* Clara's decision was given under scenario 1. Conversely, if Clara's decision was given under scenario 3, Tom would be prevented from distinguishing. Why? Because in scenario 3, but not in scenario 1, Clara decided to treat Oliver's awareness of condition (*a*) as either immaterial or legally insignificant, both being equally authoritative for Tom. Accordingly, Tom cannot use condition (*a*) as a ground for distinguishing, for this condition was judged by Clara as *insufficient* to favour Rita's case—and so it was reported in Clara's decision.[49]

Let me finish with one final thought. Just as before, I would like to leave open the possibility that the decision to treat certain facts as material, together with the decision to give them a specific legal significance, *may* necessarily entail a particular treatment on the necessary and sufficient conditions for reaching a legally justified decision. But again, it seems analytically valuable to keep things separated. A particular decision on the legal significance of certain facts may not necessarily establish, by itself, whether that decision is sufficient to decide in favour of either

[49] In a similar way, Lamond (n 25) 21; J Horty, *Rules and Reasons in the Theory of Precedent* (2011) 17 *Legal Theory* 1, 7-14; and J Horty & T Bench-Capon, 'A Factor-Based Definition of Precedential Constraint' (2012) 20 *Artificial Intelligence & L.* 181, 189-196.

party. That is why, I have argued, the decision to treat certain facts as necessary and sufficient conditions for reaching a justified decision is another, final step that the earlier court has to make.

d) Conclusion

I have offered an account that seeks to capture the gist of the authoritative mode. The account is consistent with rule-based theories in that it provides a robust idea of precedential constraint. The later court *must* respect the following three decisions of the earlier court: (1) to treat certain facts as material, (2) to give certain material facts a specific legal significance, and (3) to treat certain facts as necessary and sufficient conditions for reaching a justified decision. Because my account provides a sufficiently robust form of precedential constraint, it is sufficient, I think, to provide a new way of understanding the authoritative mode. At the same time, the account is also a consistent with those analogical theories that place limits on distinguishing. In a nutshell, not every novel fact allows the later court to distinguish. The final decision must also be compatible with the three steps mentioned above.

D. Summary

This has been a long chapter, but I think one of its virtues is that it shows in detail the many differences between the persuasive mode and the authoritative mode, and the various ways we can understand the authoritative mode (or *stare decisis*).

A recap of the argument thus far could be useful. Chapter II secured robust precedential constraint via a specific judicial duty. The upshot is that later courts always have a legal reason for following relevant precedent, but it is up to legal systems whether to reinforce such a legal reason by turning it into a protected reason. If a legal system decides not to reinforce this reason (by adding to it, as seen

in this chapter, an exclusionary reason for action), then later courts within that system adjudicate under the persuasive mode. As seen above, this mode is characterised by the fact that precedential constraint comes in degrees, since the final weight of the legal reason for following relevant precedent varies according to the various factors of weight considered at the beginning of this chapter. The persuasive mode is necessary for advancing the Rule of Law, but the existence of legal systems adjudicating under the authoritative mode may suggest it is not sufficient. Hence the need to go one step further and adjudicate under the authoritative mode. This extra step, however, may need justification, and in the next and final chapter I will discuss some of the challenges of justifying the authoritative mode. At the same time, I will contribute to this justificatory project by introducing an equitable power.

To the extent that the authoritative mode has the form of a protected reason for action, one may rightly think that it is more justified *vis-à-vis* one where such a form is a conclusive reason. It is doubtful that the law can ever be justified in requiring, *ex ante*, later courts to follow relevant precedent from an all-things-considered perspective. When, on the other hand, an obligation to follow precedent makes room for a set of non-excluded reasons action on which allows the later court to depart from relevant precedent, important values may be advanced. For example, developing the law in a more flexible way, and providing more fine-grained substantive justice to the case at hand.

There are two main competing candidates when it comes to the content of the legal obligation to follow relevant precedent, the rule-based and analogical theories. I have shown their main claims and part of their disagreement. To some extent, this debate hinges on methodological aspects in jurisprudence, in particular on the extent to which the goals of a theorist may allow dispensing with some central and pervasive features of the practice under analysis. The debate between rule-based and analogical theories sheds light into alternative but compatible ways of thinking about the authoritative mode.

I have, finally, tried to offer my own account of what the obligation under the authoritative mode consists of. In a nutshell, the later court must respect the following three decisions of the earlier court: (1) to treat certain facts as material, (2) to give certain material facts a specific legal significance, and (3) to treat certain facts as necessary and sufficient conditions for reaching a justified decision. This account seeks to capture some necessary features of adjudication under the authoritative mode; at the same time, it provides a sufficiently robust form of precedential constraint and is thus capable of providing a new way of understanding the authoritative mode.

CHAPTER IV
JUSTIFYING THE AUTHORITATIVE MODE

A. Introduction

In this final chapter, I address the problem of justifying the authoritative mode (for stylistic purposes, in what follows I will also refer to this mode as '*stare decisis*'). As I have said, the need to provide further justification for this mode arises from the fact that it requires later courts to be generally bound by precedent. Accordingly, a court that does not follow precedent, in circumstances where it is legally required to do so, is a court that acts unlawfully. By contrast, in the persuasive mode, since courts are not legally required to follow precedent, departing from precedent is not a ground of unlawful decision-making. It is this legal obligation to follow relevant precedent, absent in one mode but present in the other, that needs extra justification.

Of course, some people might simply disagree that *stare decisis* needs further justification. On their view, it is precisely the other way around: the persuasive mode requires extra support, since—it may be argued—this mode is insufficient to advance the Rule of Law. It is not enough, the objection would go, to have a non-obligatory reason for following relevant precedent; courts must be generally bound by precedent. There are two reasons to dismiss this objection. First, the possibility of the Null Model, reminding us that things could be worse when it comes precedent. Second, the judicial duty I have defended in Chapter II as a means for advancing the Rule of Law in an institutionalised way. This duty, it was argued, contributes to reducing the issue of potential lack of motivation by judges to follow precedent. Recall that, in virtue of this duty, judges must always put in the balance the legal reason for following relevant precedent. This duty contributes to advancing the Rule of Law (via the persuasive mode), but without placing courts under a defeasible obligation to follow relevant precedent. In the persuasive mode,

courts can always render a decision they take to be morally or legally superior to the precedent.

While the persuasive mode is thus at the centre of the spectrum that lies between the Null Model and the authoritative mode, it is also backed by a judicial duty that significantly reduces the likelihood of falling back into the Null Model. On the other hand, to the extent that I argued sufficiently that there is a content-independent, non-contingent, and *pro tanto* legal reason in favour of following relevant precedent, the persuasive mode has been sufficiently justified—that reason is non-obligatory *by default.* It is only if we go one step further, by protecting that non-obligatory reason via an exclusionary reason, that a further layer of justification may be required. The burden, therefore, lies on the authoritative mode, not the persuasive mode.

My aim, to be sure, is not to argue that the authoritative mode *is* justified—for this would be a very difficult task, arguably requiring much more than one chapter. I will, rather, assume that this mode is justified if the reasons for having it outweigh those against. My purpose is to identify some of these reasons (for and against the authoritative mode) and show what the balancing process should take into account. I will argue, in particular, that we can mitigate the pull *against* having the authoritative mode if we allow for the introduction of an equitable power whereby a legal system may realise opposing values. By thus mitigating the pull against the authoritative mode, my equitable power contributes to the project of justifying the authoritative mode. The authoritative mode becomes easier to justify precisely on the grounds of the proposal I will defend in this chapter.

For simplicity, I shall understand the authoritative mode as grounding a defeasible obligation to follow relevant precedent. The obligation is defeasible because it is generally agreed that every court can distinguish the case at hand from the precedent and some courts have the additional power of overruling precedent. In effect, every court under the authoritative mode may distinguish the present case

from the precedent.[1] To do so, the later court must show that the present case exhibits a fact not reported in the precedent that is a good ground for deciding differently.[2] By contrast, not every court under the authoritative mode has the power to overrule precedent.[3] Accordingly, for a court lacking the power to overrule precedent, the obligation under the authoritative mode becomes *undefeated* when the case at hand is indistinguishable from the precedent. For a court with the power to overrule precedent, that obligation becomes undefeated when both the present case and the precedent are indistinguishable from one another *and* the conditions for overruling the precedent do not obtain.[4] For simplicity, then, I shall understand the authoritative mode as grounding a defeasible obligation to follow relevant precedent. Nothing in this stipulation should affect my discussion in the previous chapter,[5] for the gist of the authoritative mode continues to be that courts are, in

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[1] See, e.g., J Raz, *The Authority of Law* (2nd edn, OUP 2009) 186. Some scholars argue, however, that later courts *should not* distinguish; see, e.g., L Alexander & E Sherwin, *Demystifying Legal Reasoning* (CUP 2008) 122-123. Cf. *supra*, Chapter III, text to note 35.

[2] The requirement of showing a relevant difference capable of justifying a different treatment is a *weak* version of distinguishing. There are stronger proposals in the literature; see, e.g., Raz (n 1). I will adopt a weak model of distinguishing in order to make room for various courts that will not accept a stronger account, such as Raz's. C*f.* S Perry, 'Judicial Obligation, Precedent and the Common Law' (1987) 7 *OJLS* 215, 239.

[3] Roughly, lower courts cannot overrule precedents of higher courts, but higher courts can overrule precedents of lower courts. The conditions under which *horizontal* overruling may take place are often limited. In the UK, see, e.g., W Twining & D Miers, *How to Do Things with Rules* (5th edn, CUP 2010) 279-289.

[4] Another way of posing the problem is according to the terminology of K Stevens, 'Reasoning by Precedent—Between Rules and Analogies' (2018) 24 *Legal Theory* 216, 218. A precedent can be relevant but still have a relevant difference with respect to the case at hand. When the later court is confronted with this type of precedent, the court has an 'authoritative reason' for either following that precedent or distinguishing it. By contrast, when there is no relevant difference (between the instant case and the relevant precedent) the court has an 'authoritative binding reason' for following relevant precedent.

[5] This formulation is consistent with my previous discussion of the authoritative mode. The idea of a defeasible obligation is another way of capturing an obligation arising from a protected reason—in virtue of which action on some non-excluded reasons allows the later court to depart from precedent. One of these non-excluded reasons is, of course, distinguishing—when both the precedent and present case are relevantly different. Another non-excluded reason is to depart from precedent on grounds of overruling—if that is the case.

some cases, legally *bound* by relevant precedent. And if a court breaches such an obligation, then it acts unlawfully.

The chapter is structured as follows. Section B aims to identify one reason in favour of the authoritative mode, and one reason against it. My purpose, again, is not to exhaust all the possible reasons for and against this mode, but only to illustrate what is at stake. It will be argued that one good reason for having the authoritative mode lies in its capacity to advance the Rule of Law *vis-à-vis* the persuasive mode. At the same time, though, this mode might be in tension with two principles that some authors consider important. According to these principles, the institutions in charge of creating law of general application should have (1) democratic pedigree and (2) proper institutional support. It will be acknowledged that this is not an irremediable tension, because these two principles can admit of exceptions, just as the Rule of Law can also tolerate exceptions in favour of realising conflicting values.

The remainder of the chapter will focus on what I take to be the main reason for not having the authoritative mode—namely, the undefeated character of the obligation under this mode may lead to the entrenchment of morally deficient decisions in the law. In effect, when a later court is confronted with a morally deficient precedent which can neither be overruled nor distinguished *on a genuine basis* (more below), then the court has an undefeated legal obligation to follow precedent. This undefeated obligation, therefore, contributes to entrenching a morally deficient decision in the law.

So the question arises as to what the later court should do, taking into account questions of good institutional design. While Section C will elaborate more on the notion of a 'morally deficient precedent', Section D will show the traditional approach to this question. On the traditional approach, if the court can neither distinguish nor overrule a precedent which is morally deficient but nonetheless relevant, then the court must follow that precedent even if doing so leads to the entrenchment of a morally deficient decision in the law. I will question this

approach on the grounds that it offers an unnecessarily strict interpretation of precedential constraint—that is, an all-or-nothing situation in which precedential constraint will deliver the values it promises to advance *if and only if* we have the authoritative mode. By contrast, without the authoritative mode, we fall back into some of the negative consequences of the Null Model. The traditional approach, it will be argued, fails to appreciate that the persuasive mode, in which courts are not legally bound to follow relevant precedent, can also deliver the values of precedential constraint.

This criticism will provide the basis for proposing an alternative way in which we could deal with morally deficient precedents in the law. I will argue, in Section E, that if a later court can neither distinguish nor overrule a relevant but morally deficient precedent, the court should have the power to either follow the precedent or suspend its application to the parties (*inter partes*) by ordering a temporary stay of proceedings in the lower court and referring the case to a higher court with power to overrule the precedent. (For stylistic purposes, I shall simply say that a court exercises the equitable power when it 'suspends the application of the precedent', though what the court does, strictly speaking, is to suspend the application of the *legal requirement* provided by the precedent). I call this approach 'equitable' because, by authorising a later court to suspend the application of the precedent on grounds of a sound moral consideration, the law authorises that court to make an exception to the application of an otherwise binding legal requirement.

The first consequence of my proposal is to drop, in some cases, the undefeated character of the obligation under *stare decisis*, particularly when it comes to morally deficient precedents. The second consequence is that, by adding a mechanism that seeks to accelerate the revision of a morally deficient precedent, my proposal contributes to the justification of *stare decisis.* When a later court exercises the equitable power, the legal system hastens the revision of the morally deficient precedent by a court with power to overrule it. That revision, I argue, contributes to the justification of the authoritative mode in preference to the *status*

quo, whereby the legal system often relies on the interested party having both the time and money to bring litigation up to an appellate court.

Section F defends my proposal against three possible objections, namely that my equitable power (1) undermines vertical discipline; (2) may entail a slippery slope; and (3) can be unfair to the party that relied on the precedent. Section G, finally, concludes.

B. Framing the Problem

Recall that I have assumed that the authoritative mode is justified if the reasons for having it outweigh those against it. So part of the task of justifying the authoritative mode consists in identifying which are those reasons, and articulating a view of what the balancing process should look like. Let me identify some reasons—my purpose, of course, is not to exhaust the list, but merely to illustrate what is at stake.

One good reason for having the authoritative mode lies in its capacity for advancing the Rule of Law in a way stronger than the persuasive mode. Take the values of stability and reliability. As seen in Chapter I, under the authoritative mode, some precedents are sources of law, because a norm accepted and practised by a sufficient number of officials allows a later court to identify, by an act of judicial interpretation, an authoritative legal norm.[6] It is this legal norm that enables the later court to reach a legally justified decision. Notice, though, that since authority and legal validity are different notions,[7] it is in principle possible that a

[6] See, *supra*, Chapter I, 43.

[7] Whether a norm is *authoritative* depends—following our discussion in Chapter III—on whether it provides a protected reason for action. By contrast, whether a norm is *legal* depends on whether it meets the criteria for legal validity given by the rule of recognition. This makes room for the possibility that a precedent could be authoritative without being a source of law. But we need not make too much out of this conceptual possibility. At least in England, as Raz (n 1) 184 fn 8 writes, the doctrine of *stare decisis* is part of the rule of recognition. There is no reason to think that the same could not happen with respect to *other* legal systems—cf., S Legarre & JC Rivera, 'Naturaleza y dimensiones del "*stare decisis*"' (2006) 33 *Revista Chilena de Derecho* 109, 112.

precedent may be authoritative without being a source of law. However, for simplicity, and since nothing in the argument turns on this conceptual possibility, I shall assume that a relevant precedent under the authoritative mode is generally a source of law.

Given this contingent connection between authority and legal validity, every court capable of setting a relevant precedent can, in principle, change the content of the law.[8] Yet the authoritative mode reduces this margin for potential change by legally requiring later courts, in some cases, to decide the present case by following relevant precedent. Thus, any time a precedent-governed dispute arises, the content of the law should remain stable, because later courts are often bound by relevant precedent and the non-excluded reasons for deciding differently are typically limited. Thus, the authoritative mode fosters the value of reliability, for people know in advance what later courts have a defeasible legal obligation to do when confronted with relevant precedent.

In the persuasive mode, later courts have a non-obligatory reason for following relevant precedent, the weight of which they can determine according to some of the factors explored in the previous chapter.[9] This type of discretion may reduce the amount of reliability offered to parties compared to the authoritative mode. It is more difficult for parties, to be sure, to anticipate whether the later court will follow or depart from precedent. Possibly the amount of reliability given to parties is a function of whatever reliability can be offered by a non-obligatory reason for following relevant precedent, plus whatever factors of weight bear on the dispute *as the court determines it.* This situation, I take it, offers less reliability compared to the authoritative mode, in which courts have a defeasible legal obligation to follow relevant precedent.

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[8] See, e.g., Raz (n 1) 185; G Lamond, 'Do Precedents Create Rules?' (2005) 11 *Legal Theory* 1, 17; and J Gardner, *Law as a Leap of Faith* (OUP 2012) 80.

[9] See, *supra*, Chapter III.B.1.

Furthermore, in the persuasive mode reliability can be affected in a different way. I suggested in the previous chapter that where it is possible to identify a specific pattern of assigning weight to the non-obligatory legal reason for following relevant precedent, a distinction may be drawn between weak and strong persuasive modes.[10] In the strong persuasive mode, a later court is consistent over time in giving significant weight to the legal reason for following relevant precedent. This pattern may lead people to think that the court is legally *bound* by precedent, but what the court has done is, at most, to create for itself a *de facto* obligation.[11] This situation can be problematic because such a *de facto* obligation depends mostly on contingencies of the legal system in question. It may depend, for example, on the particular composition of a court at a given time. Judges under this contingent composition may treat the legal reason in favour of following relevant precedent as very weighty. This, in turn, may create a contingent pattern of deciding precedent-governed disputes by following relevant precedent. But because this pattern is the result of a *de facto* contingency and not of a *de jure* obligation, the pattern may easily change, such as when the composition of the court changes. In this new scenario, judges may treat the legal reason in favour of following relevant precedent as a weak non-obligatory reason. This can affect reliability, for people may have relied on this *de facto* pattern instead of relying on the law itself.

So one good reason for adopting the authoritative mode is its greater capacity to advance the Rule of Law *vis-à-vis* the persuasive mode. The problem, of course, is that the Rule of Law is not the only value that matters for legal systems.[12] There are

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[10] See, *supra*, Chapter III, 124.

[11] On the *de facto* bindingness of precedents in the civil law, see A Peczenik, 'The Binding Force of Precedent' in N MacCormick & R Summers (eds) *Interpreting Precedents* (first published 1997, Routledge 2016) 461 and 465-466. I believe a real tension may exist between precedents binding *de jure* and *de facto* when a statutory provision explicitly provides that judicial decisions are binding on the parties to the dispute *only*. One example is Article 3 of Chile's *Código Civil*—see, *supra*, Chapter I, text to note 33.

[12] See, e.g., Raz (n 1) 229; T Endicott, 'The Impossibility of the Rule of Law' (1999) 19 *OJLS* 1, 5; Gardner (n 8) 192; and L Green, 'Should Law Improve Morality?' (2013) 7 *Crim Law and Philos* 473, 487.

other values that matter as well and that might be in tension with advancing the Rule of Law via *stare decisis*. Consider the well-known problem of whether *stare decisis* entails judicial law-making. Perhaps you have no problem with allowing judges to create law of general application by setting binding precedents—many authors, particularly in the common law, would think that judicial law-making is even desirable.[13] For many others, though, the power to make law, at least law of general application, should be reserved for institutions such as legislatures. For one thing, legislatures have institutional capacities courts do not have; for another, legislatures, unlike courts, have direct democratic support and are directly accountable to the people.[14]

One possible line of response is to argue, as Grant Lamond does, that *stare decisis* does not entail exercising law-making powers, since the (*erga omnes*) legal status of precedents under this doctrine comes as a by-product.[15] It follows, on this view, that the 'democratic' and 'institutional' principles (as we might call them) can only be affected when a court *intentionally* exercises a law-making power that

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[13] And this desirability comes from values other than the Rule of Law. For example, T Endicott, 'How Judges Make Law' in E Fisher et al (eds) *The Foundations and Future of Public Law: Essays in Honour of Paul Craig* (OUP 2020) 134, argues that one reason for allowing judicial innovations in the content of the law is equity: 'Case law gives the courts a particularly supple way of managing the tension: the self-correcting revisability of the common law, associated with its aptitude for equitable decision making, enables the judges to manage the tension case by case, intending primarily to craft a good ruling for the case, but mindful of the implications for the law in general. The resulting flexibility is so striking that it is easy to exaggerate; it is not unlimited, and it need not be excessive. Case law enables courts not only to develop the law but also to give the law the elements of rigidity that are demanded by the rule of law and good public policy and justice'.

[14] See, e.g., M Moore, 'Precedent, Induction, and Ethical Generalization' in L Goldstein (ed) *Precedents in Law* (Clarendon 1987) 187, for whom judicial law-making is in tension with the principle of separation of powers, and who thinks that courts might not have appropriate institutional capacity to make law. Cf. D Lyons, 'Formal Justice and Judicial Precedent' (1985) 38 *Vand L Rev* 495, 512: 'It may be argued, first, that within a system like ours, with a doctrine of judicial deference to legislation emerging from a popularly elected legislature, it is appropriate for courts to minimize apparent changes in the law they are charged with administering'.

[15] Lamond (n 8) 25; emphasis in original.

will produce law of general application. But this is not what happens, according to Lamond, with *stare decisis*:

> court decisions can change the law without courts being given the power to change the law—because there is a crucial difference between one's actions having a normative effect and one's actions having that effect *because* one possesses the normative power to bring it about.[16]

Unfortunately, Lamond is only half right. According to Melvin Aron Eisenberg, there are 'two possible models of the courts' role in establishing legal rules', which he calls the 'by-product model' and the 'enrichment model'.[17] For Eisenberg, under the by-product model (which captures the gist of Lamond's claim),

> courts establish legal rules only as an incidental by-product of resolving disputes. To resolve disputes, courts must formulate and apply general propositions. Since the courts are official agencies, these propositions, once formulated, have some sort of legal status and effect. A court is justified in formulating such propositions, however, only insofar as is necessary to resolve the dispute before it, and no further.[18]

By contrast, under the enrichment model, 'the establishment of legal rules to govern social conduct is treated as desirable in itself—although subordinated in a variety of important ways to the function of dispute-resolution—so that the courts *consciously* take on the function of developing certain bodies of law, albeit on a

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[16] Id.

[17] MA Eisenberg, *The Nature of the Common Law* (Harvard UP 1988) 6.

[18] Id.

case-by-case basis'.[19] Eisenberg's conclusion is that although it 'may be thought that the by-product model governs adjudication, since this is the model the courts often profess to follow', 'observation of several important elements of judicial practice suggests that the enrichment model has greater descriptive power'.[20] For example, according to Eisenberg the enrichment model explains better (*vis-à-vis* the by-product model): (1) the binding character of the rules in a precedent, and (2) the fact that courts 'often announce rules to govern issues that are at best tangential to a resolution of the dispute before them'.[21]

What Eisenberg's enrichment model aims to capture is the fact that many courts *also* create law of general application *intentionally*, and their decisions will very often contain a far-reaching regulation exceeding what is strictly necessary for deciding the dispute at hand. It is no reply against Eisenberg's second model to say that the court hands down these regulations because it knows its decisions will create law—regardless of whether the court wants to do that—so that the regulations should be seen as a good opportunity to create fine-grained law. For we can always answer by saying that the legal system gives legal effect to those decisions *because* it gives the court the legal power in the first place. It is the exercise of a legal power that brings about a particular legal consequence. A better approach, thus, is simply to acknowledge that some courts do create law of general application intentionally when they set binding precedents. And *if* the democratic and institutional principles are to be preserved, then we have a reason for resisting the authoritative mode. Again, some people might allow for exceptions to these principles and *stare decisis* would be one of them, because of its rule-of-law benefits. Thus, advancing the Rule of Law would justify an exception to the

[19] Id; emphasis added.

[20] Id.

[21] Id.

democratic and institutional principles, just as the Rule of Law can tolerate exceptions as well.[22]

But possibly the main reason for not having the authoritative mode lies in its potential for entrenching morally deficient decisions in the law. This is the problem I want to address in the remainder of the chapter—by showing, in particular, the traditional approach to this problem and defending an alternative proposal. Before doing so, let me elaborate more on the notion of a 'morally deficient precedent', although I briefly said something about this idea in Chapter II.[23] In the next section, I will unpack this notion and introduce one important epistemic condition for a precedent to be properly considered a morally deficient precedent.

C. A Morally Deficient Precedent

To be sure, the equitable power I want to defend calls for moderate legal change (some might think that it is radical change, but I genuinely think it is not),[24] and this presupposes some robust normative work. It will be impossible to address in full all the various problems and objections that I could consider. For this reason, I will have to rely on some assumptions and offer some caveats as a way to narrow the scope of my argument.

Possibly the most important caveat relates to the grounds that make a precedent 'deficient' or 'mistaken'—for stylistic purposes, I will use these expressions interchangeably. A first meaningful distinction can be drawn between a precedent that is *legally* mistaken and one that is *morally* deficient. This distinction depends on a conception of legal validity which I cannot fully address here, but the gist of it

[22] Cf. T Endicott, *Vagueness in Law* (OUP 2000) 191.

[23] See, *supra*, Chapter II, Section C.

[24] I take radical legal change to be, for example, a new constitutional document, an important part of the law being repealed or substantially changed, and so on.

is that the grounds on which a precedent is legally valid, and which thus determine whether the precedent has been correctly or mistakenly rendered *as a matter of law*, need not be the same as those on which a precedent is morally sound.[25] A precedent can be morally deficient and yet be legally valid and the reverse is also true; a precedent can be morally sound but legally invalid. As an example of the former we have a precedent that, while being rendered by a court with sufficient powers and following all the relevant legal rules, nevertheless has evil content. An example of the latter is a morally sound precedent rendered in contravention of some relevant power-conferring norm—thus affecting its legal credentials and possibly its legal validity.[26] In short, the sound moral content of a precedent is not enough to make it legally valid, and likewise the immoral content of a precedent (i.e., the content that makes the precedent morally deficient) is not sufficient to make it legally invalid. In what follows, I will discuss precedents that are morally deficient but nevertheless legally valid.

A second meaningful distinction refers to the immoral content of the precedent. Here we find 'evil precedent' on the one hand, and 'morally suboptimal precedent' on the other. Evil precedent is an instance of evil law more generally; the fact that the evil content in question comes from a judicial decision (instead of, say, a legislative provision) may add something distinctive insofar as precedent can be a

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[25] The view of legal validity I have in mind draws from Joseph Raz's 'sources thesis'; see, e.g., Raz (n 2) ch 3. Cf. with the 'separability thesis'—No. (1) in *supra,* Introduction, fn 2.

[26] A legally *incorrect* precedent can, but need not be, legally *invalid*. Whether it is valid or invalid will depend on the kind of formality or constraint the precedent was rendered in contravention to. Even precedents that have been rendered mistakenly as a matter of law can remain legally valid for various reasons. See, e.g., Endicott, 'How Judges Make Law' (n 13) arguing that 'there can be very good reason for the system to treat a decision as valid, and final, even if it was contrary to the law, and even if the court was not authorised to make it. The reason is the rule of law requirement of resolution, which depends on finality in the creation of particular norms. There is a standing tension within the rule of law: it requires both fidelity to the law (or legal accuracy, as it is sometimes called) and also resolution. And ironic as it may seem, the requirement of resolution takes primacy over fidelity to law. If the court of last instance gets the law wrong, the rule of law does not require a judicial remedy, or it would require an infinite regress of judicial proceedings. That would be a negation of the rule of law because if a ruling could always be lawfully challenged, the law would never actually *rule*—that is, determine, on behalf of the political community, what is to be done'.

distinctive source of law—with its own values, requirements, etc. From the standpoint of political theory, it also matters whether some evil legal requirement is the product of a statutory provision (passed by a democratic legislature) or whether it obtains in virtue of a decision by an unelected and unaccountable court. But, important as this difference (and some others) might be, the focus here is on the *content* of evil law, not on its *source*. So, for example, a precedent that directly undermines human dignity, by denying the juridical possibility of rape within marriage or by establishing an implicit consent to sexual intercourse on grounds of an alleged assistance on the side of the victim in removing their jeans, is an evil precedent. Thus, both *R v Clarence*[27] and decision 1636/99 of the Italian Supreme Court[28] are instances of evil precedent.

Morally suboptimal precedent, on the other hand, is a wide category encompassing various considerations of political morality, such as poor or

[27] (1889) 22 QBD 23. It could be argued that insofar as the court in *Clarence* applied an existing legal doctrine (on marital rape), it is misleading to characterise that decision as evil. The law applied by the judges is evil, not the decision itself. But we should be mindful of two things: first, it is not at all clear whether the judges in *Clarence* thought that, as a matter of existing law, there cannot be rape within marriage. Wills J writes: 'If intercourse under the circumstances now in question constitute an assault on the part of the man, it must constitute rape, unless, indeed, as between married persons rape is impossible, *a proposition to which I certainly am not prepared to assent, and for which there seems to be no sufficient authority*' (at 33; emphasis added). In a similar way, wondering whether the wife (in this case) consented to the infliction of harm, Fields J writes: 'The ground for holding that she did so, put forward in the argument, was the consent to marital intercourse which is imposed upon every wife by the marriage contract, and a passage from Hale's Pleas of the Crown, vol. i. p. 629, was cited, in which it is said that a husband cannot be guilty of rape upon his wife, "for by their mutual matrimonial consent and contract the wife hath given up herself in this kind to her husband, which she cannot retract." The authority of Hale, C.J., on such a matter is undoubtedly as high as any can be, *but no other authority is cited by him for his proposition, and I should hesitate before I adopted it*' (at 57; emphasis added). The only evidence that I can see for the claim that the court in *Clarence* was bound by existing law is from Hawkins J, who writes that 'The wife *submits* to her husband's embraces because at the time of marriage she gave him an irrevocable right to her person. The intercourse which takes place between husband and wife after marriage is not by virtue of anu special consent on her part, *but is mere submission to an obligation imposed upon her by law*' (at 54; emphasis added). No authority is offered for this claim, though. Secondly, even if we grant that the court in *Clarence* was applying existing law, that by no means establishes that the decision was morally justified with respect to the doctrine of marital rape.

[28] Decision 1636/99, dated 10 February 1999. Although Italy does not officially have a system of *stare decisis*, decisions by the Italian Supreme Court play a decisive role in unifying the jurisprudence of Italian courts. It can be quite misleading, thus, to think that those decisions—or at least some of them—do not create binding precedents.

inefficient institutional design, significant burdens for obtaining judicial redress, precedents imposing too many conditions for exercising moral rights protected by the law (or not providing any conditions whatsoever), legal requirements affecting political concerns of social justice, precedents undermining sound institutional protection of the environment, and so on. To illustrate this category (and, in particular, the extent to which a precedent can be morally suboptimal because it establishes too many conditions—or very demanding conditions—for exercising certain rights), let us consider *Marshall*,[29] famously decided in 1993 by the Court of Justice of the European Union (ECJ). Although the ECJ does not officially have a doctrine of horizontal *stare decisis*, its decisions have, as Karen McAuliffe has put it, 'binding force on all national courts as well as other authorities'.[30] In *Köbler*, to be sure, the ECJ even held that a 'manifest breach of the case-law of the Court' constitutes a 'sufficiently serious' 'infringement of Community law', which might even trigger Member State liability.[31] Thus, it is safe to say that, although the ECJ is not, strictly speaking, legally bound to follow its own decisions, national courts (among others public authorities) do have such an obligation.

The main issue at stake in *Marshall* was whether individuals can seek the judicial enforcement of the rights and obligations provided by EU Directives against other individuals ('horizontal direct effect'), or whether these rights and obligations can only be enforced against Member States ('vertical direct effect'). The court took a textual approach to the interpretation of the corresponding norm-formulation [today Article 288 TFEU],[32] and it held that EU Directives may only be *vertically*

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[29] *M. Helen Marshall v Southampton and South-West Hampshire AHA*, C-271/91.

[30] K McAuliffe, 'Precedent at the Court of Justice of the European Union: The Linguistic Aspect', in M Freeman and F Smith (eds) *Law and Language: Current Legal Issues Volume 15* (OUP, 2013) 484.

[31] *Köbler v Republik Österreich*, C-299/95, at 56.

[32] The relevant part of Article 288 TFEU provides that 'A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods'.

enforced, that is, against Member States only. Thus, the court ruled out the possibility of enforcing Directives against other individuals. With time, though, the ECJ has introduced six exceptions or qualifications to *Marshall*, thereby allowing, in some limited cases, the possibility of horizontal direct effect of Directives.[33]

According to Paul Craig, *Marshall* is said to be justified on two related grounds; first, on the text of Article 288 TFEU, which does not *explicitly* contemplate the possibility of the direct horizontal effect of Directives; and secondly, on grounds of legal certainty, which would recommend limiting the direct effect of Directives to vertical direct effect only. Craig, however, offers compelling reasons why neither the textual argument nor the legal certainty argument are good grounds justifying *Marshall*. A first difficulty with the textual argument, on the one hand, is that it is 'difficult to reconcile with the judicial approach to certain Treaty articles', in which the court has adopted a notably different approach to interpretation.[34] A second difficulty is that 'the reasoning in *Marshall* is not self-evident in black-letter textual terms'; rather, the 'most natural interpretation' of the relevant provision is that 'Directives do not have to be addressed to all Member States, the corollary being that they are binding on the Member States to which they are addressed', i.e., the provision only addresses 'the question of which Member States are bound by a Directive, *but does not touch issue of who within that state may be bound*'.[35] A final difficulty is whether the textual argument is consistent with the kind of reasoning that has consolidated, judicially, the primacy and obligatoriness of EU law:

> Given, however, that the Community courts created direct effect from an admixture of principled, teleological and functional reasoning, and given also

[33] See, e.g., P Craig, 'The legal effect of Directives, policy, rules and exceptions' (2009) 34 *European L Rev* 349, 355-376; and M Dawson and F de Witte, *EU Law and Governance* (CUP, 2022) 107-108.

[34] Ibid, 351.

[35] Ibid, 352; emphasis added.

> their willingness to recognise horizontal as well as vertical effect of Treaty articles, regulations and decisions, it is surely necessary to consider why Directives are treated differently in this regard.[36]

The problem with the legal certainty argument, on the other hand, is that 'legal certainty' can capture five different meanings or values, none of which is incompatible with the possibility of Directives having direct horizontal effect.[37] To take but one of those five possible meanings, legal certainty is usually related to 'the clarity of the overall body of law that regulates a particular area', thereby allowing individuals to 'plan their lives cognisant of the legal consequences of their actions'.[38] Seen in this light, however, the argument is 'highly unsatisfactory', since

> The rejection of horizontal direct effect of Directives, coupled with the complex qualifications to that proposition, means, as recognised by A.G. Jacobs, that there is a very significant legal uncertainty, such that it is difficult even for the expert to navigate the complex case law that has evolved. The problems for the private individual seeking to do the 'right thing' legally without constant resort to expensive legal advice and litigation are considerably greater.[39]

Furthermore, Craig persuasively shows that none of the six exceptions or qualifications (which give Directives the same effect in particular situations, as if they generally had horizontal direct effect) is consistent with the two grounds that supposedly justify *Marshall*. The upshot is that not only does this important area of EU law present significant internal tensions, but it also places 'individuals in a

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[36] Ibid, 352.

[37] Ibid, 353.

[38] Ibid, 354.

[39] Id.

worse position than if horizontal direct effect of Directives existed'.[40] That is why Craig argues for overturning *Marshall*,[41] which for the ECJ would mean 'to admit that its jurisprudence in this area of the last 25 years was a mistake', but that would be nonetheless the 'right thing to do'.[42]

Marshall illustrates the notion of a morally suboptimal precedent. The precedent is morally suboptimal because the two grounds that supposedly support this decision do not actually justify it, and also because *Marshall* makes it significantly burdensome for individuals to seek the enforcement of Directives against other individuals. Furthermore, as seen above, *Marshall* also creates an important deficit in legal certainty, given the complexity of the exceptions or qualifications for seeking the judicial enforcement of Directives against other individuals.

Now, I am of course *not* saying that everyone agrees or will agree that *Marshall* is indeed a morally suboptimal precedent, as (following my remarks in Chapter II)[43] it will very often be controversial whether a precedent is morally suboptimal. All I am arguing is that, for reasons offered by Craig, which I consider to be sound, there are good grounds for considering this precedent morally suboptimal. We could thus provide the following general definition of a morally suboptimal precedent: a precedent is morally suboptimal when, without being morally evil, there are good grounds for thinking that following in it the case at hand undermines one or more sound moral considerations that the legal system, via courts, should protect. And that tension makes it reasonable to seek the reassessment of the morally suboptimal precedent by a court with sufficient power to overrule it. As the example of *Marshall* shows, that sound moral consideration can be, in the case of EU law, the value of providing a reliable, intelligible and workable legal framework upon which

[40] Ibid, 376.

[41] An alternative approach could be to invert the rule. Individuals *can* seek the judicial enforcement of Directives against other individuals, unless the contrary is explicitly provided for by law.

[42] Craig (n 33) 377.

[43] Chapter II.2.C, at 96.

private individuals may enforce rights and obligations arising out of Directives against both Member States and individuals alike.

As it may be clear from my discussion so far, the difficulty in giving content to the category of a morally suboptimal precedent lies in the possibility of a variety of (related or unrelated) sound moral considerations that might be undermined by giving effect to the legal requirement provided by the morally suboptimal precedent, and the possibility that other, sound moral considerations, might be *fulfilled* by giving effect to the precedent. These possibilities may cast doubt on the soundness of seeking more specificity in the notion of a morally suboptimal precedent. But that the category is wide, and to some extent also vague, is not a reason for abandoning the project of thinking about how a legal system should deal with morally suboptimal precedents in the law—provided that it is meaningful to talk of this type of precedent in the first place.

To be sure, the proof of the fact that the notion of morally suboptimal precedent is meaningful—despite its semantic, moral, and epistemic challenges—is the reality of legal systems often making provision for dealing with this type of precedent. They do so, for example, via targeted statutory reform, the practice of distinguishing and the power to overrule precedent. But, as we know, legislatures do not often engage in correcting morally suboptimal precedents; rather, they often rely on the fact that courts will do this job—'the common law works itself pure'. On the other hand, there are requirements or conditions for courts to distinguish and overrule precedent on a genuine basis (as seen in the previous section). Furthermore, there are two important challenges to the idea of leaving the correction of morally suboptimal precedents to courts themselves. First, higher courts with the power to overrule precedent usually have discretion to select those cases they want to decide. This discretion, coupled with the limited time for adjudicating disputes, contributes to the possibility of an important number of morally suboptimal precedents not being overruled when they should be. Secondly, there are important costs of time and money in bringing litigation up to the higher

court with the power to overrule precedents, privileging those who can wait and can afford the prospect of obtaining a decision by the higher court.

My proposal, as I said, aims to add another mechanism to the list of tools for dealing with a morally deficient precedent in cases where the court has an undefeated obligation to follow it. To give the argument more traction, I will add one epistemic caveat (or condition) for exercising the equitable power I will soon propose, which relates to the idea of the grounds that make a precedent morally deficient. For a judge or court to exercise the equitable power soon to be defended, I will say that it is necessary that the judge or court shows that an important number of competent legal participants considers the precedent to be morally deficient, on good grounds. Many of us are familiar with morally deficient precedents. We know that they are deficient even absent an official declaration to that effect, for example by looking at academic commentary, the technical opinion of experts in a certain field, a well-reasoned dissent from an influential judge, and the treatment of the same legal issue by courts in another jurisdiction. These sources may, with time, show in a reliable way the grounds that make a precedent morally deficient, despite being legally valid. Another epistemic tool can be derived from Judge Frank H. Easterbrook's important observation that:

> The willingness of later generations of judges to evade or cabin the cases suggests that they were wrong, and even if not wrong were causing more trouble than they were worth.[44]

The grounds on which courts have distinguished a particular precedent can provide, following Judge Easterbrook's observation, sound indication of whether an important number of competent legal participants considers, on good grounds, that such a precedent is morally deficient. If, for example, these courts have

[44] FH Easterbrook, 'Stability and Reliability in Judicial Decisions' (1988) 73 *Cornell L Rev* 422, 432.

distinguished disingenuously,[45] that fact may suggest judicial disagreement with respect to the moral content of the precedent—although, by hypothesis, that disagreement has not been made explicit, for otherwise the courts would be showing the extent to which they have distinguished disingenuously. But a court, to be sure, may distinguish legitimately while also showing, in *dicta*, its moral objections to the moral content of the precedent.

I am aware that the topic of morally deficient precedents, and likewise that of the grounds that make a precedent morally deficient, is thorny. But I hope I have said enough to at least get my proposal off the ground. Before unpacking the proposal, the next section will critically examine what I take to be the traditional approach to the undefeated obligation under *stare decisis*. This discussion will serve as a useful background; while I will argue for abandoning, in some cases, the undefeated character of the legal obligation to follow morally deficient precedent, the traditional approach argues for preserving it.

D. The Traditional Approach

Let me illustrate the problem with a simple example. Suppose the Supreme Court of the UK, whose precedents, as we know, are generally binding on all other British courts, decides a case and gets things morally wrong.[46] Its decision is, as Rupert Cross and Jim Harris would put it, a matter of 'judicial regret'.[47]

Now, put yourself in the situation of a court bound by this morally deficient precedent, and suppose further that your court does not have the power to overrule

[45] For example, by treating a factual difference between the instant case and the precedent *as if* it was legally relevant—so as to justify giving a different treatment—when actually it is not.

[46] As opposed to getting things wrong from the *legal* point of view. Cf. Endicott's reasons for treating as legally valid decisions that might have been made in contravention of the law in *supra*, this chapter, fn 26.

[47] R Cross & JW Harris, *Precedent in English Law* (4th edn, Clarendon 1991) 36.

it. In the UK, this would be the case for all British courts except for the Supreme Court—as we saw in Chapter III, this court has the power to overrule precedent.[48] A dispute then arises that is relevantly similar to the precedent. Because both cases are relevantly similar, the later court will not be able, by hypothesis, to distinguish in a genuine way. To distinguish in a genuine way means, as we saw before, to show that the present case meets the two conditions mentioned above. There is, first, a novel fact not reported in the precedent, and that fact, second, is a good ground for deciding differently. Given that the facts of the case are relevantly similar to those of the precedent, your court *should not* distinguish. If it does, it would be doing it in a disingenuous way. And the problem with this approach is that by distinguishing disingenuously the court would be affecting the legitimacy of the common law and would also disrupt the public confidence that it will adjudicate in good faith. By distinguishing disingenuously, the court just found a way to avoid being bound by precedent, while concealing this fact (and thus the real bases for its decision) under the pretext of distinguishing.[49]

To be sure, a court may avoid following a morally deficient precedent by engaging in something akin to Dworkinian interpretivism. If the Dworkinian judge is satisfied that the precedent neither figures in nor follows from those relevant principles that provide the best interpretation of the community's legal practice,[50] then she may render a morally superior decision. But notice that what the judge is doing, in this case, is testing the legal validity of the precedent in order to determine whether she is legally bound by it. If the precedent does not pass through the filter

[48] In virtue of the House of Lord's 1966 Practice Statement, [1966] 1 WLR 1234.

[49] Now, one may object by saying: 'well, this is what courts do all the time'. (This is, I fear, what many lawyers and even judges would say). If, moreover, we consider that the later court determines the differences and similarities that are relevant for the law, all it takes for a later court to distinguish is to show why it thinks that the precedent and instant case are relevantly different. This possibility would explain why some scholars, notably Alexander & Sherwin (n 1) 122-123, think later courts *should not* distinguish. I will not address this possible objection—it is too easy a way to rule out a debate we could at least have in the theory of precedent.

[50] See, e.g., R Dworkin, *Law's Empire* (Harvard UP, 1986) 225.

of integrity, which is another way of saying that the precedent is not part of the law, then the judge is *not* legally bound by it. While the duty of judges is to give effect to the law, under Dworkinian integrity a bad precedent may not qualify as law.

Yet for judges that are neither Dworkinian nor want to undermine the legitimacy of the common law—by adjudicating disingenuously—there aren't many options left when their legal obligation to follow a morally deficient precedent becomes undefeated.[51] From the standpoint of good institutional design, what should the judge do in this scenario? Many scholars and courts (those favouring the 'traditional approach', for one) argue that the judge must follow the morally deficient precedent, even if doing so leads to the entrenchment of a morally deficient decision in the law. After all, this is exactly what an undefeated obligation to follow precedent is about. In the words of Frederick Schauer:

> It is only when the decision-maker in the instant case disagrees with the outcome or the reasoning in the precedent case that the content-independent authority of a precedent becomes apparent… In such cases, it is most obvious that the decision maker is under an obligation to follow the precedent because of its source or status, and just because of that source or status, even if the decision maker in the instant case believes that the decision in the precedent case was mistaken.[52]

On the traditional approach, when a court has an undefeated legal obligation to follow precedent—including evil or morally suboptimal precedent—the court must

[51] Another option could be the practice of 'narrowing' precedent, when the precedent is ambiguous and the later court offers a reasonable reading of the precedent. See, e.g., R Re, 'Narrowing Supreme Court Precedent from Below' (2016) 104 *Geo L Rev* 921, 925-927, 928-929. What differentiates 'narrowing' from the practice of distinguishing is, I think, the conditions for engaging in one or the other. For simplicity, I will avoid drawing a clear-cut division between these two practices—I think my proposal stands even if distinguishing and narrowing can be clearly differentiated.

[52] F Schauer, 'Precedent' in A Marmor (ed) *Routledge Companion to Philosophy of Law* (Routledge 2012) 124.

follow precedent regardless of whether by doing so the court entrenches a morally deficient decision in the law. Accordingly, the traditional approach holds that in those cases in which the court can neither distinguish nor overrule a morally deficient precedent, the undefeated character of the legal obligation to follow precedent is upheld. Now, I do not want to attribute to Schauer any endorsement of the traditional approach. I take his quote above as illustrative of the traditional approach, even if he happens to reject it—for example, by arguing that there is an important difference, for the purposes of *stare decisis*, between a court *believing* that the precedent is mistaken and the same precedent actually *being* mistaken. We can set this difference aside and proceed on the more demanding assumption that even if the precedent is actually evil or morally suboptimal (and not merely believed to be so by the later court), the court has nevertheless an undefeated obligation to follow precedent.

One reason often given in support of the traditional approach is the belief that if courts have the power to depart from precedent—in those cases where there is an undefeated obligation to follow precedent—the resulting consequences will be worse for the legal system than if the courts are required to follow a morally deficient precedent. On this view, it is preferable, on balance, to preserve the undefeated character of the obligation to follow precedent than to allow the court bound by an evil or morally suboptimal precedent to depart from it.

I believe the following quotes are illustrative of the type of belief that usually supports the traditional approach. First, according to Lord Scarman:

> I fear that if *stare decisis* disappears … there is a real risk that there might be a plethora of conflicting decisions which would create a state of irremediable confusion and uncertainty in the law.[53]

[53] *Davis v. Johnson* [1979] AC 264, 344, cited by Twining & Miers (n 3) 287.

Similarly, for Laurence Goldstein:

> should every court have the power to disregard precedent then inconsistencies, abuses and injustices—in short, chaos—would indeed very likely ensue.[54]

Finally, according to the US Supreme Court:

> unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.[55]

A belief in the likelihood of 'irremediable confusion', 'injustices', 'chaos' and 'anarchy' (in short, a belief in the likelihood of a state of affairs that is taken to be worse than following a morally deficient precedent) justifies upholding the undefeated character of the obligation to follow precedent. If, as a consequence of this decision, the later court contributes to entrenching a morally deficient decision in the law, then on this view this is only one of the costs to be assumed when we choose to implement *stare decisis* in the first place.[56]

Usually, though, that belief in a more favourable state of affair is for the most part only assumed, as the example of Larry Alexander shows:

> I am assuming that an improvement in legal predictability can be a net gain in terms of whatever political morality we hold, even when it comes at the cost of

[54] L Goldstein, 'Some Problems about Precedent' (1989) 43 *Cambridge L. J*. 88, 106.

[55] *Hutto v. Davis*, 454 US 370 (1982), 375. I thank Nina Varsava for showing me this example.

[56] Cf. F Schauer, 'Precedent' (1987) 39 *Stan L Rev* 571, 575; N Varsava, 'How to Realize the Value of Stare Decisis: Options for Following Precedent' (2018) 30 *Yale J L & Huma* 62, 76; Stevens (n 4) 219; and R Kozel, *Settled Versus Right: A Theory of Precedent* (CUP 2017) 6, 50.

setbacks under that same political morality in particular cases and to particular litigants.[57]

The purpose of Alexander's assumption is to argue in support of the rule-based version of the authoritative mode.[58] He defends it against what he calls the 'natural model'—in which courts are not generally required to follow precedent. (Differences aside, call this natural model the persuasive mode). On Alexander's view, if courts are not generally required to follow precedent (that is, if courts adopt a practice of precedent softer than *stare decisis*), then the resulting unpredictability and insecurity '*may* produce a state of affairs that is morally inferior to the state of affairs a stronger doctrine of precedent would produce'.[59] And because of that possibility—again, the belief in which is for the most part only assumed—it follows on the traditional approach that the undefeated character of the legal obligation to follow a morally deficient precedent is to be upheld. The benefits of *stare decisis* outweigh, on balance, the costs, including the cost of a morally deficient decision obtaining legal membership.

I believe, however, that the traditional approach offers an unnecessarily strict interpretation of the problem of an undefeated obligation to follow a morally deficient precedent. At the same time, this approach also ignores the reality of many legal systems in which courts honour the values of precedential constraint—e.g., legal stability and reliability—without being legally bound by the rules of *stare decisis.* The traditional approach, in other words, ignores the fact that the values of precedential constraint can be protected *even if* courts do not have a defeasible legal obligation to follow relevant precedent (*stare decisis*).

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[57] L Alexander, 'Constrained by Precedent' (1989) 63 *S Cal L Rev* 1, 126.

[58] Cf. *supra*, Chapter III.C.3.

[59] Alexander (n 57) 126; emphasis added.

The mistake underlying the traditional approach is to treat the values of precedential constraint as an all-or-nothing situation where on the one hand there is 'irremediable confusion', 'injustices', 'chaos' and 'anarchy' (as in the quotes above), and on the other we find the values of precedential constraint, which can only be realised through *stare decisis.* Without *stare decisis*, a legal system falls into some of the negative consequences of the Null Model (e.g., irremediable confusion, anarchy, and so on) With *stare decisis*, by contrast, the same system delivers the values of precedential constraint. In this view of things, there is no middle ground, and this situation leads to a self-defeating scenario because we are forced to conclude that those legal systems without *stare decisis*—for example, a sophisticated civilian jurisdiction such as Germany—live under irremediable confusion, chaos, anarchy, etc.

Contrary to the traditional approach, the values of precedential constraint can be realised even if courts are not bound by a defeasible legal obligation to follow relevant precedent (*stare decisis*). Of course, that alternative, which frees courts (or at least some of them) from this legal obligation, makes courts responsible for protecting the values of precedential constraint via a non-obligatory legal reason for following relevant precedent. And the more sensitive the courts are to the idea of protecting the values of precedential constraint, the more they should act on the legal reason for following relevant precedent. Put differently, the more sensitive the courts are to the values of precedential constraint, the less they should depart from relevant precedent—at least without explaining why.

In this alternative framework, following relevant precedent is always a matter of degree,[60] for the courts in question are not legally bound by relevant precedent. There is only a continuum in which these courts are responsible for balancing different and sometimes opposing values. For example, the values of precedential

[60] Cf. Stevens (n 4) 232: 'I adopt an understanding according to which judicial decision-making is constrained by a precedent if its existence either excludes reasons that the judge would otherwise have taken into consideration or adds reasons into the judge's considerations that would otherwise not have existed. Constraint comes in degrees'.

constraint may have to be weighed against the value of not entrenching morally suboptimal decisions in the law. There are, to be sure, institutional ways of making courts sensitive to the values of precedential constraint without requiring them to abide by *stare decisis.* I have argued in Chapter II for a general judicial duty in virtue of which courts must always put in the balance the non-obligatory legal reason for following precedent, while also providing reasons for departures from relevant precedent.[61] That judicial duty, grounding a non-contingent and content-independent legal reason for following relevant precedent, contributes to honouring the values of precedential constraint. At the same, this duty gives courts enough leeway for balancing values that might be in tension in the case at hand. Consequently, this duty allows later courts to depart from relevant precedent when the merits of the case so recommend—for example, in order to avoid entrenching a morally deficient decision in the law.

To summarise: it is a mistake to think that a sound alternative to *stare decisis*, namely a non-obligatory legal reason for following relevant precedent, leads to anarchy, chaos, etc. There is a middle ground between *stare decisis* and the Null Model. That middle ground is the persuasive mode of precedential reasoning. Especially if it is backed by the judicial duty I defended in Chapter II, precedential constraint under the persuasive mode can deliver what it promises even if it comes in degrees; not all the value of precedent is lost if courts are not bound by *stare decisis*.[62] This conclusion, of the value of precedential constraint under the persuasive mode, offers the basis for proposing another candidate to the traditional approach, to which I turn now.

[61] Cf. *supra*, Chapter III, 137-138.

[62] Cf. Stevens (n 4) 232.

E. My Proposal: An Equitable Power

I argued that there is value in a practice of precedent softer than the authoritative mode (or *stare decisis*), especially if it is backed by a judicial duty to always put in the balance of reasons the non-obligatory legal reason for following relevant precedent. That conclusion is a first step against thinking that, if my proposal is adopted, courts will lead us into chaos, anarchy, irremediable confusion and the like. Contrary to Lord Scarman, Lawrence Goldstein, and the US Supreme Court in *Hutto v. Davis*, that catastrophic scenario need not be the case.

With that in mind, my proposal is that when a later court can neither distinguish nor overrule a morally deficient precedent, the court should have the power to either follow the precedent or suspend its application to the parties by ordering a temporary stay of proceedings in the lower court and referring the case to a higher court with power to overrule the precedent. By giving the court facing a morally deficient precedent the possibility of exercising an equitable power (as I will explain in below), my proposal entails rethinking, in some cases, the undefeated character of the obligation under *stare decisis.* So long as there is at least one court in the legal system with the power to overrule *any* morally deficient precedent which is part of the law of that system, then if the conditions for exercising the equitable power obtain, my proposal entails rethinking the obligation of a later court as generally defeasible. For a court facing a morally deficient precedent can, if these conditions are met, refer the decision in the instant case to a higher court with power to overrule the precedent. Let me unpack the proposal.

The idea of referring cases to other courts is common in law. Often the law allows for one court to request the opinion of another court in a matter relevant for deciding the dispute. The requested court issues a decision, which many times is authoritative for the court making the request. An example of this mechanism is Article 267 of the Treaty on the Functioning of the European Union (TFEU), providing roughly that a court of a Member State may request a preliminary ruling

by the ECJ on matters concerning EU law. Similarly, Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms authorises the highest court of a Contracting Party to request an advisory opinion from the European Court of Human Rights, which according to Article 5 is *not* binding on the requesting court. Another final example is Section 40 of Australia's *Judiciary Act 1903* (Cth), allowing a constitutional case (or part of it) to be removed from lower courts and be placed under the decision of Australia's apex court, the High Court.

These examples show some of the ways in which cases can pass from the jurisdiction of one court to that of another court—belonging to either the same or a different legal system—for the purposes of deciding a specific legal issue. At the same time, these examples also provide support for my proposal, in the sense that it is possible to think of ways in which a court facing a morally deficient precedent may suspend its application *inter partes* and refer the case to a higher court with power to overrule the precedent. The ultimate institutional design can be a matter of further discussion—for example, whether the higher court is bound to provide a resolution to the question or whether it has regulated discretion to establish conditions for hearing the case. Likewise, it need not detain us here whether the higher court needs to hear the case in a special or ordinary session, whether the power to overrule the morally deficient precedent can be delegated to the lower court, and so on. The gist of the proposal is, I hope, clear. When, in accordance with my epistemic caveat in the previous section, an important number of competent legal participants considers on good grounds that a precedent is evil or morally suboptimal, a court facing this precedent may be entitled to either follow it or suspend its application *inter partes* and refer the case to a higher court with power to overrule the precedent.

I said that my proposal entails exercising an equitable power. Let me explain why this is so. In adjudication, equity is traditionally associated with the idea of dispensing with, or making an exception to, the application of an otherwise binding

legal requirement.[63] Thus, to the extent that under my proposal a court can suspend the application *inter partes* of the morally deficient precedent, my proposal entails making an exception to the application of the precedent's legal requirement. To be sure, equity is traditionally understood as a judicial remedy against problems arising from the generality of the law, which in England adopted a distinctive form as a way to correct common-law decisions.[64] Thus, to the extent that a precedent may ground a binding legal requirement, the rationale of equity applies to statutory law and precedent alike. Since following a morally deficient precedent may conflict with a moral consideration in much the same way as applying a morally deficient statute can, the court suspending the application *inter partes* of the precedent, and thereby making an exception to the application of the precedent's legal requirement, exercises equity. The court acts equitably, just as a court acts equitably when it declines to apply a binding statute on the grounds of a sound moral consideration.

To be sure, I argue for an equitable *power*, not for a *de facto* equitable override on grounds of a sound moral consideration. What I argue for is that the legal system should recognise, implement, and give protection to, the decision of a later court to

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[63] This is the corrective role of equity in law. The other is interpretative: a judge exercises equity when she reads the letter of the law according to its spirit. In England, both roles have considerable historical support. Roughly, before St. German, the Chancery corrected the law on grounds of conscience. With St. Germain, this corrective jurisdiction was connected to a canon of interpretation—the Chancery made exceptions by reading the law equitably i.e., according to its spirit. See, e.g., TFT Plucknett & JL Barton, 'Introduction' in TFT Plucknett & JL Barton (eds) *St German's Doctor and Student* (Selden Society 1974) fn 23; M Drakopoulou, 'Equity, Conscience and the Art of Judgement as Ius Aequi et Boni' (2001) 5 *Law Text and Culture* 345, 357 and 364; M Fortier, *The culture of equity in early modern England* (Ashgate 2005) 60; and D Klink, *Conscience, Equity and the Court of Chancery in Early Modern England* (Routledge 2010) 44-45. Today, an example of corrective equity can be found in T Endicott, 'Legal Interpretation' in A Marmor (ed) *Routledge Companion to Philosophy of Law* (Routledge 2012) 119. Against Endicott, and favouring interpretative equity, see R Ekins, *The Nature of Legislative Intent* (OUP 2012) 275-276.

[64] This is, at least, the Aristotelian sense of equity—*epieikeia.* See Aristotle, 'Nicomachean Ethics' in J Barnes (ed) *The Complete Works of Aristotle: The Revised Oxford Translation* vol II (Princeton UP 1984) 1796 ($1137^{b}15$-25). In this traditional sense, equity justifies making an exception to the application of an otherwise binding legal requirement; see, e.g., M Fortier, *The Culture of Equity in Restoration and Eighteenth-Century Britain and America* (Ashgate 2016) 7; and EM Harris, *The Rule of Law in Action in Democratic Athens* (OUP 2013) 285.

suspend the application *inter partes* of a morally deficient precedent under the terms of my proposal.[65] On this view, the later court deciding to exercise this equitable power would not act unlawfully—i.e., the court would not act contrary to its legal obligation under the authoritative mode. Accordingly, what I argue for is that we should *rethink* the obligation under the authoritative mode in order to make room for the equitable suspension of the precedent's legal requirement under the terms of my proposal. In the Razian terminology used in Chapter III, I argue that acting on the reason in favour of avoiding the entrenchment of a morally deficient decision in the law by exercising the equitable power, under the conditions here proposed, *should not* be excluded. That is why my proposal calls for moderate legal change, because I argue that the law should allow later courts the possibility of exercising an equitable power in a way that is compatible with their legal obligation under *stare decisis.* And the way to do so is by dropping, in some cases, the undefeated character of the obligation to follow a morally deficient precedent.

My proposal is compatible with keeping the obligation under the authoritative mode as generally defeasible*,* and to see this it will be useful to draw a parallel with the power to overrule precedent. Under my proposal, the legal system *authorises* a later court to defeat the obligation to follow a morally deficient precedent on the condition that an important number of competent legal participants considers the precedent to be so, on good grounds. The legal system, in other words, makes the reason for suspending the application *inter partes* of the precedent (in order to exercise the equitable power) a *non-excluded* reason. Accordingly, the court that exercises the equitable power is not a *disobedient* court—as it arguably would if the equitable power I propose wasn't previously recognised by the legal system. But in this situation the court would be disobedient only in respect of its legal duty under the authoritative mode, since it is perfectly possible that declining to uphold an evil legal requirement is what the later court should do all things considered.

[65] The legal recognition of the equitable power, as well as the conditions for its legitimate exercise, should be positively laid down in a legal source, ideally an Act of Parliament or alternatively a decision by an apex court. That provision should specify the final design of the equitable power.

Under the terms of my proposal, the court exercising the equitable power needs to justify such a decision by providing reasons, in its decision, why the important epistemic condition posited in the previous section obtains. If, conversely, the court is not able to provide these reasons, the court cannot exercise the equitable power in a legitimate way. Therefore, it is a mistake to think that this equitable power leaves the door open for courts to repudiate their obligation under the authoritative mode whenever they have a disagreement *vis-à-vis* the moral content of the precedent. In a similar way, it does not follow from the fact that a court has the power to overrule precedent that such a power is incompatible with the court's obligation under the authoritative mode. Consider again the 1966 Practice Statement, allowing the House of Lords (today the UK Supreme Court) to depart from precedent 'when it appears right to do so'.[66] As argued in the previous chapter, it is a mistake to think that such a power is incompatible with that court's obligation under *stare decisis*, because in order to legitimately exercise such a power, the court needs to show first that the conditions for doing so have been met. If the court provides those reasons, then the court overrules legitimately. Likewise, a court intending to exercise the equitable power needs to show that the conditions for legitimately exercising this power obtain.[67]

Nothing in the notion of a court's power to overrule precedent is incompatible with that court's legal obligation under *stare decisis* if the court adjudicates transparently and in compliance with the applicable rules or conditions. Likewise, nothing in the notion of a court's power to exercise the equitable power over a morally deficient precedent is incompatible with that court's obligation under the authoritative mode if the court adjudicates transparently and in compliance with the

[66] [1966] 1 WLR 1234.

[67] If, despite these remarks, someone objects that my equitable power and the obligation under the authoritative mode are incompatible, then that person would need to show the extent to which such an obligation is also incompatible with the power to overrule binding precedent—at least as laid down in the 1966 Practice Statement in respect of the House of Lords.

conditions here posited. A court adjudicating transparently and legitimately will decline to exercise the equitable power if the court concludes, in good faith, that the court is alone in regarding the precedent as morally deficient. In this case, since one of the necessary conditions for exercising the equitable power is absent—namely, the existence of a morally deficient precedent, as supported by the epistemic condition posited in the previous section—then the court is under an undefeated obligation to follow precedent. These remarks show that my equitable power, very much like the power to overrule precedent, is compatible with the obligation under *stare decisis*.

Notice, furthermore, that by authorising the later court to exercise the equitable power, the legal system may provide a technique for the *accelerated* revision of the morally deficient precedent. It does so, in particular, by making it possible for the requesting court to request the revision of the morally deficient precedent by the higher court. Importantly, it is the higher court that decides whether to overrule the morally deficient precedent (it may not). If it does, then the higher court must create law *de novo* by setting a new, generally valid, binding precedent. Precisely because the requesting court does *not* have the power to overrule the morally deficient precedent, the requesting court only suspends its application temporarily and between the parties to the dispute.[68] The obvious consequence is that while a decision from the higher court is pending, the morally deficient precedent (i.e., its legal requirement) will continue to be applicable in respect of other disputes that might arise between other parties. This situation can be paralleled to what happens when a court lawfully declines to apply a statutory rule because doing so would conflict with the constitution. According to Hans Kelsen:

[68] The *inter partes* effect could be another historical reason for why the power is equitable. When the English Chancery exercised equity, it did not repeal law *erga omnes*, but corrected it *in personam*. See, e.g., Plucknett & Barton (n 61) xxx; JH Baker, *Oxford History of the Laws of England: Volume VI* (OUP 2003) 19; and Klinck (n 63) 85, 90-91.

> if [the court] considers the law "unconstitutional", [the court] is usually only authorized to refuse the application of this statute in the concrete case, that is, to suspend its validity for the concrete case; but the statute remains valid for all other cases, to which it refers, and has to be applied by all courts in these cases unless they, in turn, refuse application.[69]

Of course, in order to avoid inconsistent legal regimes (i.e., the application of the morally deficient precedent being suspended for some parties, but not for others) there can be an institutional design such that, once the case has been allocated to the higher court, the application of the precedent's legal requirement is temporarily suspended *erga omnes*—for everyone—until a decision is reached. The intervention of the higher court is crucial because, if we were to argue in favour of a *de facto* equitable override, inconsistent decisions in the law might ensue—which might in turn undermine the value of equality in the judicial application of the law. By contrast, on my proposal, the intervention of the higher court aims to bring consistency, i.e., by issuing one decision that will produce *erga omnes* effects, namely the decision of whether to overrule the morally deficient precedent. If the higher court decides *not* to overrule the morally deficient precedent, the question might arise whether a later court should be able in future to exercise the equitable power—and, if so, under what conditions. The best answer to that question depends on a balance between the value of finality as to the effect of the precedent, and the value of continued opportunity for challenges to that effect.

F. Objections

I assume that by now you may have very good objections to my proposal. Let me consider what I think could be three of them: my equitable power (1) undermines

[69] H Kelsen, *Pure Theory of Law* (M Knight tr, 2nd edn UCP 1967) 273-274.

vertical discipline; (2) might entail a slippery slope; and (3) might lead to an unfair situation with respect to the party who relied on the morally deficient precedent.[70] Before turning to these objections, I would like to address one possible source of worry.

I think it is preferable for courts to be transparent with what they do and say, instead of concealing their real bases for a decision. This means that I think it is preferable to be open about introducing an equitable power, positively recognised by the legal system in a legal source, instead of distinguishing in a disingenuous way and thereby affecting the legitimacy of the common law. Recall that distinguishing in a disingenuous way means to decide *as if* the precedent and instant case are relevantly different, when on their face they are not.

Possibly, what explains disingenuous distinguishing is the lack of an equitable power that would allow courts to be more transparent. Of course, someone might object that, on the contrary, it is preferable for courts to distinguish in this disingenuous way rather than introducing new judicial powers that might affect the *status quo*. But since I am arguing for *more* transparency (while also proposing a mechanism that aims to contribute to the legitimacy of the common law), whereas this would-be objector is putting transparency under the rug, I am inclined to think that the burden is not on me. Thus, I will not be making a full-blown objection out of this worry—I will, however, be considering though some related worries in subsection 2 below.

1. Vertical Discipline

According to vertical discipline, lower courts in the judiciary owe deference to the decisions of higher courts. Thus, lower courts must, on grounds of vertical discipline, treat the decisions of higher courts as generally binding. Since my

[70] It goes without saying that there could be many more objections. I am only discussing those I take to be the most important for my proposal. I welcome further criticism.

proposal entails giving lower courts—in some cases—the power to exercise an equitable power over these precedents, my proposal arguably entails undermining vertical discipline.

Before I answer this objection, let me briefly analyse the justifications that would support vertical discipline. According to Schauer:

> the justifications … are fairly obvious. Just as children are expected to obey their parents even when they disagree, as privates are expected to follow even those orders from sergeants they believe wrong, as Catholics are expected to follow the dictates of the pope even if they think those dictates mistaken, and as employees are expected to follow the instructions of their supervisors, lower courts judges are expected to follow the "instructions" of those courts above them in what the military calls the "chain of command".[71]

At the root of Schauer's claim rests the idea that, in roles where authority is displayed, there is an expectation that the authority's addresses will comply with the authority's directives. We may think of this expectation as having two sources: one internal—to the relation of authority itself—and the other external. According to the former, if I have authority over you, then I expect you to comply with my directives. According to the latter, *we*, third-parties to this type of authoritative relation, expect that one of you complies with the say-so of the other. In both cases, the value is expectation. Thus, in regard to vertical discipline, external expectation would reflect the idea that *we*, possible parties to a dispute, expect lower courts to follow the precedents of higher courts. By contrast, internal expectation would insist that, in the eyes of a higher court, a lower court should follow its precedents.

In my view, what really does the work in both sources of expectation is the latter—external expectation. Internal expectation, at least in adjudication, is

[71] F Schauer, *Thinking Like a Lawyer* (Harvard UP 2009) 41-42.

ultimately a shortcut. When courts adjudicate, they do so, ultimately, to advance a value that is important *for others*, not for themselves.[72] The purpose of having courts is not to adjudicate disputes for the sake of adjudicating them. We, third-parties to a relation of authority between higher and lower courts, have given them the power to advance whatever value we think it is important to advance via adjudication.

Once it is clear that external expectation is what matters, it becomes apparent that this kind of expectation cannot, by itself, justify vertical discipline. Expectation must be linked to some other, independent value that is advanced *through* the authoritative relation that exists between lower and higher courts. Although Schauer fails to see this important point, we can read his argument above as follows. *We* have deposited our trust in the idea that the relation of authority between higher courts and lower courts will advance some value—whatever this value is. And vertical discipline is precisely a way to protect this external trust or expectation. On this view, a much stronger reading of the objection, whenever a lower court exercises my equitable power over the binding precedents of a higher court, that court has breached our trust or expectation. For the court has failed to live up to the value we thought it important to advance via the institutional design.

I want to put forward three arguments to counter the objection—apart from insisting that we should also rethink the value that ultimately grounds our external expectation so as to make room for equitably dealing with morally deficient precedents (see note 57). First, we should not succumb to its suggestion that the problem is binary. It is tempting to think that whenever a lower court exercises an

[72] As a way to honour the value *we* consider important to advance via adjudication, courts might create internal expectation concerning their own actions. For example, the value of consistency and equal judicial treatment may recommend honouring internal expectation in the sense that courts will interpret the law according to its literal meaning, or that lower courts will treat higher-court precedent as binding. But notice that those judicial actions are again shortcuts for honouring the value that *we* think ultimately grounds the adjudicatory system. So my proposal is an invitation to rethink, if you will, that grounding value, so as to make room for minimising the existence of evil and morally suboptimal decisions in the law.

equitable power with respect to a morally deficient precedent from a higher court, the court has undermined our trust in the legal system. But this need not be the case. The lower court may advance important values by exercising the equitable power. The court may, *to begin with*, avoid entrenching a morally deficient decision in the law; its decision may furthermore shed light on the grounds that make a precedent morally deficient, thereby bringing legal and moral clarity to a contested problem.[73] And finally, the lower-court decision may be a small step towards the statutory repeal (or the judicial overruling) of the morally deficient precedent.[74]

Do lower courts have this capacity—namely, to get things morally right? Admittedly this point is difficult to assess, and my impression is that any rigorous analysis should rely on sound empirical data.[75] But, crucially, recall that on my proposal a necessary condition for exercising the equitable power is that a significant number of competent legal participants considers that the precedent is morally deficient, on good grounds. The likelihood of the lower court getting things right is precisely supported by this important epistemic condition. Notice also that in many legal systems lower courts tend to be specialised courts, whereas higher courts tend to have general jurisdiction. Thus, reasons of expertise might in some cases favour the lower court getting things right.[76] Thus, we should not think that

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[73] On the duty of judges to improve the law, *see* L Green, 'Law and the Role of a Judge' in KK Ferzan & SJ Morse (eds) *Legal, Moral, and Metaphysical Truths: The Philosophy of Michael S. Moore* (OUP 2016) ch 22.

[74] By exercising the equitable power, the court might be *signalling* that the precedent is mistaken. Cf. Eisenberg (n 17) 122. See, also, Easterbrook (n 44) 17: 'The need to get around a doctrine may show that there is some problem. Just as a series of anomalies in the data may spur scientists to propose a new theoretical model, so a series of "manipulative" cases that evade or mischaracterize some existing precedent may set the stage for overruling'.

[75] S Hershovitz, 'Integrity and Stare Decisis', in S Hershovitz (ed) *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (OUP 2006) 108 argues that lower courts are bound by vertical precedent because 'higher court judges have superior expertise to lower court judges (or even simply more time and resources to bring to bear on a case)'. Hershovitz's claim is intuitively appealing, but notice that in many countries there is an important tendency of lower courts to have technical expertise over a particular area—*vis-à-vis* higher courts of general jurisdiction.

[76] I thank Manuel González for this observation.

my proposal entails a leap of faith. If it does so, it is by no means blind or irremediable; the lower court is not alone in considering the precedent morally deficient.

Second, while the objection tends to conceive of trust as a matter of kind—i.e., trust is undermined *whenever* a lower court exercises the equitable power—I would like to think of trust as a matter of degree. Thus, if my proposal is adopted, trust will not *necessarily* be undermined whenever a lower court exercises the equitable power. Just as our trust in our children will not necessarily be undermined whenever they fail to obey us—in fact, sometimes it can be reinforced[77]—the same applies to lower courts. Lower courts can make good decisions towards making the law better. Recall that, on my proposal, the lower court has only referred the case to the decision of the higher court, which will eventually decide whether to overrule the morally deficient precedent. And finally, the decision of the lower court is backed by the epistemic condition that a significant number of competent legal participants considers the precedent to be morally deficient, on good grounds.

Third, notice that what I am arguing for is not that exercise of the equitable power by the lower court is the *only* option. We should give the lower court that option, *but not only that option*. In the end, the decision whether to follow a mistaken precedent or exercise the equitable power is that of the lower court. It may well be that the lower court decides to follow the morally deficient precedent because of some prudential reasons. Among them, uncertainty in getting things right, or a wish to avoid taking up the responsibility for improving the law. But there is a subtle yet important difference between saying that lower courts should exercise the equitable power over the morally deficient precedent, and giving them

[77] It can be reinforced when the disobedience of our children produces non-anticipated value. If I have prohibited my young son from going out at night for a walk, and if he disobeys me because there was nothing wrong in going out except the fact that he disobeyed me, then my trust in his moral judgment may be reinforced. His disobedience can contribute to my confidence that he will make good decisions. If, however, my son disobeys me while being clear it was dangerous for him to go for a walk, then admittedly my trust in his judgment will be affected. I don't think the situation is too different with lower courts. At the root of the problem is the decision whether we should allow lower courts to show us that they can, in some exceptional cases, make good decisions.

the power to *either* follow that precedent *or* exercise the equitable power. My proposal argues only for the latter approach.

2. Slippery Slope

The second objection argues that, if we give later courts an equitable power, then it only takes *one* court to exercise it for the rest of the courts to be tempted to give it a try—perhaps more often than we would like. This bare possibility should warn us against giving courts this equitable power writ large. Otherwise, we might be opening up the door for a slippery slope that might produce worse systemic consequences than the *status quo*.

I want to counter the objection by further specifying the conditions under which a later court may exercise the equitable power. I hope to convey the idea that my proposal should not be taken to be an open ticket for courts to exercise the equitable power. Equity, even if recognised by the legal system,[78] should always be used responsibly, for otherwise political and institutional crisis might ensue—as the history of English equity shows.[79]

I will assume that, for my proposal to entail a slippery slope, the following conditions should obtain:

i) A later court, "Y", exercises the equitable power;

ii) Y's decision is an *individually sufficient* reason for another court, "Z", to exercise the equitable power;

[78] For an analytically and historically rich defence of the judicial use of equity in law—particularly in criminal law—*see* Luigi Ferrajoli, *Derecho y Razón* (A Ibáñez et al trs, Trotta 1995) 155-162 and 402-405.

[79] See, e.g., JH Baker, 'The Common Lawyers and the Chancery: 1616' (1969) 4 *The Irish Jurist* 368.

iii) Y's and Z's decisions are individually sufficient for an unspecified number of later courts to exercise the equitable power; and

iv) The aggregate value of the resulting state of affairs is morally worse than the *status quo*.

By now you might object that I have assumed too much. You might object, in particular, that I should not have stipulated *ii)* above. For it is not the case that, for a slippery slope to obtain, Z must take Y's decision as individually sufficient for exercising the equitable power. To be sure, this could be a reason, but one among the many reasons bearing on Z's decision.

The problem, however, is that if we buy into this objection then virtually any fact or reason that causally contributes to a negative effect can be determinant of a slippery slope. If this is what slippery slopes are about, then it is almost like a win-win argument. I could only counter the objection from two angles. On the one hand, I could ask for the threshold above which *one* fact or reason, within a jointly sufficient set of facts or reasons, is said to be causally determinant of a negative effect—and why.[80] On the other, I could argue that from the fact that we have allowed courts to exercise the equitable power it does not follow that they will in fact do so. Hence, no slippery slope would exist so long as no court in the legal system exercises this power. But admittedly this answer would come at too a high price: I would be proposing a course of action while hoping to never see it take place.

[80] To illustrate: call X a set of jointly sufficient facts or reasons that is causally determinant of a negative result. Call Y one fact or reason (within X) that contributes to X's being causally determinant of this negative result. Call the other fact or reason Z. If we take a slippery slope argument to mean not an individually sufficient fact or reason, but a set of jointly sufficient facts or reasons, I would still want to know the threshold above which Y, or Z, is held to be *mainly* determinant of X's producing the negative result. Why, say, a 99% and not 99,9% (or 95%) contribution to X's producing the negative outcome?

Another, broader, reading of the slippery-slope argument, is *ii)* above. Y's decision cannot be a jointly sufficient fact or reason—i.e., it cannot be the case that Y's decision *plus* another fact or reason motivated Z's decision to exercise the equitable power. Y's decision must be *individually sufficient* for Z to exercise the equitable power.

If this broader reading is sound—and for my money, I hope it is—I can counter it by arguing why Z *should not* take the fact of Y's decision as individually sufficient for exercising the equitable power. What I need to show, then, is that *some other* fact or reason (other than Y's decision) must obtain in order for Z to exercise the equitable power. I can do this by establishing that some other fact or reason must be a *necessary* condition for Z to exercise the equitable power. Of course, that condition cannot be the fact that the precedent is morally deficient, since this is merely the conditional antecedent of the equitable power—'if an otherwise binding precedent is morally deficient, the court may exercise the equitable power'.

What other necessary condition could I offer? I believe the following condition may help to reduce the likelihood of a slippery slope. The later court, Z, *genuinely* believes itself to be exercising an equitable power in a responsible way, and is capable of giving reasons, in its decision, for such a genuine belief. This belief would act as a constraint on the power of Z. We know these reasons cannot appeal to the fact that the instant case and the precedent are relevantly different, for otherwise Z could simply distinguish the precedent. Z's reasons must therefore acknowledge that the instant case and the morally deficient precedent are relevantly similar, while showing the extent to which the earlier court—and thereby the law, by giving legal validity to the court's decision—got things morally wrong. It is on the basis of this perceived error, perceived also by a sufficient number of competent legal participants, that Z genuinely believes itself to be exercising an equitable power in a responsible way.

It is possible to think of additional necessary conditions for exercising the equitable power—for example, epistemic conditions relating to the grounds that make the precedent morally deficient. The more conditions are added, the more difficult it will be to exercise the equitable power—and consequently the lesser the risk of a slippery slope. Of course, the final design should seek a compromise between adding further conditions and allowing the equitable power to be used. This power is, after all, an additional mechanism for dealing with morally deficient precedents and accelerating their revision by a court with sufficient powers to overrule them.

As you can see, the conditions under which the equitable power can be exercised are demanding, and thus they reduce the likelihood of a slippery slope. Even if under these conditions a risk exists that we might fall into a slippery slope, then I would be open to revisiting my proposal. But it would be important to have a discussion on the ontology of causal grounding and the semantics of a slippery-slope argument if that were to be the case.

3. Fairness

Finally, there is the claim from fairness that the party disfavoured by the new decision might have.[81] In particular, this party may have relied on the existence of the morally deficient precedent in order to litigate. Without the mediation of a regular procedure aimed at either repealing the precedent or overruling it, it would be unfair to deprive this party of the decision that the dispute should otherwise have. Notice, though, that if my proposal is adopted, it would provide an additional *institutional* and *lawful* way for deciding whether to overrule a morally deficient precedent. If litigants take that new fact into account, as they should, then it is not clear whether fairness would continue to have a pressing claim anymore.

[81] I am grateful to Nina Varsava for pointing me to this objection.

Putting that important caveat aside for a moment (and for the sake of the argument only), an objection from fairness may be countered from various angles, depending on the kind of precedent we are considering. In the case of an evil precedent (admittedly exceptional but always possible), one could argue that a claim from fairness can only succeed where the relevant rules are not morally evil. This line of response might draw from the following remarks by Leslie Green:

> If the rules are bad *enough* no justice of any kind, administrative, formal or otherwise, results from their steadfast application. When an evil rule is *not* applied to someone covered by its terms, there is no one to whom an injustice is done, no one entitled to demand that the evil be perpetuated.[82]

Confronted with an evil precedent, it is possible to argue that the all-things-considered duty of the later court is to correct the evil law by exercising the equitable power (recall that, by hypothesis, this is a power recognised by the legal system). After all, it is far from clear whether fairness will be served by giving effect to an evil legal requirement. A similar line of response could also draw from Scott Hershovitz remarks on *stare decisis.* In discussing *Plessy v. Ferguson,* in virtue of which Southerners were allowed to 'plan their affairs in the certainty that the federal government would not interfere with state-created racial caste systems',[83] Hershovitz claims that 'the value of the activities planned in reliance on *Plessy* was hardly sufficient to warrant continued adherence to precedent'. Moreover, he claims that 'it seems *inappropriate* to weigh the "benefit" of segregation-based plans against the cost of segregation-caused harms at all'.[84] If it

[82] L Green, 'Law as a Means' in P Cane (ed) *The Hart-Fuller Debate in the Twenty-First Century* (Hart Publishing 2010) ch 22. Cf. Green, 'Law and the Role of a Judge' (n 73) 335.

[83] Hershovitz (n 75) 111.

[84] Id; emphasis added.

is debatable whether upholding an evil legal requirement serves any kind of justice, it is also debatable whether fairness to the party who relied on the evil precedent outweighs the value of judicially improving the moral content of the law.

Now, there is an additional issue which I shall bracket for present purposes since it would take us too far afield. Sometimes, following an evil precedent *might* be recommended by principles of criminal law. Take the Italian Supreme Court decision mentioned before—acquitting a rapist on grounds of an implicit consent to sexual intercourse. The court held that it is difficult for the rapist to remove the jeans of the victim without their assistance. This assistance suggested a collaboration from the victim, thereby establishing an implicit consent to sexual intercourse.[85]

In this example, someone might argue that if the rapist relied on the evil precedent while assaulting the victim, then the later court should follow the evil precedent instead of exercising the equitable power. That decision would be required by a criminal law principle requiring that, where a court has two possible courses of action, it should select the one which is most favourable to the criminal offender. This is an important line of criticism, but at the same time it should be clear that giving effect to this principle leads to an injustice with respect to the victim: the rapist will not be convicted on grounds of an evil precedent. As Randy Kozel has put it: 'When the Court concedes that a precedent is flawed but nevertheless opts to follow it, the losing party may feel the sting of injustice'.[86]

Perhaps it all comes down to a question of what exactly the principle in question prohibits or requires. If what such a principle prohibits is to change the criminal law

[85] Decision No. 1636, dated 6 November 1998—the relevant passage reads as follows: '*Deve poi rilevarsi che è un dato di comune esperienza che è quasi impossibile sfilare anche in parte i jeans di una persona senza la sua fattiva collaborazione, poiché trattasi di una operazione che è già assai difficoltosa per chi li indossa'*. A suggested translation is the following: 'It must also be noted that a common experience is that it is almost impossible to take off a person's jeans, even in part, without their active collaboration, since this is an operation that is already very difficult for the wearer'.

[86] Kozel (n 56) 51. Although Kozel refers to the Supreme Court of the United States, the analysis can be extended to other courts that follow unjust precedents as a matter of obligation.

retroactively—in a way that makes a criminal offender worse off—then there might be a tension between giving effect to this principle and exercising the equitable power. This use of this power might lead to an evil precedent being overruled by the higher court. But notice two things. First, following my previous discussion, we should not be reluctant to revise the soundness of the principle, or seek a sound reinterpretation of it, if an evil legal requirement is at stake.

Secondly, notice that, in this case, as well as in every other case in which the morally deficient precedent is not evil but only morally suboptimal, we have translated the present objection into one concerning the extent to which overruling is compatible with the Rule of Law. What I argue for is that the later court should be authorised, on the grounds of an equitable power, to refer the case to the decision of a court that *already has* the power to overrule the morally deficient precedent. Thus, I argue that the law should accelerate the revision of the morally deficient precedent on grounds of equity. My equitable power, therefore, entails no additional conflict in terms of fairness, because the party who might have relied on the morally deficient precedent already knows, or should know, that such a precedent may be overturned in the regular way by the higher court.

So, if there is a tension, it is one concerning the extent to which the exercise of an *existing* legal power (namely, the power to overrule precedent) is compatible with the Rule of Law. And the literature has offered sound ways of remedying this tension. Timothy Endicott, for example, has argued that a society in which the law did not provide for its own change 'would commit itself to an increasing irationality', 'by refusing to respond when existing regulations or forms or regulations are seen to be (or become) pointless, and when new regulations and forms of regulation are needed'.[87] On this view, failing to implement reasonable legal change is also a way of departing from the Rule of Law. Endicott argues that a good measure for determining whether legal change is a deficit in the Rule of Law

[87] Endicott, 'The Impossibility of the Rule of Law' (n 12) 9.

is whether the 'prospect of change' makes it 'impossible to use the existing law as a guide'.[88] Thus, overruling precedent is not necessarily contrary to the Rule of Law if the prospect of change allows individuals to use the existing law as a guide.

But there might be cases in which overruling precedent will affect the Rule of Law. Here the sound approach is, following Endicott, to avoid thinking of the Rule of Law as an ideal that is honoured only if it is *completely* realised, for on this view the Rule of Law would be an impossible ideal (as he exemplifies with the inevitability of widespread vagueness in legal language). A better approach is to take the Rule of Law as an ideal that can be honoured as a matter of degree, and which may tolerate exceptions for the sake of realising conflicting values. On this point there is agreement among legal philosophers: the Rule of Law is not the *only* value that matters for legal systems.[89] A sound adaptation of the law (for example, by overruling a morally deficient precedent) is also a goal of the legal system, whether you think of this goal as part of the Rule of Law (as Endicott would seem to think) or as part of another moral goal of the law.

G. Summary

I have tried to address, from a rather conceptual point of view, a problem that admittedly may not only be conceptual but also empirical. For example, empirical data may have an important role to play on the issue of whether courts distinguish disingenuously in order to avoid following a morally deficient precedent. It goes without saying that empirical analysis is very welcome.

Yet to the extent that the problem is not only empirical but also conceptual (or that it remains conceptual after empirical analysis has done its part), the issue of morally deficient precedents persists. Evil and morally suboptimal precedents pose a crucial challenge for *stare decisis*. The lesser the legitimate means a legal system

[88] Id.

[89] See, *supra*, fn 12.

under *stare decisis* has for dealing with morally deficient precedents, the harder this doctrine is to justify. This chapter is, I think, a small step towards thinking of an additional means for a legal system to deal with morally deficient precedent. An equitable power along the lines defended here invites us to rethink the undefeated character of the obligation under *stare decisis*, while also contributing to the project of justifying this doctrine. At the same time, this power may also contribute to the legitimacy of the common law, that is by adding a new mechanism that would allow courts to adjudicate more transparently.

There is no denying that my proposal may be subject to various objections, and that is why I have addressed three of them. To some extent, these objections are grounded in the same view of precedential constraint that informs the traditional approach. That is, a binary or all-or-nothing situation view whereby precedential constraint will deliver the values it promises to advance only if courts abide by the doctrine of *stare decisis*. Once we abandon this binary approach to the problem and we appreciate that the persuasive mode can also deliver the values of precedential constraint, it should become apparent that my proposal should not undermine the different values that these objections aim to protect.

FINAL REMARKS

Let me summarise the main claims defended throughout this thesis. My aim has been to offer a philosophical foundation for precedent-following in law. I have been sensitive to central aspects of the practice of precedent in both the common law and the civil law—I have argued, in particular, that these central aspects constitute a 'minimum methodological requirement'. Admittedly, this is a minimum if we are interested in practice-interpretation, but for those who want to engage in a more normative enterprise, the door is open for dropping the minimum methodological requirement, on pain though of 'missing the mark'.[1] To be bound by this minimum requirement does not prevent one from defending normative claims as to how things ought to be. I myself have engaged in this type of normative analysis in various parts of this thesis, but notably in Chapter IV, where I have addressed the problem of justifying the authoritative mode. In this chapter, I tried to defend an equitable power aimed at dealing with the problem of entrenching morally deficient decisions in the law. At the same time, I have been sensitive to central feature of *stare decisis*, such as vertical precedent.

Chapter I defended a view of the value of following precedent in law. I grounded such a value in the Rule of Law, in particular in its values of stability, reliability and equality in the application of the law. My strategy was to show how a legal system would look if courts did not pay attention, in a legally significant way, to relevant precedent—the Null Model. This model is a thought experiment; but the conditions for its possibility are sound—both from the point of view of legal theory and practice. The value of the Null Model is mainly theoretical; it reminds us that we should not take for granted the value of the practice of following precedent in law. At the same time, the possible existence of the Null Model invites us to reflect on what causes later courts to pay attention, in a legally significant way, to the ways

[1] A Rigoni, 'Common-Law Judicial Reasoning and Analogy' (2014) 20 *Legal Theory* 133, 135.

in which relevantly similar disputes have been decided before. The rule-of-law values of stability, reliability, and equality in the application of the law provide very good reasons for resisting the Null Model. I have showed the extent to which this model runs counter to these values, and accordingly I closed the chapter by arguing that we should prefer a practice of precedent that advances the Rule of Law, instead.

I argued, in Chapter II, that there is a significant gap between the Null Model, on the one hand, and a model of precedent that advances the Rule of Law in an institutionalised way, on the other. The purpose of Chapter II was to lay out the foundations for bridging that gap. A model of precedent that advances the Rule of Law in an institutionalised way should deliver a non-contingent, content-independent, and *pro tanto* legal reason for following relevant precedent. This is a demanding kind of reason for action. One initial challenge was to show how such a reason can be content-independent, if in general reasons recommend an action (or omission) based on their specific merits and on the facts of the case. My strategy was to show that we can account for this reason by considering the idea of a specific judicial duty that aims to advance the Rule of Law in an institutional way. That is the duty to always put in the balance of reasons the legal reason for following relevant precedent. This duty, it was argued, advances the Rule of Law by reducing the potential lack of motivation of judges in honouring this ideal. The upshot of my discussion is that, on the grounds of this judicial duty, a later court always has a legal reason for following relevant precedent, even if the precedent is morally suboptimal, so long as it is not evil. That legal reason, importantly, may not correspond to its moral equivalent. That is why I dealt with Ronald Dworkin's one-system objection at the outset. It is not the case, contrary to Dworkin, that for every legal obligation (or legal reason) that exists there is a corresponding moral obligation (or moral reason) of equal normative content.

In my rule-of-law account of precedent-following, later courts always have a legal reason for following relevant precedent, even if the precedent is morally suboptimal, so long as it is not evil. That is a minimum requirement of the Rule of

Law in regard to precedent, since by default that reason is non-obligatory. Accordingly, one way in which a legal system may further advance the Rule of Law via precedent is by *requiring* later courts, in some cases, to follow relevant precedent. These two alternatives, namely to follow relevant precedent on grounds of a non-obligatory legal reason or a legal obligation, are the foundations of the two modes of precedential reason explained in Chapter III.

The persuasive mode, on the one hand, is characterised by its flexibility, because later courts determine the exact weight of the legal reason for following relevant precedent—and they do so on the basis of some of the various factors examined in that chapter. There are notable differences between the persuasive mode and the Null Model: in the former, but not in the latter, courts always have a legal reason (albeit non-obligatory) for following relevant precedent. If a court decides *not* to follow relevant precedent—in order to act on a more compelling reason—the persuasive mode still requires the court to give reasons for such a decision. For it is contrary to the Rule of Law (all else being equal) to depart from relevant precedent without explaining why.

The authoritative mode, on the other hand, can be distinguished according to the form and content of the legal obligation to follow relevant precedent. In relation to the form, I have argued that it is difficult to think that the law can ever be justified in requiring courts, *ex ante*, to follow relevant precedent all things considered. But the law can make, and indeed has made, such a claim. That was, as explained, the situation in the UK between 1898, the year in which *London Tramways* was decided, and 1966, the year in which the House of Lords issued the Practice Statement.[2] But there is another way of conceiving of obligations, that is according to Joseph Raz's idea of a protected reason. On this view, obligations are categorical requirements deriving from protected reasons for action, which are a combination of a first-order reason plus an exclusionary reason not to act on some conflicting

[2] [1898] AC 375 and [1966] 1 WLR 1234, respectively.

reasons. I assumed, for the purposes of that chapter, that a protected-reason account of the authoritative mode is justified *if* at least the highest tribunal of the land can act on a non-excluded reason leading to departing from precedent. That is the case, today, of the UK Supreme Court. In virtue of the 1966 Practice Statement, this court may depart from precedent when it appears right to do so.

The authoritative mode can also be distinguished according to the content of the legal obligation to follow relevant precedent. By looking at an important debate in the common-law literature on *stare decisis*, I argued that such a content can be to decide the present case by applying the rule provided in the *ratio decidendi* of the precedent, or it can be to determine whether the present case and the precedent are relevantly similar. If they are, then the later court is required to follow precedent; if they are not, then the later court may distinguish. The two positions are, respectively, the 'rule-based theories' and the 'analogical theories'. While this debate hinges on interesting issues concerning methodology in jurisprudence, it is fair to say that both positions have benefitted significantly from the objections they have faced. For my part, I have tried to show an alternative conception of the authoritative mode, one that benefits from the rule-based theories and the analogical theories but that aims to highlight features which, to my knowledge, have not been explored before. I have argued, in particular, that any sound account of the authoritative mode would view three decisions of the earlier court as authoritative for the later court. These decisions are: (1) to treat certain facts as material, (2) to give certain material facts a specific legal significance, and (3) to treat certain facts as necessary and sufficient conditions for reaching a justified decision. This account, I have argued, seeks to capture some necessary features of adjudication under the authoritative mode, and my hope is that it will benefit from constructive criticism and further reflection on the topic.

However we understand the authoritative mode, the gist of it (or at least that feature of it which distinguishes this mode from the persuasive mode), is that later courts are generally *required* to follow precedent. A court that does not follow

relevant precedent, in circumstances where it has a legal duty to do so, is a court that acts unlawfully. It doesn't follow, of course, that the court (or the judge who voted in the majority that decided not to follow precedent) should be held responsible for that decision. Sometimes it can be wise for the law not to hold judges responsible for breaching a judicial duty; possibly the law guarantees a healthy dose of judicial autonomy. But this is not to deny that the court or judge has acted unlawfully. The court has reached an unlawful decision *even if* departing from precedent was the right thing to do all things considered. This extra burden on judges—*vis-à-vis* the persuasive mode—may thus need further justification. I have addressed this problem in Chapter IV. In particular, I assumed that the authoritative mode is justified if the reasons for having it outweigh those against it. One good reason for having the authoritative mode rests in its capacity to advance the Rule of Law *vis-à-vis* the persuasive mode. One reason against having the authoritative mode lies in its potential conflict with two principles that bear on how law of general application should be created. That is, through a process that guarantees democratic participation, and by institutions that have proper institutional capacity.

Admittedly, the main reason for not having the authoritative mode concerns the problem of entrenching morally deficient decisions in the law. Taking into account considerations of good institutional design, what should a later court do when it can neither overrule nor distinguish a morally deficient but nevertheless binding precedent? On the traditional approach, the later court must follow precedent, because only if courts do so will precedential constraint deliver the values it promises to advance. This view, however, offers too strict an interpretation of precedential constraint: an all-or-nothing situation whereby precedential constraint will only deliver its values if courts abide by the doctrine of *stare decisis*. Contrary to this view, I proposed another approach to the problem of the undefeated character of the obligation to follow a morally deficient precedent. I argued, in particular, that when a later court can neither distinguish nor overrule a morally deficient precedent, the court should have the power to either follow the precedent or suspend

its application to the parties by ordering a temporary stay of proceedings in the lower court and referring the case to a higher court with power to overrule the precedent. I explained why this power is equitable, i.e., because the law authorises the court to make an exception to the application of an otherwise binding legal requirement on grounds of a sound moral consideration. And I also posited an important epistemic condition: for a precedent to be properly considered a morally deficient precedent, it is necessary that a sufficient number of competent legal participants considers so, on good grounds. The court that exercises the equitable power needs to provide reasons, in its decision, showing that this epistemic condition has been met.

A court that exercises the equitable power suspends the application *inter partes* of the precedent, and temporarily. I offered reasons why the law should recognise, implement, and give protection to, the decision of a later court to suspend the application *inter partes* of a morally deficient precedent under the terms of my proposal. A later court that decides to exercise this equitable power would not act unlawfully—i.e., the court would not act contrary to its legal obligation under the authoritative mode. Accordingly, I argued that we should *rethink* the obligation under the authoritative mode in order to make room for the equitable suspension of the precedent's legal requirement under the terms of my proposal. And the way to do so is by dropping in some cases the undefeated character of the obligation under *stare decisis*.

By drawing a parallel with the power to overrule precedent, I argued that my proposal is compatible with keeping the obligation under the authoritative mode as generally defeasible. Just as there are conditions for overruling precedent, there are also conditions for exercising the equitable power. These conditions make the equitable power compatible with *stare decisis*. Importantly, I think the equitable power contributes to the justification of the authoritative mode. This mode is easier to justify if courts have an additional tool that allows them to avoid entrenching morally deficient decisions in the law. At the same time, this power may contribute

to the legitimacy of the common law, by adding a new mechanism that would allow courts to adjudicate more transparently.

But I am aware that my proposal may be objected to on many fronts. That is why I have considered three objections. They argue that my proposal (1) undermines vertical discipline, (2) may entail a slippery slope, and (3) can be unfair to the party who relied on the precedent. I have tried to show why we should not succumb to these objections: there is value in a practice of precedent that conceives of precedential constraint as a matter of degree. This means that not all the value precedential constraint is meant to achieve will be lost if, in some exceptional cases, later courts exercise the equitable power to avoid entrenching morally deficient decisions in the law.

Looking forward, there are many interesting questions that can be asked about each of the modes of precedential reasoning defended here. It would be interesting to determine, for example, whether a legal system needs an equitable power (such as the one defended in Chapter IV) or whether judges can reach similar equitable outcomes by using the tools they already have, and one way this can be done is through legal interpretation. Are there ways judges can construct the words in a precedent equitably? The history of equity teaches that, with respect to legislation, one way to exercise equity is by reading the words of the law according to its spirit.[3] And so there are many candidates as to what the spirit of the law is—or should be presumed to be. What could the spirit of the common law be? Could that spirit provide means for interpreting precedents equitably and without need of giving courts an equitable *power*?

Another topic worth exploring is the type of mode of precedential reasoning used by important courts in the world. Does the Court of Justice of the European Union, or the European Court of Human Rights, adjudicate under the persuasive mode or under the authoritative mode? In order to answer this question, we would need to

[3] See, *supra*, Chapter IV, note 48.

look at both the constitutive legal rules of those courts and their jurisprudence over time. But we should always bear in mind that there is an important difference between having a non-obligatory legal reason for following relevant precedent, and being generally bound to do so. That distinction defines the boundaries of what the courts can lawfully do when they face precedent-governed disputes.

A satisfactory analysis of this problem should deal with the following question: what is the legal effect of a *de facto* obligation? As seen in Chapter IV,[4] a court not bound by precedent may create, for itself, and through consistent decisions over time, a *de facto* obligation to follow precedent. This situation, I argued, may on some conditions affect reliability. But possibly on other conditions that *de facto* obligation may collapse into a *de jure* obligation. The analysis of these conditions, and the defence of the legal philosophy from which such an analysis can be offered, has been beyond my current purpose. But if on plausible assumptions a *de facto* obligation can collapse into a *de jure* obligation, then a court under the persuasive mode can switch to the authoritative mode *even if* the constitutive rules provide otherwise. For example: if the constitutive rules of a court provide that the decisions of such a court are binding to the parties to the dispute only, but with time the court extends such a binding effect to third parties similarly situated, has that *de facto* obligation made those constitutive rules ineffective? Surely the analysis, relying on solid jurisprudential foundations, will have to consider whether such a constitutive rule is statutory, constitutional, etc.

Another fascinating question concerns the degree of autonomy that courts should have when deciding cases on which there is relevant precedent. That autonomy is greater in the persuasive mode, since later courts are not legally required to follow relevant precedent. By contrast, courts have less autonomy when they have a defeasible legal obligation to follow relevant precedent.[5] Up to now, the majority

[4] See, *supra*, Chapter IV.B.

[5] R Kozel, *Settled Versus Right: A Theory of Precedent* (CUP 2017) 59, aware of this point on judicial autonomy (or independence), incorrectly assumes nevertheless that without a binding doctrine of precedent judges would have unchecked discretion—thus leaning support to the basic

of legal systems approach the question of which mode should courts adopt from a systemic point of view. For example, in the common law, the general rule is that courts adjudicate under *stare decisis* unless the reverse is explicitly provided for by law. By contrast, the civil law is often characterised by inverting the rule: courts are not legally bound by precedent unless the law requires a particular court to follow precedent. But what are the reasons for making these particular exceptions? This question deserves much more attention than what it has actually received. Possibly a wiser approach makes the selection of one particular mode a function of the specific legal area under consideration. What matters, on this view, is not so much the court that will adopt one or the other mode, but rather the field of law in which that court will adjudicate. In some areas, for example, it may be wise to give more autonomy to courts, so that they can depart from relevant precedent if the facts of the case deserve it. In some other areas, possibly the desirable approach recommends giving less autonomy to later courts. What are those fields? And what values (within those fields) are advanced by giving courts more or less autonomy?

Another question worth exploring—I close now—relates to the reasons we have today for either setting or declining to set a precedent. Here is one fascinating question worth reflecting upon. Can a court whose precedents are typically followed as a matter of legal obligation deliver a 'one-off' decision—i.e., a decision that deliberately avoids setting a binding precedent? This was, I think, what the US Supreme Court tried to do in *Bush v Gore*, when it declared that: 'Our consideration is limited to the present circumstances…'.[6] Similarly, in *R (Miller) v Prime Minister* the UK Supreme Court declared that the issue under consideration 'arises in

assumption of the traditional approach. He writes: 'Precedent supplements the constitutional framework by preventing judicial independence from turning into unchecked discretion. It fends off the "arbitrary discretion" that might otherwise prevail when life tenure judges are asked to apply a charter containing numerous areas of uncertainty'.

[6] *Bush v Gore*, 531 US 98 (2000), at 109. I thank Mikolaj Barczentewicz for pointing me to this example.

circumstances which have never arisen before and are unlikely ever to arise again. It is a "one-off".[7]

Now, whether an earlier court can render a one-off decision is arguably a function of what the constitutive rules of such a court provide, and also (and crucially) of whether there is a legal prohibition against issuing this kind of decisions. But this is only one half of the problem; the other half brings us back to the reasons of a later court for following precedent. What is the legal effect of such a one-off decision for later courts? In the absence of a particular legal duty, I suspect the answer to this question will most likely hinge on the legal tradition in question. Arguably in a legal system where courts are not generally required to follow precedent, the later court will not be legally required to follow the one-off precedent either—even if, in some other cases, that court would indeed be required to follow the precedents of such an earlier court.

But surely the waters will be muddier in a legal system in which courts are generally required to follow precedent. Here is one possible interpretation: if a later court follows a 'one-off' precedent, the resulting decision can be treated as legally justified because that one-off decision constitutes a *permissive*, not mandatory, source of law. Hence, if a court delivers a one-off decision, what the court is doing is to change the nature of the legal source such a decision would otherwise create—allowing, but not requiring, later courts to follow it. Can an earlier court prohibit later courts from following a one-off decision? Some constitutional authority will be required. But if a legal system allows a higher court to demand conformity with its own precedents, why couldn't it also allow this court to demand *non*-conformity with its decisions?

[7] *R (Miller) v Prime Minister* [2019] UKSC 41, at 1. I thank Timothy Endicott for showing me this example.

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