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Judges as Rulemakers

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Precedent

The sources of law recognized by English and American courts are commonly understood to include not only legislation and constitutions but also prior judicial decisions. Lawyers rely on judicial precedents in advising clients, and courts cite precedents in their opinions. Yet exactly what courts do, or should do, with precedents is a surprisingly complex problem.

In this essay, we shall outline competing views of the proper role of precedent in judicial decisionmaking and defend one such view.[1] Our position is that, subject to certain qualifications, courts can best serve the ends of the legal system by treating rules announced in past cases as binding. In other words, courts should apply previously announced rules to present cases that fall within the rules' terms even when the courts' own best judgment, all things considered, points to a different result.[2]

In defending this approach to precedent rules, we adopt the point of view of an imaginary authority designing a legal system.[3] We assume that the subjects of this legal system share a set of general aims and moral values, but do not always agree on what these aims and values require in particular settings.[4] Accordingly, the dominant end of the legal system, and the reason why its subjects have enlisted our imaginary authority to design it, is to settle peacefully and correctly the controversies that arise over how best to carry out shared aims and values in the course of daily life.

With these assumptions in mind, we first consider the inevitable consequences of prior judicial decisions. We then set out leading positions on precedent and defend a rule-oriented approach. Finally, we address some details and necessary qualifications of our favored approach.

I. Moral Consequences of Judicial Decisions

We assume that judicial decisions in the legal system we are considering are publicly accessible: not only are the specific outcomes a matter of record, but in addition courts issue opinions in which they describe the facts presented and explain the reasons for their conclusions. Given this form of publicity, a court cannot defensibly ignore prior judicial decisions because prior decisions alter the decision-making landscape.

The most significant moral consequences of judicial decisions fall under the heading of reliance. Reliance enters the picture in several ways. Most obviously, the parties to the original controversy must conform their behavior to the terms of the decision. Disputants A and B, having litigated a point and complied with the remedial orders of the court, should not face the possibility that their dispute will be re-opened.

Apart from the immediate impact on parties, in a system of public decisions, others who observe the outcomes of prior cases will tend to expect consistent decisions in the future and will adjust their behavior accordingly.[5] Actor C, whose activities are similar to the activities of A that were at issue in A versus B, is likely to alter his activities if the court in A versus B decided adversely to A. Of course, C's expectation of consistency is reasonable only to the extent that courts typically reach consistent decisions; if they regularly disregard prior cases, C's reliance is misplaced. Therefore, the fact that non-parties have relied is not an independent reason for courts to conform to past decisions.

A society seeking to advance shared ends, however, has reason to foster expectations of consistent decision-making by courts. A significant source of moral error – possibly the most significant source among individuals of good will - is lack of coordination.[6] An actor who wishes to act correctly may be unable to

do so if his own best course of action depends on the actions of others whose choices he cannot predict. If the moral merits of D's actions are affected by what C does, then however wise and well-motivated D may be, he cannot decide correctly how to proceed unless he knows what C will do. If, however, courts resolve disputes consistently, D can predict that C will observe pertinent decisions and act accordingly. Thus, a practice of consistent decision-making, which generates expectations of consistency, serves to reduce moral error. Further, given this independent reason for judicial consistency, the expectations of actors (such as C) become reasonable, and a decision that fails to honor them will inflict harm.

Another reason often cited in favor of consistency with past decisions is that by deciding consistently, courts treat litigants equally.[7] If a court decides for B in B's dispute with A, and X later does to Y what A did to B, a court judging X versus Y should decide for Y to ensure that A and X (and B and Y) are treated alike under law.

Despite the superficial appeal of this argument, we believe it is misguided. One difficulty is that the circumstances of disputes are never identical. In other words, the argument is not really an argument for equal treatment but an argument for the same treatment in cases that are deemed for some substantive reasons to be relevantly similar. If those reasons warranted the decision for B, and if those reasons favor Y to an equal or greater extent, then the court should indeed decide for Y. But notice that on this account, it is the substantive reasons in Y's case, not equality, that are doing the work.

In some cases, of course, each party's case is equally meritorious, so that a court in reaching a decision for one party or the other is simply choosing an outcome in order to end the dispute. In such cases, the decision is essentially an allocative choice, and equality -- or, more accurately, comparative justice -- may have some bearing. If, however, there are relative moral merits at issue in the dispute

between X and Y, so that one party merits a decision in his favor more than the other, we fail to see how equality could justify treating a party in a way the party otherwise does not deserve. The argument for equal treatment of A and X arises only when the second court – the court judging X - believes that the first court was mistaken and that A should have won. The second court may have reason to pause and consider before reaching this conclusion. Assuming, however, that the second court is both confident and correct, the fact that the first court wrongly decided against A is not in itself - apart from considerations of reliance - a reason for the second court to commit a similar wrong against X.[8] Ironically, if equal treatment imposed a moral requirement on courts to decide present cases consistently with erroneous past decisions, morality itself would shift over time in the direction of what otherwise would be immorality.

The various considerations we have described in this section - reliance and, for those who reject our conclusions about equal treatment, equality - are reasons why courts should take past decisions into account in reasoning about present cases. They are not necessarily reasons why courts should follow precedent, in the sense of reaching a conclusion that is consistent with the precedent decisions but that differs from their own best judgment, all things considered, regarding the merits of the present case. In other words, reliance and equality are not reasons to treat prior decisions as *authoritative.* They merely represent prior decisions' moral impact on the world.

II. Approaches to Precedent

We begin by describing two models of precedent – the natural model and the rule model - and identifying the flaws inherent in each. Of these, we believe the rule model will produce better decision in the long run than the natural model. We then take up several alternative models of precedent that attempt

to provide constraint but also permit courts to modify or disregard rules when they produce infelicitous results. In our view, none of these alternatives is successful.

A. The Natural Model of Precedent

One view of precedent holds that courts should give prior decisions whatever moral weight they intrinsically have in an all-things-considered process of reasoning.[9] In other words, courts should take into account the reasonable expectations of actors, including expectations the parties before them may have formed on the basis of prior decisions, and the expectations of non-parties who have planned their activities around past decisions and reasonably expect consistency in the future. Courts should also take into account the societal interest in encouraging activities that depend on expectations of judicial consistency and the capacity of consistent decisions to reduce error by providing coordination. (As we said, we do not believe that equal treatment provides a further reason for consistency with past decisions; but for those who disagree with us on this, equal treatment also weighs in the balance.) This reasoning process, however, never results in a judgment that differs from the court's own conclusion about what decision is best all-things-considered, taking the effects of the past into account. Past court decisions are not authoritative. They have no effect on current decisions apart from their morally relevant consequences (reliance and equality) and, perhaps, their epistemic value.

If judges were perfect reasoners operating with perfect information, this particularistic, all-things-considered moral reasoning would be both ideal and morally obligatory. (We shall hereinafter refer to this form of reasoning as "ATC moral reasoning.") Vesting authority in precedents, apart from their natural moral weight, could only displace or distort correct judgment. In fact, however, judges, like any reasoners,

are certain to err. It follows that ATC moral reasoning, imperfectly executed, will produce a number of imperfect outcomes.

In addition to lack of information and ordinary lapses of judgment, courts are especially prone to err in gauging the value of protecting and encouraging reliance on past decisions. Judges reason in the context of particular disputes. In any given case, the situation of the parties before the court will be more salient than the expectations of remote actors or the general benefits of settlement.[10] As a result, judicial decisions may fail to provide an adequate basis for coordination.

B. The Rule Model of Precedent

An alternative to ATC moral reasoning in deciding cases is to treat rules announced in past opinions as "serious rules."[11] A serious rule, as we use the term, is a prescription, applicable to a range of cases, that exercises preemptive authority over decision-makers.[12] Within the domain of a precedent rule, courts are expected to refrain from ATC moral reasoning. The role of the court is to identify the rule (if any) applicable to the dispute at hand, deduce the outcome prescribed by the rule, and decide accordingly. Whether it is rational for courts to apply rules in this manner is another question; we assume that, rationally or not, courts are capable of implementing a rule model of precedent.[13]

Identification of applicable rules, of course, entails interpretation. We assume that interpretation, for this purpose, means discerning the intent of the court that announced the rule.[14] In effect, a rule-oriented understanding of precedent gives prior courts authority to settle future disputes by announcing rules. This settlement authority in turn implies that the resolution intended by the first court is the resolution to be adopted, without further input from later appliers of the rule.

The preemptive authority of serious rules also implies that if two rules conflict in a way that cannot be resolved by interpretation, one rule must be revised or overruled. Serious rules cannot be weighed against one another in context; they can only be obeyed or rejected. On the other hand, serious precedent rules do not provide a complete body of law capable of resolving every case that may arise. We shall return later to the question how a court should proceed when no prior rule governs the case at hand.

Decision-making according to rules laid down in past cases is inherently inferior to *perfect* ATC moral reasoning.[15] One difficulty is the generality of rules: a rule dictates a particular result throughout a range of cases identified by the predicate of the rule. The most that can be hoped from a general rule is that, overall, fewer (or less grave) errors will occur if the rule is universally followed than would occur if all persons subject to the rule acted on their own best judgment employing ATC moral reasoning. A rule may meet this criterion of overall improvement on unconstrained reasoning, thus qualifying as a sound and desirable rule, and nevertheless produce the wrong result in some of the cases it governs. This consequence is inevitable; it cannot be avoided by exempting those cases in which the rule yields an incorrect result, because whoever is charged with identifying exempt cases is subject to the same errors of individual judgment that the rule is designed to preempt. In other words, there will be cases in which good precedent rules produce bad results.

In addition, an approach to precedent that treats rules announced in prior cases as binding on later courts can entrench rules that are substantively undesirable, that is, undesirable apart from their necessary over- and under-inclusiveness. Rules may fail to improve on unconstrained ATC moral reasoning, either because they were wrongly conceived at the outset, or because changed circumstances have made them obsolete. Unless the authority of such a rule is qualified in some way, it will nevertheless stand as a

precedent that preempts ATC moral reasoning by the court.

Moreover, the nature of adjudication raises special risks that rules laid down in judicial opinions will not satisfy the criterion of net benefit. Courts announce rules in the course of resolving particular disputes. Evidence, arguments, and the minds of judges are attuned to the facts at hand, while other situations covered by potential rules remain comparatively obscure.[16] As a result, courts are not ideal rule-makers.

Bearing these difficulties in mind, we nevertheless believe that a system of authoritative rules will yield better results than a system of ATC moral reasoning. We have noted that individuals tend to rely on judicial decisions and, more importantly, that if courts protect reliance by reaching consistent decisions over time, all actors will obtain the benefits of coordination. Enabling courts to lay down authoritative rules contributes in two ways to protection of reliance. First, the generality of rules increases the scope of what has been dependably settled. Second, the preemptive authority of precedent rules ensures that reliance will not be undervalued in future decision-making. ATC moral reasoning, perfectly performed, takes account of the need to protect and encourage reliance; however, as we have noted, courts focused on particular disputes may lose sight of remote considerations of this kind. Preemption of natural reasoning within the scope of precedent rules eliminates that danger.

Several other practical benefits follow from the broader settlement made possible by precedent rules and from the constraints authoritative rules place on courts. Entrenched rules can reduce the cost of judicial decision-making and, at least in some circumstances, encourage private settlement.[17] By limiting discretion, precedent rules also reduce the opportunity for bias in decision-making and correspondingly increase public faith in the impartiality of courts.[18]

Overall, therefore, we believe that authoritative precedent rules are, or at least have the capacity to be, superior to case by case ATC moral reasoning. Another way to put this is that, although binding precedent rules will lead some courts to err when they otherwise would not, an authority overseeing the judicial system as a whole and observing the rate of error in case by case ATC moral reasoning would prefer that all courts obey precedent rules. Our conclusion is subject to refinements to be discussed below. First, however, we should consider whether any other approach to precedent, less strictly preemptive of judicial reasoning, can provide a useful compromise between case by case ATC moral reasoning and rules.

C. Alternatives

Courts and theorists have resisted a strict rule-based approach to precedent for several reasons.[19] As already described, serious rules limit particularized moral decisionmaking by courts, curtailing their ability to correct erroneous and unjust results. Rules also stand in the way of legal innovation.[20] Finally, a rule-based approach to precedent casts courts as rulemakers and so contradicts the traditional assumption that courts apply rather than make law.[21]

These concerns have led to a variety of alternative descriptions of the role of precedent in decision-making, in which prior decisions constrain later courts but do not preempt judicial reasoning and innovation. In differing forms, compromise positions of this kind have been widely embraced. For purposes of discussion, we divide them, roughly, into two in groups: result-based approaches to precedent and coherence-based approaches to precedent. In our view, neither group yields an effective compromise between ATC moral reasoning and precedent rules.

1. The Result Model of Precedent

In its most typical form, what we call the result model of precedent recognizes prior decisions as binding, but also permits courts to distinguish precedent cases that differ factually from the cases before them.[22] This approach to precedent is appealing because it appears to accommodate the evolution of law within a framework of constraint. Courts must treat prior decisions as correct and reach analogous results when faced with analogous problems. When precedents are distinguishable, however, later courts are free to reach contrary results, even when prior opinions state a rule that appears to govern the later dispute and demands a different result. Not surprisingly, this view of precedent was popular among American Legal Realists, who sought to free legal reasoning from what they viewed as an artificial concern with doctrinal rules.[23]

The practice of distinguishing precedents is often characterized as a qualified form of rule-following. Rules established by prior courts are authoritative, except that later courts may modify them by narrowing their scope. The later court, in other words, devises a new version of the rule that supports the result of the precedent case but excepts the later case based on some critical new fact.[24]

Suppose, for example, that the precedent case (*P*) involved facts of types *a*, *b*, *c*, *d*, & *e*. The court presiding over *P* reached result *X*, and announced a rule, "if *a*, *b*, and *c*, then *X*." Facts d and e were mentioned but not discussed. Later, a new case N arises, which involves facts of types *a*, *b*, *c*, *d*, and *f*. The later court might distinguish its case by noting that it involves the new fact of type *f*, and restate the precedent rule as "if *a*, *b*, and c, and not *f*, then *X*." Or it might distinguish its case by noting that it does not involve fact type e, and restate the rule as "if *a*, *b*, c, and e, then *X*."[25]

In fact, however, the reference to rules is misleading because, under the approach we are now

discussing, rules laid down in prior cases in reality play no part in the reasoning of later courts. No precedent rule can be at once determinate enough to dictate results and comprehensive enough to encompass all the circumstances of any given dispute. It follows that every new case will present some fact that is not specified by the predicate of the precedent rule and that, accordingly, can serve as a distinguishing fact.[26] If every later court is free to distinguish every precedent rule, then the authority of precedent decisions, if any, must lie in their facts and results, not in any rules announced by the precedent court.[27] In distinguishing a prior decision, the later court is simply comparing fact set *a*, *b*, *c*, *d*, and e, with fact set *a*, *b*, *c*, *d*, and *f*. If the two sets differ, as they inevitably will, the new case can be distinguished and the precedent rule ignored. Hence our description of this form of judicial reasoning as the "result model" of precedent.

This approach to precedent, however, raises the question whether results - outcomes in the context of particular facts - can actually provide any constraint on later decisions. The most plausible form of constraint by results is an *a fortiori* effect: if the reasons for the outcome reached by the precedent court are at least as strong in the context of the later case as they were in the context of the precedent case, then the later court must reach a parallel outcome although it believes that, in the absence of the precedent, the outcome is wrong. In other words, precedents are distinguishable only when the reasons for the precedent outcome are weaker in the later case than in the precedent case.[28] *A fortiori* reasoning, however, suffers from a number of difficulties, both in its execution and in its systemic effects.

To determine whether a new case presents weaker or stronger reasons for a particular outcome than a prior case, the court must assign weights and the outcomes towards which those weights incline to the various facts present in each case.[29] An initial difficulty is that the court's access to the facts of the

precedent case is limited to the description provided by the precedent court. Suppose, for example, that the opinion in the precedent case states only that the plaintiff was injured while driving a car manufactured by the defendant, and approves a judgment for the defendant. If, in future cases, courts feel bound to follow the precedent and deny all claims by injured drivers against car manufacturers, then a clever precedent court (or an unthinking precedent court) will have had a powerful impact on future cases simply by minimizing its description of facts.[30]

More likely, however, later courts will assume that facts not mentioned by the precedent court were not present and therefore qualify as grounds for distinguishing the new case.[31]

If so, the constraint imposed by the precedent case is minimal, if not illusory. We have noted that a later court can almost always identify some fact about its own case that does not appear in the record of the precedent case.[32] Given that, by definition, the later court believes the precedent decision was wrong, it is also very likely to conclude that these new facts tip the balance in favor of a new result. For example, a precedent opinion may reveal that the plaintiff was injured when a car marketed with defective wheels collapsed on the highway. In a later case, the plaintiff is injured when a high-priced car marketed with defective wheels collapse on the highway. If the precedent court decided for the defendant, and the later court wishes to decide for the plaintiff, the later court need only assume that the fact "high-priced" did not exist in the precedent case because the precedent opinion did not mention it.

This effect might be curbed by applying a standard of relevance: the price of the car simply does not matter to the outcome of the case. Yet, it is difficult to see how a court could make this determination of relevance without referring to an unstated rule connecting facts to outcomes: the price of cars is irrelevant according to the rule that duties of care do not vary with price. A result-based approach to precedent,

however, is supposed to operate without the aid of rules.

A second, related puzzle is what exactly it means to say that a fact points toward a particular outcome. Presumably, a fact points toward a judicial outcome when a decision in favor of one party or another, given that fact, would produce good in the world or would advance or conform to a principle deemed to be correct. Making this determination is not a simple task. The court must either engage in a complex process of reasoning (is it fair and efficient to support higher expectations of safety in consumers who pay high prices?) or refer, again, to an unstated rule (duties of care vary, or do not vary, with price). If we exclude the possibility of referring to rules, it follows that a result model of precedent will not significantly reduce the errors of natural reasoning.

Assuming the court has access to a useful array of facts and can assign tendencies to those facts, there is also the matter of weight. To compare the strength of different facts for or against an outcome, the court must employ a metric that assigns weight to the facts in a common currency. If there is no such metric – that is, if the various facts key to multiple principles and policies that are not lexically ordered or reducible to a common master principle, then comparison is not possible.[33]

If there is a common metric, such as utility or equal welfare, the determination when one case is controlled by another becomes purely quantitative. As a result, incorrect precedents have pernicious effects. Suppose, for example, that we measure the effects of judicial outcomes by the number of utiles they produce. In a precedent case, a court mistakenly decided for the defendant when a decision for the plaintiff, given the array of pertinent facts, would have produced ten more utiles. *A fortiori* analysis suggests that from this point onward, courts should decide for the defendant in *all* cases in which the balance of utility favors the plaintiff by ten or fewer utiles, not matter how unrelated the cases may seem.

In this way, a tort case can be a precedent for a contract case that bears no resemblance to it at all.

Under a under a result model that applies a common metric for comparison of cases, the consequences of incorrect decisions are systemic. Suppose a precedent court incorrectly decided that set of facts *a*, which favored the plaintiff, outweighed set of facts *b*, which favored the defendant. A new case arises involving set of facts *x* for the plaintiff and set of facts *y* for the defendant, and the court decides that *y* outweighs *x*. The court may nevertheless be constrained to hold for the plaintiff if *x* outweighs *a* and *b* outweighs *y*. In other words, if there is in fact a common metric by which facts can be weighed and cases compared across all of law, then even a few erroneous decisions will render the whole of legal doctrine incoherent.

Moreover, the body of precedents is sure to include cases that were correctly decided as well as cases that were incorrectly decided. If this is so, then every later case will be constrained in opposite and irreconcilable directions. Suppose that in a precedent case in which the balance of utility favored the plaintiff by one utile, the plaintiff won. In another precedent case, the balance of utility favored the plaintiff by ten utiles, but the defendant won. Now all later cases in which the balance of utilities favors the plaintiff by between one and ten utiles are *a fortiori* cases for both plaintiff and defendant.

The result model of precedent has the virtue of conforming to courts' own descriptions of their treatment of prior decisions. Courts purport to study and follow precedents, and they are at pains to distinguish precedents they wish to avoid. Yet whatever courts may say, they cannot be applying the result model of precedent in the way its logic dictates. Most likely, the process of distinguishing cases is a form of ATC moral reasoning, or rule-sensitive particularism,[34] coupled with a conservative tendency that results from the courts' *belief* that they are constrained by the results of prior cases.

2. The Model of Principles

Another approach that has won support among theorists holds that courts should resolve disputes on the basis of legal "principles" derived from past decisions.[35] A court faced with a particular dispute surveys prior decisions and either discerns or constructs a principle or underlying reason that explains those decisions. The resulting principle provides an authoritative source of law in the case now before the court. If the present case appears to fall within the terms of a previously announced judicial rule, the principle can also serve as a ground for distinguishing and limiting the rule.[36] At the same time, legal principles do not govern outcomes in the all-or-nothing manner of rules. The body of legal material may suggest several valid but conflicting principles relevant to a given dispute, in which case the court must determine the principles' relative weights as applied to the dispute.[37]

This account of judicial decision-making implies the existence of a body of law shaped and defined by internal coherence.[38] By identifying principles that connect and explain prior decisions and extending those principles to new disputes, courts form past and present cases into a consistent whole. Moreover, once a foundational mass of decisions is in place, the obligation to seek coherence provides a solution (although not, perhaps, a unique solution) to every case that may arise. Courts can determine answers to every new dispute by reference to the principles immanent in prior decisions.[39]

Like the result model of precedent, the model of principles is designed to strike a compromise between ATC moral reasoning and serious precedent rules. Yet result-based and principle-based approaches differ in several ways. First, the model of principles takes account of a broader array of legal material than the result model. The result model limits the precedential authority of prior cases to the combination of revealed facts and outcomes; rules announced by prior courts are irrelevant.[40] Under the

model of principles, announced rules, as well as justifying reasons, count as evidence of legal principles although they are not authoritative as rules.[41] Second, as noted, the authority of legal principles under a principle-based model of precedent is not absolute within any range of cases. Under the result model, the conclusion that a later case follows *a fortiori* from the facts and outcome of a prior case puts an end to deliberation. A legal principle, however, may apply to a given case and yet fail to dictate an outcome if other competing principles are also in play.[42] Finally, the model of principles gives wider-reaching effect to precedent decisions than does the result model. The force of precedent under a result model is limited to the implications, if any, of overlapping facts. In contrast, the set of principles derivable from legal data provides a comprehensive, although changeable, body of authority for future decisions.[43]

A number of prestigious legal scholars have endorsed and developed the idea of decision-making according to legal principles. Roscoe Pound incorporated legal principles into his functionalist philosophy of law, arguing that law was composed not only of rules but of higher order principles that served as "authoritative starting point[s] for legal reasoning in all analogous cases."[44] Henry Hart and Albert Sacks made "reasoned elaboration" of principles found in the body of law a tenet of their process-based approach to law.[45]

The idea of legal principles was later reviewed by Ronald Dworkin, who made it a cornerstone of his conception of "integrity" in law. According to Dworkin, an ideal judge employs reason and moral judgment to develop the best decisional principles that can satisfy a requirement of "fit" with prior decisions and then decides the case before him accordingly.[46] In other words, Dworkin's judge seeks coherence with existing precedents but also engages in moral reasoning to reach the best result possible within the constraint that coherence provides.[47]

Legal principles have several seeming advantages over binding rules. Courts are constrained by law, but are not required to suppress their best moral judgment in resolving disputes; instead, they participate in the formulation of governing principles and weigh principles that conflict.[48] The problem of erroneous or obsolete precedent rules is solved by locating the authority of prior decisions in more malleable precepts of a higher order. Thus, law can evolve with society, but the pace of change is controlled because past and present are linked by common principles. Finally, legal principles provide guidance for courts, and continuity in law, in cases that are not governed by any preexisting rule.

In our view, this appealing picture is misleading. Rather than providing a happy compromise, legal principles combine the worst features of ATC moral reasoning and of binding precedent rules, while at the same time eliminating the advantages of both.

Legal principles immanent in the body of law are less determinate than precedent rules posited by prior courts in several ways. Most obviously, principles tend to be vaguer and more dependent on value-laden terms than posited rules that prescribe results for future cases. For example, the principle that no one should profit from a wrong does not provide determinate guidance because it leaves undefined the notions of a wrong and of profit. In comparison, a rule stating that an heir convicted of murdering the ancestor from whom he hopes to inherit may not claim a share of the ancestor's estate is considerably easier to apply. The rule may be inconveniently under-inclusive, as when the murderer kills himself before trial, but it avoids an excursion into the open-ended concept of wrongdoing.

Beyond the problem of form, judgments about coherence within the body of law are likely to be both inaccessible and unstable. Multiple principles may qualify as plausible explanations for existing legal material, leaving room for disagreement about which best fits the material as well as which is most desirable

overall.[49] Moreover, even when the set of eligible principles is uncontroversial, competing principles within that set must be weighed. We have noted that legal principles are not definitive of outcomes: they are "starting points" for reasoning, or considerations to be given "weight," which may conflict with one another in a particular case.[50] The logical process by which judges should weigh two or more conflicting principles in context is elusive, and in any event seems no less prone to controversy and error than ATC moral reasoning about the best result.[51]

A further source of indeterminacy is that the data from which principles are drawn (decisions and opinions) change with each new decision. Not only is the new decision added to the body of law,[52] but some number of existing decisions may need to be dropped or discounted due to inconsistency. The requirement of coherence or "fit" with existing legal data cannot be a requirement of perfect harmony with all prior decisions: to be workable, it must be limited to some threshold proportion of decisions, beyond which judges are free to disregard recalcitrant cases.[53] In fact, a judge seeking the best qualifying principle can be expected to discard as many of the cases she cases she disapproves of as the threshold of fit will allow.[54] And that in turn means that each new decision will open the way for a new principle by rendering another past case eligible for discard.

For these reasons, legal principles lack the capacity of rules to curb error, provide settlement and coordination, and protect and encourage reliance. Moreover, legal principles are generally understood to override precedent rules. Therefore, a coherence model of precedent that relies on legal principles eliminates the settlement and coordination benefits of rules.

At the same time, legal principles, like rules, are inherently inferior to ideal ATC moral reasoning. The requirement of coherence or fit limits the ability of courts to follow their own best judgment in resolving

disputes. The court cannot disregard all past decisions it deems to be wrong – if it could, the body of decisions would exert no precedential force and the court would simply be engaged in pure ATC moral reasoning. Accordingly, the court must build or adduce its principle from data that include at least some errors by past courts.

In other words, legal principles are not moral principles, arrived at through a process of reflective equilibrium that starts from intuition about correct results. They are precepts that incorporate at least some results that the current court believes to be wrong. The odd task assigned to the court is to determine what principles would be correct moral principles in a world in which certain erroneous decisions were correct.[55] Thus, if we assume that legal principles in fact exist – that is, that decision-making according to legal principles is constrained to some extent by the body of prior decisions – then, like rules, legal principles entrench error. Courts may have more room to correct errors and bring about changes in law than they have in a system of binding precedent rules, but their reasoning is distorted without the compensating settlement value of decision-making according to rules.

III. Precedent Rules Revisited

Assume that we are correct in our conclusion that a system of binding precedent rules is superior to a system of precedents that bind only through their results and that leave courts with the power to distinguish precedents. And assume likewise that we are correct that a system of binding precedent rules is superior to a system of precedents based on legal principles. Still, a number of questions remain to be answered. We do not undertake to answer them in full: our objectives are to identify problems that need to be solved in order to make a system of binding precedent rules attractive and to show that these problems

are not so intractable as to disqualify precedent rules as a plausible feature of law.

1. Identification of Precedent Rules

The object of a rule is to settle controversy and provide coordination in cases of uncertainty and disagreement. For that purpose, a rule must be general, covering a range of future cases.[56] It must also be determinate enough to be applied without direct consideration of the questions it was designed to settle.[57]

Ideally, a precedent rule will appear in this form in the opinion accompanying a previous decision. When this occurs, not only is the rule capable of guiding future decisions, but the court that authored the opinion is likely to have crafted the rule with future cases in mind. Yet, because courts are reluctant to legislate overtly, explicit precedent rules may be difficult to find. A typical judicial opinion contains a narrative description of facts, a summary of arguments by the parties, and an explanation of the court's decision; but it rarely sets forth canonically an explicit rule for the future.

The rule model of precedent, however, does not necessarily depend on deliberate judicial promulgation of rules in canonical form. A more expansive version of the model would also recognize as authoritative implicit rules derived from judicial opinions. A court's explanation of its reasoning, the facts it particularly emphasizes, and its references to prior cases may reveal that the court endorsed, without explicitly stating, an identifiable rule of decision. If this rule can be discerned with reasonable confidence and restated in canonical form, then it may serve as a serious precedent rule.

The notion of implicit precedent rules is limited in several ways. First, the authority of any rule, including a precedent rule, comes from general agreement among members of society to vest its author with power to settle future controversies; therefore, the force and meaning of the rule are functions of the author's

intent.[58] It follows that an implicit precedent rule must have been understood by the precedent court to occupy a place within the body of law and to govern future cases in the manner of a rule. A precept found by a later court to be immanent in the pattern of past decisions, but not so understood by prior courts, is not a precedent rule. Second, rules must prescribe results. Therefore, for an implicit rule to qualify as a precedent rule, it must have been understood by the precedent court as providing an answer to all disputes that fall within its terms and not simply as a principle to be weighed against other reasons for decision.

Expansion of the rule model to include implicit rules carries some risks. A rule that is not obvious loses much of its capacity to coordinate private conduct. There is also a danger that the precedent court, although it had the rule in mind, did not consider its consequences as carefully as it might have done if engaged in deliberate legislation. As a result, the rule may be poorly designed. Nevertheless, recognition of implicit rules probably is necessary to secure the benefits of a rule model of precedent, given the dominant practices of courts at present. On the other hand, were the desirability of the rule model of precedent to be fully internalized by courts, courts might begin making their rules explicit and crafting them with greater care.

2. Preconditions for Precedential Authority

The benefits of a rule depend on its capacity to curtail error in the range of cases to which it applies. A precedent court may sometimes announce a rule in general and determinate form, but do so very casually. When this occurs the rule is particularly likely to fail in its task of reducing error. If the precedent court did not in fact intend its statement to operate as a rule, no rule exists. If it did intend a rule, but acted without reflection, then without some refinement of the model, the rule is binding on future courts.

One possible strategy to prevent entrenchment of undesirable rules is to screen precedent rules for adequacy of deliberation by studying the process that surrounded their adoption. Briefs and arguments submitted to the precedent court, for example, may reveal that there was no significant adversarial debate on the subject of the rule.[59] If so, a later court could disregard the rule on the ground that it was not formulated with sufficient care.

A condition that focuses on the quality of deliberation by precedent courts, however, may pose dangers to the system of precedent. An investigation of the gravity with which the precedent court approached its rule, particularly when conducted by a later court that believes the rule is about produce an erroneous result, could undermine the habit of compliance on which any system of rule-based decision-making depends. In any event, perhaps because evidence of judicial reflection is not readily available, inquiry into the deliberative background of precedent rules is not a common feature of legal practice.

Another possibility, which relies on more objective criteria and therefore poses fewer dangers to the habit of following rules, is to screen precedent rules for acceptance over time. A precedent rule, according to this condition, is not binding on reluctant courts until it has met the approval of many courts over time. Only then, through repeated scrutiny and trial, has the rule earned the assumption that it will prevent more error than it will cause if consistently applied.[60] Indeed, there is evidence that courts often apply a test of this kind.[61]

Interestingly, a condition of judicial acceptance and use over time alters the provenance of the precedent rule. The author is no longer the court that first announced the rule, but the series of courts that later adopted it. This should not, however, present a serious problem for the rule model. As long as the rule issues from an authoritative source, and its meaning is uniformly understood, it can function as a serious

precedent rule.

More problemmatic for any "judicial acceptance" test for precedent rules is its inherent and inexorable indeterminacy. How many and which courts must accept the rule? Must they accept it in identical canonical form? What should primary actors do during the period after the rule is first announced but before it is "accepted"? These and other questions might be answered by "rulifying" this rule-plus-acceptance model. ("The rule must be accepted by three courts of parallel rank within the jurisdiction within ten years, etc., etc.") In the end, however, the added complexity of a rule for acceptance might undermine the advantages a rule model of precedent aims to secure. But the model will then become much more elaborate than the simple rule model .

3. Decisionmaking in the Absence of a Precedent Rule

The rule model of precedent requires courts to follow precedent rules but says nothing about how courts should proceed in cases that are not covered by the terms of any rule. The simplest default position is that courts should return to ATC moral reasoning in the absence of precedent rules. A possible alternative, consistent with common judicial practice, is for courts to reason by analogy, seeking out prior cases that appear similar and reaching parallel results.[62]

As a matter of logic, we question whether this option exists.[63] Similarities between cases are meaningless in themselves: the fact that two plaintiffs have red hair, for example, does not mean that both should win if one does. There must be a principle, or **?**analogy-warranting rule," that picks out similarities that are relevant to outcome.[64] If the analogy is supported by a rule implicit in the prior opinion, then what appears to be analogical reasoning is really an application of the rule model of precedent, broadly

understood to recognize implicit rules. If no such implicit rule is available, the best explanation of analogical reasoning is that the later court has ?abduced" a principle from an array of prior cases, which identifies similarities between those cases and the case before the court.[65] This process of abduction may or may not be a plausible form of reasoning, but assuming it is, reasoning by analogy is now an instance of the coherence model of precedent and suffers from the defects of that model. Specifically, a retrospective principle drawn from an imperfect set of decisional data incorporates the errors of past decisions but lacks the settlement value of a rule. As we have argued, a principle of this kind should not be treated as authoritative.

Thus, in so far as analogical reasoning differs from identification of implicit precedent rules intended by precedent courts to operate as rules, we reject it as a source of precedential constraint. Nevertheless, there may be potential benefits to analogical reasoning as a professional custom among lawyers and judges. Ideally, a court engaged in ATC moral reasoning will test potential decisional principles against real and imagined examples of their application.[66] Courts, however, have limited time for reflection. The practice of studying past cases in search of relevant similarities at least ensures that they are exposed to a variety of fact patterns to which their own hypotheses might apply, as well as to various lines of reasoning pursued by prior courts. For this reason, courts may make fewer errors in the absence of rules if they believe they are able to, and even obliged to, reason by analogy from past cases.[67]

4. Overruling Precedent Rules

The rule model of precedent requires courts to follow qualified precedent rules without deliberating about whether the results they prescribe are correct, all-things-considered. Courts may not second-guess the outcomes of rules, nor may they "distinguish" rules that appear to produce the wrong result in a particular

case. When precedent rules are justified *as rules* – that is, when following the rules in all cases will produce a fewer total errors than unconstrained deliberation – then erroneous results in particular cases are simply a byproduct of the rules' generality, which cannot be avoided without losing the benefits of rules.

However, some rules are not justified as rules: following them in all cases will not yield a net benefit over ATC moral reasoning, either because the rules were wrongly conceived, or because changed circumstances have made them obsolete. The most persuasive objections to the rule model of precedent are based on its failure to offer an escape from rules of this kind: an accumulation of unjustified rules undermines the claim that serious precedent rules will minimize the overall level of error. Therefore, the rule model must be qualified by a power to overrule.

The most direct approach to overruling would entail judicial assessment of the justification of each rule: before applying the rule to a particular case, the court would ask whether it prevents more error overall than it causes by prescribing erroneous outcomes. This type of assessment, however, presents the court with a difficult, if not impossible, task. It must evaluate the overall justifiability of the rule, but it must also refrain from evaluating the outcome the rule prescribes for the case now before it. Although the court's two functions – overall assessment of rules and application of rules - are logically distinct, a court engaged with the facts of a particular case may find them practically inseparable.

Alternatively, courts might adopt, or a legislature might prescribe, a rule for overruling. This strategy, however, is doomed to fail. A rule settles moral controversy by substituting a simple prescription for moral deliberation. The question when to follow rules cannot be simplified in this way. A determinate rule for overruling ("overrule all precedents more than ten years old") is capable of guiding courts, but its own justification may come into question, requiring an appeal to a higher level rule. At some point in the regress,

moral judgment is unavoidable if the problem is to be solved. In contrast, an indeterminate standard ("overrule precedent rules when the reasons for overruling them reach a strength of *X*") cannot function as a rule. Moral judgment is once again required.

The best solution, in our view, is to adopt a presumption in favor of precedent rules: courts may overrule, but only when the rule is obviously and seriously unjustified.[68] The standard of obvious and serious lack of justification, for this purpose, is a standard of overall rule assessment, not a standard of rule application. Courts must apply rules to the cases before them, even if they are convinced that the result is an error. Only if a court is almost certain that the rule, if consistently followed, will produce far more error than it prevents, may the court refuse to follow the rule.

This standard is not ideal. The presumption in favor of rules prevents courts from overruling some rules that should be overruled. Meanwhile, the unavoidable vagueness of the presumption means that courts will differ in their assessment of when rules are obviously unjustified, and the potential for variable judicial behavior undermines to some extent the settlement value of the rules themselves. Finally, even when limited by a presumption in favor of rules, an overruling power that asks courts to assess the justifiability of rules but not to evaluate the results they prescribe for the case at hand requires mental gymnastics from judges. Nevertheless, this rough solution seems preferable to any other: some power to overrule is necessary to escape rigidity and unnecessary error. Meanwhile, rules for overruling are unworkable, and unconstrained rule assessment is inconsistent with the habit of obedience to rules on which the rule model of precedent depends.

1. In this essay, we address the problem of "horizontal" precedent, in which the precedent court and the later court are either the same court or courts of equal rank. When a hierarchy of courts is in place within a legal system, there are additional reasons for precedential constraint. See Larry Alexander, Precedent, in A Companion to Philosophy of Law and Legal Theory 503, 512 (Dennis Patterson, ed.)(Blackwell Publishers 1996).

2. We have described and defended this approach to precedent in earlier writings. See Larry Alexander & Emily Sherwin, The Rule of Rules: Morality, Rules, and the Dilemmas of Law 137-56 (Durham and London: Duke University Press 2001); Alexander, supra note 1; Larry Alexander, Constrained by Precedent, 63 Southern California Law Review 1 (1989).

3. On the gap in perspective between a governing authority issuing rules and individuals who are subject to the rules, see Alexander & Sherwin, supra note 2, at 53-95; Frederick Schauer, Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life 128-34 (Oxford: Clarendon Press 1991). We define coordination errors broadly to mean any misallocation of resources or other miscalculation of reasons for action that results from uncertainty about what others will do.

4.See Alexander & Sherwin, supra note 2, at 11-25. Our imagined society is stylized and idealized in order to make the case for rules maximally difficult.

5.See Stephen R. Perry, Judicial Obligations, Precedent and the Common Law, 7 Oxford Journal of Legal Studies 215, 248-50 (1987) (discussing expectations generated by judicial decisions).

6.On the value of coordination, see, e.g., Alexander & Sherwin, supra note 2, at 56-59; Joseph Raz, The Morality of Freedom 49-50 (Oxford: Clarendon Press 1986); Schauer, supra note 3, at 163-66; Gerald J. Postema, Coordination and Convention at the Foundation of Law, 11 Journal of Legal Studies 165, 172-86 (1982); Donald H. Regan, Authority and Value: Reflections on Raz's *Morality of Freedom*, 62 Southern California Law Review 995, 1006-10 (1989).

7.See, e.g., Kent Greenawalt, How Empty is the Idea of Equality?, 83 Columbia Law Review 1167, 1170-71 (1983); Michael S. Moore, Precedent, Induction, and Ethical Generalization, in Precedent in Law 183 (Laurence Goldstein, ed.)(Oxford: Clarendon Press 1987).

8.See John E. Coons, Consistency, 75 California Law Review 59, 102-07 (1987). For more general critiques of equality as a moral ideal, see Peter Westen, Speaking of Equality: An Analysis of the Rhetorical Force of "Equality" in Moral and Legal Discourse 119-23 (Princeton: Princeton University Press 1990); Christopher J. Peters, Equality Revisited, 110 Harvard Law Review 1210 (1997).

9. Michael Moore can be read as adopting this stance. See Moore, supra note 7, at 210 ("one sees the common law as being nothing else but what is morally correct, all things considered – with the hooker that among those things considered are some very important bits of institutional history which may divert the common law considerably from what would be morally ideal"). However, Moore also expresses sympathy, at least procedurally, with the model of principles described below. See id. At 201.

10. See Amos Tversky & Daniel Kahneman, Availability: A Heuristic for Judging Frequence and Probability, in Judgment under Uncertainty: Heuristics and Biases 163, 163-65, 174-78 (Daniel Kahneman, Paul Slovic, & Amos Tversky, eds.)(Cambridge and New York: Cambridge University Press 1982) (demonstrating that human reasoning is affected by a bias in favor of particularly salient facts).

11. See Alexander & Sherwin, supra note 2, at 145-48 (endorsing a rule model); Schauer, supra note 3, at 185-87 (endorsing a rule model); Alexander, supra note 2 (find a rule model superior to alternatives); see also Melvin A Eisenberg, The Nature of the Common Law 52-55, 62-76 (Cambridge, Massachusetts: Harvard University Press 1988) (suggesting that courts generally accept a rule model of precedent, but coupling the rule model with a generous view of overruling powers).

12.On the essential nature of rules, see Alexander & Sherwin, supra note 2, at 26-35, Joseph Raz, The Authority of Law 21-22, 30-33 (Oxford: Clarendon Press 1979); Schauer, supra note 3, at 4-6, 38-50, 121-22. Whether it is rational, or even psychologically possible, to follow rules in this way is another question.

13. See Heidi M. Hurd, Challenging Authority, 100 Yale Law Journal 1011 (1991) (rejecting the possibility that rules can preempt reasoning); Jason Scott Johnston, Rules and the Possibility or Social Coordination, in Rules and Reasoning: Essays in Honour of Fred Schauer 109 (Linda Meyer, ed.)(Oxford and Portland Oregon: Hart Publishing)(presenting an economic analysis of rule following); Michael S. Moore, Authority, Law, and Razian Reasons, 62 Southern California Law Review 827, 873-83 (1989) (rejecting the capacity of rules to exclude reasons for action but suggesting that actors can limit their deliberation); Scott J Shapiro, Rules and Practical Reasoning 138-206 (1996) (unpublished Ph.D. dissertation, Columbia University) (suggesting that individual reasoners can commit themselves to comply with rules);.

14.We have defended this assumption at length elsewhere. See Alexander & Sherwin, supra note 2, at 96-122 (relying on a conception of intent that includes inchoate, but not hypothetical, intentions).

15. See Schauer, supra note 3, at 49-50 (discussing entrenchment and the overinclusive and underinclusive nature of rules).

16.See Tversky & Kahnman, supra note 10.

17.But cf. Jason Scott Johnston, Bargaining Under Rules Versus Standards, 11 Journal of Law, Economics, and Organization 256 (1995) (suggesting that under certain conditions a "contingent, ex post entitlement" will result in more efficient bargains than a "definite, ex ante entitlement").

18.See Henry M Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 568 (prepared for publication from the 1958 Tentative Edition by William N.. Eskridge, Jr. & Philip P. Frickey)(Westbury, New York: The Foundation Press 1994).

19.See Robert S. Summers, Precedent in the United States (New York), in Interpreting Precedent 355, 378-94, 401-04 (D Neil MacCormick & Robert S. Summers, eds.)(Dartmouth: Ashgate 1997) (reviewing the variable practices and attitudes of American judges in the U.S., with illustrations from the New York Court of Appeals). Characteristic twentieth century American views of precedent can be found in Benjamin N. Cardozo, The Nature of the Judicial Process (New Haven and London: Yale University Press 1949); Hart & Sacks, supra note 17 at 545-96; Edward Levi, An Introduction to Legal Reasoning 1-6 (Chicago: Chicago University Press 1949); Karl N. Llewellyn, The Bramble Bush: On Our Law and Its Study 66-69, 186-89 (New York, London, Rome: Oceana Publishing 1960); Conference: The Status of the Rule of Judicial Precedent, 14 University of Cincinnati Law Review 203 (1940) (in which most participants agreed that the doctrine of precedent does not require strict adherence to precedent rules).

In the nineteenth century, the House of Lords endorsed what appeared to be a rule model of precedent. Beamish v. Beamish, 9 HL.C. 274 (1861); London Street Tramways, Ltd. v. London County Council, [1898] A.C. 375 (1898). However, the court frequently distinguished cases (a practice we discuss below), and the court ultimately abandoned its position. See Zenon Bankowski, D. Neil MacCormick, & Geoffrey Marshall, Precedent in the United Kingdom, in Interpreting Precedent, supra, at 315, 326. The English approach has been much criticized as a source of rigidity, injustice, inconsistency, and disingenuous interpretation.. See, e.g., Hart & Sacks, supra, at 575 (asking, of the House of Lords: “Has it fulfilled its historic mission as the voice of legal reason in the Anglo-American world? Or become the degraded prisoner and pettifogging distinguisher of its own precedents?”).

20.See Levi, supra note 19, at 2 (change in rules from case to case is “the indispensible dynamic quality of law).

21.See W.A.B. Simpson, The Ratio Decidendi of a Case and the Doctrine of Binding Precedent, in Oxford Essays in Jurisprudence 148, 160-63, 167 (A.G. Guest, ed.)(Oxford: Oxford University Press 1961); W.A.B. Simpson, The Common Law and Legal Theory, in Oxford Essays in Jurisprudence (Second Series) 77, 84-86 (W.A.B. Simpson, ed.)(Oxford: Oxford University Press 1973).

22.This approach to precedent is defended analytically in Joseph Raz, The Authority of Law 183-89 (Oxford: Clarendon Press (1979); John F. Horty, The Result Model of Precedent, 10 Legal Theory 19 (2004); Grant Lamond, Precedent as Decision (unpublished manuscript on file with the authors). See also Steven Burton, An Introduction to Law and Legal Reasoning 27-41 (Boston, New York, Toronto,

London: Little, Brown & Co., 2d ed., 1995) (defending analogical reasoning from results); Levi, supra note 19, at 1-19 (same).

23. See, e.g., Levi, supra note 19, at 1-19; Llewellyn, supra note 19, at 72-75 (arguing that courts are free either to maximize the effect of a precedent decision by applying a stated rule or to minimize its effect by distinguishing cases with dissimilar facts, as they wish). See genrally, Brian Leiter, American Legal Realism, forthcoming in The Blackwell Guide to Philosophy of Law and Legal Theory (W. Edmundson & M. Golding, eds.) (Oxford: Blackwell 2004). Leiter makes the point that Legal Realists were not uniformly hostile to rules. Yet, they did have in common the belief that existing legal rules failed to constrain judicial decisions and masked the considerations that actually influenced judges.

24. For example, Raz, treats the practice of distinguishing precedents as a practice of modifying precedent rules. Accordingly, he imposes two conditions:

> "(1) The modified rule must be the rule laid down in the precedent restricted by the addition of a further condition for its application.
>
> (2) The modified rule must be such as to justify the order made in the precedent."

Raz, supra note 22, at 186.

25. This format is taken roughly from Raz. See id. at 183-89. Raz is careful to distinguish between the *facts* of cases, e.g., a, b, and c, and the *fact types* identified in rules, e.g., A, B, and C.

26.See, e.g., Llewellyn, supra note 19, at 72-23 ("This rules holds only of redheaded Walpoles in pale magenta Buick cars.").

Raz attempts to avoid this conclusion by maintaining that the new rule must be a restricted version of the precedent rule, and must *justify* the outcome of the precedent case; it is not enough that the new rule simply be *compatible* with the outcome of the precedent case. The example Raz gives is that if the precedent case announced a rule "if A, B, and *C*, then *X*" on facts of types *a*, b, c, *d*, and *e*, a later court adjudicating facts of types *a*, *b*, *c*, *d*, *f*, and not *e* could could adopt a distinguishing rule "if *A*, *B*, *C*, and E" then *X*," but could not adopt a rule "if *A*, *B*, *C* and not *D*, then *X*" Raz, supra note 17, at 186-87. Raz adds, however, that the later court could legitimately adopt a distinguishing rule if *A*, *B*, *C*, and not *F*, then *X*. Id at 187. Our point is that there will always be an *F*. Raz also states that the court should "adopt only that modification which will best improve the rule," but this admonition is too vague to constrain. Id. He adds further that "[a] modified rule can usually be justified only by reasoning very similar to that justifying the original rule"; however, he does not make clear why this is so. Id.

27. See Horty, supra note 17, at 21..

28. For a defense of validity of *a fortiori* reasoning, within limits, see Horty, supra note 17. For criticism, see Alexander, supra note 2, at 29-30.

29. See Horty, supra note 17, at 23-27 (modeling *a fortiori* reasoning with a set of equations based on the "polarities" of facts).

The analysis in the following paragraphs tracks arguments presented in Alexander, supra note 2, at 34-37, 42-44.

30. Horty points out that the effect of a spare description differs from the effect of a rule. For example, a precedent court mentions facts a (tending in favor of the plaintiff), b (tending in favor of the defendant, and c (tending in favor of the defendant), and holds for the plaintiff. It also announces a rule, "if a, b, and c, hold for the plaintiff." A case then arises involving facts a, b, c, and d (tending in favor of the defendant). This new case is covered by the precedent rule, but is not an *a fortiori* case based on the precedent result. Id. at 28-29. Thus, on this understanding of the effect of the precedent decision, the result model does not collapse into the rule model but it does permit the precedent court to control a wide range of future cases by limiting its statement of facts.

31. Raz proposes that later courts may assume that facts not mentioned were not present. Raz, supra note 17, at 189.

32. See note 25 and accompanying text, supra.

33. Horty argues that precedents can have *a fortiori* effect in the absence of a metric for comparing the weight of different facts. Specifically, if a precedent case is decided for the plaintiff, and if all the facts that supported the plaintiff in the precedent case are present in a later case, *and* all the facts that support the defendant in the later case were present in the precedent case; then the later case follows a fortiori from the precedent case. Horty, supra note 17, at 23-24. This seems correct, but the constraint provided by the precedent is minimal. All that is needed to free the later court to decide as it believes best is a single new fact in support of the defendant. Moreover, Horty concedes that within the narrow range of precedential constraint, inconsistent precedents might lead to cases that are a fortiori for both plaintiff and defendant. Id. at 26. [Larry, did I miss something here?]

34.This term is Frederick Schauer's. See Schauer, supra note 3, at 94-100. For skepticism about the ability of rule-sensitive particularism secure the benefits of rules, see Alexander & Sherwin, supra note 2, at 61-68.

35. See Ronald Dworkin, Law's Empire 240-50, 254-58 (Cambridge, Massachusetts: The Belknap Press of Harvard University Press 1986) [hereinafter Dworkin, Law's Empire]; Ronald Dworkin, Taking Rights Seriously 22-31 (Harvard University Press 1978) [hereinafter Dworkin, Rights]; Hart & Sacks, supra note 18, at lxxix-lxxx, 545-96; Llewellyn, supra note 19, at 189, Roscoe Pound, Survey of the Conference Problems, in Conference: The Status of the Rule of Judicial Precedent, supra note 19, at 324, 328-31.

36.See Llewellyn, supra note 19 at 189 ("*the rule follows where its reason leads; where the reason stops, there stops the rule*")(emphasis in original); see also Dworkin, Law's Empire, supra note 34, at

257-58 (suggesting that judges should treat both rules and principles articulated in the past as "provisional," to be reconsidered in light of further insight into principle); Dworkin, Rights, supra note 34, at 37 (suggesting that principles can justify a change in rules).

37. See Dworkin, Rights, supra note 34, at 25-27 (a principle "states a reason that argues in one direction, but does not necessitate a particular decision"); Pound, supra note 34, at 329 ("a principle doesn't lay down any definite detailed state of facts and doesn't attach any definite legal consequence").

38.See Dworkin, Law's Empire, supra note 34, at 225, 228-32 ("The adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author – the community personified – expressing a coherent conception of justice and fairness."); Kenneth J. Kress, 72 California Law Review 369, 370 (1984) (associating Dworkin with coherence theory); Barbara Baum Levenbook, The Meaning of a Precedent, 6 Legal Theory 185, 233-34 (2000) (interpreting Dworkin's theory of precedent as a coherence theory). Cf. Joseph Raz, The Relevance of Coherence, 72 Boston University Law Review 273 (1992) (discussing and criticizing coherence theories in law). Raz alternately treats Dworkin's work as an example of coherence theory and suggests that Dworkin may not be committed to a coherence-based theory of adjudication. Id. at 315-21.

39. See Dworkin, Rights, supra note 34, at 82-84 (elaborating the "rights thesis"); Hart & Sacks, supra note 18, at 369 (referring to the common law as "a process of settlement which tries to relate the grounds of present determination in some reasoned fashion to previously established principles and policies and rules and standards).`

40. See text accompanying note 26, supra.

41. See Hart and Sacks, supra note 18, at 369; Llewellyn, supra note 19, at 191 (commending the "Grand Tradition" of appellate decision-making in which opinions "make sense and give guidance for tomorrow for the *type of situation* at hand") (emphasis in original); Pound, supra note 34, at 330-31 (indicating that principles are gradually formulated by series of courts, through expressions of reasoning in opinions). Dworkin is ambiguous on this question. For example, he states that "Fitting what judges did is more important than fitting what they said," and that "an interpretation [of precedent] need not be consistent with past judicial attitudes or opinions, with how past judges saw what they were doing, in order to count as an eligible interpretation of what they in fact did." Dworkin, Law's Empire, supra note 34, at 284. He adds, however, that fit with judicial opinions is "one desideratum that might be outweighed by others." Id. at 285. Cf. Dworkin, Rights, supra note 34, at 110-115 (referring to the "enactment force" and gravitational force" of precedents).

42. See note 36, supra.

43. See note 38, supra.

44. Pound, supra note 34, at 331.

45.Henry M Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law lxxix, 568-70 (prepared for publication from the 1958 Tentative Edition by William N.. Eskridge, Jr. & Philip P. Frickey 1994).

See also Gerald J. Postema, Classical Common Law Jurisprudence (Part 2), 3 Oxford University Commonwealth Law Journal 1, 11-17 (2003) (suggesting that the common law conception of precedent, as it stood in the seventeenth century, was based in part on a perceived obligation to maintain coherence among decisions). Postema notes a difference of opinion as to whether legal reason relied on principles or simply on the pattern of past decisions. His own interpretation is that precedents were authoritative in the sense that they provided illustrations of sound legal reason and guides for decision. See id. at 14-17.

46. See Dworkin, Law's Empire, supra note 23, at 230-32, 254-58; Dworkin, Rights, supra note 34, at 115-18.

Dworkin's system may be best categorized as a hybrid that combines elements of the result model and the model of principles. Legal principles play a central role, and judges do not mechanically calculate the implications of prior outcomes. At the same time, Dworkin suggests at times that the outcomes of cases, rather than rules or explanations set forth in prior opinions, are the primary data which legal principles are drawn. See, e.g., Dworkin, Law's Empire, supra, at 284-85. A related feature of his approach is that each judge constructs a principle for the purpose of decision, rather than applying principles identified by prior courts. See, e.g, id. at 255-56. If principles are the work of current judges without input from the explanations prior judges provided for their decisions, the only authoritative component of a prior decision is its outcome, given its array of facts.

47.Zenon Bankowski, Neil MacCormick, and Geoffrey Marshall aptly refer to this as a "determinative" theory of precedent: courts neither deduce results from prior opinions nor decide independently what is best; instead they determine the best result consistent with prior cases. Bankowski, MacCormick, & Marshall, supra note 19, at 332.

48.See Dworkin, Law's Empire, supra note 34, at 255.

49. See Levenbook, supra note 37, at 236-38 (tracing consequences of "the subsumed view that the significance of anything in law depends on relationships to a lot of other things"). Dworkin admits that interpretations of law, on his account, may differ substantially. See Dworkin, supra note 34, at 256-57.

50. See note 36, supra.

51.For an effort to systematize this process, see S.L. Hurley, Coherence, Hypothetical Cases, and Precedent, 10 Oxford Journal of Legal Studies 221 (1990) (suggesting that settled cases, actual and hypothetical, provide guidance about the relative weight of principles in particular factual settings).

52. See Kress, supra note 37, at 380-83 (discussing the "ripple effect").

53.Dworkin makes this explicit in his discussion of a threshold of "fit." See Dworkin, Law's Empire, supra note 34, at 230, 255.

54.The changeability of legal principles is particularly apparent in Dworkin's account, in which legal principles are not passed down from court to court but are re-made as each judge identifies the best principle that fits the pattern of prior decisions. See id. at 255-56. Others who argue for decision on the basis of legal principles appear to have in mind that principles are passed down from court to court in increasingly reliable form. See Pound, supra note 34, at 330 ("we get gradually a line of decisions which work out a principle"); Hart and Sacks, supra note 18, at

55. See Alexander & Sherwin, supra note 2, at 147; Alexander, supra note 2, at 509. For a similar suggestion, see Raz, supra note 37, at 307.

56.See Schauer, supra note 3, at 1-12, 23-27 (defining rules).

57.See id. at 53-62 (discussing the "semantic autonomy" of rules).

58. Our views on these matters are set out in detail in Alexander & Sherwin, supra note 2, at 11-25 (settlement), 97-101 (intentions). See also Raz, supra note 37, at 295-96 (discussing law as a function of authority).

59.See Emily Sherwin, The Story of *Conley*: Precedent by Accident, in Civil Procedure Stories (Kevin M. Clermont, ed.)(New York: Foundation Press 2004).

60.See Edmund Burke, Reflections on the Revolution in France and on the Proceedings in Certain Societies in London Relative to that Event (1790), reprinted in Edmund Burke, Selected Writings and Speeches 424, 470 ((Peter J. Stanlis, ed.) (Chicago: Regnery Gateway 1963) (referring to the common law as "the wisdom of the ages").

61.Gerald Postema suggests that acceptance and repeated use by courts was understood to be the dominant criterion for precedential authority in the jurisprudence of classical common law. Postema, supra note 45, at 13, 17, 24-25.

62. On analogical reasoning, see Burton, supra note 22, at 27-41; Levi, supra note 19, at 1-19; Cass R. Sunstein, Legal Reasoning and Political Conflict 62-100 (Oxford: Clarendon Press 1996); Scott Brewer, Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy, 109 Harvard Law Review 925, 925-29, 962-63 (1996). For a skeptical view, see Larry Alexander, Bad Beginnings, 145 University of Pennsylvania Law Review 57m 80-86 (1996). For a more sympathetic analysis, see Emily Sherwin, A Defense of Analogical Reasoning in Law, 66 University of Chicago Law Review1179 (1999).

63.See Richard A. Posner, The Problems of Jurisprudence 86-98 (Cambridge, Massachusetts and London: Harvard University Press 1990)(describing analogical reasoning as "an unstable class of

disparate reasoning methods"); Schauer, supra note 3, at 183-87 (describing analogical reasoning as a form of deduction from rules).

64. See Brewer, supra note 62, at 962. But cf. Moore, supra note 7, at 188-89 (questioning whether it is logically possible to extract a rule from a decision rendered on particular facts).

65. See Brewer, supra note 62, at 962..

66.This process of reasoning is captured by Rawl's term ? reflective equilibrium." See John Rawls, A Theory of Justice 46-53 (Cambridge, Massachusetts: The Belknap Press of Harvard University Press 1971)

67. For a more detailed version of this argument, see Sherwin, supra note 62.

68.Psychologically, this approach would entail a "peek" at the justification of the rule, of the kind Frederick Schauer recommends in his discussion of "presumptive positivism." See Schauer, supra note 3, at 677. Although we do not think presumptive positivism is successful as a solution of the general dilemma of rules, it seems the best available solution to the question when a rule should be jettisoned altogether. See Alexander & Sherwin, supra note 2, at 68-73.