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AN ECONOMIC PERSPECTIVE ON STARE DECISIS

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I. INTRODUCTION

On what theory of adjudication do economic analyses of law rely? To the normative question "How *ought* judges to decide cases?" some economic analysts, though not all, respond: "Judges ought to decide cases to promote efficiency."[1] To the positive question "How *do* judges decide cases?"—that is, "By what principles or practices of reasoning do judges in fact decide cases?"—economic analysts of law have remained silent.

In the study of substantive legal rules, this silence is explicable. After all, to the economic analyst the behavior of citizens or agents, not judges, is central. Agents choose levels of care, they choose to form contracts, or to perform contracts all in light of the governing "legal rules." These "legal rules," however, have significance for the agents only to the extent that differing legal consequences attach to different choices; expected liability, fines, or criminal sentence may all vary with the agent's choice. If more than one legal consequence may follow from a given action, then the agent must know the likelihood of each consequence. Because, in the economic theory of legal behavior, the legal rule offers no reason to act beyond the incentives provided by the legal consequences,[2]

* Professor of Law, New York University School of Law. J.D. 1976, Ph.D. 1980, University of California at Berkeley. I have incurred more debts in the writing of this essay than usual. I first attempted to write about stare decisis while under the influence of the Provencal sun during the summer of 1985. The hospitality of M. et Mme. D. Beranger in the Var was greatly appreciated. During the summer of 1988 I benefitted from the hospitality of the Fleming School of Law at the University of Colorado, Boulder. The Filomen d'Agostino and Max E. Greenberg Research Fund of the New York University School of Law has been generous in its support. The first draft was presented to the Columbia Workshop on Law and Economics and the NYU Workshop on Microeconomic Theory, the penultimate draft to a seminar at New York Law School. David Leebron commented insightfully on several drafts. Ricky Revesz and Larry Sager commented on the penultimate draft. Remaining errors and obscurities are my responsibility.

1. Richard Posner has been the most prominent advocate of this normative thesis. *See* Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979); Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980). *Symposium on Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485 (1980) addresses in detail this normative claim.

2. This characterization of the economic theory of legal behavior applies to current practice rather than to logical necessity. For further discussion, see Kornhauser, *Legal Rules as Incentives*, in LAW AND ECONOMICS: DEVELOPMENTS, TENSIONS, PROSPECTS 27, 42-49 (N. Mercuro ed. 1989).

Attention to practices of legal reasoning will, of course, further complicate an analysis of a

the particular source of a variation in a legal consequence is irrelevant to the agent and hence to the economic analyst. Uncertainties in legal outcomes that result from imperfections in fact-finding are thus treated identically to those that result from indeterminancies in the legal obligation that the agent faces.

Thus, though analysts often interpret various symbols in their (positive) models as "legal rules," this interpretation carries little, if any, commitment to a particular theory of law or adjudication. Mechanical jurisprudence and extreme realism are with equal ease assimilable to the economic models of substantive law. For mechanical jurisprudence, legal rules are clear and applied uncontroversially to cases; knowledge of these rules allows immediate inference of the consequences of an agent's action. The extreme realist, on the other hand, explains judicial outcomes in terms of the predilections of the judge. Predictability of legal consequences then depends simply on knowledge of the distribution of predilections among judges.

While this silence may well serve the study of substantive law, it seems inappropriate for the study of the judicial process itself. Yet the few efforts to apply economic analysis to this process have also functioned with (at best) crude conceptions of adjudication.[3] Given the aims of this literature, such crudity may have been justified.[4] Adjudication, however, seems a natural subject to which to apply economic analysis.

substantive legal rule. Section 2 of *Legal Rules as Incentives* notes that the economic analysis of legal duties has a simple structure: as the legal rule determines the game that agents play, judicial choice of a legal rule reduces to choice among the equilibria of the induced games. Presumably an economic analysis of legal reasoning will examine the choice of a judicial practice of interpretation. This practice will determine what rules judges adopt in particular cases; these rules in turn will determine the game that agents play. The discussion in Section VI illustrates this structure.

3. I have in mind two strands of the literature. Consider first the literature on the evolutionary theory of the common law, in particular, Cooter & Kornhauser, *Can Litigation Improve the Law Without the Help of Judges?*, 9 J. LEGAL STUD. 139 (1980); Goodman, *An Economic Theory of the Evolution of the Common Law*, 7 J. LEGAL STUD. 393 (1978); Landes & Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979); Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977); Rubin, *Why is the Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977). These articles rely only on differentiating some feature of the process subject to agent choice from the rest of process. Thus, the models in Rubin, Priest, and Cooter and Kornhauser, for example, simply isolate the decision to litigate from the rest of the amorphous view of a "legal rule." Admittedly, the interpretation of these models identifies one aspect as the legal rule (or the judicial process); but the model itself imposes little structure on this "rule" or "process."

An earlier strand in the literature addressed the process of rulemaking in general. In two provocative articles, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979), and *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J. LAW & ECON. 249 (1976), Landes and Posner pursue several interesting questions, in particular why dispute resolution and rule generation should be jointly produced by courts. In their model of precedent, prior decisions serve as inputs into future decisions but the discussion does not require attention to the specificities of legal reasoning.

4. The evolutionary theories asked to what extent the actual incentives faced by agents depended on the agents' own choices rather than upon choices of actors "within" the judicial system. The models thus had no need to distinguish formally among elements of the judicial system.

Adjudication after all is a decision process; and judicial systems have clear, reasonably simple structures. Jurisprudential debate about legal practice, moreover, has been extended, heated, and inconclusive.

In this essay, I propose to take legal reasoning seriously. I focus on a limited aspect of the practice of precedent, often called stare decisis. In section II, I frame the problem in two respects. First, I sketch the substantive contours of a practice that, paradoxically, demands that a court adhere to a prior decision it believes wrong. Second, I suggest that justifications for stare decisis may vary with the institutional framework. Section III explicates the idea of a "wrongly decided" case. In section IV, I survey, from an economic perspective, jurisprudential justifications for the practice. Each of the final two sections offers a heuristic model of the practice of stare decisis. Each model focuses on a distinct source of error identified in section III. In the first model, I explore "reliance" justifications grounded on errors resulting from "legal uncertainty." In the second model, I examine similar justifications grounded on errors resulting from uncertainty about the world. These models, I believe, highlight the difficulty of justifying stare decisis when one makes precise both the practice and the institutional context in which it occurs.

Though the heuristic models illustrate the difficulty of justifying stare decisis, this essay should not be understood as a rejection of that practice. After all, prior to the formulation of the models, I suggest at least four clusters of justification for the practice, each of which might apply in one of four institutional contexts. Each heuristic model addresses an interpretation of one justification in one specific institutional context. Consequently, at most two of the possible sixteen different strategies for justifying stare decisis receive any detailed examination.

II. FRAMING THE PROBLEM

Each theory of adjudication offers a different view of how a judge decides a case, the consequences (for other judges) of her decision, and the justification for these consequences. Currently, debate rages over the extent, if any, to which future judges are "bound" by the decisions of prior cases.[5] This debate over "precedent" has many facets and divisions

5. The question at the core of the debate contains an equivocation. The claim might be either that judges are not *in fact* bound by prior decisions or that judges *ought not* to be bound by prior decisions. This equivocation may account for the fact that parties have taken more than two "sides." The claims of some critical legal scholars that the law is "indeterminate" may be interpreted as a claim that prior decisions do not (perhaps *cannot*) bind current judges. *See, e.g.*, Kennedy, *Toward Freedom and Constraint in Adjudication: A Critical Phenomenology of Judging*, 36 J. LEGAL EDUC. 518 (1986). In opposition to this position, Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987), argues that past legal decisions do in fact constrain current judges. Dworkin apparently opposes both these

for the term "precedent" covers a complex institutional practice.

A. Stare Decisis and the Practice of Precedent

The term "precedent" covers a broad class of practices employed in rendering judicial decisions.[6] In this essay, I focus on one narrow aspect of the practice of precedent: stare decisis. Phrased in its starkest form, stare decisis "requires" a judge, once she has determined that the instant case is governed by a prior decision, to adhere to that prior decision even when she believes that prior decision to have been wrongly decided.

Clearly, one cannot fully understand the practice of stare decisis unless one also resolves two prior (and interrelated) questions: (1) What criteria determine when two cases are "alike?" and (2) What principle or legal rule does a given case articulate?[7] That is, what outcome does the prior case require?[8] In this essay, though, I attend only indirectly to the equivalence criteria, and I further assume, despite the difficulties of extracting a *ratio decidendum* of a case, that the rule of the case is clear and known to all parties. Instead, I concentrate on a third question: What justifies adherence to a decision known to be wrong?

To begin one must clarify the sense in which a decision is "known to be wrong" or is "wrongly decided." At least two ambiguities plague this formulation of stare decisis. To disentangle the first ambiguity, suppose a judge determines that Instant Case is equivalent to Prior Case and hence must be decided identically. Does "wrongly decided" refer to both Instant Case and Prior Case or to Instant Case only? The equivalence of Instant Case and Prior Case seems to imply that *both* must be wrong (or both correct) but, as section III argues, for some sources of error, Instant Case may be wrong though Prior Case was rightly decided. Not surprisingly, then, each source of error suggests a different justification for stare decisis.

Second, the content, as well as the reference, of "wrongly decided"

positions as he believes that, though legal decisions are constrained, political and legal history as a whole, rather than any specific legal decision, ought to bind (and in fact does bind) judges. R. DWORKIN, LAW'S EMPIRE (1986).

6. For a general introduction to the vast literature on precedent and legal reasoning, one may consult R. CROSS, PRECEDENT IN ENGLISH LAW (3d ed. 1977); E. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949); K. LLEWELLYN, THE COMMON LAW TRADITION (1960); W. TWINING & D. MIERS, HOW TO DO THINGS WITH RULES (2d ed. 1982).

7. These two questions differ from another question that preoccupies lawyers and legal theorists: what is the *rationale* for the decision in a given case? This question too receives only indirect attention; its resolution "appears" in the "substantive values" postulated in Section III(B)(1) below.

8. When the House of Lords announced in 1966 that it would abandon its practice of strict stare decisis, attention in England focused on a third question that I shall not discuss at all: Is the rule of stare decisis or the practice of precedent more generally a *legal* rule? Put differently, what obligation does the judge have to adhere to the practice?

is ambiguous. Obviously, "wrongly decided" (in reference to Instant Case) *cannot* here mean "wrongly decided all things considered." A justification of stare decisis must offer a compelling reason why the precedent of Prior Case renders a particular decision proper for Instant Case, even though, absent the decision in Prior Case, it would be wrong to reach that decision in Instant Case. Put differently, if stare decisis is justified, Instant Case must be decided correctly "all things considered" because stare decisis is one thing to consider.

B. The Institutional Context of Adjudication

Actual court systems have complex institutional structures. Theories of adjudication, on the other hand, assume explicitly or implicitly very simple institutional structures. As the institutional structure bears on the nature and force of justification for stare decisis, a few simple distinctions among models of courts will clarify much of the later discussion.

This essay identifies four different models of courts. First, one might consider a single judge who hears every case that arises in the jurisdiction. Call this model the "unitary judge" model. Much of H.L.A. Hart's discussion of open texture and judicial discretion applies to this model.[9] Second, one might consider a single court that hears every case in the jurisdiction but, in this instance, the single judge on the court is finite-lived so that not every case will be heard by the same judge. I shall call this model the "sequential judge model." Dworkin emphasizes this aspect of adjudication in his interpretive theory of legal practice.[10] Third, one might consider a single court consisting of many co-equal judges, only one of whom hears any given case. Intermediate courts of appeal have a similar structure; they differ only in that a panel of three (or five or whatever) hears each case. This model will be the "panel" model. Fourth, one might consider a hierarchy of courts, each of which has a single, infinite-lived judge on it.[11] Let this model be the "hierarchical court" model.

Among these four models, the unitary court model presents the most difficult context in which to justify stare decisis. In part, difficulties arise in the unitary model because, as section III will suggest, it offers only limited opportunity for error to occur. By contrast, the hierarchical

9. *See generally* H.L.A. HART, THE CONCEPT OF LAW 121-32 (1961).

10. *See generally* R. DWORKIN, *supra* note 5, at 228-38 (1986).

11. This set of distinctions does not exhaust possible institutional configurations of courts. Perhaps the most important omission is that of multi-judge panels, an issue discussed in Kornhauser & Sager, *Unpacking the Court*, 96 YALE L.J. 82 (1986).

court model presents the easiest justificatory context; not only does a hierarchical system present multiple occasions for error but also various "managerial" reasons for control and uniformity arise.

The panel and sequential judge models differ in only one respect. In a panel model, two instant cases (that arise simultaneously) might be decided by different judges; in the sequential judge model, two instant cases will be decided by the same judge.

III. THREE SOURCES OF JUDICIAL ERROR

Every justification of stare decisis must dissolve the paradoxical directive, stated above, that a judge adhere to a prior decision she knows to be wrong. The nature of "error" that the prior judge might have committed, then, will play a central role in any justificatory strategy. Below I distinguish four sources of error: changes in values, changes in the world, improvements in information, and incompetence. Though each of these sources of errors may be characterized abstractly, one more easily grasps each concept in a specific decisional context.

A. An Exemplary Class of Cases

Consider accidents between drivers and pedestrians, each of whom chooses both a level of care and a level of activity (e.g., number of miles driven or walked per day). Assume that only the pedestrian is injured in these accidents. Courts must choose the rule of liability that governs these accidents. A rule of liability is characterized by standards of care for each party and a "pattern of liability" which determines who bears the loss as a function of the parties' adherence to or breach of their respective standards of care. Usually we contrast a rule of negligence with contributory negligence (negligence for short) to a rule of strict liability with dual contributory negligence (strict liability for short). Under negligence with contributory negligence, the pedestrian bears the cost of the accident unless the driver is negligent (or fails to meet her standard of care) and the pedestrian is non-negligent.[12] Strict liability with dual contributory negligence is the mirror image; the driver bears the costs of the accident unless the pedestrian is negligent and the driver is not.[13]

12. Negligence thus yields the following patterns of liability:

Driver Negligent	+	Pedestrian Non-Negligent	=	Driver Liable
Driver Negligent	+	Pedestrian Negligent	=	No Liability
Driver Non-Negligent	+	Pedestrian Non-Negligent	=	No Liability
Driver Non-Negligent	+	Pedestrian Negligent	=	No Liability

13. Strict liability thus yields the following pattern of liability:

Driver Negligent	+	Pedestrian Non-Negligent	=	Driver Liable
Driver Negligent	+	Pedestrian Negligent	=	Driver Liable

In this example, the "prior" case articulates either a rule of negligence or of strict liability.[14] The example leaves open the question of when two cases are alike. We might say that two cases are alike when the drivers in each take identical levels of care and when the pedestrians adopt identical levels of care. Alternatively, we might say that two cases are alike if the drivers face identical costs of care and the pedestrians face identical costs of care or that the benefits that each type of actor accrues from undertaking her activity remain unchanged.[15]

B. Sources of Judicial Error

Under what circumstances would a court believe a prior decision to be wrong and therefore confront stare decisis in its starkest form?[16] Consider the accident example in which we may identify four "sources" of error. Three of these apply to any of the four models of the judicial process; one applies only to the sequential and hierarchical models.

1. Changes in Values

Suppose that the court initially announced a negligence rule. An "identical case" now arises. If the subsequent judge (call her Liza) differs from the prior judge (call him Henry), she may believe the first case was wrongly decided because her "values" differ from his. Both Henry and Liza must bring to bear both substantive and formal values in deciding a case. Substantive values dictate the outcome in particular cases; they

Driver Non-Negligent	+	Pedestrian Non-Negligent	=	Driver Liable
Driver Non-Negligent	+	Pedestrian Negligent	=	No Liability

14. Of course, other legal questions are also implicit in this example. Most importantly, the court must formulate the standards of care against which the finder of fact will measure the parties' conduct. I focus on the choice between negligence and strict liability for several reasons. First, the choice is purely legal. Because of the formulation of the standard of care as a judgmental criterion, questions about the standard frequently mix questions of fact and questions of law. Could any reasonable juror have reached, on the record of the case, the decision this jury did? Second, the dichotomous nature of the choice between negligence and strict liability is crucial to justifications for stare decisis; the standard of care is chosen from a wider range of alternatives.

15. Other options are also available. Most obviously, we might not admit that two cases are equivalent unless each driver and each pedestrian has adopted identical levels of both care and activity. The nature of the legal rule apparently excludes this formulation because it conditions liability only on the choices of care levels. This formulation of the legal rule also apparently excludes various other equivalence criteria: that the same driver and pedestrian be involved in each case, or that the accidents occur on the same day of the year and at the same time of day.

Of course, neither logic nor policy requires that the substantive requirements of liability dictate the equivalence criteria for cases. For further discussion, see *infra* note 19.

16. I ignore for the moment the question of the "force" or "weight" of stare decisis. We might say that if the decision is "wrong" enough, then stare decisis ought to be abandoned. "Force" thus requires some "measure" of strength of the reasons weighing against affirming the prior decision. Such a measure may differ for the different sources of "error" discussed below. In the context of the economic model discussed in Section VI a clear measure will exist and we will be able to determine precisely the optimal "force" or "weight" of precedent.

constitute the "goals" or "aims" of the judge or judicial system. "Formal" values determine when two cases are "equivalent" and hence ought to be decided identically.

Liza may disagree with Henry over either substantive or formal values. Thus, Liza and Henry might agree that their cases are equivalent but Liza simply believes that all cases of this type ought to be governed by a strict liability rule rather than the negligence rule Henry invoked.[17] Alternatively, Liza and Henry may differ over the criteria that make two cases equivalent. Liza might believe that her case differs from that decided by Henry though Henry believes them identical. If stare decisis requires Liza not only to adhere to Henry's decision in the prior case but also to adhere to his formal equivalence criteria, then Liza would be forced wrongly to decide the case before her (though she might agree that Henry correctly decided his case).[18]

2. Changes in the World

Assume now that Liza and Henry share both substantive and formal values. Suppose Liza and Henry believe that the legal rule should minimize the sum of the costs of accidents and accident prevention. The correct legal rule therefore depends upon the costs of care, the technology of accident prevention, and the benefits that pedestrians and drivers receive from their respective activities. Assume further that Liza and Henry share the formal values that two cases are equivalent if drivers and pedestrians adopted the same activity and care levels. Liza may still believe that, though Henry correctly decided the first case, changes in the "world" render it wrong to follow Henry's decision in the instant case.

Liza might now believe the prior case "wrongly" decided, if the benefits that accrue from driving and walking have changed sufficiently.[19]

17. Jovanovic, Rules vs. Discretion in the Legal Process, NYU Department of Economics (August, 1988) (unpublished paper), offers a model that justifies precedent in a panel model in which judges differ in substantive values. In his model, however, error prevention (or competence) rather than certainty justifies the rule.

18. The converse situation is more complex. As developed thus far, stare decisis requires Liza to accept Henry's substantive and procedural values. Henry has announced a rule of negligence in Prior Case which, under his equivalence criterion, differs from Instant Case. Suppose now that Liza believes Prior and Instant Case equivalent so that, writing on a clean slate, she would impose strict liability in both cases. Stare decisis in itself would not compel Liza to follow Prior Case and announce a rule of negligence. Liza might, in the name of *consistency* or *coherence*, nonetheless "follow" Prior Case and announce a rule of negligence because stare decisis prevents Liza from announcing the legal rule she believes best. Rather Liza must choose between two legal worlds: one which treats like cases differently, some of them correctly. On consistency and coherence, see Kornhauser & Sager, *supra* note 11.

19. This example critically relies on the discrepancy between the substantive and formal values. It would seem that the substantive value of "minimize social costs" should dictate the formal equivalence criteria as well as the substantive rule. That is, the substantive value identifies decision relevant

Note that, on this understanding of the cases, Henry correctly decided *his* case; that rule however is no longer appropriate for cases "equivalent" to it. Finally, note that this argument does not depend on the fact that Henry decided the first case and Liza the second. Liza might just as well have decided both cases. Stare decisis requires the "wrong" decision in the second case not because of the change in judicial personnel but because of the change in the world.

3. Improvements in Information

Though both the world and judicial values might remain constant, the judge might learn more about the world and thus understand better how she might implement her values. Some aspects of learning raise interesting questions that reach beyond the analysis of stare decisis. Learning, for example, might explain why courts decide only "cases and controversies" rather than make general legal pronouncements.

With respect to stare decisis, however, this learning phenomenon can be assimilated to either of the two prior reasons for error. One might distinguish between "performance values" and "operational values." Performance values constitute the general goals the judge seeks to meet. Operational values result from the application of the performance values to actual contexts. On this view, improved information implies a change in operational values. An analysis of stare decisis when values change should then illuminate an analysis of the practice when information changes.[20]

facts of cases; specifically it would identify costs of care, technology, and benefit functions as decision relevant. Moreover, the substantive value identifies actual care and activity levels as *irrelevant* to the choice between strict liability and negligence, though the actual levels determine the *application* of the legal rule to the particular case.

Part of the current debate over the "bindingness" of precedent turns on the linkage between substantive and formal values. Schauer has argued that precedent binds because, though these equivalence criteria (in his terminology "rules of relevance") are contingent, they are outside the control of the judges. Schauer, *supra* note 5, at 571, 585. To the extent that substantive values are determined within the legal system, then, the discrepancy between substantive and formal values posited in the text may more easily occur.

On the other hand, as suggested in note 15, *supra*, legal practice tends erroneously to conflate formal equivalence criteria with the antecedent conditions for the application of a legal rule. When confronted with the task of comparing the current case with a past case, the court generally has before it only those facts necessary for a finding of liability under the current legal rule. If the equivalence criteria differ, the court cannot make the judgment about the applicability of stare decisis. In MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916), for example, Cardozo did not have before him the relevant information about the benefits of each activity that justify (on economic grounds) a switch to strict liability.

20. Of course, changes (or differences) in performance values are most probable in models of adjudication which have more than one judge. Informational changes may occur in the unitary judge model. Thus, treating informational changes as changes in values extends any justification for stare decisis based on changes in values from models with multiple judges to the unitary judge model.

On the other hand, one might include the informational state of the court as part of the description of the state of the world. On this account, justifications of stare decisis when changes in the world occur should illuminate an analysis of the practice when information changes. This analogy, however, will be less appealing the greater the extent to which the informational change depends on the court practice. If courts learn *because* they adjudicate cases, then the practice will affect the rate at which learning takes place. This potential interaction between the rate of learning and the practice adopted may also undermine the analogy of informational changes to value changes. Important as this interaction may be, throughout the rest of the paper, effects of this type are ignored and this source of error is assimilated to either changes in values or changes in the world.

4. Imperfect Decisionmaking

The fourth source of "error" is more complex. Assume that (1) substantive values are unchanging; (2) the (unchanging) formal values identify costs of care, technology, and benefits from the activities as the decision relevant facts; (3) none of these facts are changing over time; and (4) these facts are determined with error in any given case. These errors in fact determination imply that the court unwittingly (and unknowingly) will wrongly decide many cases. On average, it might be better for the courts to ignore variations in some of the decision-relevant facts. For instance, calculating the benefits received from the activities might be subject to wider error than the determination of other decision relevant facts; consequently, a court might think it wiser to adopt the legal rule on the basis of the "average" level of benefits.[21] This source of error might arise in any of the four models of adjudication.

Two observations may clarify the nature of this source of erroneous decisions. First, the errors in fact-finding are not equivalent to changes in the world. One might model errors in fact-finding probabilistically. A case appears before the court. It has a true "type" A, but due to errors in

21. Heiner, *Imperfect Decisions and the Law: On the Evolution of Legal Precedent and Rules*, 15 J. LEGAL STUD. 227 (1986), offers this lack of reliability or competence on the part of decisionmakers as a justification for the rule of stare decisis. As formulated in the text, this justification has little appeal because the finder of fact differs from the finder of law. The legal rule thus seems to be protecting against the fact finder's incompetence rather than the law finder's. A more plausible example might have the following structure: the just decision might depend on many factors that require complex deliberation. Two judges might thus resolve the same case differently (and hence at least one of them would decide it wrongly). (As an analogy consider some complex set of mathematical calculations. Individuals doing the calculation may arrive at widely varying results and we might do better to use an easy-to-calculate approximation if that approximation "generally" gets close to the right answer.)

fact-finding, the court may classify it as a case of Type B or Type C. On average, the court will interpret the facts correctly; though they err in individual cases. The court faces an unchanging world; the correct decision in cases of Type A (and B and C as well) remain constant over time.

Second, judicial attention to this source of error requires judges to alter their decisional perspective. The discussion thus far has assumed, as discussions of adjudication generally assume, that each judge attempts to decide the case before her correctly. A judge cognizant of her imperfection attempts to decide the *class* of cases to which the instant case belongs correctly at the cost of deciding the instant case wrongly. Without a change in this decisional perspective, though, imperfect decisionmaking would not provide a justification for stare decisis. Suppose that Henry, despite knowing of the errors in fact-finding, announced the rule that he thought best for the prior case. Liza, knowing this, would have good reason to believe that Henry had wrongly decided the prior case and no reason to believe that his decision would be good *on average* for "future" cases like hers. Imperfect decisionmaking, therefore, justifies stare decisis only if each judge believes she should strive to announce a rule good for the class of cases rather than the correct rule for specific cases.

IV. JURISPRUDENTIAL JUSTIFICATIONS OF STARE DECISIS

One might demand either a weak or a strong justification of stare decisis. A weak justification entails only that a practice of stare decisis is permissible but not necessarily required or even preferable to an adjudicatory system that eschews stare decisis. A strong justification, by contrast, offers a reason for the practice of stare decisis as opposed to its renunciation.[22] Strong justifications are thus by their very nature comparative; according to the justificatory criterion an adjudicatory system with stare decisis ranks, all other things equal, better than an adjudicatory system without it. The sources of error in prior decisions discussed in section III (and the four models of adjudicatory systems defined in section II B) suggest stable backgrounds against which we may compare adjudication with stare decisis to adjudication without it. With these sources of error in mind, then, we may evaluate (as strong justifications)

22. Justifications might differ in other ways. Much discussion of precedent has focused on its "weight" or its "force," that is, the importance (to the outcome) of the prior decision relative to other reasons for the decision. Force is of particular significance when the other reasons dictate a different outcome. (These terms are not employed in a consistent fashion in the literature. For some, "weight" refers to the scope of the rule and "force" to its power as against countervailing reasons.)

three complexes of reasons for a practice of stare decisis that emerge from the jurisprudential literature: (1) Fairness; (2) Competence; and (3) Certainty.

A. Fairness

Casebooks, scholars, and judges intone the aphorism "Treat like cases alike" with numbing regularity and with little elaboration of its content. Concerns for "fairness" or "equality" are said to justify the aphorism. Despite the prominence of this justification of stare decisis, it may, for several reasons, be the most problematic of the three classes of justifications generally proffered.

First, particularly in the context of the unitary court model, theorists tend incorrectly to assimilate the norm that "like cases be treated alike" to the norm that litigants are entitled to a principled adjudication of their claims. These two norms are in fact quite distinct. In a unitary model, principled adjudication entails that a judge with invariant principles will decide cases that present identical grounds for decision identically. The practice of stare decisis, then, will differ from the norm of principled adjudication, only if the single judge changes her principles. In the other models, however, the principles on which judgment is rendered need not be uniform across judges; the apparent equivalence of stare decisis and principled adjudication consequently dissolves. In a panel model, for example, each judge might rigorously uphold the norm of principled adjudication but differ from her colleagues on what constitute the appropriate principles. Similarly, the values of a single judge (in the unitary model) might vary across time so that, though she rendered principled decisions in both Prior and Instant Case, the judgment differed. In the single judge context, some confusion arises because we may suspect a judge who frequently alters the principled basis of her decisions of masking her true arbitrary (or capricious) grounds.

Conversely, a judge who decided cases arbitrarily, that is, on the basis of "unprincipled" criteria, might arbitrarily choose to adhere to stare decisis.[23] For instance, Judge X might decide some class of cases on the basis of the relative ages of the litigants, favoring the younger over the older. As X ages, her personal preference might change so that absent her prior decisions, she would now favor the older over the younger.

23. A judge who decided cases whimsically or capriciously, on the other hand, could not adhere to stare decisis which, by its very nature, eliminates the spontaneity that characterizes whimsy and caprice. As the text suggests, arbitrary decisionmaking differs in that it may be patterned though the pattern rests on criteria that the culture considers illegitimate or irrelevant.

Second, justifications of stare decisis that are grounded in "fairness" will depend on the different conceptions of equality or fairness held by a judge or legal system. The two distinct sources of these conceptions, in the substantive and formal values of the judge, further complicates evaluation of fairness justifications. On the one hand, the equivalence criteria seem to identify which cases ought to be treated alike. But the substantive values themselves will imply the "identity" of cases as well. At the current stage of this discussion, however, we can disentangle two senses of fairness, one corresponding to a unitary court system and one to a sequential, panel, or hierarchical court.

In a unitary system, the command to treat like cases alike is directed at the single judge so that the emphasis lies on the way Liza treats similarly situated parties. Under a rule of stare decisis, Liza will decide "equivalent" cases identically despite "errors" while, in the absence of stare decisis equivalent cases will be decided correctly but differently. In what circumstances should the dictates of equal treatment prevail over "error-correction"? Given the sketchy description of the practice of precedent, a definitive answer to this question is impossible. In general, the nature of the fairness claim might depend on the content of the formal equivalence criteria and substantive values.

Fairness appears to play this justificatory role when error results from shifting values. As Liza decides all cases, any change in values must result from shifts in her own values. If her substantive values change, then the claim of fairness could rest on the nature of the formal values that determine when two cases are equivalent for decisional purposes. On the other hand, if her formal values change, then any claim of fairness, in this context, would seem to rest on a "reliance" interest of the second set of parties,[24] an interest which also might apply if substantive values had changed. In this instance, fairness then seems to reduce to the claims of "certainty" discussed below.

If the error results from changes in the world, the force of a fairness justification for stare decisis turns on the justification for the discrepancy between Liza's substantive and formal values. Substantively, Liza believes the two cases differ in some decision-relevant way but formally she believes they should be termed equivalent. Which set of values should govern will depend on the specific content of each set of values and the reasons for their discrepancy.

Finally, consider error that results from incompetence. Incompe-

24. It is possible that the new formal values dictate adherence to the old criteria of equivalence but such an outcome is unlikely.

tence implies that the court cannot reliably do justice to specific cases within some class; on average, the court reaches a correct outcome more frequently by adhering to some fixed rule rather than attempting to differentiate among cases. Incompetence thus seems to suggest that *unlike* cases should be treated alike in the interests of promoting substantively better outcomes. Fairness and incompetence thus appear to be at odds.

In a sequential, panel, or hierarchical system, the command "treat like cases alike" may have a different sense. Perhaps fairness requires that the result of the adjudication be independent of the judge who hears the case. From this perspective, changes in the world still offer no obvious justification for stare decisis but both errors of incompetence and changes in values do.

The presence of value uncertainty serves as a powerful motivation for stare decisis. If judges have different substantive values but share formal equivalence criteria, the outcome of a legal action would, in the absence of (an effective practice of) stare decisis, depend critically on which judge happened to hear the case.[25] If the two cases arose at the same time in a hierarchical system, we would object to different outcomes, though the grounds other than "certainty" for this objection are difficult to articulate. Errors of incompetence imply a similar variation among "identical" cases as errors resulting from variation in values. In the incompetence situation, however, courts may not be aware that two cases decided differently are in fact identical. They know only, *ex ante*, that they will make many errors in their determinations.

B. Competence

This complex of reasons implicates two very different notions. Competence may refer to the court's ability reliably to reach correct decisions as in the discussion of errors of fact-finding. As noted above, lack of judicial reliability argues for treating "unlike" cases alike. Put differently, judicial competence might identify equivalence criteria that are distinct from the substantive values of the court. Competence concerns of this type are likely to be most pressing in non-unitary systems where a

25. The federal courts offer a variety of conflicting attitudes towards this problem. Within a circuit court of appeal, a practice of stare decisis applies across panels; litigants appear to be entitled to a decision independent of the panel that hears the case. Of course, stare decisis does not apply across circuits. More interestingly, within a given district court, no practice of stare decisis prevails. If both Liza and Henry sat on the United States District Court for the Southern District of New York, neither would be bound to follow a decision of the other in a case each recognized as equivalent. At the trial court level, then, litigants are apparently not entitled to a decision independent of the judge who hears the case.

given judge may not trust the competence of lower court judges, subsequent judges, or her peers correctly to resolve complex legal issues.

Alternatively, competence refers not to the court's ability to decide specific cases but its ability to handle its entire caseload. Adhering to prior decisions permits the court to conserve its adjudicative resources; it can therefore resolve more cases. To accomplish this goal, the equivalence criteria of cases must be more easily applied than the substantive values that would be invoked to resolve the case de novo. Further, the court might be willing to decide some cases wrongly if it saved sufficient resources in so doing. On this account, then, stare decisis would dictate not that a court adhere to a decision it believed wrong (or enforce a decision it believed wrong) but only that the court implement a decision not knowing whether it were correct or not.

Recall the accident example. The court's substantive values might dictate that it refer in each case to the technology of accident prevention, the costs of care, and the benefits the parties derive from the activities. The benefits derived from the activities however might be costly to determine in each case. Consequently, the court adopts equivalence criteria that ignore this aspect of each case. Now, when a case arises under a given legal rule, say negligence, the court will not know whether it correctly decides the second case or not as it will not inquire into the benefits derived from the activities.

C. Certainty

"Certainty," as used in the jurisprudential literature, apparently covers a congeries of interrelated ideas. To begin, distinguish "certain" as "predictable" from "certain" as "unchanging" or "static." A changing world may be perfectly predictable and a static world highly unpredictable. To untangle these ideas requires careful attention not only to the various senses of the term "certainty" but also to the source of error under consideration and the nature of the legal rule.

Recall the description of the world with accidents between drivers and pedestrians. Suppose, as will be done in the model of section VI, that everything except the benefits to the agents is static. These benefits may be perfectly predictable; we may know that they double every six months.[26] Conversely, all the substantively relevant aspects of the world may be unchanging, but some of them might be stochastic. In the acci-

26. On this account, the "predictable" world is also "static" if viewed from the appropriate perspective "outside of time," as we know how the world changes with time. The world at time t only "changes" relative to the world at time t-1 or t+1.

dent example, when a driver sets out in her car, she may know all the relevant facts but whether she has an accident or not will still be a random event. Under a rule of strict liability, her legal responsibility would thus be uncertain at the time she sets out but it is not an uncertainty that worries us.

Alternatively, these senses of "certainty" might not apply to decision-relevant facts in the world but to the nature of the legal rule. Adjudicative outcomes might depend on some random device, such as flipping a coin, or, in a panel judicial system unconstrained by stare decisis and in which the various judges differed in their substantive values, upon the judge drawn to decide the case. Then a flip of the coin or the drawing of the judge to hear one's case would determine the outcome. This outcome would then be unpredictable (*ex ante*) to agents and to judges.

"Certainty" justifications for stare decisis often include "reliance" or "planning" arguments, but these arguments are only as strong as the value of the planned conduct. Planning requires each agent to formulate expectations about the future, including any future legal obligations. Expectations about legal obligations depend not only on the prevailing legal rule but also on the prevailing judicial practice. If the system does not adhere to stare decisis, no one will formulate expectations about her future legal obligations on that assumption. On this account, not maintenance of expectations *per se*, but the desirability of the expectations generated by stare decisis justifies the practice.

V. Uncertainty of Values: The Economics of Reliance Justifications

The desirability of stare decisis then would appear to depend on the substantive values that the system of adjudication seeks to promote. At first glance, a justification for stare decisis that depends on the substantive values of the system suggests that, in non-unitary court systems, disagreement among the judges over the substantive values they ought to promote would undermine any claim to stare decisis. Judicial disagreement over substantive values, however, does not necessarily imply disagreement over the value of stare decisis, at least in certain limited circumstances. The classical example of this occurs in "coordination games" in which, it is said, the legal rule serves to identify at which of several equilibria the social system will arrive.

Consider the game represented by the matrix in Figure 1. There are two players, Row and Column, each of whom must choose one of two actions. The numbers in each cell represent the value to Row and Col-

umn respectively of their joint, though uncoordinated, choices. In this simple coordination game, the players are indifferent between the outcomes (L,L) and (R,R) but they prefer either of these outcomes to a failure to coordinate their actions.

		Column	
		L	R
Row	L	1,1	0,0
	R	0,0	1,1

FIGURE 1

Simple Coordination Game

In the absence of any structure beyond that embodied in the matrix, neither Row nor Column has any basis for forming an expectation as to the behavior of the other party. Expectations may be created by legal rules though. A legal rule that identified the appropriate action for each party in these circumstances as "L" (or, equally, as "R") would provide each actor with a basis on which to formulate an expectation of the other actor's choice; one equilibrium would be singled out and the desired coordination achieved.

Of course, though the actors are indifferent between (L,L) and (R,R), the judges need not be. One judge might prefer (L,L) and another judge (R,R). If Row and Column are uncertain which judge will hear their case, they no longer have any basis on which to coordinate their actions. The judicial disagreement over desirable equilibria represents a disagreement in substantive values. If the judges agree, however, that coordination is preferred to its lack then they each have a reason to adhere to the initial decision in the case.

The coordination-game argument for stare decisis is strongest in the panel model of courts. In this model, the actors Row and Column would always face the uncertainty created by the random draw of a judge from the panel. In the unitary and hierarchical systems, this argument has no force as the values of the single judge at the top would provide a clear

signal to the actors.[27] In the sequential system, the prospective changes in judges would introduce some uncertainty into the actors' choices but if each judge presided for an extended period she might consider the abandonment of stare decisis desirable if her preference for one equilibrium over the other were sufficiently strong.

The conventional interpretation of Figure 1 is that "L" represents the action "drive on the left side of the street" and "R" the action "drive on the right side of the street." This interpretation illustrates how limited a range of application these games provide for stare decisis. Institutions of empowerment, such as contract or property, offer the most compelling illustrations of judge made rules that might rely on the above coordination game justification for stare decisis.

Consider, for example, contract. A rule such as *caveat emptor* or *caveat venditur* allocates various risks among the parties and hence affects the price at which transactions occur. Both buyer and seller prefer stable rules to ones on which they cannot rely; under stable rules they can achieve identical results with less detailed contracts and a price adjustment.

Rules imposing primary obligations on actors seem less likely to have the structure of a pure coordination game. These games may have multiple equilibria but the parties are likely to have conflicting preferences among these equilibrium outcomes.[28] Moreover, the appeal of *any* equilibrium rather than none may be less. Consider the game represented by the matrix in Figure 2:

27. In the hierarchical system, the situation is more complex as appeals might be costly or not as of right. In that case, if it were clear which jurisdiction (and hence which judge) would hear the case no problem would arise.

28. Pure coordination games are characterized by at least two attributes. First, the interests of the players are perfectly coincident. Second, the game has multiple equilibria. The "coordinating" role for law derives from the multiplicity of equilibria and not from the coincidence of interest. Coincidence of interest apparently plays an important role because we assume implicitly that the social objective coincides with the individuals' interests. When individual interests diverge, as in the game of figure 2 below, each individual need not prefer that her undesirable (pure strategy) equilibrium prevail over no (pure strategy) equilibrium. A policymaker, however, may still prefer that a single (pure strategy) equilibrium be identified.

		Column a	Column b	Column c
	A	5,3	7,1	1,2
Row	B	3,2	4,6	0,4
	C	4,3	3,2	2,5

FIGURE 2

Non-Equivalent but Interchangeable Equilibria

Here, (A,a) and (C,c) are both equilibria.[29] Suppose that Liza favors Column and hence prefers the equilibrium (C,c) but that Henry favors Row and hence prefers the equilibrium (A,a). The argument for stare decisis in the coordination game rested on Liza's and Henry's agreement that either of the equilibria was preferable to the uncertainty generated by "uncertainty" in the legal rule. In the game in Figure 2, Liza's preference for Column might outweigh the "losses" occasioned by legal uncertainty, particularly in a sequential model of courts. Even in a panel system, however, neither judge may see a reason to adhere to prior decisions. Both Row and Column might do better with the legal rule "uncertain" than she would do if the legal rule were clear but unfavorable to her.[30]

Thus far, the justification of stare decisis has relied both on at least

29. I use the concept of Nash equilibrium to identify "solutions" to the games in figures 1 and 2. In a Nash equilibrium, neither actor can unilaterally improve her payoff. Thus, in figure 2, (A,a) is an equilibrium because Row cannot improve upon her payoff of 5, conditional on Column's choice of strategy a. If Row chooses B rather than A she would receive 3; if she chooses C rather than A she would receive 4. Similarly, Column cannot improve his payoff of 3, conditional on Row's choice of strategy A. If Column chooses b rather than a, he receives 1 rather than 3; if he chooses c rather than a, he receives 2 rather than 3. A parallel argument reveals that (C,c) is also an equilibrium.

No other pair of choices meets this criterion of each actor's choice being her best response to her opponent's chosen strategy. Consider for example the strategy pair (B,b) which makes Column best off. This pair is not an equilibrium because, conditional on Column's choice of b, Row does best to choose A, which gives her a payoff of 7 rather than 4.

30. It is difficult to provide a formal analysis. The payoffs in the games represented in the text are the "pre-legal system" payoffs. To analyze rigorously the effects of the legal rules (or uncertainty in the legal rule) requires a theory of how the legal rule alters the game that the actors play. The standard coordination-game argument in the legal literature seems to assume that the legal rule

some limited agreement about substantive values and on unpredictability as to which values would apply to any given case. One might ask whether unpredictability of changes in the world may substitute for value unpredictability in this justification of stare decisis. In section VI, I shall argue that, under certain circumstances, changes in the world, whether predictable or not, may justify stare decisis, at least for certain shared, substantive values.

VI. UNCERTAINTY IN THE WORLD: THE ECONOMICS OF FLEXIBILITY JUSTIFICATIONS

In this section, I assume that the substantive values of the court are constant but that the world varies in one of two ways. First, I consider a model in which the world is uncertain. Next I modify a model of Blume and Rubinfeld[31] to provide a justification for a rule of stare decisis when a court faces a predictably changing world. As substantive values are constant, the arguments in this section will justify stare decisis in the least favorable context: that of a unitary court.

More interesting perhaps than the results themselves, the models reveal how difficult it is to construct a situation in which a changing world justifies stare decisis. Section A outlines the model. Section B traces the

leaves the payoff structure unchanged; it simply identifies (by making common knowledge) which of the equilibria the parties will play.

This view of the effect of the legal rule, however, ignores that most legal rules have sanctions. The legal rule thus alters the payoff structure the actors face. Uncertainty about the legal rule therefore implies that actors will be uncertain which game they are playing. An actor's optimal strategy in these circumstances will then depend on the specific structure of the derivative games and the probabilities that each derivative game will be played.

For a related discussion, see L. Kornhauser, Conceptions of Social Rule, in The Logic of Social Change (D. Braybrooke ed. forthcoming).

31. Blume & Rubinfeld, *The Dynamics of the Legal Process*, 11 J. LEGAL STUD. 405 (1982). Blume and Rubinfeld study a model of an accident situation which differs in several ways from that set out in Section III(A) above. First, in each of the three periods of the model, the actors choose only levels of care. Second, the court chooses standards of care within a regime of negligence with contributory negligence rather than between regimes. Under the standard assumptions of the economic analysis of accident law, set out in, for example, S. SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW (1987), both the static social optimum and the individual choices of care levels depend on the relative costs of taking care. In Blume and Rubinfeld, these costs change randomly over time. In addition, each agent faces a "cost of adjustment" when it alters its level of care from one period to the next.

The court seeks to minimize not simply the sum of the static costs of accidents and accident prevention but also the costs of adjustment that the agents face. The major result of the article states that the standards of care optimal under this substantive value of the minimization of the sum of accident costs, prevention costs and adjustment costs are neither those standards that minimize the total costs of accidents in the present nor those that minimize the expected total costs of accidents in the future. More specifically, the court should abandon stare decisis and continually adjust the prevailing standard of care.

logic of the argument. Section C discusses some difficulties in formulating a model.

A. Outline of the Model

Recall what conditions the model must satisfy. At time 0, the court announces a legal rule that is best, given the world at time 0. At some later time t*, a different legal rule would be best, absent the prior decision but, given the prior decision, the court adheres to the old rule at least up to some time T later than t*.

The prior discussion identifies several elements that the model must specify. First, the world must be described. Recall the example of accidents arising between drivers and pedestrians. The frequency of accidents (and the amount of losses from them) depended upon the choices of activity level (say miles driven for the driver and miles walked by the pedestrian) and care level of both driver and pedestrian. Each actor derived benefits from her activity and incurred costs in taking care. The world then can be characterized by five parameters: the functional relation between the driver's choice of activity level and the benefits she receives; the functional relation between the pedestrian's choice of activity level and the benefit he receives; the cost of care to the driver; the cost of care to the victim; and the functional relation between the extent of accident losses and the choices of care and activity levels of both parties.

Adapting this model to the study of stare decisis requires two changes. A sixth parameter, adjustment costs, is added. Adjustment costs represent costs that the agents incur when the court changes the legal rule. These costs might arise because, when the legal rule changes, an agent may make a radical change in her behavior and such radical changes often require new investments or other costly adaptations. Finally, as the model studies "flexibility" justifications of stare decisis, some change must be introduced into the world. I shall assume that all parameters are constant except the benefit functions of the agents. The model must, of course, specify how the benefit functions change with time. Specifically, one wishes to distinguish, as noted in section IV C, between predictable change and unpredictable change. As is argued below, uncertainty in the sense of unpredictable change plays only a limited role in the justification of stare decisis.

Second, the choices open to the court must be identified. I assume that the court chooses between two patterns of liability: negligence with contributory negligence (or "negligence" for short) and strict liability with dual contributory negligence ("strict liability" for short). The court

makes this choice on the basis of its substantive values, assumed here to be the maximization of social welfare defined as the sum of the benefits to each party from her choice of activity level minus total social costs. Total social costs have three elements: the costs of care incurred by both parties, the expected losses from accidents given their choices of care and activity levels, and adjustment costs.[32]

Third, the model relies on a discrepancy between the court's substantive values and its equivalence criteria. The substantive value "maximize social welfare" identifies as equivalent all those and only those cases for which the values of all the parameters of the problem were identical. Under these substantively derived equivalence criteria, stare decisis would never require a court to decide a case wrongly. Consequently, I shall assume that the court does not consider the parties' benefit functions as relevant to the decision that two cases are identical.[33] Fourth, the model compares the practice of stare decisis to a practice of no stare decisis. The court's (and the model's) evaluation of these two practices depends on differences in the agents' choices under the two practices. As each agent is assumed economically rational, these choices will be optimal, given the *private* costs faced by each party. Consequently, the model must specify how the social losses suffered when the wrong rule prevails are apportioned between the driver and the pedestrian.[34] In fact, because negligence and strict liability have different distributional consequences, the non-liability bearing party is better off under the wrong rule than she is under the correct rule. Thus, if between t* and T strict liability ought to prevail but, due to stare decisis, negligence prevails, the driver is better off than she would be under strict liability.

B. The Logic of the Argument

1. The Optimal Pattern of Liability in a Static World

It is well-known that, in general, no legal rule that conditions liability only on the levels of care adopted by the parties, can induce injurer and victim to adopt those activity and care levels that maximize social welfare (defined as the sum of the parties' benefits from the activities less

32. Define accident costs as the sum of the costs of care of both parties and the expected losses from accidents.

33. One defect of the Blume and Rubinfeld model as an analysis of stare decisis derives from its failure to offer a clear conception of when two cases are identical. Implicitly, their claim that the court abandons stare decisis rests on criteria that hold two cases equivalent if the actors have adopted identical levels of care in each instance. As remarked in notes 15 and 19, *supra*, legal practice invites this assimilation of equivalence criteria to the facts necessary to the application of a legal rule.

34. The model must also specify how the costs of adjustment are apportioned.

the accident's costs).[35] The intuition for this result is straightforward. In equilibrium, under any of the liability rules in use, only one party bears the expected costs of accidents. The other party, free of these costs, will adopt an excessively high level of activity.

A court that seeks to maximize social welfare must therefore choose between strict liability (with dual contributory negligence) and negligence (with contributory negligence) on the basis of which pattern of liability yields higher social welfare. The choice between strict liability and negligence thus turns critically on the relative values of the activities to each party. If these values may change over time, it might be desirable to alter the legal rule. For instance, if, initially, the value of the injurer's activity far exceeds the value of the victim's, a rule of negligence would be appropriate. If the value to the victim of its activity increases relative to that of the injurer, however, at some point it will be desirable to abandon negligence for strict liability.

2. Uncertain Change without Adjustment Costs

Let us now introduce uncertainty into this world. Suppose, for example, that the value of pedestrianism is fixed but that the value of driving will either be high or low, with some known probability. If the driving has a high value, then negligence would be the preferred legal rule. Conversely if driving has a low value, then strict liability will be preferred to negligence.

Under a practice of stare decisis, the court would announce a legal rule and then adhere to it, regardless of the actual value of driving to the injurer. Under a practice of no stare decisis, the court would announce the legal rule that was "optimal," given the actual value of the injurer's activity. Which judicial practice ought a court adopt?

Consider first the practice of stare decisis. Suppose the court announces a rule of negligence. Then, if the value of driving is high, the statically (second-)best rule will prevail. If, on the other hand, the value of driving is low, negligence will be far from the statically (second-)best rule. The higher the probability that driving will have a high value, the more preferable will negligence (with stare decisis) be to strict liability (with stare decisis).[36]

35. S. SHAVELL, *supra* note 31, proves this result. It may seem odd that a court that seeks to minimize social costs restricts its choice of rules to those conditioned only on care levels because no rule in this class achieves the social optimum. I adopt this assumption here because, in many instances, courts do restrict their choice in precisely this way. They may do so because of difficulties in administration of rules conditioned on activity level.

36. Contrast this analysis with that of an apparently unrelated problem. Suppose there are two

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

This discussion reveals that the desirability of a practice of stare decisis will depend on the particular "facts" of the situation the law seeks to govern. The critical facts in the example are those that identify the socially optimal equilibrium. A court's decision to adhere to a practice of stare decisis should thus vary with these critical facts.[37]

3. Predictable Change with Adjustment Costs

First, note that, with predictable change, if adjustment costs are zero, stare decisis is not justifiable. For, consider a world in which adjustment costs are zero and the benefits to the agents of engaging in the activities are changing predictably. Then, clearly, the court should, in every period t, announce the statically optimal liability rule. After all, if the agents know *ex ante* that in period t the statically optimal legal rule

types of drivers. One with a high valuation of driving and one with a low valuation. The court may be unable to condition the rule of liability on the type of driver either because of information difficulties or because "equity" prohibits discriminating among types. The choice between negligence and strict liability would then parallel that described in this paragraph.

No analogue to a practice of no stare decisis exists in this two-type problem, however.

37. We might view the court's position as follows. Given that the court will adhere to stare decisis, it has only two choices of legal rule: negligence or strict liability. If, however, the court considers not only which legal rule to adopt but whether to adhere to stare decisis or not, the court acquires a third legal option: no stare decisis.

The option "no stare decisis" is ambiguous as it does not identify the criterion the court will use for choosing between negligence and strict liability in any given case. Different scenarios might arise. The court might adopt a legal rule after inquiring into the benefits each actor received from her activity. If the court did this perfectly accurately and the parties knew at the time they chose care and activity levels, this practice would induce the first-best social optimum. In fact, this practice reduces to one of stare decisis in which the equivalence criteria are derived from the substantive value "maximize social welfare." To derive a more plausible practice of "no stare decisis" we must either introduce error into judicial determination of the benefits or imagine that the choice between strict liability and negligence is driven by some other consideration. In a panel model, some judges might favor negligence and others strict liability; the probability that a rule of negligence would prevail would thus depend on the probability that a negligence judge would be drawn from the panel.

will prevail, they incur no adjustment costs in conforming their behavior to that standard.

Now suppose that adjustment costs are positive. Thus, when the legal rule changes, each party must incur some cost to adapt their behavior to that which would be individually optimal for them, given the new legal rule. The court seeks to maximize social welfare which consists of the (discounted) flow of benefits from the activities less the flow of total social costs. Social costs now include not only the costs of taking care and the expected accident costs but also the costs of adjustment.[38]

An analysis of the desirability of stare decisis depends on three factors as yet unspecified: (1) precisely how the legal rule changes over time; (2) how the adjustment costs are divided between injurer and victim; and (3) how the injurer and the victim divide the social losses incurred when the inefficient rule prevails.

As before, the best static rule depends on the relative values of the activities to driver and pedestrian. Assume that, at the outset, the value of driving far outweighs the value of pedestrianism so that negligence would be the best static rule. Assume further that, as time passes, the value of pedestrianism gradually increases, so that, after some future time t*, the best static rule will always be strict liability.[39] Further assume that the driver bears some fixed proportion q of the adjustment cost.

In the accident example, society consists solely of the driver and pedestrian. The total social loss must therefore fall entirely on them. In fact, the social loss divides in a peculiar way. Suppose that the statically optimal rule would be strict liability but that negligence prevails instead. Then the driver is *better off* under the wrong rule than she would be under strict liability. For, under strict liability, she both adopts a lower level of activity (which means the benefits of her activity are less) and she must bear the costs of accidents (which implies her costs are higher). Conversely, the individual losses to the pedestrian *exceed* the social loss

38. The court might instead seek to maximize average social welfare. The choice of social objective function depends in part on the assumption made on how the world changes. *See infra* note 39.

39. In this formulation, then, one can identify the state of the world, which is defined by the values of the two activities, with the date at which the activities occur. This assumption is peculiar to the assumption on the "motion" of the underlying state; it moves uniformly in one direction. If the values of driving first fell then rose relative to the value of pedestrianism, the statically optimal rule would change more than once. (In this context, one might assume that the court seeks to maximize average social welfare rather than the discounted present value of social welfare.) Nor could one identify the state of the world with the date.

as the sum of "losses" to driver and pedestrian must equal the total social loss.

To compare judicial practices, one must determine how each agent will behave in response to each practice. Suppose that a practice of no stare decisis prevails. Then both parties know that the legal rule will change from negligence to strict liability at t*. As the pedestrian no longer bears the costs of accidents, he will increase his level of activity.[40] The injurer must now decide whether to restrict her level of driving. She will do so when the present discounted value of reduced liability expenditures exceeds her share qK of the adjustment costs.

Before considering how the two agents behave under a practice of (limited) stare decisis, one must understand what such a practice means in the context of this example. A court that had a practice of strict stare decisis would adhere to a rule of negligence for all time, regardless of how valuable pedestrianism becomes relative to driving.[41] Less stringent practices of stare decisis can be defined as well: the court adheres to negligence until some time T after t*.[42] During the interval between t* and T, negligence applies even though strict liability would be statically optimal; the court adheres to a legal rule it knows to be "wrong." The stringency of stare decisis can thus be measured by the length of time T-t* that the statically inefficient rule will prevail.[43]

How will the agents behave under some practice T-t* of stare decisis? As long as negligence prevails, neither agent will have any reason to incur her share of the adjustment costs. When the rule changes at date T, however, the pedestrian will, as under a practice of no stare decisis, immediately incur the adjustment costs and increase her activity level. The driver, on the other hand, will compare her share of the costs of adjustment to her expected discounted costs of adhering to her prior behavior. She may not decrease her activity level until T', when the cost of adhering exceeds the cost of adjusting.

Clearly, in some instances, a court will prefer limited stare decisis to

40. This assumes, of course, that the discounted value of the increased activity level exceeds his share (1-q)K of the adjustment costs.

41. Or, conversely, at time 0, when negligence was optimal, the court could adopt a rule of strict liability and adhere to it forever.

42. More precisely, the court adheres to negligence until the value of pedestrianism exceeds that of driving by some margin. The text can talk of dates rather than states because, in the particular example, the two are identified.

43. Or, as in footnote 42, the stringency can be measured by the extent to which the value of pedestrianism must exceed that value at which strict liability would become optimal. Another measure might be the lowest static social loss at which the court will revise the rule. No stare decisis would then be identified with a social loss of 0 and strict stare decisis with an infinite static social loss.

no stare decisis. One may understand this by considering the excess social costs that may be incurred under no stare decisis. Since, under no stare decisis, the driver may not reduce her activity level until some time T', over the interval t* to T', the static social costs incurred under no stare decisis may exceed those that would occur under stare decisis. After all, absent the adjustment costs, the driver would prefer to reduce her activity level, a choice which would also reduce the expected number of accidents.

If the (static) equilibrium behavior under strict liability is close to the statically optimal behavior, then the driver's failure to adjust her activity level down (coupled with the pedestrian's increase in her activity level) will increase static losses over those incurred under a negligence rule. Moreover, the court could eliminate these additional static losses by following a practice of stare decisis to date T'; at T', when strict liability comes into force, the driver will immediately adopt the lower activity level. Prior to T', both driver and pedestrian will adhere to their equilibrium levels of activity under negligence, hence avoiding the excess losses.[44] In some contexts, therefore, a court will maximize social welfare by adhering to a legal rule that fails to maximize social welfare in the particular period.

C. *Modeling Difficulties*

Formulating a model of stare decisis presents considerable difficulties. A brief exposition of these difficulties may clarify both choices that may appear odd to lawyers and those that appear odd to economists.

As stare decisis is a judicial practice, the decisions of the agents subject to the legal rule may seem extraneous. A model would then simply specify the costs (from a social perspective) of allowing the wrong rule to prevail and the costs incurred in changing the rule. On the other hand, even for purely self-interested agents acting economically rationally, the social costs incurred may depend on how the agents respond to the various legal rules the court might announce.[45] The agents' responses may in

44. In fact the court can increase social welfare beyond that achieved under a practice of stare decisis to date T'. In general, the driver will adjust her activity level too early for two reasons. First, because, in any period, her loss from failure to adjust exceeds the static social loss, the driver's expected discounted costs of non-adjustment exceed the expected discounted social costs of non-adjustment. Second, the driver bears only part of the adjustment costs while society cares about the date at which the pedestrian incurs his share of the adjustment costs. As her costs of adjustment are lower and her benefits to adjustment greater than the social values, the driver will incur the costs of adjustment sooner than socially desirable. If the court maintains the rule of negligence to the socially optimal transition date, the driver will wait until that date to incur her share of the costs.

45. The behavioral response of individual agents will matter to any court that evaluates legal rules at least in part in terms of the social consequences of those legal rules.

turn depend on the type of conduct regulated by the rule so that the effects and desirability of a practice of stare decisis may vary from one legal realm to another.

Attention to the specific legal context serves a further purpose. It ensures that the interpretation of the model is grounded in actual legal practice. Justification of stare decisis in the abstract relies on distinctions between substantive and formal values and among sources of error, the practical content of which is elusive in the absence of a concrete example.

One might wonder, however, why the concrete example chosen is both so complex and so unrealistic. Two features of the accident example may appear overly complex: the attention to two rather than one actor; and the choice of both activity and care levels rather than of care levels alone. If the decisions of only one actor determine social welfare, a practice of no stare decisis (conjoined with the appropriate substantive legal rule) will be optimal. In the accident context, one simply imposes strict liability on the lone actor who then faces the social objective function and will choose as the social decisionmaker would desire.[46] In a model which considers two actors, each of whom chooses a care level only, courts ought not, as Blume and Rubinfeld showed, adhere to a prior decision.[47] Neither should the courts announce the rule that would be best given the actual cost parameters faced by the parties. Rather, some "generalized" practice of stare decisis in which the court abandons the prior rule by moving towards the statically optimal rule proves ideal.

VII. CONCLUDING REMARKS

This essay has criticized and in part reconstructed some legal analyses and justifications of the practice of stare decisis. Though I have offered no formal model nor often resorted to such economic concepts as marginal costs or efficiency, various aspects of the economic analysis of law have informed and motivated the argument. These concluding remarks discuss this *economic* perspective.

Any justification of stare decisis must identify the practice as the "optimal" solution to some decision problem. Formulating the appropri-

46. This identity of interest between the actor and the judge depends critically on the choice of the social objective function as maximization of social welfare.

47. Moreover, contrary to the standard assumption of economic analysis of accident law, the standards of care do not identify a precise care level to which the agent must adhere. Rather, the standard imposes a reasonable person test. This test, to the extent it responds to changes in the relevant economic parameters of cost of care and expected accident losses, holds an agent to a standard that adjusts as the parameters change.

ate decision problem has presented the major difficulty in analyzing stare decisis, a difficulty that has manifested itself in this essay in several ways.

First, one must identify a decision maker and the objective that decision maker seeks to further. In this context, one might consider the designer of a court system who must decide what practices to require of the judges who will decide cases. Throughout the essay, I have generally assumed that the designer shared the values of the judges who would preside in the system and that these values would determine the relative desirability of a practice of stare decisis to one of no stare decisis.[48] These values have generally been left implicit rather than explicit but one might regard the proffered justifications of fairness and certainty in part as suggested aims of the designer. Additionally, we have seen that the paradox of stare decisis most often emerges only when the substantive values of the judges differ from the criteria that determine when two cases are equivalent.

Second, each of the four models of the court system suggests a different decision problem. The structure of the court system determines in part the environment in which judges decide; it may also affect our understanding of the objectives that the designer of the legal system seeks to further in her selection of judicial practices. In the unitary model, for example, we may most easily assimilate the objectives of the designer to the substantive values of the judge who must decide all cases. In the hierarchical model, by contrast, we may most easily imagine conflict between the systemic aims of the designer and the substantive values of individual judges, even of the judges on the highest court.

Third, the model in section VI revealed the complex structure of the designer's decision problem. The designer chooses a practice to which judges will respond "optimally," that is, each judge will further her interests given the practice to which she must adhere. To further her interests, however, the judge must consider how individual agents, or citizens, will respond to the legal rules she announces. The designer's decision problem thus contains two nested problems: the decision problem of the judge and the game defined by the judicially announced legal rule and played by the citizens.[49] The discussion in section VI in fact collapsed

48. The model in Section V deviates somewhat from this position. There we examined a panel model in which different judges had different substantive values. The designer, of course, could not consistently hold both sets of values. A full analysis must thus take one of two tacks. It must impute an explicit objective function to the designer that she seeks to maximize in light of the various objectives of judges. Or it must look for some "overlapping" consensus of the judges on some values that each believes should be furthered.

49. The study of stare decisis thus adds a layer to the typical economic analysis of legal duties. For a discussion of that structure, see Kornhauser, *supra* note 2.

the analysis by assimilating the designer's goal to the substantive values of the single judge.

An economic perspective does not resolve the problems presented by stare decisis but it has, I hope, clarified them. The specification of a simple economic model requires us to state more precisely the questions that the practice of stare decisis poses. When stated clearly, these questions reveal how inadequate our answers to these questions and our understanding of stare decisis have been.