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Jonathan R. Macey

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# THE INTERNAL AND EXTERNAL COSTS AND BENEFITS OF STARE DECISIS

JONATHAN R. MACEY\*

## I. INTRODUCTION

Far from merely providing judges with a useful decision-rule, the doctrine of stare decisis reflects the fundamental values of the legal process and the primordial tension within the common law between change and stability. For economists who do research on legal topics, stare decisis should be of particular interest for a variety of reasons. To begin with, the study of stare decisis may provide valuable insights into the way the judges actually go about deciding cases. Economists have had virtually nothing to say about judicial decisionmaking in general or stare decisis in particular. There simply are no economic theories at all to explain how "independent" judges, whose incomes are not contingent on the outcomes of cases, go about making decisions. A study of stare decisis is therefore of interest to economists because it provides insights into the preference patterns and utility functions of judges. In addition, the topic sheds light on the dynamics between the various hierarchies of courts, and illustrates the complex web of information transferred among judges, lawyers and litigants.

Professor Kornhauser's interesting essay offers an economic perspective on age-old jurisprudential debates over the value of precedent.<sup>1</sup> He also articulates two heuristic models of stare decisis and provides a useful discussion of the circumstances in which stare decisis is justified.

In Section II of this essay I provide an overview and analysis of some of the assumptions that underlie Professor Kornhauser's various arguments. Section III provides an outline of what I believe is involved in an economic analysis of the concept of stare decisis. Such an analysis requires an assessment of the costs and benefits of employing a legal system that invokes the doctrine. I argue that there are at least four economic attributes to a system of stare decisis, all of which suggest that such a system is efficient for legal systems that resemble ours. First, stare

\* Professor of Law, Cornell University. B.A. 1977, Harvard University; J.D. 1982, Yale University.

1. Kornhauser, *An Economic Perspective on Stare Decisis*, 65 CHI.-KENT L. REV. 63 (1989) (Professor Kornhauser's article appears in this symposium issue).

decisis is efficient because it minimizes error costs within the judicial system. Second, stare decisis is efficient because it maximizes the public-good aspect of judicial decisionmaking. Third, stare decisis is efficient because it minimizes the costs of judicial review. Finally, shifting to the judiciary's perspective, stare decisis is efficient because it increases societal demand for judge-made rules relative to legislatively created rules, and thereby enhances the power of the judiciary relative to that of the legislature. Thus, I conclude that the doctrine of stare decisis not only benefits litigants, but benefits judges as well by altering the nature of litigants' demands for judicial services.

Specifically, I will show that the weak form of stare decisis enables judges to specialize in particular subject areas more easily, makes life easier for judges who wish to maximize leisure, and provides the best mechanism by which the decisions of ambitious, enterprising judges can gain influence. Thus, the form of stare decisis practiced in U.S. courts can be explained with reference to the individual preferences of the judges who subscribe to the doctrine. It is these preferences that may best explain the continued vitality of stare decisis in the modern, bureaucratized judiciary.

## II. PROFESSOR KORNHAUSER'S APPROACH TO STARE DECISIS

In his *An Economic Perspective on Stare Decisis*, Professor Kornhauser captures much of the complexity involved in a sophisticated study of stare decisis, and successfully identifies ambiguities and clarifies obscurities in the legal debate on the subject. Almost by necessity, however, Professor Kornhauser focuses his attention on a particularly narrow aspect of the stare decisis question. Such a narrow focus forfeits some of the richness of the subject, but is of great value nonetheless. Indeed, Professor Kornhauser's provocative essay prompted me to rethink my own position on stare decisis, and inspired the remarks that follow.

Professor Kornhauser approaches the issue of stare decisis by pondering the question of what justifies adherence to a prior legal decision known to be wrong. His argument relies on the assumption that "[e]very justification of *stare decisis* must dissolve the paradoxical directive . . . that a judge adhere to a prior decision she knows to be wrong."<sup>2</sup> Thus, central to Professor Kornhauser's model is the assumption that judges actually *know* what the socially desirable outcome is. If judges know this, they can, therefore, weigh the social costs of making an erroneous decision that conforms to the principle of stare decisis, against the

2. *Id.* at 68.

social costs of violating the principle. By phrasing the question in this way, however, Professor Kornhauser presumes that judges enjoy a far greater degree of certainty about the socially desirable outcome in a particular case than they actually do. This presumption causes Professor Kornhauser to miss the important point that stare decisis is an enormously efficient mechanism for conveying information. Stare decisis enables judges to leverage a single skill—the ability to tell when like cases are alike—into a facility for deciding a wide variety of cases that involve substantive legal issues about which the judges may know next to nothing. In a complex world dominated by courts of general jurisdiction, in which lawyers may specialize but judges are expected to master hundreds of disparate areas of law, this attribute of stare decisis should not be minimized.

Similarly, the use of stare decisis allows even judges of general jurisdiction to develop specialized areas of expertise within the law. Judges can allocate their human capital in such a way as to become expert in a particular field, such as admiralty, criminal procedure, or securities regulation, confident that they can rely on other judges' expertise in the areas in which they have not specialized. Thus, as will be seen, the practice of stare decisis permits judges to "trade" information among one another, thereby enabling them to develop areas of comparative advantage.

As I will argue in greater detail below, it seems to me that an understanding of the economic value of stare decisis will lead us to be more skeptical than Professor Kornhauser about what it means for a judge to "know" that a prior decision is wrong. It is the very fact that judges are faced with extremely high information costs, and thus often cannot know whether their decisions are correct, that provides much of the value of the doctrine of stare decisis.

To assume, as Professor Kornhauser does, that we can know that a prior decision is wrong removes much of the economic justification for the concept of stare decisis. The idea of stare decisis requires that we appreciate the intractable problem of uncertainty that plagues judges when they decide cases. For a judge, whether and how to apply the doctrine of stare decisis inevitably involves not only an assessment of the law of a case as applied to a particular set of facts, but also a judicial determination of the probability of error given the circumstances of the case. In other words, stare decisis can be justified only on the grounds that it provides a basis for judicial decisionmaking when judges *don't know* what the correct answer is.

Despite the disadvantages described above, Professor Kornhauser's

assumption of certainty on the part of judges has the distinct advantage of providing useful insights regarding the value of stare decisis to potential plaintiffs and defendants. In particular, Professor Kornhauser's description of the relationship between stare decisis and the socially optimal activity levels for certain types of conduct is quite valuable.

But here too, I will argue, Professor Kornhauser's assumptions pose some problems. Professor Kornhauser argues, for example, that "reliance" or "planning" arguments for stare decisis do not provide strong justifications for the practice in terms of assuring greater certainty.<sup>3</sup> Professor Kornhauser appears to justify this conclusion by assuming that the alternative to strict stare decisis is a system that "might depend on some random device, such as flipping a coin . . ."<sup>4</sup> But, the alternative to stare decisis is not a system that substitutes one source of legal certainty (precedent) for another form of legal certainty (coin tossing). Rather, as Professor Kornhauser appears to recognize, the alternative to stare decisis is for judges to rethink the substantive merits of their decisions every time they make them. If judges reached the same results every time they applied a set of legal rules to a particular set of facts, then stare decisis would not increase the level of certainty within the legal system. The problem is that courts face severe constraints in terms of resources, time and expertise. In a world of increasing technological complexity, where the stock of information is increasing exponentially, the need for specialization is acute. All of these factors are sources of judicial error that stare decisis can mitigate.

In a common-law system, some form of stare decisis is a necessary byproduct of the legal process itself. When judges decide cases, they apply the learning of prior cases to the case before them. Therefore, it simply is not possible to separate a discussion of the value of stare decisis from a discussion of the value of the common law itself. Professor Kornhauser's attempt to separate the two limits the usefulness of his analysis.

Professor Kornhauser's model posits a world in which a court can maximize social welfare over time only if it adheres to a legal rule that fails to maximize social welfare in a particular period.<sup>5</sup> To illustrate his point, Professor Kornhauser employs a simple example involving drivers and pedestrians. In this example, a negligence rule (which would require pedestrians to bear the cost of an accident unless (1) the driver is negligent and (2) the pedestrian is not negligent) will benefit drivers, while a

3. *Id.* at 78.

4. *Id.*

5. *Id.* at 89.

rule of strict liability (which would require drivers to bear the cost of an accident unless the pedestrian is negligent and the driver is not) will benefit pedestrians.<sup>6</sup>

Now, suppose that in time period zero, driving is considered more socially valuable than walking. Under this condition, a legal rule of negligence should be applied to automotive accidents since that rule favors drivers. Later, for exogenous reasons, walking becomes more socially valuable than driving. Under a practice of strict stare decisis, "[a] court . . . adhere[s] to a rule of negligence for all time, regardless of how valuable pedestrianism becomes relative to driving."<sup>7</sup> But under a weak form of stare decisis, courts will continue to apply a negligence rule for some period of time after walking increases in social value, but ultimately courts will make the change to strict liability.<sup>8</sup>

The disadvantage of strict stare decisis in Professor Kornhauser's model at first appears obvious. By sticking to a negligence rule for all time, society suffers a social cost after walking becomes more valuable than driving.

But Professor Kornhauser does not appear to consider the possibility that, at some point after a legal rule has become inefficient, a legislature may intervene and change the law so that the rule that maximizes social welfare prevails.<sup>9</sup> Because legislatures react to societal pressures, at some point they will respond to a particularly inefficient legal rule, unless the political support for retaining the inefficient legal rule outweighs the political support for shifting to the efficient rule.<sup>10</sup>

Once we assume that legislatures can move courts in the direction of social optimality, Professor Kornhauser's implicit conclusion that a judicial practice of strict stare decisis is socially undesirable is not necessarily correct. After all, the strict form of stare decisis does have the advantage of providing legal actors with a great deal of certainty regarding the legal consequences of their actions. If the legislature could be trusted (obviously a heroic assumption) to alter the state of the law and impose the socially optimal solution whenever world events undermined the desirability of the outcome that would be dictated under a regime of strict stare

6. *Id.* at 68.

7. *Id.* at 88.

8. *Id.*

9. Kornhauser's failure to consider this possibility is particularly odd in light of the fact that the issue he has chosen, the shift of liability rules from negligence to strict liability, has been a primary source of concern for state legislatures.

10. See G. BECKER, *PRESSURE GROUPS AND POLITICAL BEHAVIOR IN CAPITALISM AND DEMOCRACY: SCHUMPETER REVISITED* 120, 124 (1985).

decisis, then there would be zero cost to a regime of strict stare decisis.<sup>11</sup> Thus, once we introduce the existence of legislatures into Professor Kornhauser's model, strict stare decisis may in fact provide the socially desirable outcome. The appropriate configuration could well be a passive judiciary coupled with an activist legislature that reacted to any socially undesirable outcomes generated by strict stare decisis with new, efficient legislation.

But if we stick to Professor Kornhauser's model and presume that the only source of legal change is the courts, a strict form of stare decisis forces society to labor under obsolete legal rules for infinite periods. Such an outcome may not be as inefficient as it first appears. Clearly, as the costs of opting-out or contracting around a particular legal rule go up, the costs of a strict form of stare decisis increase as well. But for those rules that the parties can cheaply avoid, strict stare decisis poses few efficiency concerns.

It seems clear that many of the rules generated by legislatures do not enhance economic efficiency. Rather, these rules seek to effectuate wealth transfers from societal groups that possess relatively little political power to other, more powerful, groups and coalitions.<sup>12</sup> A major attribute of an independent judiciary is that it makes it more difficult for legislatures and interest groups to effectuate such transfers.<sup>13</sup> Thus it isn't clear that legislatures should be encouraged to step in and correct perceived inefficiencies in common-law outcomes.

In addition to his observations about strict stare decisis, Professor Kornhauser observes that, at least in some instances, courts will prefer limited stare decisis to no stare decisis.<sup>14</sup> Again, Professor Kornhauser employs a simple model with drivers and pedestrians as legal actors, and negligence and strict liability as possible legal rules.

After walking becomes more valuable than driving, and there is a shift from a negligence rule to a rule of strict liability, drivers will drive less because the regime of strict liability has made driving more costly. Drivers will balance the increased costs of driving with the adjustment

11. Obviously, the longer it takes for a legislature to react to inefficient decisions, the greater the departure from efficiency, and the more closely a system of legislative reaction would resemble weak stare decisis.

12. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471 (1988).

13. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986); but see Landes & Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975) (arguing that the independent judiciary facilitates rather than retards the legislative wealth transfer process by improving the durability of the "contracts" forged between legislatures and interest-groups).

14. Kornhauser, *supra* note 1, at 88-89.

costs, and reduce their driving until the present value of an additional increment of adjustment equals the present value of an additional increment of expected costs from driving. Because drivers must face adjustment costs when they reduce their levels of driving, including presumably, the costs of obtaining information about the new legal rule,<sup>15</sup> drivers might not immediately incur the necessary adjustment costs under a regime of no stare decisis.

This delay would result in increased social costs, and lead to the possible conclusion that stare decisis may be less costly than no stare decisis. This is due to the fact that under a rule of no stare decisis, drivers may not immediately reduce their activity level after a change from negligence to strict liability because of the size of the adjustment costs involved. Under these circumstances, according to Kornhauser, the social costs incurred without stare decisis may exceed those that would occur under stare decisis.

But this conclusion assumes that drivers are more likely to delay altering their behavior in a regime of no stare decisis than they are in a regime of weak stare decisis.<sup>16</sup> In other words, Kornhauser argues that parties might not adjust their activity levels under a regime of no stare decisis as quickly as they would under a regime of stare decisis. But it is not obvious that this will be the case. Similarly, Kornhauser assumes that under a regime of stare decisis, the parties will adhere to a particular activity level, and then immediately shift when the court moves from a negligence rule to a rule of strict liability.<sup>17</sup>

But it is entirely possible that the injuring party might incur its adjustment costs even more quickly under a regime of no stare decisis than under a regime of weak stare decisis. Suppose, once again, that the socially optimal result shifts from being pro-driver to being pro-pedestrian, so that the socially optimal legal rule changes from negligence to strict liability. If the driver *is aware* that the social optimum has shifted, then he may adjust his activity level instantaneously, *i.e.* without waiting for a judicial pronouncement of the shift. This would be true in a world where information costs are low. In such circumstances, under a regime of no stare decisis the legal rule might change very soon after walking became more socially desirable than driving. If drivers expect that legal deci-

15. Professor Kornhauser is a bit unclear about when a legal rule changes under a regime of no stare decisis.

16. Kornhauser, *supra* note 1, at 89 (arguing that courts could eliminate the additional welfare losses associated with drivers' failure to adjust their activity levels by following a practice of stare decisis because when strict liability comes into force the driver "will immediately adopt the lower activity level").

17. *Id.*



sions soon will begin to impose strict liability on drivers, then they may begin adjusting their activity levels very soon under a regime of no stare decisis. By contrast, if the prevailing regime is a weak form of stare decisis, drivers may find it advantageous to delay making the transition until a court in the jurisdiction formally rejects the pre-existing precedent.

Similarly, under a regime of no stare decisis, the legal rule may not even have to change formally before the parties alter their behavior. Professor Kornhauser identifies time  $t^*$  as the point at which strict liability becomes the optimal rule because walking has increased in social desirability.<sup>18</sup> Later, however, Professor Kornhauser appears to recognize that, due to the uncertainty facing legal actors about what the socially desirable legal outcome is, time  $t^*$  may not occur until the point at which a court actually recognizes that the socially optimal result has changed and formally declares a new legal rule.<sup>19</sup> Thus it is not clear whether time  $t^*$  is the point at which a court declares a new legal rule, or the point at which the socially optimal result shifts from one favoring driving to one favoring walking.

A final problem with Professor Kornhauser's model is his assumption about adjustment costs. Professor Kornhauser assumes that under a regime of stare decisis, parties will not have any incentive to incur their share of the adjustment costs until the legal rule actually changes from negligence to strict liability.<sup>20</sup> But this ignores the fact that legal decisions operate retroactively in the sense that they affect conduct that already has occurred. Once the socially optimal outcome changes from negligence to strict liability, drivers will have an incentive to anticipate the formal declaration of a change in the law by altering their activity levels even before a court formally announces the change. If a pedestrian sues a driver, a court is likely to apply a rule of strict liability if it determines that the socially optimal outcome has changed from one favoring drivers to one favoring pedestrians. Thus drivers will have an incentive to alter their conduct in anticipation of a formal announcement of a rule change whether or not the legal system operates under a regime of stare decisis or no stare decisis.

Similarly, Professor Kornhauser assumes that under a practice of no stare decisis the pedestrian will immediately incur the adjustment costs and increase her activity level when the rule changes from negligence to strict liability. This conclusion seems to assume that the pedestrian, un-

18. *Id.* at 87.

19. *Id.* at 88.

20. *Id.*

like the driver, incurs no adjustment costs when moving to a higher activity level. This is not the case. The pedestrian may have to incur such costs as selling her car, conditioning herself for more walking, or buying better shoes. These adjustment costs may cause the pedestrian to postpone the time at which she increases her activity level. Indeed, the pedestrian may incur greater adjustment costs in the shift from negligence to strict liability than the driver. After all, the driver must only decrease his activity level, while the pedestrian must increase hers. Decreasing one's activity level may involve relatively few costs. Once we realize that adjustment costs are borne by both sides, it is not clear whether a regime of stare decisis or a regime of no stare decisis will allow us to reach the socially desirable outcome most rapidly.

The point of all this is not to suggest that Professor Kornhauser is wrong in his assessment that a weak form of stare decisis will maximize social welfare by adhering to a legal rule that fails to maximize social welfare in a particular period. I fully agree with Professor Kornhauser on this point. Rather, it seems to me that: (1) the efficiency arguments he makes against the social desirability of a strict form of stare decisis are not as strong as he suggests, due to the ability of legislatures to move legal rules towards socially desirable alternatives; (2) the efficiency arguments he advances in favor of a weak form of stare decisis over a rule of no stare decisis rely on the assumption that under a regime of no stare decisis, certain parties may be slower to adjust their activity levels than under a rule of stare decisis. While it is possible that this is the case, it seems equally plausible that parties will adjust their activity levels even faster under a regime of no stare decisis. If this is the case, then a rule of no stare decisis might produce the socially desirable result.

It appears that the question might lend itself to empirical analysis. At the theoretical level the outcome appears highly indeterminate. As Professor Kornhauser observes, following a regime of stare decisis "[i]n some contexts, . . . a court will maximize social welfare by adhering to a legal rule that fails to maximize social welfare in the particular period."<sup>21</sup> Unfortunately, in Professor Kornhauser's model, the adjustment costs facing the relevant parties determine whether social welfare is being maximized by a regime of stare decisis. But courts have exhibited little, if any, ability or inclination to delve into the adjustment costs facing the parties before them in the way that Professor Kornhauser describes. As the next section will explore, however, it appears to me that the advantages of stare decisis greatly outweigh the disadvantages, despite the am-

21. *Id.* at 89.

biguity of Professor Kornhauser's analysis about whether stare decisis actually provides incentives for legal actors to engage in behavior that maximizes social welfare.

### III. THE ECONOMICS OF STARE DECISIS

#### A. *Error Costs*

Suppose that, while judges reach correct results most of the time, they do not *always* reach correct results when applying substantive legal rules to the cases before them. In such a situation, the use of stare decisis is of value to judges because it permits a judge to compare his application of substantive legal doctrine to a particular case with the application of such doctrine by many other judges in similar cases.

In other words, judges apply two sorts of legal skills when deciding a case. One sort of legal skill is the skill involved in formulating, articulating, and applying substantive legal doctrine to a particular legal dispute. The second set of legal skills allows the judge to determine what sorts of cases are alike, in order to "check" his result in the first case.<sup>22</sup>

An advantage of stare decisis is that it enables judges to reduce the uncertainty associated with making decisions. They can check their results against the results reached by similar judges. It is easy to see that stare decisis can be extremely valuable to a legal system. In developed legal systems judges will be checking their opinions against several, perhaps hundreds of similar cases that have evolved in the common-law process over hundreds of years. If we retain our assumption that other judges usually are correct when they reach legal decisions, then the prevailing substantive legal rule on a particular issue is very likely to be correct.

It seems clear that the depiction of judges presented in the above discussion is highly idealized. Clearly, not even the best judges go about formulating what they believe to be the substantively correct legal result in every case, and then checking that result with the relevant precedents. Instead, judges generally employ stare decisis precisely because it enables them to *avoid* having to rethink the merits of particular legal doctrine. Instead of rethinking, the judges can "free-ride" on the opinions of previous judges.

At the same time, however, judges are likely to feel more confident about their abilities and instincts when deciding certain sorts of cases than when deciding others. For those classes of cases about which judges

22. *Id.* at 69-70 (Kornhauser would call these "substantive" and "formal" skills).

feel they have a particular expertise, the idealized checking process described above is a valid portrayal of the judging process. Thus a practice of stare decisis not only permits judges to conserve judicial resources, it allows them to specialize in particular areas of the law.

Judges can free-ride on the expertise of other judges in those areas in which they do not specialize, and create new law in those areas in which they feel they have expertise. This phenomenon is particularly obvious in multi-judge panels such as those that exist on federal circuit courts of appeals. Judges will hear cases in panels of three, and opinions often will be assigned to judges on the basis of their experience, interest, and expertise. Thus, judges can trade their expertise with the expertise of other judges. Stare decisis may be viewed as a legal innovation that allows judges to expand the process of trading experience and expertise over time and across jurisdictions.

But, as Professor Kornhauser explains, in a dynamic world, the practice of following precedent by employing stare decisis may lead to missteps by the judiciary.<sup>23</sup> Suppose, by way of illustration, that a judge obtains a certain legal result by formulating, articulating and applying what he believes to be the appropriate substantive legal rule to the case before him. While he believes that he has reached the correct result, he also is aware that there is a chance that he has made a mistake. A valuable method of checking for error is to compare his substantive result with the results obtained by other judges in like cases. If the result the judge has obtained by using substantive analysis is different from the result he believes others have obtained in similar circumstances, then the judge must reassess his initial substantive analysis. But there is also some probability that the judge has decided the case correctly, and that exogenous changes on the state of the world account for the variance between his result and the result reached in prior cases.<sup>24</sup>

For example, as Professor Kornhauser points out, it is possible that when earlier cases were decided, a rule of strict liability was employed because of strong substantive values favoring a legal rule that was pro-pedestrian. This may have been true because society placed a higher value on walking than on driving as a method of transportation.<sup>25</sup> Because strict liability favors pedestrians, a substantive legal rule of strict liability would conform to societal values more closely than would a negligence standard.

23. *Id.* at 70-71.

24. *See id.*

25. *Id.* at 87-88.

But if society's substantive values have shifted from favoring pedestrians to favoring drivers, then later judges may favor a negligence rule in traffic accident cases in order to reflect that shift. Professor Kornhauser refers to exogenous events that lead to changes in socially optimal legal outcomes as "changes in the world."<sup>26</sup> He concludes that following the principle of stare decisis requires a judge to make a "wrong" decision where there have been changes in the world because the principle requires that judges be bound by the prior (wrong) decisions.<sup>27</sup> But it is not clear that this is the case. It seems to me that the principle of law announced in the prior case may not be as rigid and inflexible as the one that Professor Kornhauser describes. The earlier cases, and indeed a sort of meta-legal rule, would have made it clear to legal actors that the particular details of the rule in question were subject to the condition that legal rules should further generally accepted societal values such as efficiency. As such, it would be clear to legal actors that as societal values changed, stare decisis would dictate that future judges alter the legal rule from negligence to strict liability.

In other words, Professor Kornhauser's conclusion that stare decisis requires judges to reach wrong decisions in cases in which there have been "changes in the world," rests on a rather crabbed view of what it means for a judge to follow the decisions of past cases when deciding future cases. He assumes that it means following some narrowly defined construction of the precise legal rule articulated in prior cases. But a richer conception of stare decisis would have judges follow the meta-rules articulated in previous cases, even where that meta-rule ultimately came to conflict with micro-rules such as the ones that Professor Kornhauser describes. The example Professor Kornhauser uses throughout his article is instructive. He presumes that adherence to stare decisis in automobile collision cases merely involves adherence to a particular micro-rule, in this case negligence or strict liability. A meta-rule to which a judge might adhere—while shifting among various micro-rules—is the maximization of net social welfare. Indeed, Richard Posner long has argued that the common law maximizes efficiency.<sup>28</sup> Such a meta-rule permits judges to remain faithful to the ideal of stare decisis by following the meta-rule of previous cases while ignoring the micro-rule.

As Roberta Romano has shown in her path-breaking article on the Delaware judiciary, change and predictability are not mutually exclusive

26. *Id.* at 70.

27. *Id.* at 71.

28. R. POSNER, *ECONOMIC ANALYSIS OF LAW* 495 (3d ed. 1986).

attributes of a legal system.<sup>29</sup> They are characteristics that can exist simultaneously. Indeed, in a world of flux, the most desirable legal systems are those that offer credible promises to legal actors that they will continue to maximize social welfare by quickly responding to new information and changing conditions.<sup>30</sup>

Even assuming that we wish to follow Professor Kornhauser's narrow conception of the meaning of stare decisis, it is still important to distinguish cases that depart from established precedent due to a judicial perception that there have been "changes in the world," from cases that depart from established precedent simply because the values of the judge hearing the case differ from the values of the judges who heard the prior cases.<sup>31</sup> One of the attributes of a regime of stare decisis is that it imposes a constraint upon judges who might otherwise overrule preceding cases simply because their values differ from those of previous judges. In law school, in practice, and on the bench, the legal culture conveys the message that judges ought not allow their personal values to dominate other, more meritorious considerations as precedent. While judges may, on occasion, determine that the utility to be derived from breaking with precedent is greater than the costs associated with such a move, having stare decisis imbedded in the legal culture at least raises the cost of such self-indulgence.

Thus far we have identified two possible conditions under which a judge may reach a substantive conclusion that differs from existing precedent. The first is that the judge is wrong about the efficient outcome in a case. The second is that the judge has made the correct assessment of the appropriate substantive result in the case, but that the prevailing rule is no longer the correct rule due to exogenous changes in the state of the world. As discussed above, in the latter situation it is not clear that the principle of stare decisis need be violated in order to reach the socially optimal legal result.

A third possibility, of course, is that society's preferences have not altered and the judge was correct in his assessment of the appropriate substantive legal rule, but the judge simply is incorrect in his assessment of the appropriate set of precedents to apply to the case before him. In a situation like this, the existence of stare decisis may increase the complexity of the legal system and lead to more error, because the judge

29. Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225 (1985).

30. *Id.*

31. See Kornhauser, *supra* note 1, at 69-70 (discussing how changes in the values of judges may lead to differing outcomes).

might reach the wrong result if he decides to follow what he erroneously believes to be the controlling prior cases. This is a cost that must be weighed against the benefits of stare decisis. It seems likely that the benefits in terms of reduced error costs alone outweigh this cost. Keeping in mind that all judges hold some degree of expertise in evaluating precedent, the error of a particular judge in identifying the correct precedent can be checked far more easily than can an error involving the application of substantive legal rules, because reviewing judges may not have any particular expertise in the substantive area. Thus, despite this last complicating feature, it is clear that employing stare decisis can reduce the incidence of imperfect judicial decision-making.

### B. *Stare Decisis as a Public Good*

In addition to serving as a valuable mechanism for reducing error costs in the ways described above, stare decisis is efficient because it maximizes the public good aspect of judicial decision-making. The legal rules generated by courts have two sorts of economic effects.<sup>32</sup> One set of effects is external to the litigants themselves. These effects come in the form of the information content of a decision, which provides a valuable signal to future litigants. The second set of effects are the actual wealth transfers associated with a particular decision. These effects are internalized by the parties, themselves. Stare decisis tends to maximize the external economic effects of a particular decision and minimize the internal effects. As such, the doctrine is appropriate in a legal system where the costs of the litigation system are not borne exclusively by the litigants themselves, but are shared by the litigants and society as a whole.

The collection of a set of precedents may be viewed as the principal asset of a judicial system.<sup>33</sup> The higher the quality of its assets, the better the judicial system may be said to be. Because precedents are publicly available information, it is difficult to make a defensible claim to property rights to these assets. Consequently, it is easy for people to free-ride on the rules generated by their legal system. Taxation is only a crude way to overcome the free-rider problem. Many taxpayers do not receive the benefits of the capital stock of precedent. And many who receive the benefits do not pay their full share. For example, both Israel and the United States were able to free-ride on the stock of precedents created by

32. See Landes & Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979).

33. Landes & Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 250 (1976).

Great Britain during their formative eras by incorporating British precedent into their legal systems.

The observation that the stock of precedents created by a regime of stare decisis constitutes a valuable societal asset has an interesting empirical ramification. If precedent provides certainty, then one useful means of measuring the value of a legal system's stock of precedent is to observe its litigation rates. Rational economic actors will not litigate a case if they are certain about the outcome. Litigation will only occur when the parties disagree about the probabilities of success.<sup>34</sup> Thus, high litigation rates imply relatively high uncertainty and low precedential value.

As Landes and Posner have observed, "[a]bsence or depletion of the relevant legal capital incites litigation, which produces precedents as a byproduct. . . ."<sup>35</sup> Thus, litigants, who are not compensated for bringing cases that create great precedents, nevertheless have an incentive to bring such cases despite this absence of property rights in the precedents generated by the litigation they subsidize.<sup>36</sup>

In other words, the best way to evaluate the efficacy of a particular regime of stare decisis is to look for evidence of a lack of litigation. In this regard, Kornhauser's model departs dramatically from previous work by economists on the subject. Earlier work recognized that legal precedent is "a good that accrues primarily to the community as a whole rather than to individual litigants. . . ."<sup>37</sup> By contrast, Professor Kornhauser's model focuses exclusively on the value of stare decisis to the litigants in a particular case, rather than to society as a whole.<sup>38</sup> The focus of Professor Kornhauser's model puts additional pressure on his conclusion that strict stare decisis necessarily is inferior to weak stare decisis. It seems clear that, while employing a strict form of stare decisis would impose costs on individual litigants in particular cases (as illustrated in Professor Kornhauser's model), such a system would maximize the public-good attributes of precedent by lowering the uncertainty that plagues the legal system. This diminution of uncertainty would permit better planning by legal actors, and result in less litigation.

34. Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279 (1973).

35. Landes & Posner, *supra* note 33, at 271-72.

36. *Id.*

37. *Id.* at 271.

38. Kornhauser, *supra* note 1, at 87. (This aspect of Professor Kornhauser's approach was clarified when he explained that "[i]n the accident example, society consists solely of the driver and the pedestrian. The total social loss must therefore fall . . . entirely on them."). *Id.*



### C. *Stare Decisis and the Costs of Appellate Review*

Thus far I have observed that stare decisis is of value to a legal/economic system because it reduces judges' error costs, and because it lowers uncertainty and hence reduces transaction costs. In addition, stare decisis is of value to a society because it minimizes the costs of judicial review by higher courts. This conclusion is a straightforward application of the analysis presented above.

An implication of the above discussion on error costs is that stare decisis serves as a mechanism for increasing the efficacy of multi-judge panels. Judges on such panels can choose to take primary responsibility for those cases in which they have the greatest expertise, confident that their ability to evaluate the application of precedent will enable them to check their own work product as well as the work product of the other judges. Similarly, employing a doctrine of stare decisis enables higher courts to select cases for review more efficiently. Those cases that depart dramatically from established precedent can be easily identified and singled out for special attention. As described above, it is possible that self-interested judges at times will decide cases in ways that are more consistent with their own preferences than with the preferences of society as a whole. Such cases are likely to depart from established cases, and these can easily be singled out for attention and reversal by a higher court. All else equal, lower court judges will prefer to have a low reversal rate than a high reversal rate. This preference provides an incentive for such judges to follow precedent.

Just as stare decisis improves the quality of appellate review, having a hierarchical judicial system that includes the right to appeal improves the value of stare decisis. Conflicting precedents generated by lower courts with overlapping jurisdiction undermine the value of a system of stare decisis as a mechanism for guiding behavior. This has been identified as a reason why a free market in precedent production might not generate optimal outcomes.<sup>39</sup> Appellate review in a hierarchical judicial system has the obvious benefit of achieving standardization.<sup>40</sup>

Professor Kornhauser's model does not fully recognize the value of standardization for a legal system. His model, which requires judges to select between a liability rule of negligence and a rule of strict liability as applied to drivers and pedestrians, captures only one aspect of the legal dynamic that exists among plaintiffs and defendants. This is because the parties in his model cannot easily contract around the liability rule im-

39. Landes & Posner, *supra* note 32, at 239.

40. *Id.*

posed by the courts. But in a wide variety of other contexts, particularly in corporate and contractual settings, it is quite easy for parties to contract around whatever liability rule is imposed by courts. In these settings, it doesn't matter what the particular default legal rule happens to be, so long as it's sufficiently clear that parties don't waste resources engaging in needless negotiations. Where having the "correct" legal rule is less important than the consistent application of a precisely articulated rule, the tension Professor Kornhauser draws between the legal rule that is socially optimal in the absence of stare decisis and the legal rule that is socially optimal in the presence of stare decisis, disappears.

In these latter cases, the value of a clearly articulated legal rule announced with the authority of a higher court that is unlikely to reconsider the matter in the near future becomes even greater. Under Professor Kornhauser's model, it would appear that a hierarchical court system would have the disadvantage of being somewhat inflexible. To illustrate the point, suppose once again that the socially desirable outcome of driving declined relative to that of walking so that the prevailing regime of negligence should be replaced with a regime of strict liability. Under a hierarchical system of appellate review, the rule would not change as quickly as it might otherwise change, because even after lower courts recognized that the rule ought to change, they would be bound by the prevailing outcomes endorsed by the higher courts. Not until a higher court had released the lower courts from their allegiance to a negligence standard would it be clear whether negligence or strict liability would prevail.

Thus, a hierarchical court system would cause a judicial system to mimic a legal regime of strict stare decisis in certain respects. If, as Professor Kornhauser's model implies, the precise configuration of the legal rules generated by the judicial system has significant efficiency implications, then a hierarchical legal system promotes inefficiency. To the extent that we recognize that over a wide range of legal issues the precise configuration of legal rules is rather unimportant, the problem is diminished.

Finally, whether knowingly or not, Professor Kornhauser's model places him firmly within the constellation of such controversial thinkers as Ronald Dworkin who believe that there is a right answer to every legal question.<sup>41</sup> The better argument appears to be that we simply do not live

41. R. DWORKIN, A MATTER OF PRINCIPLE 119 (1985). For more on this topic, see Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827 (1988); Janzen, *Some Formal Aspects of Ronald Dworkin's Right Answer Thesis*, 11 MANITOBA L.J. 191 (1981).

in a legal world in which logic is attainable.<sup>42</sup> Once again Professor Kornhauser's example is instructive. In a culture as diverse as ours it is impossible to imagine that there could be anything vaguely resembling a consensus regarding the relative social desirability of driving versus walking. Witness, for example, the current controversy over the rights of smokers and non-smokers. The lack of consensus that characterizes the population in general on this issue is shared by the legal community. Professor Kornhauser's presumption that there is or can be a consensus about the socially desirable outcome, even on a relatively simple issue such as this, is subject to great doubt. In a world in which the socially desirable outcome generally will be indeterminate, the certainty provided by a regime of *stare decisis* may be the best that a legal system can hope to achieve.

#### *D. Stare Decisis and Judicial Self-Interest*

The above discussion has offered reasons why a legal regime of *stare decisis* will generate legal rules that are efficient from a societal perspective. In this section, I will argue that *stare decisis* also is "efficient" from the judiciary's standpoint — even if it is not efficient from a societal viewpoint — because it increases societal demand for judge-made rules relative to legislatively created rules, and thereby enhances the power of the judiciary relative to that of the legislature.

As discussed above, an implication of Professor Kornhauser's analysis is that a regime of strict *stare decisis* increases the demand for legislative enactments. This is a consequence of Professor Kornhauser's observation that strict *stare decisis* leads to inefficient outcomes whenever the socially optimal result changes over time. The gulf between the socially desirable outcome and the outcome dictated by precedent will provide an incentive for legal actors to press for the legislature to change the law. Thus judges have an incentive to reach and maintain socially optimal results if they want to maximize their power relative to that of the legislature.

One of the most intriguing characteristics of the American system of *stare decisis* is that it is more or less optional. Judges can, in a wide range of situations, decide for themselves whether to be bound by precedent, at least where the precedent is generated by courts that are parallel or inferior to themselves. The ability of judges to make fine distinctions about fact patterns and to engage in other acts of "creative" judging sig-

42. Posner, *supra* note 41, at 879.

nificantly expands this capacity. This sort of stare decisis serves the interests of judges by expanding their freedom to decide cases as they wish.

The above discussion provides some reasons why judges do not follow precedent that they either don't like or that they find inefficient. The interesting question is why judges ever follow precedent. Landes and Posner offer an explanation of this aspect of judicial behavior that is intriguing, but I believe erroneous. Landes and Posner claim that "[n]o matter how willful a judge is, he is likely to follow precedent to some extent, for if he did not the practice of decision according to precedent (*stare decisis*, as lawyers call it) would be undermined and the precedential significance of his own decisions thereby reduced."<sup>43</sup> But what the Landes and Posner argument really suggests is that individual judges are in a form of prisoner's dilemma when it comes to following precedent. The dominant outcome for many judges may be to ignore the precedent generated by other judges, while hoping that other judges will follow the precedents they generate themselves. An individual judge can have his cake and eat it too by free-riding on the proclivity of his colleagues to follow precedent. In the absence of sanctions for disregarding precedent, it appears that judges often will choose to ignore precedent. As Landes and Posner appear to recognize, one solution to this problem is a hierarchical system of appellate review,<sup>44</sup> because reversals by higher courts are embarrassing and serve to curtail attempts by renegade judges to ignore precedent.

One heretofore unrecognized advantage of following precedent is that it allows judges to maximize leisure time. The ability to reason by analogy is taught in law school. This reasoning ability captures much of what is meant by the phrase "thinking like a lawyer." To the extent that judges (or, more to the point, their law clerks) can determine the outcome in a case by comparing it to like cases, they can avoid the extremely difficult task of constructing substantive legal theories and engaging in complicated policy analyses. In other words, stare decisis permits judges to free-ride on the earlier efforts of other judges. Of course this analysis assumes that some judges will derive utility from deciding hard cases and formulating new law. It appears clear that this is the case. Well known jurists such as Henry J. Friendly, John Harlan, and Richard Posner are distinguished for their love of the law as well as for their reasoning ability. Their name on an opinion has a signalling effect that magnifies its value.

43. Landes & Posner, *supra* note 33, at 273 (emphasis in original).

44. *Id.*

Thus a regime of *stare decisis* might well be adopted by a legal system populated by a mixture of lazy judges and intellectually active judges. Weak *stare decisis* serves the interests of both groups. It increases the effects of the opinions reached by the intellectually active judges, while simultaneously easing the burden of deciding cases that falls on the shoulders of lazy judges. In addition, judges will prefer a regime of weak *stare decisis* to a regime of strict *stare decisis* because weak *stare decisis* broadens the latitude of judges and increases the demand for their services vis-a-vis the legislature.

A final problem of *stare decisis* when viewed from the perspective of judges is its effect on the demand for legal services. Again, the outcomes we observe in the real world seem to confirm a theory that posits that judges will adopt the form of *stare decisis* that maximizes their welfare. In particular, a strict form of *stare decisis* would minimize the demand for judges' services because the clear (though perhaps inefficient) rules generated by such a system would reduce the incidence of litigation brought before judges. But a regime of weak *stare decisis* would not merely increase the demand for judges' services. Clearly, not all judges will prefer a legal regime that increases the demand for judging, particularly when they already enjoy at least a partial monopoly on the provision of their services. Rather, a regime of weak *stare decisis* would minimize the demand to have judges to decide trivial cases, since the outcomes in those cases would be bound by precedent. However, a regime of weak *stare decisis* obviously would not diminish the demand for judges to decide novel or difficult cases, which are not bound by precedent. In addition, weak *stare decisis* would permit intellectually ambitious judges to reconsider precedent that is no longer timely. Thus the regime of weak *stare decisis* currently in effect in this country seems to strike a workable compromise between the interests of intellectually active judges and the interests of lazy judges.

#### IV. CONCLUSION

The biggest shortcoming of Professor Kornhauser's provocative article is that it does not, in my view, fully convey the economic benefits of a legal regime of strict *stare decisis*. Professor Kornhauser's case for rejecting strict *stare decisis* and embracing weak *stare decisis* must be judged "not proven." Strict *stare decisis* maximizes the information value of precedent but leads to inefficient outcomes. If legal actors can opt-out of these inefficient outcomes by "contracting around" them, the benefits of strict *stare decisis* may outweigh the costs. It seems that the

explanation for why we observe judges employing the weak rather than the strong version of stare decisis may best be explained by the fact that weak stare decisis contains the most benefits for judges, personally, regardless of the cost-benefit calculus from the perspective of the legal system as a whole. Despite my tentative rejection of Professor Kornhauser's tentative conclusion, there is no doubt that the article advances our stock of learning on the subject significantly. His treatment of the temporal problems associated with retaining an efficient economic system have interesting implications beyond even the broad subject of stare decisis. By addressing for the first time the point that a regime of stare decisis may create a tension between efficient outcomes during different time periods, Professor Kornhauser greatly has enriched our understanding of a complex legal phenomenon.

