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Response to Macey

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RESPONSE TO MACEY

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In his remarks on my essay "An Economic Perspective on Stare Decisis,"[1] Professor Macey offers four major criticisms of my discussion. First, Professor Macey contends that my characterization of stare decisis as "judicial adherence to a prior decision known to be wrong" mistakenly imputes certainty into an institution grounded in the possibility of error.[2] Second, he believes that the models of stare decisis I offer ignore both the error-minimization and "public good" aspect of judicial decisionmaking in general and of stare decisis in particular.[3] Third, Macey argues that the evaluation of the practice of stare decisis requires attention to legislative power to overrule judicial decisions.[4] Finally, and parallel to the third point, Macey suggests that the ability of individuals to contract around the legal rule should influence our evaluation of stare decisis.[5]

I agree with Professor Macey that a full understanding of stare decisis must set that practice in the context of both legislative and individual ability to "overrule" the court's decision. I did not attempt a comprehensive evaluation of stare decisis in my essay and I cannot hope to provide an adequate account of the relation of legislative overruling and private "contracting-around" to stare decisis in the brief time for reflection and limited space permitted by the *Review* for reply.[6] Macey's dis-

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

2. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI.-KENT L. REV. 93, 94-95 (1981).

3. *Id.* at 106-07. I confess to some perplexity at the claim that my analysis ignores error-minimization as I explicitly discuss "errors of competence" as a possible justification of stare decisis.

4. *Id.* at 97-98, 110.

5. *Id.* at 98.

6. Though I think Macey's points important, I do think one should not overestimate their significance. In many contexts, such as torts between strangers, individuals have no opportunity to contract around legal rules. In fact, I chose to center much of my discussion around the example of the pedestrian-and-driver precisely because I could avoid discussion of the ability of parties to contract around the legal rule.

Moreover, even when such an opportunity to contract around the legal rule exists, the difference between a practice of stare decisis which, in Macey's view, provides certainty and one of no stare decisis lies solely in some reduction in transaction costs as the parties could specify legal treatment of their actions under either practice. As the example in section III (A) of Kornhauser suggests, a policymaker may have non-efficiency reasons for preferring a practice of no stare decisis; these reasons may outweigh the extra transaction costs. Kornhauser, *supra* note 1, at 68.

Similarly, legislatures, like courts, have limited resources. As a practical matter, then, legisla-

cussion of his first two points, on the other hand, suggests that my initial discussion was not sufficiently clear. I hope in this reply to untangle some confusions that my earlier text apparently engendered.

I. A PRELIMINARY REMARK

Though Macey's comment apparently suggests otherwise, I did not intend "An Economic Perspective on Stare Decisis" as a definitive appraisal of the practice. Rather, I sought largely to characterize precisely the practice and its justifications. Primarily, I set out a two-dimensional framework in which to evaluate claims about stare decisis. First, I articulated several different models of judicial institutions in which to evaluate the practice. Next, I distinguished four classes of error one might offer to support the practice of stare decisis in each institutional structure. In this context, the two heuristic models discussed in sections V and VI and to which Professor Macey devotes much of his discussion[7] are afterthoughts. The model in section V considers "errors" caused by changes in values in the panel (and perhaps sequential) institutional setting. The model in section VI considers errors resulting from changes in the world in the context of a unitary (single judge forever) institutional context. I omitted models of hierarchical courts and of errors in competence, not because I thought them unimportant, but because I preferred to illustrate most simply the power of models, and hierarchy and competence present more complex problems.

The focus on these two narrow models apparently left the impression that I thought other sources of error in any institutional context (or the same sources of error in different institutional contexts) could be ig-

tures will not often serve as a speedy and effective corrective to judicial error. Rather, legislatures will act only when a judicial decision imposes high costs on a well-organized and powerful interest group or set of interest groups.

7. I am unsure how to understand Professor Macey's extensive discussion of my pedestrian-and-driver example. Macey, *supra* note 2, at 96-102. In section VI(B)(3), I argue simply that, in some instances, a practice of limited stare decisis may be superior to one of no stare decisis or of strict stare decisis. Kornhauser, *supra* note 1, at 86. I did not claim that limited stare decisis was always superior to the other practices. Professor Macey and I thus agree in our conclusion. The details of Macey's discussion, however, suggest that I failed to make the economic analysis underlying that discussion sufficiently clear. In this note, I attempt to clarify at least some of the misconceptions created by my initial formulation.

To begin, I should have made two assumptions explicit. First, the model makes no assumption of asymmetric information. The court, the driver, and the pedestrian know at all times which legal rule would be statically optimal. Moreover, the analysis of the effects of each practice (no stare decisis, strict stare decisis, limited stare decisis) assumes that all parties know what practice prevails. Thus, driver and pedestrian know at each instant what legal rule prevails.

Second, both driver and pedestrian are economically rational. This assumption implies that each actor decides on her activity level on the basis of the costs and benefits to her, given the prevailing legal rule and the judicial practice, of any given choice of activity level.

nored. I hoped to argue to the contrary that an evaluation of stare decisis requires careful consideration of each source of error in each institutional context.

Professor Macey, in his comments, often criticizes the models of sections V and VI from the perspective of a hierarchical institutional context and with errors resulting from judicial incompetence or uncertainty. I too believe that these errors and this institutional context may justify in part stare decisis, but I also believe it worthwhile to model each context/error combination carefully and precisely in isolation from the others.

II. KNOWLEDGE VS. BELIEF IN PRIOR ERROR

Professor Macey argues that my discussion of stare decisis rests on the counterfactual assumption that a judge *knows* that a prior decision was wrongly decided. Macey then develops three complexes of argument from this observation: (1) that judicial understanding of their fallibility will justify stare decisis;[8] (2) that this assumption amounts to a commitment to Dworkin's "right answer" thesis;[9] and (3) that specialization of judges may be explained as a response to judicial self-awareness of fallibility.[10] In this section, I respond briefly to Macey's first and second arguments. I discuss his third argument in section IV. More specifically, I argue further that acceptance of the assumption of knowledge does not commit one to Dworkin's thesis. I agree that the knowledge assumption is counterfactual but it does not undermine the argument in the way Macey suggests.

To begin, I shall briefly clarify the sense in which my argument entails a commitment to the claim that every legal question has a right answer. In the context of my discussion, the objective function of some (relevant) institutional actor characterizes an answer as "right." It is then necessary to identify the relevant actor and that actor's objective function. Implicitly, much of my discussion assumed that each judge's substantive values identified "right" answers for that judge.[11] This position should be congenial to a legal realist. If Dworkin adheres to this position, then his economic view of adjudication as "right" in my sense is

8. Macey, *supra* note 2, at 102-06.

9. *Id.* at 109.

10. *Id.* at 102-03, 108.

11. As in my earlier discussion, one must distinguish "right independent of past decisions" and "right with past decisions taken into account." The discussion in the text and in the prior article contemplates "a historical right" which must be balanced by substantive concerns mediated through stare decisis.

At some places in my essay, the objective function of the designer of the court system rather than of individual judges seems to be indicated. Kornhauser, *supra* note 1.

equivalent to "best" (given the judge's "preferences") in the economic sense.

Consider now Professor Macey's first argument that judges are fallible rather than omniscient. I characterized the judicial state-of-mind as knowledge rather than (fallible) belief for rhetorical reasons only. Suppose a judge, call her Liza, must decide Instant Case in light of Prior Case and that she recognizes Instant Case as equivalent to (or governed by) Prior Case. Liza may have one of three attitudes towards the decision of Prior Case:[12] (i) she may believe (with varying degrees of conviction) that the decision in Prior Case was correct; (ii) she may believe (with varying degrees of conviction) that the decision in Prior Case was incorrect; or (iii) she may not have passed judgment on the correctness of the decision in Prior Case.

My previous discussion does not address possibility (iii). Macey suggests that this attitude is the appropriate judicial attitude and it would justify stare decisis on conservation of judicial resources grounds. I shall discuss this at greater length in section IV when I confront Macey's interesting discussion of specialization. For now let us restrict attention to attitudes (i) and (ii).

In my discussion of errors of competence, I suggested that certain forms of judicial fallibility did justify a practice akin to stare decisis, one in which judges decided *unlike* cases alike. Moreover, this justification required a shift in judicial attitude towards adjudication. Jurisprudential theories of adjudication normally assume that the judge focuses on Instant Case; she attempts to decide Instant Case correctly. Judicial incompetence, I argued, justified stare decisis only if judges shifted their focus from Instant Case to the class of heterogeneous cases that judges have difficulty distinguishing in practice from Instant Case. Judges, in this context, seek to decide the *class* of cases "well" rather than to decide Instant Case "correctly." Thus, judicial error may justify stare decisis, but to do so, it recharacterizes the practice in a manner somewhat at odds with conventional discussions of stare decisis.

If we maintain the assumption that judges seek to decide Instant Case correctly, then weakening Liza's conviction from certain knowledge to probable belief leaves my argument unchanged. Liza may understand that her judgment that Prior Case was wrongly decided is incorrect; it

12. As my earlier article suggests, Liza actually may find herself in a more complicated situation if changes in the world have occurred. In this case, she may believe that Prior Case was correctly decided given the world in Prior Case but that applying the same decision in Instant Case would yield the wrong outcome. Liza's degree of conviction plays no more important role in the analysis of this case than in the case discussed in the text. *Id.*

remains, nonetheless, her best judgment about the appropriate resolution of Prior Case (and Instant Case). To follow Prior Case remains for her, absent a justification of stare decisis, the wrong decision. Even a skeptical judge, fully aware of her own fallibility, must rely on her best judgment to decide the case before her.

III. THE "PUBLIC GOODS" ASPECT OF ADJUDICATION

Professor Macey maintains that my analysis of stare decisis "departs dramatically from previous work by economists . . . [because it] focuses exclusively on the value of stare decisis to the litigants in a particular case, rather than to society as a whole."[13] Either I misunderstand Macey's objection or my initial discussion was unclear.

Stare decisis in my analysis has only a public good component. The public good component appears in two ways. First, actors governed by primary legal rules look to those rules in making their choices. In the pedestrian/driver example, the choice of stare decisis over no stare decisis affects the future behavior of pedestrians and drivers precisely because it affects which primary legal rule will prevail at the time the individuals act. Second, the "designer" of the judicial practice, like the judges within the judicial practice, has a social goal that extends beyond the case before the court. Thus, in the pedestrian/driver example, the designer seeks to maximize social welfare. In the context of this example, driving and walking are the only activities open to actors governed by the legal rules. The welfare-maximizing practice will affect future choices of other drivers and pedestrians; it cannot affect the choices of the parties before the court. The designer chooses between judicial practices on the basis of *future* behavior not out of any concern to resolve a particular dispute before a court.

Professor Macey may have become confused because he has another, more complex, model of judicial decision as public good in mind. Suppose actor A has a choice between actions a_1 and a_2 while actor B has a choice between actions b_1 and b_2. Suppose that each pair (a,b) may impose some loss on either A or B. A complete legal rule would specify who bears the (potential) loss for each of the four possible pairs (a_i,b_j). Suppose that at the outset, the legal rule is unknown in each of the four cases. The court then resolves the case (a_1,b_1) under a practice of stare decisis. Professor Macey may believe that stare decisis has a "public good" effect on actors who adopt some different pair, say (a_2, b_2). Stare decisis might have this effect because the equivalence criteria "dictate" a

13. Macey, *supra* note 2, at 107.

particular outcome in the case (a_2,b_2) or because the equivalence criteria merely suggest a particular outcome in this case. Alternatively, the decision in the case (a_1,b_1) may induce future actors to adopt those actions because, for all other choices, they face uncertain legal outcomes.

My discussion does not analyze the role of stare decisis in this more complex model. Rather, my discussion assumed these problems away on the basis that the criteria identifying equivalent cases were complete, clear, and well-known to all parties and that the agents faced no choice *among* activities in which she might engage. I adopted these assumptions not because I thought the issues suggested by this complex model uninteresting or unimportant but because the issues are complex. Before these complex problems can be analyzed, we must get clear on the simpler conundrums posed in my essay.

IV. Error Correction, Specialization and Other Sundry Matters

Professor Macey contends that my discussion ignored "error correction" concerns.[14] His subsequent discussion offers a potpourri of interesting and provocative remarks on the subject of error correction. In this section, I focus on two threads in Professor Macey's remarks: (a) specialization of judges and (b) his distinction between substantive legal skills and "recognition" skills.

Macey states:

> [J]udges 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 requires the judge to determine what sorts of cases are alike, in order to 'check' his result in the first case.[15]

This distinction is relatively straightforward and reflects conventional wisdom within legal practice. Macey argues further, however, that judges in general are accomplished at recognizing like cases but not generally accomplished at formulating, articulating, or applying substantive legal doctrine. Consequently, a practice of stare decisis reduces error because it allows judges to exercise their talent for recognition and avoid their failing of substantive pronouncement.[16]

14. I find this contention odd as one of my four categories of error, "errors of competence," deals explicitly with a court's unreliability in arriving at "correct" judgments. Kornhauser, *supra* note 1, at 72-73.

15. Macey, *supra* note 2, at 102. His footnote to this passage equates the first skill with my characterization of substantive values and the second skill with equivalence criteria or "formal values."

16. This argument basically rephrases one of the riddles highlighted, I believe, by my discus-

This argument has an appealing ring but it requires more to justify stare decisis. On Macey's account, when Liza confronts a case outside her expertise, she exercises her recognition skills to arrive at a "correct" (or at least good) answer. Of course, Liza only recognizes the similarity in cases; she does not recognize that the prior case was correctly decided. Thus, if stare decisis reduces error, it does so only because the initial decisionmaker, having substantive competence, was more likely to get it right than the average judge.[17]

More problematically, the equivalence criteria have to map onto substantive decisions in the appropriate fashion. If Liza's skill at recognizing like cases differs from her substantive skills, why should we believe that the determination that case A is equivalent to case B implies that both should be decided identically on substantive grounds? If Liza's equivalence criteria are derived from her substantive values, equivalence would imply identical substantive outcomes. Professor Macey, however, cannot rely on the derivative status of recognition skills for his argument because he believes that judges have superior skill in identifying like cases than in formulating rules in line with their substantive values. Thus, for Macey, the equivalence criteria must derive from some other source. Macey must then explain how the recognition skill sorts cases into substantively appropriate categories.

Macey's argument concerning skill differences complements his argument about specialization. I wish to make only two comments here. First, his argument seems to justify specialized courts at least as much as stare decisis. If Liza has substantive competence in securities law and Henry in family law, why create a single court of general jurisdiction on which both sit rather than two specialized courts on which each has sole authority?

Second, Professor Macey apparently offers differences in substantive

sion: why don't the criteria which determine when cases are alike derive from the judge's substantive values? If the formal values that determine when like cases are alike derive from the substantive values, then changes in the world will never induce a court to decide a case wrongly. My discussion of changes in the world, therefore, assumes a discrepancy between substantive and formal values.

One of Professor Macey's criticisms of my article unwittingly denies this maintained assumption. He describes my notion of stare decisis as "crabbed" because it refers to narrow criteria of when two cases are alike rather than to meta-criteria. He then offers the meta-rule "maximize social welfare" as the criterion of similarity. Macey, *supra* note 2, at 104. This meta-rule, however, reduces the formal values to the substantive values at issue in the discussion. Stare decisis plays no role under this meta-rule because changes in the world never lead to wrong decisions. Any meta-rule that leaves a gap between substantive and formal values, however, creates the possibility of error regardless of how abstractly we formulate the criterion of similarity or the substantive rule of law.

17. This argument assumes that a substantively incompetent judge confronted with a case of first impression can manage to resolve it without setting a precedent that other judges must follow.

competence as a justification for multi-judge panels.[18] I find this explanation of adjudication by panels novel and provocative. It also runs counter to conventional justifications that are grounded in the court as a collegial body in which deliberation over a decision occurs. The deliberative model sees judges on the panel as peers, each equally competent to render judgment in the instant case. While the deliberative model may be counterfactual, one should recall that theories of adjudication are generally normative.

CONCLUDING REMARKS

Rather than respond fully to Professor Macey's provocative comments, I have emphasized the limited ambition of my initial essay. I have tried to indicate how Professor Macey's concerns reach beyond the simple distinctions I wished to make to more complex and difficult models of adjudication. I hoped to decompose the tangled issues of stare decisis into elements more amenable to analysis and understanding. I then examined two of the simpler elements of stare decisis. My essay thus stopped far short of the ideal, in which, after careful study of each element, one would reconstruct stare decisis in its full complexity.

I adopted this strategy advisedly. I do not argue that we should abandon forever the grand ambition of a complete understanding of stare decisis in particular and our practices of adjudication in general. I contend only that complete understanding will be achieved only after we have analyzed each of the simple cases carefully. My essay only began the task; its continuation and completion was left for other occasions and other hands.

18. Macey, *supra* note 2, at 108. On this question see generally Kornhauser & Sager, *Unpacking the Court*, 96 YALE L.J. 82 (1986).