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Formal Justice and Judicial Precedent

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Despite the encroachment of legislation on matters that used to lie within the province of the common law, considerable scope remains for the judicial practice of following precedent, without challenging the authority of written law. For decisions must still be rendered where legislation has not yet intervened, and interpretations of written law can be accorded precedential force.

Why should courts follow precedents? When past decisions are unobjectionable on their merits, the practice is relatively unproblematic. It might, perhaps, be justified by the usual argument that it makes judicial decisions more predictable. That justification hardly seems, however, to confront the fact that precedents may have been unfortunate, unwise, and unjust. Why should courts show any respect at all to such decisions?

This Article concerns an argument which, if sound, would support a doctrine of precedent with unlimited scope—one that would provide some justification, though not overwhelming justification, for following all precedents, however regrettable they may be. The argument holds that respect for precedent is required by the principle that like cases should be treated alike.

Although that argument is challenged here, no claim is made that a practice of precedent cannot be justified. The larger purpose of this Article is to clear the way for a systematic inquiry into the sound reasons for, as well as the legitimate scope of, such a practice.

The argument to be examined is sketched in section I. Section

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II takes up the notion of following precedent, to show both that it is not empty but also that it can be understood in more than one way. Section III considers one interpretation of the idea that like cases should be treated alike, as a "formal" principle, which leaves the doctrine of precedent unsupported. Section IV considers another interpretation of the idea, the requirement of moral consistency, which is inadequate to validate the argument, but for different reasons. Section V considers some other grounds for the practice of precedent.

I. The Formal Justice Argument

The reason most often given for the practice of precedent is that it increases the predictability of judicial decisions. As a consequence, it increases security, minimizes risks that might otherwise discourage useful ventures, and generally avoids frustrating expectations.

One might quibble with this line of reasoning. It is unclear, for example, that expectations that might be frustrated by the failure to follow past decisions would even be formed, unless there already existed a more or less regular practice of following precedent. But quibbles like that do not undermine the other claims made on behalf of predictability. These are plausible claims that I do not wish to challenge. Their implications, however, are limited, considered merely on their own terms.

Arguments like these refer to benefits supposedly brought about by the practice of precedent, and such benefits depend on variable circumstances. Even under the most favorable conditions, following precedent can have disadvantages too, if only for those who lose out in court. So the point of these arguments must be that following precedent does more good than harm, overall.

Clearly, following an unwise or unfortunate precedent can sometimes do more harm than good. The same applies to the general practice, at least within a given jurisdiction over an extended period of time. The possibility cannot be ruled out *a priori*. Such reasons for the practice therefore seem incapable of endorsing it in all circumstances, under all conditions. So far as this sort of argument is concerned, the practice can sometimes lack justification.

To clarify this point, we must distinguish between the limited scope and the limited weight that a principle or doctrine might have. Principles are rarely regarded as "absolute"; it is understood that they can be overridden in some circumstances. Such principles can be said to have limited weight. A principle's scope is its

legitimate sphere of application, which is different from, and largely independent of, its weight.

A principle prescribing that judicial precedents be followed might have unlimited scope but limited weight. This is suggested when a case to be decided should be distinguished from a precedent because of overriding differences between the two—when the significance of the differences is not determined by precedents alone. Then the principle would seem to argue for following the precedent because of its similarities to the case to be decided, but it is overridden by whatever considerations argue for different treatment of the case. This gives no reason to conclude that the principle has limited scope, though it must have limited weight.

Consider the role of precedent within the widening sphere of legislation. Where legislation has intervened, it is generally understood to take priority over previous case law. But this is compatible with the idea that the applicable principle of precedent is overridden by the doctrine of legislative supremacy. The point of understanding the principle as applicable within the context of legislation is that it would still be relevant to interpretive decisions. The principle would prescribe that past interpretations of statutes be followed—always, presumably, with the qualification "other things being equal," which represents its limited weight.

This suggests one reason for the importance of the notion that respect for precedent is a matter of treating like cases alike. The principle that like cases should be treated alike is assumed to have unlimited scope. Any reason it provides for the practice of precedent would hold for all situations in which precedents are available.

A second reason for the importance of that argument is that treating like cases alike is often regarded as a requirement, indeed perhaps the central or most fundamental requirement, of justice.[1] When so viewed, the practice of precedent is placed on a moral footing. It implies that the failure to follow precedent is not merely unwise but positively wrong—"other things being equal," that is, unless the failure can be justified by circumstances that permit an injustice to be done.

The standard argument for the practice of precedent, by contrast, has more problematic moral status. While it may be a good thing, by and large, for officials to promote benefits and minimize burdens by making judicial decisions more predictable, it is contro-

1. A good source for this view is H.L.A. HART, THE CONCEPT OF LAW 155-56 (1961).

versial whether this is always morally permissible, even other things being equal. It may be held, for example, that justice takes priority over this kind of utility, so that benefits should be promoted *only* on the condition that they be distributed fairly. A practice that merely perpetuated social injustice would be morally problematic.

This is particularly important if we suppose that a principle of precedent has unlimited scope—or at least includes among the precedents to be followed those that are morally deficient as well as those that are unproblematic. Regarding the principle that like cases should be treated alike as a principle of justice implies moral grounds for respecting flawed precedents.

The idea that there might be moral grounds for respecting morally deficient aspects of a legal system is not implausible, and it is often embraced. It is not implausible because it would merely represent the hard moral fact that principles often seem to conflict. It is embraced, for example, when it is held that there can be a general moral obligation to obey the law (incumbent more strongly, perhaps, on officials than on private citizens), which applies, at least sometimes, to bad as well as good law.

I shall call the idea that the practice of precedent respects the requirement that like cases be treated alike, *the formal justice argument*, because its premise, for reasons we shall later consider, is usually regarded as "formal."

One finds the formal justice argument suggested in the jurisprudential literature.[2] It is not developed or discussed extensively, perhaps because the inference from premise to conclusion seems so simple and direct that elaboration is unnecessary. The idea seems to be this: the requirement that like cases be treated alike is understood to imply that, once we have dealt with a situation in a certain way, it is incumbent on us, other things being equal, to deal with similar situations in similar ways. From this it may seem a simple short step to a principle of judicial precedent, because the latter may seem just a specific case of the requirement that we follow our past practice generally.

II. Following Precedent

One aspect of the formal justice argument needs to be considered first: both the premise and the conclusion incorporate the

2. *See, e.g.*, M. Golding, Legal Reasoning 98 (1984); N. MacCormick, Legal Reasoning and Legal Theory 73ff (1978).

problematic notion of a "like" or "similar" case. The "cases" referred to by the conclusion are those decided in a court of law, whereas the class of "cases" covered by the premise must be much broader, including, perhaps, any situation in which one might form a judgment and act accordingly. We can limit our attention just now to the narrower class of cases, for that will enable us to focus at once on the idea of following precedent. The problem concerning "similar cases" in the broader sphere is basically the same.

The basic problem is simple. Take any case that is to be decided and any other case that has already been decided. However similar they may be, in respects that may seem important, they will also be different in some respects, and vice versa. Some general facts about one case will be general facts about the other, and some general facts about one case will not be general facts about the other. So objective grounds exist both for *and* against regarding *any* past case as "similar" to one that is to be decided.

As a consequence, a principle prescribing that decisions follow those that have already been made in "similar cases" can seem literally impossible to follow. If all the factual aspects of cases were relevant, and any similarity and any difference between cases were sufficient to make them similar and different, respectively, then each past case would both be and not be a precedent for any case to be decided. On that interpretation, the principle would be impossible to follow because it would be, strictly speaking, incoherent.

This conclusion can be avoided only by limiting the range of cases that can be counted as "similar" to, and thus as precedents for, a case to be decided. But, it might be argued, any limitation of that sort would deliberately ignore objective similarities between the case to be decided and those that are excluded from the class of precedents, as well as objective differences between the former and those included in the class of precedents. For this reason, any interpretation of the principle of precedent that avoids incoherence might be considered inherently arbitrary.

Consequently, it might be thought that the very idea of precedent, and along with it that of following precedent, is inherently unclear, so that we need not worry about the logic of the formal justice argument; for its conclusion could make no determinate difference to judicial practice. Courts might speak of "following prior decisions in similar cases," and the like, but any actual use of precedents would be either confused or arbitrary.

A solution to this problem depends on the possibility of a

nonarbitrary distinction between similarities among cases that are relevant and those that are irrelevant to the practice of precedent. I argue in this section that a nonarbitrary distinction seems available, though there is more than one way of understanding both the distinction and the doctrine of precedent.

Let us begin with what seems the most natural and straightforward way of understanding the practice of precedent, one that also seems to conform to the intention of the formal justice argument. The premise of that argument is understood to require that we continue generally to deal with cases as we have been doing, and the conclusion is understood to require that we continue specifically to decide legal cases as we have been doing.

The most natural way of understanding this in the judicial realm is in terms of following the legal judgment that is represented by a previous court decision. Suppose that a court has decided a case by regarding some of its factual aspects as grounds for certain legal consequences. Call these the grounding aspects of the case. That case would seem to count as a precedent for another when the latter case has factual aspects that are the same as grounding aspects of the former case. For the purpose of following precedent, these similarities between the two cases are relevant, and no others are relevant—though other aspects of the cases might of course be relevant for other judicial purposes.

This elementary idea enables us to say what it is to follow precedent in a relatively simple situation. Suppose that all the grounding aspects of the precedent are also factual aspects of the case to be decided. The cases might otherwise be very different. To follow that precedent, the court deciding the later case would simply decide the issue in the same way the earlier one was decided.

Before going further, it may be useful to note how this approach to understanding the practice of precedent applies to past decisions that have interpreted written law. Suppose that a given text has been construed by a court. In arriving at its reading, the court may have formed a judgment concerning the determinate relevance of such things as the specific wording of the text, the specific type of text it is, its legal origins, its proposed applications, and so on. To form such a judgment is, in effect, to regard certain factual aspects of a case as grounds for certain legal consequences, where the consequences concern the specific meaning to be attached to the text and its acknowledged legal ramifications. To follow an interpretational precedent amounts to following a court's judgment as to the legal difference such factors make to the read-

ing of a text.

Now I do not mean to suggest that is generally easy to identify and follow a precedent, so understood. The past court's legal judgment may be unclear; it might never have been clear, even to that court. So it may be impossible, in principle as well as in practice, to follow the legal judgments represented by some past decisions, even though the cases might reasonably seem quite similar to the one that is to be decided. But these difficulties give us no reason to suppose that it is never possible faithfully to follow prior decisions in similar cases. A court can have had determinate grounds for its decision, and there can be adequate evidence of it now. This means that a principle of precedent, on this natural reading, can have determinate implications for practice.

The complications should not be underestimated. Precedents are not usually so perfectly "on point." Suppose that some, but not all, of the grounding aspects of a precedent are factual aspects of a case to be decided. On the present conception of the practice, there is in principle a way to follow that precedent if, but only if, the court that decided it regarded that proper subset of grounding aspects as sufficient grounds for certain legal consequences. To follow that precedent, the court deciding the later case would attach those consequences to the relevant factual aspects of it and decide it accordingly. Any other way of deciding the case would not amount to following precedent, on this conception.

As matters become even so slightly more complicated, it is clear that precedents become increasingly difficult to follow. The court that decided the earlier case may have formed no legal judgment concerning the significance of the relevant proper subset of factual conditions; for it might not have needed to do so. Even if it did so, it might not have expressed that judgment clearly. This is just the beginning of the complications.

Perhaps the most serious difficulty for the practice of precedent is the incidence of conflicting precedents—past decisions that provide, in effect, incompatible guidance for a judicial decision. Two similar cases might have been decided differently, so that the precedents conflict most directly, or the case to be decided might have aspects in common with each of two past cases while those cases share no relevant aspects. Either way, while it may be possible to follow each precedent, it will be impossible to follow all precedents.

Because it is impossible to follow all precedents, a reasonable doctrine of precedent would not require courts always to follow all

precedents for a given case. But we cannot say, *a priori*, what more specific guidance a reasonable doctrine would provide for such a case. That presumably depends, most importantly, on what grounds there are for following precedents and how those grounds may be implicated when precedents conflict.

While the possibility of conflicting precedents tells us that they *can* not always be followed, other factors are taken as reasons why precedents *should* not always be followed. We have already noted two such reasons: intervening legislation and differences that are taken as justifying differential disposition. Such complications make it difficult to say when, precisely, precedent should be followed. But they do not suggest that the very notion of following precedent is inherently unclear. They indicate rather the need to become clear about possible justifications for the practice.

Before we consider the formal justice argument in that role, we should note that the practice of precedent can be understood quite differently. In either describing or endorsing the practice, one might not conceive of it in terms of faithfully following a past court's legal judgment. One might hold, for example, that the *justifiable* use of past decisions as determinate points of departure for current ones involves construing them in the best light possible. One would seek to determine whether, and if so how, past decisions could have been justified; only such decisions would be assumed to merit subsequent respect. The precedential import of a justifiable past decision would be given by the standards, such as the principles or other values, that provide the best justification for it. A past case would constitute a precedent for a new case when at least some of the standards so identified can be applied to the current case.[3] The notion of justification that is employed in this conception of the practice requires clarification, but I shall defer comment until later. For now it may be noted that, if the criteria of justification can be fixed, then the idea of following precedent has determinate implications for judicial decision under this interpretation too. I do not mean that it would generally be easy or always possible to apply such a conception. Just as courts in some past cases may have failed to form a relevant and clear legal judgment, so courts have rendered decisions that cannot be justified. Such cases could not serve as precedents under the two respective conceptions of the practice.

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3. This approach to precedent is discussed in D. LYONS, ETHICS AND THE RULE OF LAW 92-104 (1984).

We might call these two conceptions the historical and the normative, respectively. The normative conception might seem problematical because its use involves recourse to value judgments, which are not required under the historical conception. Any discomfort with that fact must stem from the notion that courts may not legitimately employ value judgments, even when interpreting precedents, rather than from skepticism about value judgments themselves. For one who inquires into the possible justification of such doctrines as judicial precedent must assume that value judgments are differentially defensible—that they are not inherently arbitrary.

It may turn out that the various attempts that have been made to characterize and justify the practice of precedent can be understood as modeled on either or both of these two conceptions, emphasizing either fidelity to the legal judgments that courts have already in fact embraced, or fidelity to past practice only insofar as, and in the respects in which it is, justifiable.

III. Formal Justice as a Framework

We turn now to the premise of the formal justice argument and begin with the problem of "similar cases." For reasons already noted, it could be held that the principle requiring that like cases be treated alike is impossible to follow or else can be followed only in an arbitrary manner. Until it is supplemented by "criteria of relevant similarities," it "cannot afford any determinate guide to conduct."[4]

The question that we face, then, is whether the principle has any interpretation that would solve this problem and render the argument sound. Two different approaches to its interpretation are in fact available. On the view we shall consider in this section, the words "treat like cases alike" express only the bare "form" of principles of justice and no determinate content. In the next section we will examine a determinate interpretation that has been placed on those words.

We can understand the first approach as follows. Justice requires certain patterns of dealing with situations. That is what the *concept* of justice involves. But this concept is subject to many different interpretations, some of which are incompatible with others. These are specific *conceptions* of justice—different theories of

4. *See* H.L.A. Hart, *supra* note 1, at 155.

what justice requires and allows.[5] A coherent egalitarian conception of justice, for example, would tell us that all people should be treated alike in certain determinate respects (for it would be impossible to treat everyone alike in all respects). Nonegalitarian conceptions would emphasize that we should "treat different cases differently"—a formula that is usually thought to complement the requirement that like cases be treated alike—but they would also tell us, in effect, which cases are to be treated alike.

One merit of such a view concerning not only justice but also other broad moral concepts is that something very much like it seems needed to account for some important facts about morality. For example, two individuals who do not seem conceptually confused—who seem to have no difficulty manipulating the concept of justice, and who do not seem to be talking at cross purposes—can disagree about what justice fundamentally requires and allows. This appearance would be illusory unless something like the concept-conception distinction were applicable.

The plausibility of the distinction is suggested, moreover, by its applicability to a much wider range of concepts, not all of them normative. Something like it is needed to explain, for example, how scientists can develop increasingly accurate conceptions of a natural phenomenon under a fairly constant concept. The concept of heat does not tell us what heat fundamentally is, but the concept admits of various conceptions. The caloric conception, which regarded heat as a substance with negative mass, gave way for good reason to the current conception—of heat as the mean kinetic energy of molecules. One such conception can be an improvement over another only if the concept of heat retains a fairly constant reference, independent of the competing conceptions under it.

The example of heat suggests how the superiority of one conception over another is determined by factors that go beyond concepts alone, such as the objective facts. If there are better and worse conceptions of justice, that will not be determined by the bare concept. But the analogy with heat is not meant to imply that there must be superior and inferior conceptions of justice, no less that the matter must be determined by objective facts. We cannot rule out that possibility, but neither can we rule out the possibility that there are a number of equally valid, though competing, conceptions, none of which is best. That question is left open by the application of the concept-conception distinction. In the original

5. *See, e.g.*, J. RAWLS, A THEORY OF JUSTICE 5-6 (1971).

terms, the fact that definite criteria of similarities that are relevant for the purpose of doing justice are required if justice is to have determinate requirements does not imply that such criteria are objectively determined. That question is left open by our recognition of the need for such criteria.

The formal justice argument does not leave such matters open. The argument assumes that some ways of acting *are just* and that others *are unjust*, so it presupposes that there are significant limits on admissible conceptions of justice. But it does not tell us what those limits are, nor on this reading does it identify any general conception of justice. All the argument tells us, in effect, is that whatever those limits may be, they insure that the practice of judicial precedent is a matter of treating like cases alike in a way that justice more generally requires.

To put the matter differently, the formal justice argument presupposes that criteria of relevant similarities among cases to be treated alike are not inherently arbitrary but are discoverable. But, on the present reading, the formal justice argument gives us absolutely no reason to believe what it claims about the practice of precedent. If we regard the premise of the argument as "formal," in this first sense, then the argument as a whole amounts to a framework waiting for substantiation.

What needs to be shown is that there is a reason, grounded upon justice or something else, for following past decisions even when they were brutally inhumane and outrageously unjust. That seems on its face a dubious proposition, and the formal justice argument has not yet been found to give us any reason to believe it to be true.

IV. Consistency and Conservativism

A formal justice reason may seem to be provided by the second approach to understanding the requirement that like cases be treated alike, which holds that it has determinate, even if minimal and only "formal," implications. On this view the premise is regarded as "formal" not because it amounts to a mere framework without substantive implications, but because it is thought to represent a logical constraint of moral consistency.[6]

Consistency, in this sense, involves the logical compatibility of beliefs or judgments, and not, for example, their truth, wisdom, or justifiability. In the present context, it concerns the logical com-

6. This is suggested by both Golding and MacCormick. *See supra* note 2.

patibility of one's moral judgments, such as the way in which one judges acts or other things at different times and in different situations.

It is quite plausible to suppose that logic constrains moral judgment in this way, for one's judgments are not completely independent of one another. They have implications that might be contradicted either directly or indirectly by other judgments. Most important here, one's judgment of specific cases, such as individual acts performed by oneself or others, often reflect general standards. One's judgments are not all ad hoc. This can be true even when one does not consciously deliberate when forming a moral judgment. One can simply have a disposition to appraise certain sorts of situations in certain ways, a disposition that is exemplified in judgments that one makes about specific cases. That would seem indeed to be a psychological platitude.

We can understand this in the following way. Moral judgments, as opposed to mere visceral reactions that can be expressed in words, presuppose some general standards. That is because a judgment is predicated on the idea that relevant facts in the case ground one's judgment of it. But to believe that certain facts are relevant in a certain way in one case is to believe that the same facts are relevant in the same way in other cases, other things being equal. One need not be able to articulate one's standards on demand. The point is that in making a judgment one is committed to the idea that it can be grounded in some way on the facts, and this commits one to the view that such facts are similarly relevant in similar cases, the relevant similarities being determined by the standards that one applies. Thus consistency requires one to "treat like cases alike."

It is important to appreciate that no part of the constraint of moral consistency or such presuppositions of its applicability as we have considered makes use of the notion of a uniquely true, correct, or sound moral judgment. This minimal constraint concerns merely how one's judgments, both specific and general, hang together. And yet this constraint has some determinate implications. It says, in effect, that one must apply the same standards to all cases that one is not honestly prepared to distinguish on principled grounds. That does not tell us what cases to distinguish or more generally what principles to apply. But it does tell us to be faithful to our own deepest values, whatever they may be, and to judge specific matters accordingly.

There is some point to all of this; for we are not implacably

consistent in our judgments. Despite our deepest moral beliefs, there are times when we are inclined to judge some acts or persons either more indulgently or more severely than others, without any grounds that we would acknowledge honestly. One may be too forgiving of a loved one's weakness or of one's own predicament, or one may be exceptionally demanding of oneself or of those to whom one is intimately related. One may judge strangers too harshly or bend over backwards not to do so. The constraint of consistency is meant to counsel against such deviations from one's own general standards.

The result of a violation is not an injustice but that sort of incoherence of which one is guilty whenever one's beliefs or judgments are incompatible. Of course, there may be more to a violation than that, as when one tries to deceive oneself or others into judging in a way one could not honestly endorse.

It is easy to see how this constraint may be thought to require that we go on as before, at least in our judging. Unless we have genuinely modified our moral commitments, consistency requires that we apply them to new cases that arise, whether or not we like the results of doing so.

The requirement that one continue judging as before is parallel to the historical conception of following precedent. If a doctrine of precedent adds anything to the requirement of consistency in judgment, it may seem to be merely the requirement of a closely related kind of consistency—of one's actions with one's honest judgments. For the doctrine of precedent requires not only that one judge, in the narrow sense of forming a judgment, consistently, but also that one act accordingly—consistently with one's judgment. Both elements are of course included in the complex notion of judicial decision.

Thus, the requirement that like cases be treated alike, when understood as expressing the constraint of consistency in judgment, may seem like adequate support for a principle of precedent on the historical model. Consistency requires that we go on as before, and the doctrine of precedent requires the same sort of thing in a specific context, only more so—for it requires also the consistency of action with judgment. If the doctrine of precedent added only that last bit to the requirement of consistency, it might seem like straining a point to criticize the formal justice argument, so construed. But the seemingly tight logic of the argument is in fact an illusion.

There are two significant, nontrivial, apparently unbridgeable

gaps within the argument. One concerns the most problematic implications of precedent on the historical model. The other concerns the distinctive social character of the practice of judicial precedent.

Morally the most significant implication of a doctrine of precedent on the historical model is the notion that any departure from the most inhumane, unjust, unconscionable precedent requires justification. This sort of doctrine holds that, if a court has attached legal consequences to certain facts because it regards that as appropriate for legal purposes, then that judgment deserves some measure of respect.

The constraint of moral consistency is parallel to this sort of doctrine only if it has what we may call a conservative bias, as my formulations were meant to suggest it has. But in fact it has no such bias. That is because we are free to change our moral opinions honestly. The constraint of consistency does not mean that we are prohibited from modifying, qualifying, refining, or otherwise revising our moral judgments, including the standards we apply. We are free to reject judgments that we made in the past, if they can no longer be supported by the standards we now accept; indeed, we are bound by the constraint of consistency to do so.

The absence of a conservative bias is not peculiar to this application of the constraint of consistency. It is pervasive. I cannot be convicted of inconsistency just because I change my understanding of some aspect of the observable world about me or its microstructure. Perhaps I should not change my views without good reason. But consistency does not prevent me from acquiring such reason, from either experience or a reappraisal of it.

So the conservative presuppositions of the present version of the formal justice argument have no basis in the demands of consistency. The idea that one should go on as before, without qualification allowing for changes in one's honest views, is not a corollary of the principle that like cases be treated alike, on the present reading. Of course, it may be argued that the notion of treating like cases alike is most properly understood in just such a way, as incorporating a conservative bias. We should be willing to consider such an argument. But we can find no basis for the idea either in the "form" of principles of justice or in the bare requirement of moral consistency. To assume the validity of a conservative bias without some such supporting argument would amount in this context to begging the question at issue, which is whether, and if so why, morally indefensible decisions should be accorded any measure of respect.

This is not to argue against the idea that a defensible doctrine of precedent might have a conservative bias; it is only to deny that such a doctrine enjoys support from a noncircular version of the formal justice argument. There may still be warrant for a conservative doctrine on the historical model, but that remains to be seen.

Even if we supposed that justice or consistency somehow required such deference to past judgment, regardless of its flaws, there would remain another substantial gap within the formal justice argument. Judicial practices vary, but any doctrine of precedent requires that a court take into account decisions made by other courts—not merely superior courts within the same jurisdiction, for deferring to their judgment involves respect for authority within a hierarchy, and not merely precedent. No doctrine of precedent is limited to prior decisions rendered by the same judge.

But the rational constraint of consistency does not require that we agree—that I bring my judgments into conformity with yours or that you bring yours into line with mine. Neither your nor my judgments can be faulted as incoherent on the ground that we fail to agree. The constraint applies to each individual's judgments and beliefs, not to all beliefs taken collectively.

A doctrine of precedent based on the constraint of consistency thus would concern only the decisions of each judge separately. Even if we assumed that consistency involved a conservative bias, it would require only that a judge follow the paths that she herself has already laid down, not that she take note of signposts erected by others.

There is, finally, the complication that doctrines of precedent apply most directly to the decisions that are rendered by courts, and that courts can have more than one member. It is unclear how a constraint of individual consistency in moral judgment would apply within that context. But even if we personified courts so that the constraint applied directly to them, that still would not make it incumbent on any court to respect decisions rendered by other courts.

More than the mere idea that like cases should be treated alike is required, then, to ground such a doctrine of judicial precedent. It might be suggested, however, that our mistake has been to focus on the historical model, with its conservative bias, when the normative model for the practice of precedent is available. For the normative model, it might be held, accords with the constraint of moral consistency. That is because a normative doctrine of precedent holds that past decisions should be followed only if they can

be justified, and just when, other things being equal, the standards that provide the best justifications for such precedents are applicable to the current case to be decided. To accord best with the constraint of moral consistency, we must not understand justification here in narrow legalistic terms, which often would be of little use anyway, but must be prepared to apply standards that are sufficiently independent of the law as to be usable in its appraisal.

The trouble with this suggestion is that it does not enable the formal justice argument to do any real work. It seems sound in claiming that a normative practice of precedent would accord with the constraint of moral consistency, because a judge so deciding cases would embrace only standards she could honestly accept and respect only decisions she could justify under those standards. But this is not to say that such a practice is required by the constraint of consistency, which is what must be true if the formal justice argument, so construed, is to make any difference here. For that to be the case, any alternative judicial practice must violate the constraint of moral consistency either directly or indirectly. But this means either that any alternative judicial practice is in itself incoherent, or else that it could not be justified within a self-consistent set of values. We have absolutely no reason to reach that conclusion. True enough, we have insufficient reason to believe that a justifiable practice of precedent would include a conservative bias, for we need positive reason to believe that a justifiable practice would respect unjustifiable decisions. But that possibility is, as we have noted, no stranger than the idea that one might have to act when principles conflict. We have no *a priori* reason to suppose that a judicial practice of precedent with some conservative bias is itself incoherent and cannot be justified, therefore we have no reason to suppose that only a normative practice of precedent is justifiable. A normative doctrine of precedent would not seem to violate the constraint of moral consistency, but it seems so far to receive no special support from it either.

V. Beyond the Formal Justice Argument

A fresh start seems needed, but only a few brief comments can be offered here. We might ask, for example, whether a conservative bias can be justified. Why should a practice of precedent be expected to show any measure of respect to bad as well as good decisions?

The usual rationale for the practice, that it makes decisions more predictable, provides, as we have seen, something of an an-

swer, but its justificatory force remains unclear. The points we have already made might be reinforced as follows. Not every frustrated expectation would seem to merit our concern. Not every instance, for example, is a matter of unfair surprise. This holds even within the legislative realm. The grandson who murdered in anticipation of inheriting under his grandfather's will, which seemed assured by the language of the relevant statute, no doubt suffered some frustration when he was denied those gains by the New York Court of Appeals,[7] but it would be implausible to characterize such surprise as unfair. This suggests that not every expectation encouraged by a judicial decision has an equal claim to our concern, and that we should be suspicious of rationales for the practice of precedent that fail to discriminate accordingly. The perpetuation of an unjust precedent is, in effect, the commission of an injustice to yet another party, whereas the failure to perpetuate an unjust precedent may visit no unfair disadvantage on the party who otherwise would have won.

One might object that all expectations encouraged by judicial decisions deserve judicial consideration because the decisions on which they are based embody a commitment to decide subsequent cases in the same way. One might go further: the judicial commitment to follow the same rule thereafter can account for the distinction between ordinary and "legitimate" expectations. Expectations that have been thus encouraged by courts are made legitimate in that way, and legitimate expectations are precisely those we have an obligation to respect.

The point is well taken, but still it must be qualified. Our basic question is whether any practice of precedent—a practice that would involve just the sort of commitment in question—can be justified, and if so whether it would involve a commitment to respect all past decisions, regardless of their merits, other things being equal. The argument that expectations established by such a commitment have a valid claim to judicial concern gives us no reason to believe that such commitments should be made. Furthermore, there may be limits to the binding force of such commitments, whether we like it or not. Just as agreements can be void *ab initio* in the eyes of the law, I would argue that the same applies to some commitments from a moral point of view.[8] We cannot assume, therefore, that judicial commitments to follow precedents have

7. Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889).

8. *See* D. LYONS, *supra* note 3, at 84-85.

proper application when the precedential decisions themselves were unjustly decided.

If a conservative bias is to be defended in a practice of precedent, the most promising line of argument may be this. Suppose that a practice of precedent can be justified, initially within limits suggested by the occasional need for judicial rule-making. Two considerations, perhaps among others, would seem to argue for a judicial policy of respecting precedents generally, rather than one that calls for an attempt to differentiate the desirable from the undesirable precedents. It may be argued, first, that within a system like ours, with a doctrine of judicial deference to legislation emerging from a popularly elected legislature, it is appropriate for courts to minimize apparent changes in the law they are charged with administering. It may also be argued, secondly, that a policy encouraging courts to pick and choose among precedents, in order to ensure that only acceptable ones be followed, is at worst counterproductive and at best ineffective. Such arguments require, however, considerable elaboration and substantiation, which is precisely the sort of effort it is my overriding purpose to encourage.