**Precedent, Fairness, and Uncertainty**

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## *1. Introduction*

Courts in common law systems decide cases as they decided like cases in the past – even if they believe they decided those past cases incorrectly. This is the practice of precedent. In *Whole Woman's Health v Hellerstedt*, for example, the Supreme Court of the United States struck down as unconstitutional a law that limited access to abortion. Four years later, in *June Medical Services v Russo*, the Court heard a challenge to a nearly identical law in a different state. The Court followed precedent and struck down that law, even though most of its members believed that the Court had made a mistake in *Whole Woman's Health*. That is, the Court held as unconstitutional a law that it believed was constitutional.

The practice of precedent is a 'strange idea' (Schauer 2009: 41). Courts are in charge of making decisions on legal issues because – one hopes – they

are good at it. Their judgment on legal issues is generally sound; at the least, it is sounder than the judgment of alternative decision-makers. Why, then, would courts 'do something other than make decisions according to their own best legal judgment?' (Schauer 2009: 41).

The answer, according to some legal philosophers, is the fairness of treating like cases alike. The practice of precedent is thus a practice of fairness (Dworkin 1978: 113). The problem is that it is not fair to treat like cases alike, if that means treating them incorrectly. Suppose that *Whole Woman's Health* and *June* are alike, and that *Whole Woman's Health* was incorrectly decided. Loyalty to the practice of precedent would require the Court to follow its decision in *Whole Woman's Health*. Fairness would not. The practice and fairness diverge in such cases. Fairness on its own cannot justify the practice, as a result.

I accept this worry. I think that there is nonetheless a good argument from fairness to the practice of precedent. I defend two main claims. The first is that fairness *does* require that like cases are treated alike, if that means treating them *correctly*. The second is that a court is, in general, equally likely to make a mistake in a current case as it was in a previous case. Together, these claims support the conclusion that it is often better for

courts to stand by their previous decisions, even when they believe those decisions are mistaken, than to rely on their current judgment.

## *2. Following and distinguishing*

I start with a more precise description of the practice based on Lamond (2005).

In any case, there are two possible outcomes: a decision for the plaintiff or for the defendant. A case includes various factors, which are reasons that favour one or the other of these decisions. A court hears the case and reaches a decision on the balance of these reasons. The *ratio decidendi* of the case is the court's understanding of which reasons sufficed for its decision. We call the case the 'precedent' or 'precedent case' and the court the 'precedent court'.

The same court may later hear a case that falls within the precedent's *ratio*.[1] Call the later case the 'instant case' and the court the 'instant court'. If the court can 'distinguish' the precedent, then it will decide the instant case differently than it decided the precedent case. To distinguish a precedent is to identify a reason, present in the instant case but absent in the precedent, which tips the balance of reasons in favour of a different decision on the assumption that the precedent was correctly decided. If the court cannot distinguish the precedent, then (subject to one qualification) it will 'follow' precedent and decide the instant case as it decided the precedent case.

*Whole Woman's Health* illustrates these points. The Texas law challenged in that case required doctors to have admitting privileges at a hospital within 30 miles of where they performed abortions. The issue was whether this restriction imposed an undue burden on access to abortion. Suppose that in *Whole Woman's Health* the Court thinks that these are the relevant factors:

$f_1$ = the law led to the closure of half of the state's abortion clinics

[1] My concern is the practice of precedent as it applies when the instant and precedent court are the same ('horizontal precedent'). I set aside the practice as it applies when the courts are different ('vertical precedent').

$f_2$ = the law had few if any health benefits

$f_3$ = the legislature thought that the law was overall beneficial

Whereas $f_1$ and $f_2$ favour a decision for the plaintiff, $f_3$ favours a decision for the defendant state. The Court judges – let us suppose – that $f_1$ and $f_2$ outweigh $f_3$. As a result, it decides for the plaintiff. The *ratio* of the case is that: if $f_1$ and $f_2$, then the plaintiff prevails.

In *June*, the issue was the constitutionality of a Louisiana law that, like the Texas law in *Whole Woman's Health*, required doctors to hold admitting privileges at a hospital near to where they performed abortions. There were – let us suppose – the same set of factors as in *Whole Woman's Health*: $f_1$, $f_2$, and $f_3$. Since $f_1$ and $f_2$ are present, the case falls within the *ratio* of *Whole Woman's Health*. Since there are no factors present in *June* but absent in *Whole Woman's Health*, the cases are indistinguishable. So, the Court followed precedent and decided for the plaintiff.

Suppose that a third case now arises. In addition to $f_1$, $f_2$, and $f_3$, there is:

$f_4$ = the law protects patients by credentialing doctors

This factor favours the defendant. It was absent in *Whole Woman's Health* (and *June*). The Court judges – let us imagine – that $f_4$ would tip the balance of reasons in favour of the defendant, on the assumption that $f_1$ and $f_2$ outweigh $f_3$. In that case, the Court will distinguish *Whole Woman's Health* and decide for the defendant.

I said that there was a qualification and here it is. Instead of following or distinguishing a precedent, a court may 'overrule' the precedent, where an overruled case does not constrain any court's decision-making. Courts do not, however, overrule precedents whenever they believe they were incorrectly decided. The Court in *June*, for example, did not overrule *Whole Woman's Health*, even though it believed that case was incorrectly decided. More than mere error is needed. Exactly what more is needed I leave for §7.

With the doctrine described more fully, I can state the question more precisely. Ought courts to follow their decisions in indistinguishable cases, even if they believe those decisions were incorrect?

*3. Fairness*

To answer this question, I begin with the relationship between fairness and treating like cases alike.

Let us say that two cases are 'alike' if and only if they are indistinguishable. On this definition, cases can be alike even though they do not have all of the same factors. Rather, two cases are alike when, given that the decision in one case is correct, the same decision in the other case must also be correct, despite any differences between them. Given that the decision in *Whole Woman's Health* is correct, for example, the same decision in *June* must also be correct. Like cases are treated alike if and only if the same decision is reached in the two cases.

People often say that it is fair to treat like cases alike, but there are different ways to develop the idea. Here is a possible principle:

> (P1) When $c_1$ and $c_2$ are like cases, if you decide $c_1$ in some way, then it is fair to decide $c_2$ in the same way and unfair to decide it differently.

Were (P1) true, it would be easy to defend the practice of precedent. Since (P1) draws no distinction between correct and incorrect decisions, fairness would require a court to follow its decision in an indistinguishable case,

even if that case was decided incorrectly. Fairness would require the Supreme Court in *June* to follow *Whole Woman's Health*, for example. But fairness would not require the Court to follow *Whole Woman's Health* in our imagined third case, because that case can be distinguished from *Whole Woman's Health* on the basis of $f_4$. So, (P1) explains the sense in which precedents constrain courts, and the sense in which they leave them free.

(P1) has very counterintuitive implications, however. Suppose that you and I commit the same, minor offence. We each deserve a 3-month sentence. I receive an unduly harsh sentence of 3 years. According to (P1), fairness demands that you receive the same 3-year sentence. But this cannot be right. It is *not* fair to treat you incorrectly just because I was treated incorrectly. In general, it is not true that fairness demands the repetition of incorrect decisions (Alexander 1989: 10; Postema 1991: 1167-8; see also Montague 1980: 133).

So we should reject (P1). That does not mean, though, that we must reject the idea that it is sometimes fair to treat like cases alike and unfair to treat them differently. Sometimes, there are cases in which there is more than one correct decision. There may be incommensurable values at stake, for example, or the reasons in a case could be evenly balanced. In such cases,

fairness could serve as a tiebreaker (Alexander 1991: 11-12; Lamond 2007: 707; Brand-Ballard 2010: 259-60). This suggests an alternative principle:

> (P2) When $c_1$ and $c_2$ are like cases, if there is more than one way to decide each case correctly, and if you decide $c_1$ in one of these ways, then it is fair to decide $c_2$ in the same way and unfair to decide it differently.

Suppose that you and I commit the same offence and deserve a 3-month or 4-month sentence. Either sentence would be correct. I receive a 4-month sentence. According to (P2), fairness demands that you receive a 4-month sentence, too.

(P2) is fine as far as it goes, but it does not go far enough. Suppose that you and I commit the same offence, the uniquely correct sentence for which is 4 months. While I receive the correct sentence, you receive an unduly lenient 3-month sentence. I have nothing to complain about, noncomparatively. But I still have a legitimate complaint (Lyons 1973: 843). The complaint is that I have been treated too harshly compared with you. A natural way for me to express this complaint is that it is unfair for me to receive a harsher punishment than you received, when there is

nothing to distinguish us. (P2) cannot account for this type of complaint: by hypothesis, there is only one correct way to treat our cases.

At this point we are looking for a principle that is not as strong as (P1) or as weak as (P2). Here is the principle I favour:

> (P3) When $c_1$ and $c_2$ are like cases, if you decide $c_1$ correctly, then it is fair to decide $c_2$ in the same way and unfair to decide it differently.

Because the antecedent is not satisfied unless you decide $c_1$ correctly, (P3) does not favour the repetition of mistakes. That avoids the problem with (P1). Because the antecedent can be satisfied even if there is no tie, we are able to explain why it is unfair to decide one case correctly and a like case incorrectly. That avoids the problem with (P2).

I would, of course, be delighted if you endorsed (P3). But if you were not already inclined towards (P3), I suspect you may not be entirely convinced of its merits. Examples are all well and good, you might say, but they are not enough of an argument on their own. If this describes your reaction, then you will have an open mind about (P2). (I assume that no one would, on reflection, endorse (P1).) That is fine for my purposes; you can still

accept the rest of my argument. All I need is some positive probability, however small, that (P3) is true.

### *4. Uncertainty*

Now that we have in hand a principle relating fairness to treating like cases alike, I want to bring uncertainty into the picture.

If (P3) is true, then there is an asymmetry between departing from a precedent, if it was incorrectly decided, and following a precedent, if it was correctly decided. If a court departs from an incorrectly decided precedent, then it decides the instant case correctly. But it does not decide that case fairly. It does not decide it unfairly either. Fairness is simply not at stake. For fairness is at stake, according to (P3), only when the precedent case was decided correctly. By contrast, if a court follows a correctly decided precedent, then it decides the instant case correctly *and* fairly. It realizes not one but two goods: the good of deciding correctly and the good of deciding fairly.

We can illustrate using *Whole Woman's Health* and *June*. Call *C* the good of deciding *June* correctly. We assume that *C* has the same value whether the correct decision is for the plaintiff or defendant. Call *F* the good of

deciding it fairly. Given the Court's decision in *Whole Woman's Health*, there are four possible outcomes:

**Table 1**

| | | *Whole Woman's Health* | |
|---|---|---|---|
| | | *Correct* | *Incorrect* |
| *June* | *Follow* | *C + F* | -- |
| | *Depart* | -- | *C* |

As the table indicates, the Court realizes only *C* if it departs from *Whole Woman's Health* when that decision was incorrect. It realizes *C* and *F* if it follows *Whole Woman's Health* when that decision was correct.

Under conditions of certainty, what an instant court ought to do is determined entirely by which court, precedent or instant, is correct. Fairness does not make a difference. Under conditions of uncertainty, by contrast, fairness can make a difference. Let $p$ be the probability that the precedent court is correct. Let $(1 - p)$ be the probability that the instant court is correct. The court ought to make whichever decision maximises expected

goodness. Following precedent uniquely maximises expected goodness if and only if:

$$p(C + F) > (1 - p)(C) \tag{4.1}$$

Thus, a court ought to follow precedent if it is sufficiently likely that the precedent is correct. What is 'sufficiently' likely? A full answer would require us to say something about the relative goodness of deciding cases correctly and fairly. I won't try to do that here. But I can provide a partial answer.

## *5. Peerhood*

Let us say that agents who are equally likely to be correct on some matter are *epistemic peers* with respect to that matter (Elga 2007). In general, agents are epistemic peers if they have (1) the same ability to evaluate evidence on a matter and (2) the same evidence on the matter. There are rare cases in which agents are peers on some matter despite their divergent abilities or evidence. (1) and (2) are not sufficient conditions for peerhood, as a result. Still, they are a good rule of thumb (Bokros 2020). For our purposes, the issue is whether a precedent and instant court are epistemic peers with respect to the correct decision in like cases.

I start with (1). A court's evaluative capacities do not, I think, tend to improve over time. The number of judges, their skill, their education levels, the time they have to deliberate, the quality of the lawyers appearing before them – all stay about the same, year after year. The Supreme Court is a good example. The panel in *Whole Woman's Health* had eight judges; the panel in *June* had nine. So, there were about the same opportunities to pool experience and insight. Of the eight judges who heard *Whole Woman's Health*, seven also heard *June*. The judges who joined the court in between the two cases had similar educational and professional backgrounds as the judges who left. The Court in *Whole Woman's Health* took 17 weeks to deliberate – the same amount of time the Court took in *June*. It is plausible that the Court in *Whole Woman's Health* is the evaluative peer of the Court in *June*. In general, instant and precedent courts are evaluative peers.

With respect to (2), an instant and precedent court will almost never have the *same* evidence. A lot of the evidence in a case is about the specific parties and dispute in that case. The real question is whether there is additional evidence in the instant case that suggests that a different decision would be correct than in the precedent case. And the answer is that it depends on the instant case. Sometimes, the two courts will be evidential peers. In *June*, for instance, not only was the law at issue nearly identical

to the one in *Whole Woman's Health*; the facts 'mirror[ed] those … in *Whole Woman's Health* in every relevant respect' (*June* 2020: 3). Sometimes, the instant court will be the evidential superior of the precedent court. I doubt that we can say anything much more sweeping than this.

In summary: an instant court and a precedent court are epistemic peers – in general, and absent new evidence. I return to these qualifications in §7. For now, I proceed on the basis that an instant and precedent court are peers.

### *6. Why precedent?*

If the precedent and instant court are epistemic peers with respect to the correct decision in like cases, then they are equally likely to be correct when they disagree. So: $p = (1 - p)$. The expected goodness calculation is now straightforward. We can simplify Equation 4.1 and say that following precedent uniquely maximises expected goodness if and only if:

$$F > 0 \tag{6.1}$$

$F$ is of course of positive value. Following precedent maximises expected goodness. Here, then, is my answer to our starting question: given peerhood, courts ought to follow precedent in like cases, even if they

believe that the precedent is incorrect. The rationale is essentially that peerhood takes correctness out of the equation, leaving only fairness.

I said that it is plausible that the Court in *Whole Woman's Health* and the Court in *June* are peers. If that is right, then the Court is equally likely to make the correct decision in the two cases. In terms of Table 1, given a choice of row, the Court is equally likely to end up in either column. So, the decision in *June* that maximises expected goodness – the right decision – is to follow precedent and decide for the plaintiff.

Since §3, I have been writing as if (P3) is true. But, as I said, you may be sceptical of (P3). Indeed, you may be *very* sceptical. Suppose you think that the probability that (P3) is true is just 0.01, whereas the probability that (P2) – which gives fairness a mere tiebreaker role – is true is 0.99. It might seem that this would weaken my argument.

It does not weaken my argument, in fact, and this is why. Assume that (P2) is true. If the precedent and instant courts are peers, and there is a uniquely correct decision in the two cases, then fairness is not in issue. The expected goodnesses of following and departing from precedent are the same. By contrast, if (P3) is true, then under the same conditions the expected goodness of following precedent is greater than the expected goodness of

departing from it. Following precedent is therefore the weakly dominant option: it is better under one state of affairs (that is, the state in which (P3) is true) and worse under no state of affairs (Ross 2006: 747-8). So, provided that the probability that (P2) or (P3) is true is 1, and that the probability that (P3) is true is greater than 0, a court ought to follow precedent.

### *7. Overruling*

I said in the last section that a court ought to follow indistinguishable precedents – if it is the peer of the precedent court. But I also conceded that an instant and precedent court will not always be peers. So, my argument has a limited scope.

Given its limited scope, my argument falls short of justifying the practice of precedent unless the practice's scope is similarly limited. Here is where overruling becomes relevant. As I said in §2, a court does *not* follow a precedent, even in a like case, when it overrules the precedent. So, the question is: do courts overrule precedents only when (they believe) they are the epistemic superior of the precedent court?

Overruling is a big topic, and its details vary a lot between common law jurisdictions. So, I can't fully answer this question here. What I can do is

say why a positive answer is plausible. Sticking with US law for simplicity's sake, here is what the majority of the Supreme Court said when it was asked to overrule *Roe v Wade*:

> [W]e may enquire whether *Roe*'s central rule has been found unworkable; … whether the law's growth in the intervening years has left *Roe*'s central rule a doctrinal anachronism discounted by society; and whether *Roe*'s premises of fact have so far changed in the ensuing decades as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed. (*Planned Parenthood v Casey* 1992: 855)

This is not an exhaustive statement of Supreme Court practice. But it is still the 'most prominent' (Kozel 2017: 108) account of the factors that favour overruling precedents.

The point to notice is that the majority's enquiries are all about evidence that could be before the instant court but could not have been before the precedent court. Evidence as to the 'law's growth' since *Roe*, for example, is evidence that would only be available to the instant court. A court with more evidence is the epistemic superior of a court with less evidence, other things being equal. So, the Court is asking the right kind of questions, if the

aim is to work out whether it is the epistemic superior of the precedent court. This suggests that the scope of my argument aligns with the scope of the practice.

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