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STARE DECISIS AND EQUITABLE POWER

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ABSTRACT. One of the main moral costs of *stare decisis* lies in the continuous possibility of entrenching morally deficient decisions in the law. Although legal systems usually make provision for dealing with morally deficient precedents, there are cases in which the legal obligation of later courts to follow one of these precedents is undefeated. This possibility affects the overall justification of *stare decisis*. One traditional answer to this problem consists in accepting this moral cost, on the belief that the benefits of *stare decisis* outweigh it. On this view, when there is an undefeated legal obligation to follow a morally deficient precedent, the court must simply follow precedent. In this article, I question this approach and defend an alternative solution. I argue that, under some conditions, a court facing a morally deficient precedent should have the power to either follow the precedent or suspend its application to the parties by ordering a temporary stay of proceedings and referring the case to a higher court with power to overrule the precedent. This proposal entails exercising an equitable power recognised by the legal system, which I defend against three possible objections.

I. INTRODUCTION

It is often said that one of the main differences between adjudication in the common law and civilian jurisdictions comes down to the duty of courts in regard to precedent. On the received view, civilian courts are not legally required to follow precedent whereas common-law courts do have this obligation. But, as some scholars have noted,¹ this view is mistaken, for the sole reason that many civilian courts are legally required to follow precedent whereas the reverse is

¹ Cf. Neil MacCormick & Robert Summers, 'Introduction', in N. MacCormick & R.S. Summers (eds), *Interpreting Precedents* (London/New York: Routledge, 2016): pp. 2–3, 12; John H. Merryman & Rogelio Pérez-Perdomo, *The Civil Law Tradition*, 4th ed. (Stanford: Stanford University Press, 2019): p. 47; and Fábio Perin Shecaira, 'Precedent and the Source-Norm Distinction', in T. Endicott, H. Kristjánsson, & S. Lewis (eds), *Philosophical Foundations of Precedent* (Oxford: Oxford University Press, 2023).

also true with respect to some common-law courts. What matters, for grounding a meaningful distinction between types of precedential constraint, is not the legal tradition in which courts adjudicate, but whether the advancement of certain values justifies placing courts under a general legal obligation to follow precedent.

A general legal obligation to follow precedent (typically known as ‘*stare decisis*’) is often taken to be justified on two related grounds. First, a non-obligatory legal reason for following precedent (the default option)² is considered to be insufficient for advancing the values that the practice of precedent is meant to advance *in general*.³ Secondly, the benefits of *stare decisis* outweigh its costs – a claim I shall soon consider. By contrast, in those legal systems where precedent matters but it is unclear whether the benefits of *stare decisis* outweigh the costs, a non-obligatory legal reason for following precedent is taken to be a good compromise for balancing opposing values. For example, a legal system may realise the values of precedential constraint⁴ while avoiding giving unelected courts the power to create law of general application – which may sometimes lead to the entrenchment of morally deficient decisions in the law. It does not follow, of course, that a non-obligatory legal reason equals a null model of precedent, whereby a precedent is a fact without any legal significance for the later court. A non-obligatory reason is still a reason, and thus recommends a particular decision, without *requiring* it.

In previous work, I called ‘authoritative’ and ‘persuasive’ the two modes of precedential reasoning that can be derived from the two types of precedential constraint sketched above.⁵ A general legal obligation to follow precedent leads to the authoritative mode, and a non-obligatory legal reason leads to the persuasive mode. Roughly,

² A non-obligatory reason is the default option because showing that a bare or non-obligatory reason applies to a certain situation is less demanding than showing that someone is bound by an imperative requirement to act in a certain way.

³ As some scholars have noted, there might be cases in which following precedent will not advance the values the practice is meant to advance in general; *see, e.g.*, David Lyons ‘Formal Justice and Judicial Precedent’, *Vand L Rev* 38(3) (1985): pp. 511–512; Frederick Schauer, ‘Precedent’, *Stan L Rev* 39(3) (1987): pp. 597–598; Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge: Cambridge University Press, 2008): p. 163; and Jeremy Waldron, ‘Stare Decisis and the Rule of Law: A Layered Approach’ *Mich L Rev* 111(1) (2012): pp. 9–14. That possibility recommends a *ceteris paribus* clause, as I have argued in Sebastian Lewis, ‘Towards a General Practice of Precedent’ *Jurisprudence* (2022, online version).

⁴ The literature on the values justifying precedent is vast; for an introduction, *see, e.g.*, Duxbury, *The Nature and Authority of Precedent*, chapter 5, *supra* note 3.

⁵ Sebastian Lewis, ‘Precedent and the Rule of Law’, *Oxford J. Legal Stud.* 41(4) (2021) pp. 890–895.

under the authoritative mode, courts have *defeasible* legal obligation to follow precedent. The obligation is defeasible because every court can distinguish the case at hand from the precedent and some courts have the additional power of overruling precedent. Accordingly, for a court lacking the power to overrule precedent, the obligation under the authoritative mode becomes undefeated when the case at hand is indistinguishable from the precedent. For a court with the power to overrule precedent, that obligation becomes undefeated when both the present case and the precedent are indistinguishable from one another *and* the conditions for overruling the precedent do not obtain.⁶

Under the persuasive mode, by contrast, precedential constraint comes in degrees because the weight of the non-obligatory legal reason for following precedent depends on various factors. For example, a precedent that is morally sound will often give a reason for decision that is weightier than one given by a morally deficient precedent. And the same is true when the precedent was rendered by a court at the top of the judicial hierarchy, when a clear majority concurred in the decision, or when the stakes in the case at hand recommend judicial restraint instead of innovation. Importantly, under the persuasive mode, courts are *not* legally required to follow precedent. Courts can always depart from relevant precedent if they think, on good grounds, that acting on a more pressing, conflicting reason is justified.

But the possibility of avoiding precedential constraint in this way is not available for courts under an undefeated legal obligation to follow precedent—in the authoritative mode. When that legal obligation is undefeated (i.e., when distinguishing and overruling are not available), the court bound by the doctrine of *stare decisis* is legally required to follow precedent even if doing so leads to the entrenchment of a morally deficient decision in the law. This possibility plays an important part in the overall justification of *stare decisis*. The doctrine is *more* difficult to justify when taking into account the continuous possibility of entrenching a morally deficient decision in the law.

⁶ Roughly, lower courts cannot overrule precedents of higher courts, but the opposite holds. The conditions under which *horizontal* overruling may take place are often limited. In the UK, see, e.g., William Twining & David Miers, *How to Do Things with Rules*, 5th ed. (Cambridge: Cambridge University Press, 2010): pp. 279–289.

To be sure, a court facing a morally deficient precedent may avoid following it by distinguishing in a disingenuous way. This means to treat a factual difference between the instant case and the precedent *as if* it was legally relevant⁷ – so as to justify giving a different treatment – when actually it is not. But courts distinguishing disingenuously affect the legitimacy of the common law, by undermining the conditions on distinguishing that aim to protect and preserve the doctrine of *stare decisis*. Moreover, these courts disrupt the public confidence that they will adjudicate in good faith. And the same problem of legitimacy occurs when courts overrule precedent but the conditions for doing so do not obtain.

Likewise, a court may avoid following a morally deficient precedent by engaging in something akin to Dworkinian interpretivism. If the Dworkinian judge is satisfied that the precedent neither figures in nor follows from those relevant principles that provide the best interpretation of the community's legal practices,⁸ then she may render a morally superior decision. But notice that what the judge is doing is testing the legal validity of the precedent in order to determine whether she is legally bound by it. If the precedent does not pass through the filter of integrity, which is arguably another way of saying that the precedent is not part of the law, then the judge is *not* legally bound by it. While the duty of judges is to give effect to the law, under Dworkinian integrity a morally deficient precedent may not qualify as law.

Yet for judges who neither are Dworkinian nor want to undermine the legitimacy of the common law, there aren't many options left when their legal obligation to follow a morally deficient precedent is undefeated.⁹ These judges *must* follow precedent even if doing so leads to the entrenchment of a morally deficient decision in

⁷ The requirement of showing a relevant difference capable of justifying a different treatment is a *weak* version of distinguishing. There are stronger proposals in the literature; see, e.g., Joseph Raz, *The Authority of Law*, 2nd ed. (Oxford: Oxford University Press, 2009): p. 186. I will adopt a weak version of distinguishing in order to make room for various courts that will not accept a stronger proposal, such as Raz's. Cf. Stephen Perry, 'Judicial Obligation, Precedent and the Common Law', *Oxford J. Legal Stud.* 7(2) (1987): p. 239. Cf. Grant Lamond, 'Do Precedents Create Rules?', *Legal Theory* 11(1) (2005): p. 15.

⁸ See, e.g., Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986): p. 225.

⁹ Another option could be the practice of 'narrowing' precedent, when the precedent is ambiguous and the later court offers a reasonable reading of the precedent. See, e.g., Richard Re, 'Narrowing Supreme Court Precedent from Below', *Geo L Rev* 104(4) (2016): pp. 925–927, 928–929. What differentiates 'narrowing' from the practice of distinguishing is, I think, the conditions for engaging in one or the other. For simplicity, I will avoid drawing a clear-cut division between these two practices – I think my proposal stands even if distinguishing and narrowing can be clearly differentiated.

the law. This possibility is one of the moral costs of *stare decisis*, which affects its overall justification. One common answer is to simply accept this cost in the belief that the overall benefits of *stare decisis* outweigh it. On this view, courts under an undefeated legal obligation to follow precedent must simply follow the precedent, regardless of whether by doing so they contribute to entrenching a morally deficient decision in the law.

In this article, I would like to offer another way we could deal with a morally deficient precedent in cases in which there is an undefeated obligation to follow it. I will argue that when a court can neither distinguish nor overrule a morally deficient precedent, the court could either follow the precedent or suspend its application to the parties by ordering a temporary stay of proceedings in the lower court and referring the case to a higher court with power to overrule the precedent. The latter option entails exercising an equitable power because the legal system authorises the court to make an exception to the application of an otherwise binding legal requirement.

My aim is to explain this proposal, defend it against three possible objections, and thereby contribute to the transparency and legitimacy of the common law. If my approach is sound, further, the project of justifying *stare decisis* would be less burdensome because courts would have an additional, legitimate tool for dealing with morally deficient precedents.

I should clarify from the outset that my proposal is not addressed to any specific legal system. The proposal is general in the sense that it aims to apply to any legal system in which the courts bound by *stare decisis* have an undefeated legal obligation to follow a morally deficient precedent. Where a legal system already has (similar) existing means for dealing with this type of precedent, then my proposal may provide a further theoretical backup for either explaining or justifying those means.

II. A MORALLY DEFICIENT PRECEDENT

My proposal calls for moderate legal change (some might think that it is radical change, but I genuinely think it is not),¹⁰ and this pre-

¹⁰ I take radical legal change to be, for example, a new constitutional document, an important part of the law being repealed or substantially changed, and so on.

supposes some robust normative work. It will be impossible to address in full all the various problems and objections that I could consider. For this reason, I will have to rely on some assumptions and offer some caveats as a way to narrow the scope of my argument.

Possibly the most important caveat relates to the grounds that make a precedent 'deficient'. A first meaningful distinction can be drawn between a precedent that is *legally* deficient and one that is *morally* deficient. This distinction depends on a conception of legal validity which I cannot fully address here, but the gist of it is that the grounds on which a precedent is legally valid, and which thus determine whether the precedent has been correctly or deficiently rendered *as a matter of law*, need not be the same as those on which a precedent is morally sound or morally deficient.¹¹ A precedent can be morally deficient and yet be legally valid and the reverse is also true; a precedent can be morally sound but legally invalid. As an example of the former we have a precedent that, while being rendered by a court with sufficient powers and following all the relevant legal rules, nevertheless has evil content. An example of the latter is a morally sound precedent rendered in contravention of some relevant power-conferring norm – thus affecting its legal credentials and possibly its legal validity.¹² In short, the sound moral content of a precedent is not enough to make it legally valid, and likewise the immoral content of a precedent is not sufficient to make it legally invalid. In what follows, I will discuss precedents that are morally deficient but nevertheless legally valid.

A second meaningful distinction refers to the immoral content of the precedent. Here we find 'evil precedent', on the one hand, and 'morally suboptimal precedent', on the other. Evil precedent is an instance of evil law more generally; the fact that the evil content in question comes from a judicial decision (instead of, say, a statute) may add something distinctive insofar as precedent can be a distinctive source of law. From the standpoint of political theory, it also

¹¹ Cf. H.L.A. Hart, 'Positivism and the Separation of Law and Morals', *Harv L Rev* 71(4) (1958): p. 599; H.L.A. Hart, *The Concept of Law*, 3rd ed. (Oxford: Oxford University Press): pp. 210–211; and Raz, *The Authority of Law*, chapter 3, *supra* note 7.

¹² A legally *deficient* precedent can, but need not be, legally *invalid*. Whether it is valid or invalid will depend on the kind of formality or constraint the precedent was rendered in contravention to. Even precedents that have been rendered mistakenly as a matter of law can remain legally valid for various reasons. See, e.g., Timothy Endicott, 'How Judges Make Law' in E. Fisher *et al* (eds) *The Foundations and Future of Public Law: Essays in Honour of Paul Craig* (Oxford: Oxford University Press 2020): p. 130.

matters whether some evil legal requirement is the product of a statute passed by a democratic legislature or whether it obtains in virtue of a decision by an unelected court. But, important as this difference (and some others) might be, the focus here is on the *content* of evil law, not on its *source*. So, for example, a precedent that directly undermines human dignity, by denying the juridical possibility of rape within marriage or by establishing an implicit consent to sexual intercourse on grounds of an alleged assistance on the side of the victim in removing their jeans, is an evil precedent. Thus, both *R v Clarence*¹³ and decision 1636/99 of the Italian Supreme Court¹⁴ are instances of evil precedent.

Morally suboptimal precedent, on the other hand, is a wide category encompassing various considerations of political morality, such as poor or inefficient institutional design, significant burdens for obtaining judicial redress, precedents imposing too many conditions for exercising moral rights protected by the law (or not providing any conditions whatsoever), legal requirements affecting political concerns of social justice, precedents undermining sound institutional protection of the environment, and so on. The difficulty in giving content to this category lies in the possibility of a variety of (related or unrelated) sound moral considerations that might be undermined by giving effect to the legal requirement provided by the morally suboptimal precedent, and the possibility that other, sound moral considerations, might be *fulfilled* by following precedent. These possibilities may cast doubt on the soundness of seeking more specificity in the notion of a morally suboptimal precedent. But that the category is wide—and may often generate debate—is not a reason for abandoning the project of thinking about how a legal system should deal with morally suboptimal precedents, provided that it is meaningful to talk of this type of precedent in the first place.

¹³ (1889) 22 QBD 23. It could be argued that insofar as the court in *Clarence* applied an existing legal doctrine (on marital rape), it is misleading to characterise that decision as evil. The law applied by the judges is evil, not the decision itself. But we should be mindful of two things: first, it is not at all clear whether the judges in *Clarence* thought that, as a matter of existing law, there cannot be rape within marriage – see, e.g., Wills J at 33 and Fields J at 57, doubting that there is sufficient authority for this proposition and that it should be endorsed. Secondly, even granting that the court in *Clarence* was applying existing law, that by no means establishes that the decision was morally justified in regard to the doctrine of marital rape.

¹⁴ Decision 1636/99, dated 10 February 1999. Although Italy does not officially have a system of *stare decisis*, decisions by the Italian Supreme Court play a decisive role in unifying the jurisprudence of Italian courts.

Proof of the fact that the notion of morally suboptimal precedent is meaningful – despite its semantic, moral, and epistemic challenges – is the reality of legal systems often making provision for dealing with this type of precedent. They do so, for example, via targeted statutory reform, the practice of distinguishing and the power to overrule precedent. But, as we know, legislatures do not often engage in correcting morally suboptimal precedents; rather, they often rely on the fact that courts will do this job – ‘the common law works itself pure’. On the other hand, there are two important challenges to the idea of leaving the correction of morally suboptimal precedents to courts themselves. First, courts with the power to overrule precedent usually have discretion to select those cases they want to decide. This discretion, coupled with the limited time for adjudicating disputes, contributes to the possibility of an important number of morally suboptimal precedents not being overruled when they should be. Secondly, there are important costs of time and money in bringing litigation up to the higher court with the power to overrule precedent, privileging those who can wait and can afford the prospect of obtaining a decision by the court.

My proposal aims to add another mechanism to the list of legitimate tools for dealing with a morally deficient precedent. To give the argument more traction, I will add one epistemic caveat (or condition) for exercising the equitable power I will soon propose, which relates to the grounds that make a precedent morally deficient. For a judge or court to exercise this equitable power, I will say that it is necessary that the judge or court shows that a significant number of competent legal participants considers the precedent to be morally deficient, on good grounds. Many of us are familiar with morally deficient precedents. We know that they are deficient even absent an official declaration to that effect, for example by looking at academic commentary, the technical opinion of experts in a certain field, a well-reasoned dissent from an influential judge, and the treatment of the same legal issue by courts in another jurisdiction. These sources may, with time, show in a reliable way the grounds that make a precedent morally deficient, despite being legally valid. Another epistemic tool can be derived from Judge Frank H. Easterbrook’s observation that:

'The willingness of later generations of judges to evade or cabin the cases suggests that they were wrong, and even if not wrong were causing more trouble than they were worth'.¹⁵

The grounds on which courts have distinguished a particular precedent can provide, following Judge Easterbrook's observation, sound indication of whether a significant number of competent legal participants considers, on good grounds, that such a precedent is morally deficient. If, for example, courts have distinguished disingenuously,¹⁶ that fact may suggest judicial disagreement with respect to the moral content of the precedent – although, by hypothesis, that disagreement has not been made explicit. But a court can, to be sure, distinguish legitimately while also showing, in *dicta*, its moral objections to the precedent.

I am aware that the topic of morally deficient precedents, and likewise that of the grounds that make a precedent morally deficient, is thorny. But I hope I have said enough to at least get my proposal off the ground. Before unpacking the proposal, in the next section I will examine what I take to be the traditional approach to the undefeated obligation under *stare decisis*. This discussion will serve as a useful background; while I will argue for abandoning, in some cases, the undefeated character of the legal obligation to follow morally deficient precedent, the traditional approach argues for preserving it.

III. THE TRADITIONAL APPROACH

When a court can neither distinguish nor overrule a morally deficient precedent – and setting aside, for the rest of the article, the possibility of engaging in Dworkinian interpretivism – many think that the court must follow precedent, even if doing so leads to the entrenchment of a morally deficient decision in the law. After all, this is exactly what an undefeated obligation to follow precedent is about. In the words of Frederick Schauer,

¹⁵ Frank H. Easterbrook, 'Stability and Reliability in Judicial Decisions', *Cornell L Rev* 73 (1988): pp. 432.

¹⁶ For example, by treating a factual difference between the instant case and the precedent *as if* it was legally relevant – so as to justify giving a different treatment – when actually it is not.

'It is only when the decision-maker in the instant case disagrees with the outcome or the reasoning in the precedent case that the content-independent authority of a precedent becomes apparent... In such cases, it is most obvious that the decision maker is under an obligation to follow the precedent because of its source or status, and just because of that source or status, even if the decision maker in the instant case believes that the decision in the precedent case was mistaken'.¹⁷

For simplicity, let us call the view that I want to articulate the 'traditional approach'. On the traditional approach, when a court has an undefeated legal obligation to follow precedent – including evil or morally suboptimal precedent – the court must follow precedent regardless of whether by doing so a morally deficient decision obtains legal membership. Accordingly, the traditional approach holds that in those cases in which the later court can neither distinguish nor overrule a morally deficient precedent, the undefeated character of the legal obligation to follow precedent is upheld.

Now, I do not want to attribute to Schauer any endorsement of the traditional approach. I take his quote above as illustrative of the traditional approach, even if he happens to reject it – for example, by arguing that there is an important difference between a court *believing* that the precedent is morally deficient and the same precedent actually *being* morally deficient. We can set this difference aside and proceed on the more demanding assumption that even if the precedent is actually evil or morally suboptimal (and not merely believed to be so by the later court), the court has nevertheless an undefeated legal obligation to follow precedent.

One reason often given in support of the traditional approach is the belief that if courts have the power to depart from precedent – in those cases where there is an undefeated legal obligation to follow precedent – the resulting consequences will be worse for the legal system than if the courts are legally required to follow a morally deficient precedent. On this view, it is preferable, on balance, to preserve the undefeated character of the legal obligation to follow precedent than to allow the court bound by an evil or morally suboptimal precedent to depart from it.

¹⁷ Frederick Schauer, 'Precedent', in A. Marmor (ed), *Routledge Companion to Philosophy of Law* (London: Routledge, 2012): p. 124.

I believe the following quotes are illustrative of the type of belief that usually supports the traditional approach. According to Lord Scarman:

'I fear that if *stare decisis* disappears ... there is a real risk that there might be a plethora of conflicting decisions which would create a state of irremediable confusion and uncertainty in the law'.¹⁸

Similarly, for Laurence Goldstein:

'should every court have the power to disregard precedent then inconsistencies, abuses and injustices – in short, chaos – would indeed very likely ensue'.¹⁹

Finally, according to the Supreme Court of the United States,

'unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be'.²⁰

A belief in the likelihood of 'irremediable confusion', 'injustices', 'chaos' and 'anarchy' (in short, a belief in the likelihood of a state of affairs that is taken to be worse than following a morally deficient precedent) justifies upholding the undefeated character of the legal obligation to follow precedent. If, as a consequence of this decision, a later court contributes to entrenching a morally deficient decision in the law, then on this view this is only one of the costs to be assumed when choosing to implement *stare decisis* in the first place.²¹ Eventually, the benefits of *stare decisis* (in terms of the advancement of specific values, such as legal stability and predictability) outweigh the costs, such as entrenching a morally deficient decision in the law.

Usually, though, that belief in a more favourable state of affair is for the most part only assumed, as the example of Larry Alexander shows:

¹⁸ *Davis v. Johnson* [1979] AC 264, 344.

¹⁹ Laurence Goldstein, 'Some Problems about Precedent', *Cambridge L. J.* 43(1) (1984): p. 106.

²⁰ *Hutto v. Davis*, 454 U.S. 370, 375, 102 S. Ct. 703, 706 (1982). I thank Nina Varsava for showing me this example.

²¹ Cf., Schauer, 'Precedent', p. 575, *supra* note 3; Nina Varsava, 'How to Realize the Value of Stare Decisis: Options for Following Precedent', *Yale J L & Huma* 30(2) (2018): p. 76; Katharina Stevens, 'Reasoning by Precedent – Between Rules and Analogies', *Legal Theory* 24(3) (2018): p. 219; and Randy Kozel, *Settled Versus Right: A Theory of Precedent* (Cambridge: Cambridge University Press, 2017): pp. 6, 50.

'I am assuming that an improvement in legal predictability can be a net gain in terms of whatever political morality we hold, even when it comes at the cost of setbacks under that same political morality in particular cases and to particular litigants'.²²

On Alexander's view, if courts are not generally required to follow precedent (that is, if courts adopt a practice of precedent softer than *stare decisis*), then the resulting unpredictability and insecurity 'may produce a state of affairs that is morally inferior to the state of affairs a stronger doctrine of precedent would produce'.²³ And because of that possibility – again, the belief in which is for the most part only assumed – it follows that, on the traditional approach, the undefeated character of the legal obligation to follow a morally deficient precedent is to be upheld. The benefits of *stare decisis* outweigh, on balance, the costs, including the cost of a morally deficient decision obtaining legal membership.

I believe, however, that the traditional approach offers an unnecessarily strict interpretation of the problem of an undefeated legal obligation to follow a morally deficient precedent. At the same time, this approach also ignores the reality of many legal systems in which courts honour the values of precedential constraint – e.g., legal stability and predictability – without being bound by the rules of *stare decisis*. The traditional approach, in other words, ignores the fact that the values of precedential constraint can be protected *even if* courts do not have a defeasible legal obligation to follow relevant precedent (*stare decisis*).

The mistake underlying the traditional approach is to treat the values of precedential constraint as an all-or-nothing situation where on the one hand there is 'irremediable confusion', 'injustices', 'chaos' and 'anarchy' (as in the quotes above), and on the other we find the values of precedential constraint, which can only be realised through *stare decisis*. Without *stare decisis*, a legal system falls into some of the negative consequences of a null model of precedent (e.g., irremediable confusion, anarchy, and so on). With *stare decisis*, by contrast, the same system delivers the values of precedential constraint. In this view of things, there is no middle ground, and this situation leads to an unsound scenario because we are forced to conclude that those

²² Larry Alexander, 'Constrained by Precedent', *S Cal L Rev* 63(1) (1989): p. 126.

²³ *Ibid.* p. 126 (emphasis added).

legal systems without *stare decisis* – for example, a sophisticated civilian jurisdiction such as Germany – live under irremediable confusion, chaos, anarchy, etc.

Contrary to the traditional approach, the values of precedential constraint can be realised even if courts are not bound by a defeasible legal obligation to follow relevant precedent. Of course, that alternative, which frees courts (or at least some of them) from this legal obligation, makes courts responsible for protecting the values of precedential constraint via a non-obligatory legal reason for following relevant precedent. And the more sensitive the courts are to the idea of protecting the values of precedential constraint, the more they should act on the legal reason for following relevant precedent. Put differently, the more sensitive the courts are to the values of precedential constraint, the less they should depart from relevant precedent – at least without explaining why.

In this alternative framework, which should not be conflated with a type of legal tradition, following precedent is always a matter of degree,²⁴ for the courts in question are not legally required to follow precedent. There is only a continuum in which these courts are responsible for balancing different and sometimes opposing values. For example, the values of precedential constraint may have to be weighed against the value of not entrenching a morally deficient decision in the law. There are, to be sure, institutional ways of making courts sensitive to the values of precedential constraint without requiring them to abide by *stare decisis*. I have argued elsewhere for a general judicial duty to always put in the balance of reasons the non-obligatory legal reason for following relevant precedent.²⁵ That judicial duty, grounding a non-contingent and (morally) content-independent legal reason for following relevant precedent, contributes to honouring the values of precedential constraint. At the same, this duty gives courts sufficient leeway for balancing values that might be in tension in the case at hand. Consequently, this duty allows later courts to depart from relevant precedent when the merits of the case so recommend.

Just as it is a mistake to conflate the common law with *stare decisis* and the civil law with absence of *stare decisis*, it is also a mistake to

²⁴ Cf., Stevens, 'Reasoning by Precedent...', p. 232, *supra* note 21.

²⁵ Lewis, 'Towards a General Practice of Precedent', *supra* note 3.

think that a sound alternative to *stare decisis*, namely a non-obligatory legal reason for following relevant precedent, leads to anarchy, chaos, etc. There is a middle ground between *stare decisis* and a null model of precedent. That middle ground is a non-obligatory legal reason for following relevant precedent – leading to the persuasive mode. Especially if it is backed by the judicial duty I mentioned before, precedential constraint can deliver what it promises even if it comes in degrees; not all the value of precedent is lost if courts are not bound by *stare decisis*. This conclusion, of the value of a non-obligatory legal reason for following relevant precedent, offers the basis for proposing another candidate to the traditional approach.

IV. MY PROPOSAL

There is also value in a practice of precedent softer than *stare decisis*, especially if it is backed by a judicial duty to always put in the balance the non-obligatory legal reason for following relevant precedent. This conclusion is a first step against thinking that, if my proposal is adopted, courts will lead us into chaos, anarchy, irremediable confusion and the like. Contrary to Lord Scarman, Lawrence Goldstein, and the US Supreme Court in *Hutto v. Davis*, that catastrophic scenario need not be the case.

With that in mind, I argue that when a court can neither distinguish nor overrule a morally deficient precedent, the court should have the power to either follow the precedent or suspend its application to the parties by ordering a temporary stay of proceedings in the lower court and referring the case to a higher court with power to overrule the precedent. By giving the court facing a morally deficient precedent the possibility of exercising an equitable power (as I will explain in below), my proposal entails rethinking, in some cases, the undefeated character of the obligation under *stare decisis*. So long as there is at least one court in the legal system with the power to overrule *any* morally deficient precedent which is part of the law of that system, then if the conditions for exercising the equitable power obtain, this proposal entails rethinking the obligation of later courts as generally defeasible. For a court facing a morally deficient precedent can, if these conditions are met, refer the decision in the instant case to a higher court with power to overrule the precedent. Let me unpack the proposal.

The idea of referring cases to other courts is common in law. Often the law allows for one court to request the opinion of another court in a matter relevant for deciding the dispute. The requested court issues a decision, which many times is authoritative for the court making the request. An example of this mechanism is Article 267 of the Treaty on the Functioning of the European Union (TFEU), providing roughly that a court of a Member State may request a preliminary ruling by the Court of Justice of the European Union on matters concerning EU law. Similarly, Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms authorises the highest court of a Contracting Party to request an advisory opinion from the European Court of Human Rights, which according to Article 5 is not binding on the requesting court. Another final example is Section 40 of Australia's *Judiciary Act 1903* (Cth), allowing a constitutional case (or part of it) to be removed from lower courts and be placed under the decision of Australia's apex court, the High Court.

These examples show some of the ways in which cases can pass from the jurisdiction of one court to that of another court – belonging to either the same or a different legal system – for the purposes of deciding a specific legal issue. At the same time, these examples also provide support for the claim that it is possible to think of ways in which a court facing a morally deficient precedent may suspend its application *inter partes* and refer the case to a higher court with power to overrule the precedent. The ultimate institutional design can be a matter of further discussion – for example, whether the higher court has regulated discretion to establish conditions for hearing the case and thereby balances the equitable power with limited time and resources for deciding more disputes. Likewise, it need not detain us here whether the higher court needs to hear the case in a special or ordinary session, whether the power to overrule the morally deficient precedent can be delegated, and so on. The gist of the proposal is, I hope, clear. When, in accordance with the epistemic condition posed in section II, a significant number of competent legal participants considers on good grounds that a precedent is morally deficient, a court facing this precedent may be entitled to either follow it or suspend its application *inter partes* and

refer the case to a higher court with power to overrule the precedent.

I said that this proposal entails exercising an equitable power. Let me explain why this is so. In adjudication, equity is traditionally associated with the idea of dispensing with, or making an exception to, the application of an otherwise binding legal requirement.²⁶ Thus, to the extent that a court can suspend the application *inter partes* of the morally deficient precedent, my proposal entails allowing an exception to the application of the precedent's legal requirement. Equity, to be sure, is traditionally understood as a judicial remedy against problems arising from the generality of the law, which in England adopted a distinctive form as a way to correct common-law decisions.²⁷ Since following a morally deficient precedent may conflict with a sound moral consideration in much the same way as applying a morally deficient statutory rule can, the court suspending the application *inter partes* of the precedent, and thereby making an exception to the application of the precedent's legal requirement, exercises equity. The court acts equitably, just as a court acts equitably when it declines to apply a binding statutory rule on the grounds of a sound moral consideration.

To be sure, I argue for an equitable power, not for a *de facto* equitable override on moral grounds. What I argue for is that the legal system should recognise, implement, and give protection to, the decision of a later court to suspend the application *inter partes* of

²⁶ This is the corrective role of equity in law. The other is interpretative: a judge exercises equity when she reads the letter of the law according to its spirit. Cf. John Finnis, *Philosophy of Law: Collected Essays Volume IV* (Oxford: Oxford University Press, 2011): p. 170; and John Tasioulas, 'Law as the Art of Justice: On Vermeule's *Common Good Constitutionalism*' (forthcoming). In England, both roles have considerable historical support. To summarise: before St. Germain, the Chancery corrected the law on grounds of conscience. With St. German, this corrective jurisdiction was connected to a canon of interpretation – the Chancery made exceptions by reading the law equitably – according to its spirit. See, e.g., T.F.T. Plucknett & J.L. Barton, 'Introduction', in T.F.T. Plucknett & J.L. Barton (eds), *St German's Doctor and Student* (London: Selden Society, 1974): fn 23; Maria Drakopoulou, 'Equity, Conscience and the Art of Judgement as *Ius Aequi et Boni*', *Law Text and Culture* 5(1) (2001) pp. 357, 364; Mark Fortier, *The Culture of Equity in Early Modern England* (Aldershot: Ashgate, 2005): p. 60; and Dennis Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (London: Routledge, 2010): pp. 44–45. Today, an example of corrective equity can be found in Timothy Endicott, 'Legal Interpretation', in Marmor, p. 119, *supra* note 18. Against Endicott, and favouring interpretative equity, see Richard Ekins, *The Nature of Legislative Intent* (Oxford: Oxford University Press, 2012): pp. 275–276.

²⁷ This is, at least, the Aristotelian sense of equity – *epieikeia*. See Aristotle, *Nicomachean Ethics*, in Jonathan Barnes (ed), *The Complete Works of Aristotle: The Revised Oxford Translation: Volume II* (Princeton, Princeton University Press, 1984): p. 1796 (1137^b15–25). In this traditional sense, equity justifies making an exception to the application of an otherwise binding legal requirement; see, e.g., Mark Fortier, *The Culture of Equity in Restoration and Eighteenth-Century Britain and America* (Aldershot: Ashgate, 2016): p. 7; and Edward M. Harris, *The Rule of Law in Action in Democratic Athens* (New York: Oxford University Press, 2013): p. 285.

a morally deficient precedent under the terms here proposed.²⁸ On this view, a court deciding to exercise the equitable power would not act unlawfully – i.e., the court would not act contrary to its legal obligation under *stare decisis*. Accordingly, what I argue for is that we should *rethink* the obligation under the authoritative mode in order to make room for the equitable suspension (i.e., temporary and *inter partes*) of the precedent's legal requirement. That is why this proposal calls for moderate legal change, because I argue that the law should allow later courts the possibility of exercising an equitable power in a way that is compatible with their legal obligation under *stare decisis*. And the way to do so is by dropping, in some cases, the undefeated character of the legal obligation to follow a morally deficient precedent.

Importantly, the court exercising the equitable power needs to provide reasons, in its decision, showing that a significant number of competent legal participants considers the precedent to be morally deficient, on good grounds. If the court is not able to provide these reasons, the court cannot exercise the equitable power in a legitimate way. Accordingly, it is a mistake to think that the equitable power I defend entails a repudiation of the legal obligation under *stare decisis*. Likewise, it is also a mistake to think that the power to overrule precedent is incompatible with *stare decisis* provided that the applicable rules for exercising that power are respected.

Notice that by authorising later courts to exercise this equitable power, the legal system may provide a technique for the *accelerated* reassessment of the morally deficient precedent. It does so, in particular, by making it possible for a court to request the reassessment of a morally deficient precedent by a higher court with power to overrule it. Crucially, it is the higher court that decides whether to overrule the morally deficient precedent (it may not). If it does, then the higher court must create law *de novo* by setting a new, generally valid, binding precedent.

²⁸ The legal recognition of the equitable power, as well as the conditions for its legitimate exercise, should be positively laid down in a legal source.

Precisely because the requesting court does *not* have the power to overrule the morally deficient precedent, the court only suspends its application temporarily and between the parties to the dispute (*inter partes*).²⁹ The obvious consequence is that while a decision from the higher court is pending, the legal requirement provided by the precedent will continue to be applicable in respect of other disputes that might arise between other parties. This situation can be paralleled to what happens when a court lawfully declines to apply a statutory rule because doing so would conflict with the constitution. According to Hans Kelsen:

‘if [the court] considers the law “unconstitutional”, [the court] is usually only authorized to refuse the application of this statute in the concrete case, that is, to suspend its validity for the concrete case; but the statute remains valid for all other cases, to which it refers, and has to be applied by all courts in these cases unless they, in turn, refuse application’.³⁰

Of course, in order to avoid inconsistent legal regimes (i.e., the application of the morally deficient precedent being suspended for some parties, but not for others) there can be an institutional design such that, once the case has been allocated to the higher court, and thereby the court has started the revision of the precedent, its application is temporarily suspended *erga omnes* – for everyone – until a decision is reached.

The intervention of the higher court is crucial because, if we were to argue in favour of a *de facto* equitable override, inconsistent decisions in the law might ensue. By contrast, on my proposal, the intervention of the higher court aims to bring consistency by issuing one decision that will produce *erga omnes* effects, namely the decision of whether to overrule the morally deficient precedent. If the higher court decides *not* to overrule the precedent, the question might arise whether a later court should be able in future to exercise the equitable power – and, if so, under what conditions. The best answer to that question depends on a balance between the value of finality

²⁹ The *inter-partes* effect could be another historical reason for why the power is equitable. When the English Chancery exercised equity, it did not repeal law *erga omnes*, but corrected it *in personam*. See, e.g., Plucknett & Barton, Introduction, p. xxx, *supra* note 26; John H. Baker, *Oxford History of the Laws of England: Volume VI* (Oxford: Oxford University Press, 2003): p. 19; and Klinck *Conscience...*, pp. 85, 90–91, *supra* note 26.

³⁰ Hans Kelsen, *Pure Theory of Law*, 2nd ed. (M. Knight tr, Berkeley, LA: University of California Press, 1967): pp. 273–274.

as to the effect of the precedent, and the value of continued opportunity for challenges to that effect.

V. OBJECTIONS

In this final section, I consider three objections to my proposal, namely that it undermines vertical discipline, it might entail a slippery slope, and it might be unfair to a party that relied on the morally deficient precedent. Before discussing these objections, let me address one possible worry.

I think it is preferable for courts to be transparent with what they do and say, instead of concealing their real bases for a decision. This means that I think it is preferable to be open about introducing an equitable power, positively recognised in a legal source, instead of distinguishing and overruling in a disingenuous way – thereby affecting the legitimacy of the common law. But someone might claim that, on the contrary, it is preferable for courts to adjudicate disingenuously rather than altering the *status quo*. But since I am arguing for *more* transparency (while also proposing a mechanism that aims to contribute to the legitimacy of the common law), whereas this would-be objector is putting transparency and legitimacy under the rug, I am inclined to think that the burden is not on me. Thus, I will not be making a full-blown objection out of this worry, though I will consider some related worries in subsection 2 below.

A. Vertical Discipline

According to vertical discipline, lower courts in the judiciary owe deference to the decisions of higher courts. Thus, lower courts must, on grounds of vertical discipline, treat the decisions of higher courts as generally binding. Since my proposal entails giving lower courts – in some cases – the power to exercise an equitable power over these precedents, my proposal arguably entails undermining vertical discipline.

Before I answer this objection, let me briefly analyse the justifications that would support vertical discipline. According to Schauer,

‘the justifications ... are fairly obvious. Just as children are expected to obey their parents even when they disagree... lower courts judges are

expected to follow the “instructions” of those courts above them in what the military calls the “chain of command”.”³¹

At the root of Schauer’s claim rests the idea that, in roles where authority is displayed, there is an expectation that the authority’s addressees will comply with the authority’s directives. We may think of this expectation as having two sources: one internal – to the relation of authority itself – and the other external. According to the former, if I have authority over you, then I expect you to comply with my directives. According to the latter, *we*, third-parties to this type of authoritative relation, expect that one of you complies with the say-so of the other. In both cases, the value is expectation. Thus, in regard to vertical discipline, external expectation would reflect the idea that *we*, possible parties to a dispute, expect lower courts to follow the precedents of higher courts. By contrast, internal expectation would insist that, in the eyes of a higher court, a lower court should follow its precedents.

In my view, what really does the work in both sources of expectation is external expectation. Internal expectation, at least when it comes to adjudication, is ultimately a shortcut. When courts adjudicate, they do so, ultimately, to advance a value that is important *for others*, not for themselves.³² The purpose of having courts is not to adjudicate disputes for the sake of adjudicating them. We, third-parties to a relation of authority between higher and lower courts, have given them the power to advance whatever value we think it is important to advance via adjudication.

Once it is clear that external expectation is what matters, it becomes apparent that this kind of expectation cannot, by itself, justify vertical discipline. Expectation must be linked to some other, independent value that is advanced through the authoritative relation that exists between lower and higher courts. Although Schauer fails to see this important point, we can read his argument above as

³¹ Frederick Schauer, *Thinking Like a Lawyer* (Cambridge, MA: Harvard University Press, 2009): pp. 41–42.

³² As a way to honour the value *we* consider important to advance via adjudication, courts might create *internal* expectation concerning their own actions. For example, the value of consistency and equal judicial treatment may recommend honouring internal expectation in the sense that lower courts will treat higher-court precedent as binding. But notice that such a deference is again a shortcut for honouring the value that *we* think ultimately grounds the adjudicatory system. So my proposal is an invitation to rethink, if you will, that grounding value, so as to make room for minimising the challenge posed by evil and morally suboptimal decisions.

follows. We have deposited our confidence in the idea that the relation of authority between higher courts and lower courts will advance some value – whatever this value is. And vertical discipline is precisely a way to protect this confidence or external expectation. On this view, a stronger reading of the objection, whenever a lower court exercises the equitable power over the binding precedents of a higher court, that court has breached our confidence or expectation. For the court has failed to live up to the value we thought it important to advance via the institutional design.

I want to put forward three arguments to counter the objection – apart from insisting that we should also rethink the value that ultimately grounds our external expectation so as to make room for the equitable suspension of a morally deficient precedent (see note 32). First, we should not succumb to its suggestion that the problem is binary. It is tempting to think that whenever a lower court exercises the equitable power over a morally deficient precedent from a higher court, the court has undermined our confidence in the legal system. But this need not be the case. The lower court may advance important values by exercising the equitable power. The court may, *to begin with*, avoid entrenching a morally deficient decision in the law; its decision may also shed light on the grounds that make a precedent morally deficient, thereby bringing legal and moral clarity to a contested problem.³³ And finally, its decision can be a small step towards the repeal or overruling of the morally deficient precedent.³⁴

Do lower courts have this capacity of getting things right? Admittedly this point is difficult to assess, and my impression is that any rigorous analysis should rely on sound empirical data.³⁵ But recall that, on my proposal, a necessary condition for exercising the equitable power is that a significant number of competent legal participants considers that the precedent is morally deficient, on

³³ On the duty of judges to improve the law, see, e.g., Leslie Green, 'Law and the Role of a Judge', in K.K. Ferzan & S.J. Morse (eds), *Legal, Moral, and Metaphysical Truths: The Philosophy of Michael S. Moore* (Oxford, Oxford University Press, 2016): chapter 22.

³⁴ By exercising the equitable power, the court might be signalling that the precedent is mistaken. Cf., Melvin A. Eisenberg, *The Nature of the Common Law* (Cambridge, MA: Harvard University Press, 1988): p. 122. See, also, Easterbrook, 'Stability and Reliability...', p. 424, *supra* note 15.

³⁵ Scott Hershovitz, 'Integrity and Stare Decisis', in S. Hershovitz (ed) *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (Oxford: Oxford University Press 2006): p. 108 argues that lower courts are bound by vertical precedent because 'higher court judges have superior expertise to lower court judges (or even simply more time and resources to bring to bear on a case)'. Hershovitz's claim is intuitively appealing, but notice that in many countries there is an important tendency of lower courts to have technical expertise over a particular area – *vis-à-vis* higher courts of general jurisdiction.

good grounds. The likelihood of the lower court getting things right is precisely supported by this epistemic condition. Notice also that in many legal systems lower courts tend to be specialised courts, whereas higher courts tend to have general jurisdiction. Thus, reasons of expertise might in some cases favour lower courts getting things right.³⁶ Thus, we should not think that my proposal entails a leap of faith. If it does so, it is by no means blind or irremediable; for the lower court is not alone in considering the precedent morally deficient.

Second, while the objection tends to conceive of confidence as a matter of kind – i.e., confidence is undermined *whenever* a lower court exercises the equitable power – I would like to think of confidence as a matter of degree. Thus, if the proposal here defended is adopted, confidence will not *necessarily* be undermined whenever a lower court exercises the equitable power. Just as our confidence in our children will not necessarily be undermined whenever they fail to obey us – in fact, sometimes it can be reinforced³⁷ – the same applies to lower courts. Lower courts can make good decisions towards making the law better. Recall that, on my proposal, the lower court has only referred the case to the decision of the higher court, which will eventually decide whether to overrule the morally deficient precedent. And that decision of the lower court is further backed by the epistemic condition that a significant number of competent legal participants considers the precedent to be morally deficient, on good grounds.

Third, notice that what I am arguing for is not that exercise of the equitable power by the lower court is the *only* option. We should give the lower court that option, *but not only that option*. In the end, the decision whether to follow a morally deficient precedent or exercise the equitable power is that of the lower court. It may well be that the lower court decides to follow the morally deficient precedent because of some prudential considerations – among them,

³⁶ I thank Manuel González for this observation.

³⁷ It can be reinforced when the disobedience of our children produces non-anticipated value. If I have prohibited my young son from going out at night for a walk, and if he disobeys me because there was nothing wrong in going out except the fact that he disobeyed me, then my confidence in his judgment may be reinforced. His disobedience can contribute to my confidence that he will make good decisions. If, however, my son disobeys me while being clear it was dangerous for him to go for a walk, then admittedly my confidence in his judgment will be affected. I don't think the situation is too different with lower courts. At the root of the problem is the decision whether we should allow lower courts to show us that they can, in some exceptional cases, make good decisions.

uncertainty in getting things right, or a wish to avoid taking up the responsibility for improving the law. But there is a subtle yet important difference between saying that lower courts should exercise the equitable power over the morally deficient precedent, and giving them the power to *either* follow that precedent *or* exercise the equitable power. My proposal argues only for the latter approach.

B. Slippery Slope

According to the second objection, if we give later courts an equitable power, then it only takes one court to exercise it for the rest of the courts to be tempted to give it a try – perhaps more often than we would like. This bare possibility should warn us against giving courts this equitable power writ large. Otherwise, we might be opening up the door for a slippery slope that might produce worse systemic consequences than the *status quo*.

I want to counter the objection by further specifying the conditions under which a later court may exercise the equitable power. I hope to convey the idea that my proposal should not be taken to be an open ticket for courts to exercise the equitable power. Equity, even if recognised by the legal system,³⁸ should be used responsibly, for otherwise political and institutional crises might ensue – as the history of English equity shows.³⁹

I will assume that, for my proposal to entail a slippery slope, the following conditions should obtain:

- (i) A later court, “Y”, exercises the equitable power;
- (ii) Y’s decision is an *individually sufficient* reason for another court, “Z”, to exercise the equitable power;
- (iii) Y’s and Z’s decisions are individually sufficient for an unspecified number of later courts to exercise the equitable power; and
- (iv) The aggregate value of the resulting state of affairs is morally worse than the *status quo*.

³⁸ For an analytically and historically rich defence of the judicial use of equity in law – particularly in criminal law – see Luigi Ferrajoli, *Derecho y Razón* (A. Ibáñez et al trs, Madrid: Editorial Trotta, 1995): pp. 155–162 and 402–405.

³⁹ See, e.g., J.H. Baker, ‘The Common Lawyers and the Chancery: 1616’, *The Irish Jurist* 4 (1969): pp. 368–392.

By now you might object that I have assumed too much. You might object, in particular, that I should not have stipulated (ii) above. For it is not the case that, for a slippery slope to obtain, Z must take Y's decision as individually sufficient for exercising the equitable power. To be sure, this could be a reason, but one among the many reasons bearing on Z's decision.

The problem is that if we buy into this objection then virtually any fact or reason that causally contributes to a negative effect can be determinant of a slippery slope. If this is what slippery slopes are about, then it is almost like a win-win argument. I could only counter the objection from two angles. On the one hand, I could ask for the threshold above which *one* fact or reason, within a jointly sufficient set of facts or reasons, is said to be causally determinant of a negative effect – and why.⁴⁰ On the other, I could argue that from the fact that we have allowed courts to exercise an equitable power it does not follow that they will in fact do so. Hence, no slippery slope would exist so long as no court in the legal system exercises this power. But admittedly this answer would come at too a high price: I would be proposing a course of action while hoping to never see it take place.

Another, broader, reading of the slippery-slope argument is (ii) above. Y's decision cannot be a jointly sufficient fact or reason – i.e., it cannot be the case that Y's decision *plus* another fact or reason motivated Z's decision to exercise the equitable power. Y's decision must be *individually sufficient* for Z to exercise the equitable power. And if this broader reading is sound, I can counter it by arguing why Z *should not* take the fact of Y's decision as individually sufficient for exercising the equitable power. What I need to show, then, is that *some other* fact or reason (other than Y's decision) must obtain in order for Z to exercise the equitable power. This means that some other fact or reason must be a *necessary* condition for Z to exercise the equitable power. Of course, that condition cannot be the fact that the precedent is morally deficient, since this is merely the conditional antecedent of the equitable power – 'if an otherwise

⁴⁰ To illustrate: call X a set of jointly sufficient facts or reasons that is causally determinant of a negative result. Call Y one fact or reason (within X) that contributes to X's being causally determinant of this negative result. Call the other fact or reason Z. If we take a slippery slope argument to mean not an individually sufficient fact or reason, but a set of jointly sufficient facts or reasons, I would still want to know the threshold above which Y, or Z, is held to be *mainly* determinant of X's producing the negative result. Why, say, a 99% and not 99.9% (or 95%) contribution to X's producing the negative outcome?

binding precedent is morally deficient, then the court may exercise the equitable power’.

What other necessary condition can be offered? I believe the following condition may help to reduce the likelihood of a slippery slope. The later court, Z, *genuinely* believes itself to be exercising an equitable power in a responsible way, and is capable of giving reasons, in its decision, for such a genuine belief. This belief would act as a constraint on the power of Z. We know these reasons cannot appeal to the fact that the instant case and the precedent are relevantly different, for otherwise Z could simply distinguish the precedent. Z’s reasons must therefore acknowledge that the instant case and the morally deficient precedent are relevantly similar, while showing the extent to which the earlier court got things morally wrong. It is on the basis of this perceived error, perceived as well by a significant number of competent legal participants, that Z genuinely believes itself to be exercising an equitable power in a responsible way.

It is possible to think of additional necessary conditions for exercising the equitable power – for example, epistemic conditions relating to the grounds that make the precedent morally deficient. The more conditions are added, the more difficult it will be to exercise the equitable power – and consequently the lesser the risk of a slippery slope. Of course, the final design should seek a compromise between adding further conditions and allowing the equitable power to be used. This power is, after all, an additional mechanism for dealing with morally deficient precedents and accelerating their revision.

C. Fairness

Finally, there is the claim from fairness that the party disfavoured by the new decision might have.⁴¹ In particular, this party may have relied on the existence of the morally deficient precedent in order to litigate. Without the mediation of a regular procedure aimed at either repealing the precedent or overruling it, it would be unfair to deprive this party of the decision that the dispute should otherwise have. Notice, though, that if my proposal is adopted, it would pro-

⁴¹ I am grateful to Nina Varsava for pointing me to this objection.

vide an additional *institutional* and *lawful* way for deciding whether to overrule a morally deficient precedent. If litigants take, as they should, that new fact into account, then it is not clear whether fairness would continue to have a pressing claim anymore.

Putting that important caveat aside for a moment (and for the sake of the argument only), an objection from fairness may be countered from various angles depending on the kind of precedent we are considering. In the case of an evil precedent (admittedly exceptional but always possible), it could be argued that a claim from fairness cannot succeed if the relevant rules are morally evil. This line of response might draw from the following remarks by Leslie Green:

'If the rules are bad *enough* no justice of any kind, administrative, formal or otherwise, results from their steadfast application. When an evil rule is *not* applied to someone covered by its terms, there is no one to whom an injustice is done, no one entitled to demand that the evil be perpetuated'.⁴²

Confronted with an evil precedent, the objection could be countered by arguing that the all-things-considered duty of the later court is to correct the evil law by exercising the equitable power (recall that, by hypothesis, this is a power recognised by the legal system). After all, it is far from clear whether fairness will be served by upholding an evil legal requirement (and likewise whether someone may rely, on grounds of fairness, on evil law).

Now, there is an additional issue which I shall bracket for present purposes since it would take us too far afield. Sometimes, following an evil precedent *might* be recommended by principles of criminal law. Take the Italian Supreme Court decision mentioned before – acquitting a rapist on grounds of an implicit consent to sexual intercourse.⁴³ The court held that it is difficult for the rapist to remove the jeans of the victim without their assistance. This assistance suggested a collaboration from the victim, thereby establishing an implicit consent to sexual intercourse.

⁴² Leslie Green, 'Law as a Means', in Peter Cane (ed), *The Hart-Fuller Debate in the Twenty-First Century* (Oxford: Hart Publishing, 2010): p. 22 (emphases in original). Cf. Green, 'Law and the Role of a Judge', p. 335, *supra* note 33.

⁴³ *Supra* note 14. A suggested translation of the relevant passage is as follows: 'It must also be noted that a common experience is that it is almost impossible to take off a person's jeans, even in part, without their active collaboration, since this is an operation that is already very difficult for the wearer'.

In this example, someone might argue that if the rapist relied on the evil precedent while assaulting the victim, then the later court should follow the evil precedent instead of exercising the equitable power. That decision would be required by a criminal law principle according to which, where a court has two possible courses of action, it should select the one which is most favourable to the criminal offender. This is an important line of criticism; at the same time, though, it should be clear that giving effect to this principle leads to an injustice with respect to the victim. The rapist will not be convicted on grounds of an evil precedent.⁴⁴

Perhaps it all comes down to a question of what exactly the principle under analysis prohibits or requires. If what such a principle prohibits is to change the criminal law retroactively – in a way that makes a criminal offender worse off – then there might be a tension between giving effect to this principle and exercising the equitable power. After all, the exercise of this power *might* lead to an evil precedent being overruled by the higher court. But notice two things. First, as suggested before, we should not be reluctant to revise the soundness of this principle, or seek a sound reinterpretation of it, if an evil legal requirement is at stake. Secondly, in this case, as well as in every other case in which the morally deficient precedent is not evil but morally suboptimal, the equitable power might at most lead to the accelerated revision of the precedent. That is the only cost, I believe, of this power in terms of fairness – a cost, to be sure, that should be minimised once it becomes apparent that I defend a *lawful* equitable power, not a *de facto* equitable override. There is no additional cost, for example, in terms of an increased likelihood in the law being changed. The party who relied on the precedent knows, or at any rate should know, that a higher court can always overrule the precedent in the regular way.

So the present objection ultimately concerns the extent to which overruling (not the equitable power) is compatible with the rule-of-law value of reliability. And the literature has offered sound ways of remedying this tension. Timothy Endicott, for example, has argued that a society in which the law did not provide for its own change ‘would commit itself to an increasing irrationality’, ‘by refusing to respond when existing regulations or forms or regulations are seen

⁴⁴ Cf. Kozel, *Settled Versus Right*, p. 51, *supra* note 21.

to be (or become) pointless, and when new regulations and forms of regulation are needed'.⁴⁵ Thus, failing to implement reasonable legal change is also a way of departing from the Rule of Law. Endicott argues that a good measure for determining whether legal change conflicts with the Rule of Law is whether the 'prospect of change' makes it 'impossible to use the existing law as a guide'.⁴⁶ On this view, overruling precedent is not contrary to the Rule of Law if, despite the prospect of change, people can nevertheless be guided by the existing law.

But there might be cases in which overruling precedent will affect the Rule of Law. Here the sound approach is, following Endicott, to avoid thinking of the Rule of Law as an ideal that is honoured only if it is *completely* realised, for on this view the Rule of Law would be an impossible ideal (as he exemplifies with the inevitability of widespread vagueness in legal language). A better approach is to take the Rule of Law as an ideal that can be honoured as a matter of degree, and which may tolerate exceptions for the sake of realising conflicting values. On this point there is agreement among legal philosophers: the Rule of Law is not the only value that matters for legal systems.⁴⁷ A sound adaptation of the law (for example, via overruling a morally deficient precedent) is also a goal of the legal system, whether you think of this goal as part of the Rule of Law or as part of another moral ideal.

VI. CONCLUSION

I have tried to address, from a rather conceptual point of view, a problem that admittedly is not only conceptual but also empirical. For example, empirical data may have an important role to play on the issue of whether courts distinguish disingenuously in order to avoid a morally deficient precedent. It goes without saying that empirical analysis is very welcome.

Yet to the extent that the problem is not only empirical but also conceptual (or that it remains conceptual after empirical analysis has

⁴⁵ Timothy A.O. Endicott, 'The Impossibility of the Rule of Law', *Oxford J. Legal Stud.* 19(1) (1999): p. 9.

⁴⁶ *Ibid.* p. 9.

⁴⁷ See, e.g., Raz, *The Authority of Law*, p. 229, *supra* note 7; Endicott, 'The Impossibility of the Rule of Law', p. 5, *supra* note 45; John Gardner, *Law as a Leap of Faith* (Oxford: Oxford University Press, 2012): p. 192; and Leslie Green, 'Should Law Improve Morality?' *Crim. Law and Philos.* 7(3) (2013): p. 487.

done its part), the issue of morally deficient precedent persists. Evil and morally suboptimal precedents pose a crucial challenge for *stare decisis*. The fewer legitimate means a legal system has under *stare decisis* for dealing with morally deficient precedents, the harder this doctrine is to justify. This article is, I think, a small step towards thinking of an additional means for a legal system to deal with this type of precedent. An equitable power along the lines here defended invites us to rethink the undefeated character of the obligation under *stare decisis*, while also contributing to the project of justifying this doctrine and bringing more transparency and legitimacy to the common law.

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