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Precedent: What It Is and What It Isn't; When Do We Kiss It and When Do We Kill It?*

Ruggero J. Aldisert**

The title of this offering is inspired by Holmes' sparkling apothegm:

When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal.¹

The doctrine of precedent is everyone's dragon. If facts in the putative precedent are identical with or reasonably similar to those in the compared case, the precedent is recognized as legitimate, and it is applied. In such cases, all of us—student and professor, lawyer and judge, commentator and philosopher—consider it merely, as the Italians say, *un dragonetto* (a small dragon). But if the material facts in the compared case do not run on all fours with the putative precedent, the doctrine becomes *un dragone* or, to give equal time, *una dragonessa* (a full grown, ferocious dragon). Wrestling with such a dragon can be the most difficult and controversial job in the judging business.

I realize that literature on how to deal with this dragon abounds. To borrow Rabelais' Judge Bridlegoose,

The subject has been well and exactly seen, surveyed, overlooked, reviewed, recognized, read and read over again, tossed and turned about, seriously perused and [we have] examined the preparatories, productions, evidences, proofs, allegations, depositions, cross-speeches, contradictions . . . and other such like confects and spiceries.²

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** Senior United States Circuit Judge of the U.S. Court of Appeals for the Third Circuit. This article expands remarks delivered at the Mid-Winter Meeting of the Conference of State Chief Justices, Orlando, Florida, January 25, 1989. I acknowledge the assistance of my law clerks, Catherine S. Hill and Anne Marie Finch.

1. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

2. RABELAIS, BK III, at 39.

Undeterred, I make bold to mount my charger, draw my lance, and gallop into the lists to volunteer some advice on how to tweak the dragon's tail. Perhaps the dragon will prove too elusive, or I too bold or too meek, but ever persistent I will press on, hoping to tame this dragon. I bring with me experience, not only as a judge, to be sure, but also as one who has explored and meandered in the judicial process thicket, seeking trails to understand what it is all about.³

First I will discuss some definitions of precedent and the overarching doctrine of *stare decisis*. I then will explore what I call the four different models of precedent. From this I will move to a consideration of precedent as a method of classification containing varying degrees of abstraction. This will lead to a study of inductive reasoning, including both generalization and analogy, taking freely from my recent book, *Logic for Lawyers: A Guide to Clear Legal Thinking* (1989). I wrap it up with some views of precedential vitality, and close with the distinction between precedent and persuasive authority.

I.

Let's take a moment to review some basics. Precedent is an often misunderstood concept. Some believe it is more understandable than explainable. I tried my hand at a definition in *Allegheny County General Hospital v. NLRB* in 1979:

A judicial precedent attaches a specific legal consequence to a detailed set of facts in an adjudged case or judicial decision, which is then considered as furnishing the rule for the determination of a subsequent case involving identical or similar material facts and arising in the same court or a lower court in the judicial hierarchy.⁴

Chief Justice Marshall expressed the reason for this definition in 1821:

It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom com-

3. See, e.g., R. ALDISERT, *LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING* (1989) [hereinafter *LOGIC FOR LAWYERS*]; R. ALDISERT, *THE JUDICIAL PROCESS* (1976); Aldisert, *Philosophy, Jurisprudence and Jurisprudential Temperament of Federal Judges*, 20 IND. L. REV. 453 (1987); Aldisert, *The House of the Law*, 19 LOY. L.A.L. REV. 755 (1986); Aldisert, *Rambling Through Continental Legal Systems*, 43 U. PITT. L. REV. 935 (1982) [hereinafter *Continental Legal Systems*]; Aldisert, *The Nature of the Judicial Process: Revisited*, 49 U. CIN. L. REV. 1 (1980); Aldisert, *The Role of the Courts in Contemporary Society*, 38 U. PITT. L. REV. 437 (1977).

4. *Allegheny County Gen. Hosp. v. NLRB*, 608 F.2d 965, 969-70 (3d Cir. 1979) (footnote omitted).

pletely investigated.⁵

Stare decisis is the policy of the courts to stand by precedent.⁶ The expression *stare decisis* is but an abbreviation of *stare decisis et non quieta movere* (to stand by or adhere to decisions and not disturb that which is settled). Consider these words. First, *decisis*. This word means literally, and legally, the decision. The doctrine is not *stare dictis*. It is not "to stand by or keep to what was said." The doctrine is not *stare rationibus decidendi* or "keep to the *rationes decidendi* of past cases." Rather, a case is important only for what it decides: for "the what," not for "the why," and not for "the how." It is important only for the decision, for the detailed legal consequence following a detailed set of facts. Thus, *stare decisis* means what the court *did*, not what it *said*.

Strictly speaking, the later court is not bound by the statement of reasons, or *dictis*, set forth in the rationale. We know this because a decision may still be vital although the original reasons for supporting it may have changed drastically or been proved terribly fallacious. In a large number of cases, both ancient and modern, one or more of the reasons given for the decision can be proved to be wrong, but the cases have retained vitality.

Priestly v. Fowler,⁷ announcing the common law fellow-servant rule, is one such case. The court based the holding on the alleged consent of a servant to run the risk. Yet there was no evidence that such consent was ever requested of, or given by, fellow servants. Of this case, it has been said that Lord Abinger planted it, Baron Alderson watered it, and the devil gave it increase.⁸ The concept, however, was almost immediately adopted in the United States in *Farwell v. Boston & Worcester Railroad*.⁹ Chief Justice Shaw reasoned that an employee consented to assume the risk of negligence by a fellow servant upon accepting employment. Again, there were no facts to support the assertion that the employee actually consented to anything. This was a concept built out of thin air. Yet, the fellow-servant rule remained the law in the United States for many years.¹⁰

5. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399-400 (1821).

6. BLACK'S LAW DICTIONARY 1261 (5th ed. 1979).

7. 3 M. & W. 1, 150 Eng. Rep. 1030 (1838).

8. C. KENNY, LAW OF TORT 90 (5th ed. 1928).

9. 45 Mass. (4 Met.) 49 (1842).

10. See W. KEETON, D. DOBBS, R. KEETON, D. OWEN, PROSSER AND KEETON ON TORTS § 80 (5th ed. 1984).

II.

Our understanding is furthered by setting forth in symbolic logic the canonical formula which to me expresses the entire philosophy of the common-law tradition. The "material implication" formula is the essence of precedent: if antecedent fact P is present, then legal consequence Q will follow. This is indicated: $P \supset Q$. Precedent thus is embodied in the following formula:

$$\begin{array}{l} P \supset Q \\ R \cdot P \\ \therefore R \supset Q \end{array}$$

The key to logic and the law is correctly deciding when R is equal to P. If R's material facts are similar or the same as P's, then the previous case, $P \supset Q$, controls. The essence of common-law precedent is, therefore, two-fold:

- + The rule or holding of the case has the force of law.
- + The decision constitutes the rule in subsequent cases containing material facts similar to or identical with those in the case.

This doctrine is central to legal reasoning, briefs, arguments, decision-making, and opinion writing. Yet precedent is but one aspect of the doctrine of *stare decisis*. Precedent means simply that like cases should be treated alike. *Stare decisis* requires that the holding of a similar case with sufficiently similar facts to the case at issue, be applied to courts of equal or lesser hierarchy within the same jurisdiction.¹¹

Precedent and *stare decisis*, as discussed above, are peculiar to common-law countries. Neither Roman law nor civil-law traditions that built on it affords to a court decision the dignity and legal efficacy of this Anglo-American notion. In theory at least, precedent in its pristine elegance is not followed on the European continent, in Latin America or in the Socialist countries. In actual practice, however, civil-law courts are today borrowing our concepts of precedent as shortcut interpretations of codes and statutes, while theoretically speaking, each case must be an *ab initio* interpretation of a legislative act.¹²

III.

Precedent can be discussed in the context of four common types of opinions:

1. The textbook common-law model. Here the opinion discusses only the adjudicative facts. Facts are carefully and meticulously set forth so that the reader may quickly become acquainted with the ma-

11. BLACK'S LAW DICTIONARY 1261 (5th ed. 1979).

12. See generally *Continental Legal Systems*, *supra* note 3, at 935-93 (discussion of civil law in theory and in practice).

terial facts that form the subject of the holding. The court does not suggest how it would decide another case based on a change in the material facts. The fabric is tightly woven. There is no room, there is no give, to stretch the holding beyond the stated facts.¹³

2. A variation of this purist model exists when, in addition to the adjudicative (or material) facts, the court also discusses narrow and specific facts not in the record and gratuitously suggests how it would decide a case based on those non-record facts. Such a discussion is easily recognized as *obiter dictum*. Consider this example: Operating his car at an improperly high rate of speed, the driver-defendant attempts a turn and whips across the centerline and crashes into oncoming traffic. The court decides the case in favor of the plaintiff and says by way of *dictum*, "Of course, although the facts are not present here, if the steering wheel suddenly becomes defective, we would have a products liability case and the defendant would not have been liable."

3. A third model occurs when the court suggests how it would decide an entire series of cases based on a broad array of facts not in the record. So long as this discussion does not implicate the adjudicative facts at bar, it also is recognized as *obiter dictum*. Consider the same operative facts presented in our second model. This time the court says, "If the manufacturer designed a defective brake, a sticking accelerator, a poorly designed steering mechanism, the plaintiff would have a valid cause of action against the car dealer and manufacturer." This is only *dictum*. The facts of the case do not discuss defective steering.

4. A fourth model is an opinion in which the court's statement of its conclusion is broad enough to cover not only record facts but also additional facts not in the record. Here, the court's decision is not *obiter dictum*. It is truly the decision of the case, arrived at in the common-law tradition, but couched in a holding that is beyond a rule of law in the narrow sense.¹⁴ The decision takes the form of a general principle instead of a narrow rule of law.

13. See, e.g., *Strotman v. K.C. Summers Buick, Inc.*, 141 Ill. App. 3d 8, 11-12, 489 N.E.2d 1148, 1151 (1986) (upholding the dismissal of a complaint alleging strict products liability for a car accident, because the complaint lacked specificity as to what was defective).

14. See, e.g., *Finberg v. Sullivan*, 634 F.2d 50 (3d Cir. 1980). Although the facts before the court in *Finberg* were limited to Philadelphia County, and only that county's procedural rules were interpreted, the court announced a decision governing the entire State of Pennsylvania.

Each of the foregoing variations announce decisions of the court and can be components of the doctrine of *stare decisis*. As precedents, however, they are not currency of equal value. Clearly, the first one, the classic common-law model, possesses the strongest bite of precedent. As we go down the list of examples, numbers two and three are not precedent, and yet they are authority that can be considered by a court in a subsequent decision. The fourth variation meets the definition's technical niceties, but does not possess maximum strength, and therefore, does not achieve the reliability of a decision limited to the record material facts. An able advocate may convince a subsequent court that its original holding, although technically precedent, was only "a little bit precedent."

This fourth model causes the courts more trouble than any aspect of adjudication. It occurs when a court does not announce a narrow rule based solely on record facts, but embarks on an intellectual frolic of its own. Two examples of the fourth variation, decided in the same year, are illustrative.

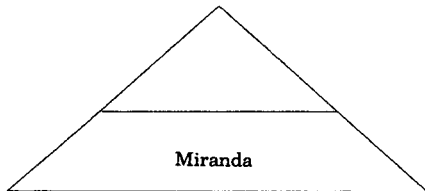
In *Webb v. Zern*,¹⁵ Charles Webb purchased a keg of beer from a distributor, John Zern. Webb's son, Nelson, was injured when the keg exploded. The Pennsylvania Supreme Court held that section 402A of the *Restatement (Second) of Torts* was controlling and then stated: "We hereby adopt the foregoing language as the law of Pennsylvania." The court should have held: Nelson, the son, could recover in tort from the brewer, beer distributor and keg manufacturer on the theory of strict products liability, for the reasons set forth in the *Restatement (Second) of Torts*, section 402A. This holding would have met the strictures of the pure common-law model. In holding as they did, the judges galloped out of the courtroom, up the hill to the legislature, and proceeded to legislate. The decision was not limited to the material facts, but rather announced a broad principle of law that could be applied to cases with materially different facts.

Another example of this type of judicial legislation can be seen in *Miranda v. Arizona*.¹⁶ *Miranda* was decided in 1966 and promulgated a broad legal principle, the so-called "*Miranda* Rule." For the past twenty years, courts and police departments across the country have been forced to decide what does and what does not implicate *Miranda*. The common-law tradition requires starting with a narrow holding and, then depending upon the collective experience of the judiciary, either applying it or not applying it to subsequent facts. The Court did the opposite in *Miranda*.

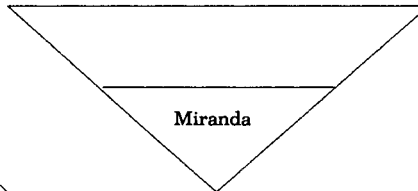
15. 422 Pa. 424, 220 A.2d 853 (1966).

16. 384 U.S. 436 (1966).

What the Supreme Court Did



What the Common Law Tradition Demands



Because the usual model was inverted in this case, the Court has spent the last twenty years chipping away at its holding.

Miranda says that a prisoner must be advised that he or she has a right to remain silent, a right to have an attorney present during questioning, and a right to the appointment of an attorney if the prisoner cannot afford one. In 1971, the Court said that *Miranda*'s proscription did not apply if the statement was used only to impeach a witness.¹⁷ The Court subsequently held that although it was necessary to cut off questioning in a robbery case when the defendant invoked his right to remain silent, it was permissible to question about an unrelated murder if fresh warnings were given "after the passage of a significant period of time."¹⁸ In *Beckwith v. United States*,¹⁹ the Court held that the questioning of a person suspected of criminal tax fraud by Internal Revenue agents did not give rise to *Miranda*. Later the Court held that *Miranda* was not violated when a defendant who initially invoked *Miranda* waived his rights before seeing an attorney, even though his attorney attempted to see her client but was assured that he would not be questioned until the following day.²⁰ In *Duckworth v. Eagan*,²¹ the Court held that informing a suspect that an attorney would be appointed for him "if and when you go to court" did not render the warnings inadequate.

The end result is that the broad legal principle announced in *Miranda v. Arizona* has been consistently chipped away in the 23 years since the decision was filed. Perhaps the same results would have been forthcoming if the traditional application of precedent had been

17. *Harris v. New York*, 401 U.S. 222, 226 (1971).

18. *Michigan v. Mosley*, 423 U.S. 96, 106 (1975).

19. 425 U.S. 341, 344 (1976).

20. *Moran v. Burbine*, 475 U.S. 412, 420 (1986).

21. 109 S. Ct. 2875, 2876 (1989).

followed. For our purposes, the important point is that *Miranda* was a drastic departure from the common-law tradition of incremental and gradual accretion of an original narrow rule. It was the exact opposite. We saw a broad structure erected in one case that has been subsequently subject to do-it-yourself remodeling.

IV.

Obiter dictum is where the precedential dragon often reposes. Gratuitous statements in an opinion which do not implicate the adjudicative facts of the case's specific holding are neither *stare decisis* nor precedent. They bind neither coordinate nor inferior courts in the judicial hierarchy. They are classic *obiter dicta*: "statement[s] of law in the opinion which could not logically be a major premiss of the selected facts of the decision."²²

I do not accept the cynic's wail that *dictum* is merely a label pasted on a case that a subsequent court simply does not want to follow. I suggest two ways to identify *dicta*:

- First, *dictum* is the express or implied description of a factual scenario that does not appear in the case record.
- Second, *dictum* is any statement of facts that does not appear in the minor premise of the court's syllogistic reasoning.

For example, using the familiar categorical syllogism in deductive logic as used in the law:

Major Premise: All men are mortal.

Minor Premise: Socrates is a man.

Conclusion: Therefore, Socrates is mortal.

This syllogism is legitimate only to the extent that Socrates appears in the record and legitimately belongs both in the minor premise and also the conclusion. We cannot properly say that RoboCop is also a man, is qualified to be in the minor premise, and is therefore, mortal. The fact of RoboCop's mortality is simply not a matter of record. *Dictum* is the antithesis of precedent.

V.

Precedent then, is a doctrine with two jurisprudential concepts in tension:

- The notion that the reasoning supporting the past decision may be wrong, but the decision itself, may be right. We have mentioned this concept before. The logic of the argument,

22. R. CROSS, PRECEDENT IN ENGLISH LAW 80 (2d ed. 1968) (citing E. PATTERSON, JURISPRUDENCE: MAN AND IDEAS OF THE LAW 313 (1953)).

the analysis of the historical background and the legislative history may all be demonstrably incorrect.

- The countervailing notion is that expressed by Karl Llewellyn: "Where stops the reason, there stops the rule."²³

All of us will continue to struggle with these countervailing considerations. I suggest, however, that these problems which I freely admit do exist do not go to the precedent's definition; rather, they go to the precedent's vitality. I express these tensions now solely to emphasize that for definitional purposes, *stare decisis* means no more and no less than that precedent is simply a fact-specific concept, pure and simple. The doctrine refers only to a detailed legal consequence that follows a detailed statement of material facts.

VI.

Yet another view of precedent is the perception of the doctrine as a method of classification. In this view, precedent covers the fact situation of the instant case and at least one other. It decides one case and classifies another.

Any classification is an abstraction. The art of legal advocacy is to expand or contract an abstraction to the extent it is either desirable or undesirable. If contracted, the original case retains only the highly constrictive confines of a legal rule. If expanded, the precept develops from a narrow rule of law into a full-fledged legal principle. The precepts may form the basis of what Herman Oliphant once called "a mounting and widening structure, each proposition including all that has gone before and becoming more general by embracing new states of fact."²⁴

When we expand, we indulge in the process of classification. We have two fact situations. The first has a definite legal result. We see one or two elements common to the two fact situations. We then put the two fact situations in one class, and, using the combined elements as one enlarged antecedent fact situation, we apply the legal consequence of the first case. Such a class may include multitudes of fact situations so long as a single common attribute exists.

These classes of fact situations give us a parallel series of corresponding propositions of law, each more and more generalized as we recede farther and farther from the original state of facts and include more and more fact situations in the successive classes. It becomes a

23. K. LLEWELLYN, *THE BRAMBLE BUSH* 158 (7th printing 1981).

24. Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71, 72-73 (1928).

mounting and widening structure, each proposition including all that has gone before and becoming more general by embracing new states of facts.

For example:

1. "An employee in an Executive agency [of the federal government] or an individual employed by the government of the District of Columbia may not . . . take an active part in political management or in political campaigns."²⁵

2. Any employee of any agency, office or department of the federal government may not take an active part in political management or political campaigns.

3. The spouse of a federal government employee may not take an active part in political management or political campaigns.

4. The parents and children of a federal government employee may not take an active part in political management or political campaigns.

5. Acquaintances, friends or business associates of federal government employees may not take an active part in political management or political campaigns.

6. No one may take an active part in political management or political campaigns.

Clearly, gradation six is far removed from the basic case and it is clearly illegitimate as classic *reductio ad absurdum*. Yet the tendency to build a gradation of generalization upon the basic case is the centerpiece of the art of advocacy; it is external as seen in the arguments of counsel, and internal, insofar as the value judgments of individual judges are concerned.

Another example is a presently-developing concept of tort law—the tort of negligent infliction of emotional distress. At common law, there was no recovery for the negligent infliction of emotional distress.²⁶ Consider this developing law in the context of a gradation of widening propositions:

1. A mother may recover for the negligent infliction of emotional distress if she watches her child suffer harm, provided the mother, herself, is in the zone-of-danger, the area of possible physical peril.²⁷

2. A child who watches his step-grandmother run down and killed may recover for the negligent infliction of emotional distress, even though he was not within the zone-of-danger.²⁸

25. 5 U.S.C. § 7324(a)(2) (1982).

26. See generally RESTATEMENT (SECOND) OF TORTS §§ 313, 436, 436A (1966).

27. *Dillon v. Legg*, 68 Cal. 2d 728, 741, 441 P.2d 912, 921, 69 Cal. Rptr. 72, 81 (1968).

28. *Leong v. Takasaki*, 55 Haw. 398, 402-07, 520 P.2d 758, 762-64 (1974).

3. A friend may recover for emotional harm if he or she witnesses another friend being harmed.

4. Bystanders may recover for emotional harm whenever they witness an accident.

Examine another example that is more typical in the judicial process. It is taken from *Donoghue v. Stevenson*,²⁹ the House of Lords case that is similar to our *MacPherson v. Buick Motor Co.*:³⁰ A Scottish widow bought a bottle of beer containing a snail. The court held:

The presence of a dead snail in an opaque bottle of beverage caused by the negligence of the defendant who is a manufacturer whose goods are distributed to a wide and dispersed public by retailers that caused physical injury to a Scots woman will render the defendant liable.

This can be stated more generally:

Whether the manufacturer of an article of drink sold by it in circumstances that prevent the distributor or the ultimate purchaser or consumer from discerning by inspection any defect is under a legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health.

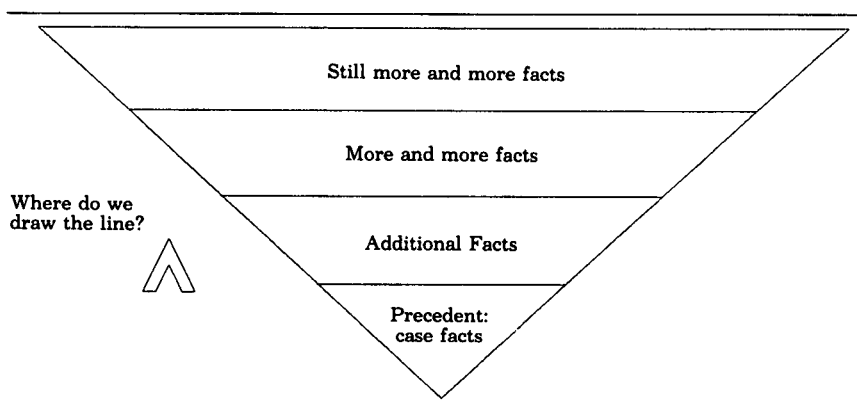
To extend a rule to cover a novel fact pattern is a technique that lies at the heart of the common-law tradition. It is accomplished through the use of analogy or generalization. If it suits the purpose of an advocate to limit application of the precept to the original facts, the argument will be designed accordingly, and the opponent will take the contrary view.

The question for the judge is critical. Where on that gradation of propositions do we take our stand and say: "This proposition is the decision of this case within the meaning of the doctrine of *stare decisis* and we go no further?" To hold tight or to expand is a question of line-drawing. Classification, then, is simply line-drawing.

Classification is also a process of abstraction. We can visualize it as an inverted pyramid:

29. 1932 App. Cas. 562.

30. 217 N.Y. 382, 111 N.E. 1050 (1916).



Our problem as judges is obvious: as the French General Robert Nivelle told the Germans under General de Castelnau in World War I, "*Ils ne passeront pas!*"³¹ When do we say, "You go this far and no farther"?

Professor Oliphant suggested another view of classification. Imagine standing in the middle of the field in a stadium and looking at the seats. If you focus on one seat on the lower level, the angle between you and the seat is rather slight; if you look at a seat in the upper level, it's a larger angle.³² The smaller the angle, the closer the classified case to the original precedent.

Karl Llewellyn put it another way. He said that precedent can be viewed as having a minimum or maximum effect.³³ The minimum would be a strict view or small angle; the maximum, a loose view, or large angle. The problem facing judges is how to treat the precedent. Strict or loose. Lower seat or higher seat. Minimum or maximum. We must remember that this is a value judgment, depending upon the individual judge's notion of correct public policy. If we want to expand the holding, we will do so. If we want to hold tight, we will. As Llewellyn suggests, you can find that the putative precedent "holds only of redheaded Walpoles in pale magenta Buick cars."³⁴

Is the process of classification strictly subjective? Is it simply a roll of the dice? I do not think so. There are certain guidelines to help us. And it is to that subject that I now turn.

VII.

How do we determine where to draw the line? Is there some gui-

31. The phrase translated means, "They shall not pass!" It has been attributed to Petain but actually was uttered by General Nivelle at Verdun on January 23, 1916.

32. Oliphant, *supra* note 24, at 73.

33. K. LLEWELLYN, *supra* note 23, at 56-69.

34. *Id.* at 66-67.

dance to know when the precedential force of one case must stop? Or is it purely personal intuition? At what level in the model classification do we say that the rule must stop? Cardozo raised the same sort of question 75 years ago:

What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future?³⁵

We judges seek answers to these questions throughout our judicial careers. I do not purport to give you answers; however, I make bold to suggest a *method* to find those answers. I emphasize that I will be talking about methods, not answers. The methods are found in the canons of logic. And here I draw freely upon passages of my most recent book, *Logic for Lawyers: A Guide to Clear Legal Thinking* (1989).

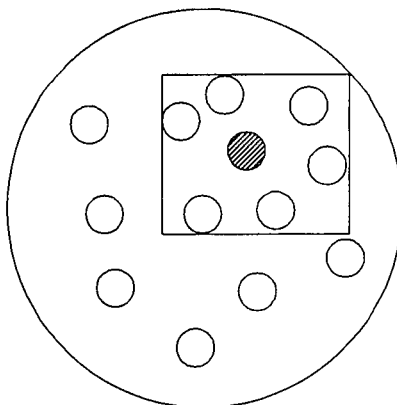
Whether to extend or restrict precedent is inextricably wrapped up in the concept of inductive reasoning. This means reasoning from a particular to another particular, or from an assembly of particulars to an inductive generalization. Let us start with generalizations.

A. *Inductive Generalization and Analogy*

In the law, the method of arriving at a general or, in the logician's language, a universal proposition (a principle or doctrine) from the particular facts of experience (legal rules or holdings of cases) is called *inductive generalization*. This is reasoning from the particular to the general.

35. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 10 (1921).

From the particular
rulings in the
square we induce a
generalization.



We borrow this process from the certainty of scientific laboratory experiments. If nine particular pieces of blue litmus paper turn red when dipped in acid, we may draw a general conclusion about what happens to all blue litmus paper dipped in acid. We use the technique of *enumeration* to reach an inductive generalization. Unlike in science, however, in law we do not assert that our conclusion is true, only that it is more probably true than not.³⁶

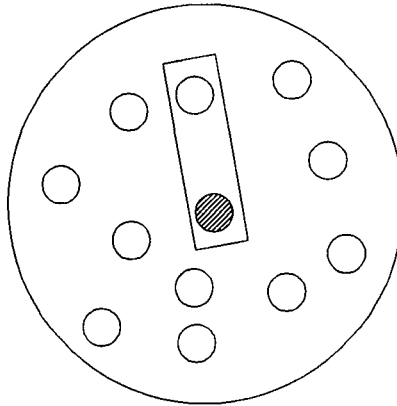
Closely related to induced generalization is the process of *analogy*. Analogy is reasoning from the particular to the particular. If, from the experience of nine pieces of blue litmus paper, we conclude only that the tenth piece will turn red, we reach a particular, not a general conclusion.

36. *But see* K. POPPER, CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE vii (1962). Popper states the following:

The way in which knowledge progresses, and especially our scientific knowledge, is by unjustified (and unjustifiable) anticipations, by guesses, by tentative solutions to our problems, by *conjectures*. These conjectures are controlled by criticism; that is, by attempted *refutations*, which include severely critical tests. They may survive these tests; but they can never be positively justified: they can neither be established as certainly true nor even as 'probable'

Id. (emphasis in original).

From one particular to
another we analogize.



The structure of these two types of inductive arguments—induced generalization and analogy—is similar. There is, however, a basic difference, extremely important in the law, when the premises contain a number of instances in which the certain attributes occur together.

- ++ By inductive generalization we may infer that *every* instance of the one attribute will also be an instance of the other.
- ++ By analogy we may infer that a different *particular* instance of one attribute will also exhibit the other attribute.

Let us examine *inductive generalization* in the law:

A's oral conveyance of real estate is invalid.
B's oral conveyance of real estate is invalid.
C's oral conveyance of real estate is invalid.

...

Z's oral conveyance of real estate is invalid.

Therefore, all oral conveyances of real estate are invalid.

All inferences proceed on the assumption that the new instances will exactly resemble the old one in all material circumstances. This is purely hypothetical, of course, and sometimes we discover we are mistaken. Thus, for years we proceeded along the following induction:

A is a swan and it is white.
B is a swan and it is white.

C is a swan and it is white.

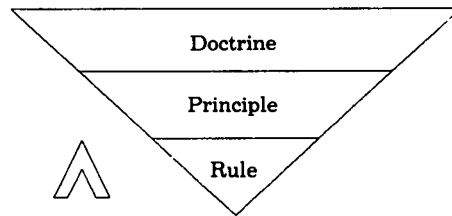
...

Z is a swan and it is white.

Therefore, all swans are white.

But then Australia was discovered, and it was learned that there are swans that are black. Inductive generalization underlies the development of the common law. From many specific case holdings, we reach a generalized proposition.

From the rules we create principles:



From many cases deciding that individual oral conveyances of real estate were invalid, we reached the conclusion that all such conveyances were invalid. We arrived at that point by what Lord Diplock described as "the cumulative experience of the judiciary."³⁷ In generalization by enumeration, we can say that the larger the number of specific instances, the more certain the resulting generalization. This simply bades fealty to the concept of probability. It is the common-law tradition of creating a principle by connecting the dots.

The process of *analogy* is a little different. *Analogy* does not seek proof of an identity of one thing with another, but only a comparison of resemblances. Unlike the technique of enumeration, analogy does not depend upon the *quantity* of instances, but upon the *quality* of resemblances between things. J.S. Mill reduced it to a formula: Two things resemble each other in one or more respects; a certain proposition is true of one; therefore, it is true of the other.³⁸ In legal analogies, we may have two cases which resemble each other in a great many properties, and we infer that some additional property in one will be found in the other. The process of analogy is used on a case-by-case basis. It is used to compare the resemblance of prior cases to the case at bar. Reaching a conclusion by enumeration has the bene-

37. *Home Office v. Dorset Yacht Co.*, 1970 App. Cas. 1004, 1058 (Lord Diplock); see also *LOGIC FOR LAWYERS*, *supra* note 3, at 113-22.

38. See J. MILL, *A SYSTEM OF LOGIC RATIOCINATIVE AND INDUCTIVE* 98-142 (8th ed. 1916).

fit of experience. Reaching a conclusion by analogy has the benefit of the high degree of similarity of the compared data.

The degree of similarity is always the crucial inquiry in analogies. Clearly, you cannot conclude that a partial resemblance between two entities is equal to an entire and exact correspondence. Here the skill of the advocate will often be the determining factor. Plaintiff's lawyer may argue that the historical event or entity in the putative precedent, Alpha, bears many resemblances to the case at bar, Bravo. The opponent will argue that although the facts in Alpha and Bravo are similar in some respects, this does not mean that those similarities are material and, therefore, relevant, or that the cases are similar in other respects; he or she will argue that a false analogy is present.

What is one man's meat is another man's poison. What is one attorney's material and relevant fact in analogical comparisons is the other attorney's immaterial and irrelevant fact. Often the art of advocacy resolves itself into convincing the court which facts in previous cases are indeed positive analogies and which are not. The judge is required to draw this distinction. The successful lawyer is one who is able to convince the judge to draw the distinction in the manner most favorable to his or her client.

Points of unlikeness are as important as likeness. Comparison without contrast is not an ideal to be followed. In examining the cases, as a scientist in a laboratory, the judge should not look for the rigid fixity of facts. Seldom are there perfectly identical experiences in human affairs.

What is "reasonable" in determining analogies may permit endless differences of opinion. And this is how it should be. The existence of varying views in multijudge courts is one of the most vitalizing traditions animating the growth of the common law. Determining what is "reasonable," however, is closely related to the overarching process we call "reasoning," or solving a problem by pondering a given set of facts to perceive their relationship and then reach a logical conclusion. The application of "reasonableness" to "reason" is an ever-recurring scenario. If Delta has been found to be liable in set of circumstances involving Alpha and Bravo and Charlie, we have to decide, often without an exact precedent to guide us, whether Delta is also liable if only facts Alpha and Bravo are present. To do this we must determine which facts are material. Given the situation that Delta is liable if set of circumstances Alpha and Bravo and Charlie

applies, we must decide if minus circumstance Charlie is material or immaterial.

Two famous cases dramatically illustrate this. In *Rylands v. Fletcher*,³⁹ the defendant employed an independent contractor to make a reservoir on his land. Because of the contractor's negligence in not filling some unused mine shafts, water escaped and flooded the plaintiff's mine. The case could have been decided solely on the theory of the contractor's negligence, but the court chose to decide it on the theory of strict liability by determining that the negligence of the contractor was immaterial. Compare the actual facts of the case with the facts deemed material by the court:

Actual facts

D had a reservoir built on his land.
Through the negligence of the contractor (our circumstances C)
Water escaped and injured P.
Conclusion: D is liable to P.

Material facts as seen by the court

D had a reservoir built on his land.
Water escaped and injured P.
Conclusion: D is liable to P.

Thus by determining that circumstance C was immaterial, the doctrine of absolute liability was established in 1868 and is still alive and kicking today.

Another example is seen in the Court's treatment of segregation. In *Brown v. Board of Education*,⁴⁰ the Court addressed circumstance B, segregation, in circumstance C, schools. It decided that under the doctrine of "separate but equal," no segregated school could be considered "equal." In *Mayor of Baltimore v. Dawson*,⁴¹ the Court was again presented with a segregation issue—this time minus circumstance C (i.e., not in the context of schools). The Court affirmed the Fourth Circuit's ruling that the *Brown* decision applied to end segregation in public beaches and bathhouses. Segregation minus circumstance C led to the same result in *Holmes v. Atlanta*⁴² (municipal golf course) and *Gayle v. Browder*⁴³ (buses). When *Browder* was decided, it was obvious that, as a matter of law, the entire doctrine of "separate but equal" was overruled and was not only limited to the facts in *Brown*—the special and particular problems of segregated ed-

39. 3 L.R.-E. & I. App. 330 (H.L. 1868).

40. 347 U.S. 483 (1954).

41. 350 U.S. 877 (1955) (per curiam).

42. 350 U.S. 879 (1955) (per curiam).

43. 352 U.S. 903 (1956) (per curiam).

uation. Changing social and judicial perspectives had rendered that circumstance immaterial.

From this, we can learn something about the process of analogy, a process which lies at the heart of the system of precedents. In analogy, it is mandatory to determine which facts in the previous case are to be deemed material. The decision in a subsequent case depends as much on the exclusion of "immaterial" facts as it does on the inclusion of "material" ones.

The analytical process thus comes down to several steps: First, establish the holding of the case to learn the legal consequences attached to a specific state of facts. Then exclude any *dictum*. The next step is to determine whether that holding is a binding precedent for a succeeding case containing *prima facie* similar facts. This involves a double analysis: First state the material facts in the putative precedent and then attempt to find those which are material in the compared case. If these are identical, then the first case is binding precedent for the second, and the court should reach the same conclusions as it did in the first. If the first case lacks any fact deemed material in the second case, or contains any material fact not found in the second, then it is not a direct precedent.

Listed are some suggestions to help determine which facts are material in the process of analogy. Of course, it is important to recognize that no individual test may succeed unless there is first a complete understanding of the relevant substantive law precepts and why they came to be. I suggest these tests with some trepidation and advance them not as truths, not even as probabilities, but only as, to use the most weasely of terms, "possible possibilities":

- All facts which the court specifically stated to be material must be considered material.
- All facts which the court specifically stated to be immaterial must be considered immaterial.
- All facts which the court impliedly treats as immaterial must be considered immaterial.
- All facts of person, time, place, kind and amount are immaterial unless stated to be material.
- If the opinion omits a fact that appears in the record this may be due to (a) oversight, or (b) an implied finding that the fact is immaterial. Option (b) will be assumed to be the case in the absence of other evidence.
- If the opinion does not distinguish between material and im-

material facts, then all the facts set forth must be considered material.

—A conclusion based on a hypothetical set of facts is *dictum*.⁴⁴

This is not to say that these are the only tests of what facts are material, and therefore, important, and what facts are merely interesting. There are, no doubt, others. Whatever the test, the process requires patience, care and thoroughness.

Ultimately, law is reduced, in the case of the judge, to the art of drawing distinctions, and in the case of the lawyer, to the art of anticipating the distinctions the judge is likely to draw.⁴⁵ To be sure, "[i]n a system bound by precedent such distinctions may often be in the nature of hair-splitting, this being the only instrument to hand for avoiding the consequences of an earlier decision which the court considers unreasonable, or as laying down a principle which is 'not to be extended.'"⁴⁶ As an art, both the study and practice of law consist of problem solving. Because of the doctrine of *stare decisis*, however, problem solving must not be performed on an *ad hoc* basis. We must respect the overarching consideration that like cases be decided alike. The real question, however, is deciding what is a like case.

To solve a problem fairly and justly we must employ techniques of reflective thinking. Problems tend to originate in a confused and often complicated setting. That, in essence, is what the difficult problem of precedent is all about. To think reflectively is to face a situation where there is obscurity, doubt, and conflict, and then transform that situation to one that is clear, coherent and harmonious. It is a constant effort to suggest, search, and compare, and then suggest, search, and compare again and again what has gone before and what may occur again.

Thus, it is critically important to use logical reflective thinking to distinguish between what is or is not precedent. Logical process is the cement that binds the determination of "reasonableness" with the statement of "reasons." "Reasons" are, of course, the explanation or justification of an act. Judges and lawyers give "reasons" to prove that their conclusion reflects "reasonableness." "Reasons" are "the how" in the process; "reasonableness" is "the why." "Reasons" are the logical premises that justify the desired conclusion of "reasonableness." What is used to coalesce "reasons" and "reasonableness" is "reasoning," which we know as "logical process."

Always to be remembered is that logical order in the law is an instrumentality, not an end. John Dewey has told us that "[i]t is a

44. See Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161 (1930).

45. See Lloyd, *Reason and Logic in the Common Law*, 64 L.Q. REV. 468, 482 (1948).

46. *Id.*

means of improving, facilitating, clarifying the inquiry that leads up to concrete decisions; primarily that particular inquiry which has just been engaged in, but secondarily, and of greater ultimate importance, other inquiries directed at making other decisions in similar fields."⁴⁷ We have emphasized that, unlike in mathematics and science, there are few immutable major premises in the law. Logic must always be tempered with experience. Holmes was certainly right when he said:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.⁴⁸

In the reasoning process of the law, we do not intend that the guidelines to materiality, the rules of the syllogism, and the idiosyncrasies of formal and material fallacies be only a "ballet of bloodless categories."⁴⁹ Instead, they are vibrant tools of analytic thought used to give force, power, sinew, and respect to a process that adjudicates claims, demands, and defenses asserted by live litigants in very live cases and controversies. These legal rules and guidelines are society's sword and shield to fend off, in Frankfurter's felicitous phrase, "[t]he tyranny of mere will and the cruelty of unbridled, unprincipled, undisciplined feelings."⁵⁰

Our use of logical processes in the law is neither perfect nor does it claim to be. Inductive reasoning does not purport to reach truths; its aim is to produce a result that is more probably true than not. Rules of deductive reasoning go further. Properly applied, these rules command that if the premises are true, the conclusion must be true. But the genius of the common law is that these premises are not fixed in cement. In the popular idiom, they are always "up for grabs" to meet changes in our social, political, philosophical, and economic climates. When invention is active, when industry, commerce, and transportation bring about new forms of human relations, and when community relations change because of the extension of ethical and moral ideas, the law is dynamically able to keep pace with the variety and subtlety of social change.

47. J. DEWEY, *HOW WE THINK* 19 (2d ed. 1933).

48. O. HOLMES, *THE COMMON LAW* 1 (1881).

49. Lloyd, *supra* note 45, at 483 n.68.

50. As quoted in the *New York Herald Tribune*, August 30, 1962, on the occasion of his retirement as a Supreme Court Justice. See *As Felix Frankfurter, Retiring, Saw Law vs. Tyranny*, N.Y. *Herald Tribune*, Aug. 30, 1962, at 1, col. 2.

VIII.

The questions that face the judges of the highest courts go much further than a mere determination of when to apply a putative precedent to the case at hand. We also must decide whether to *overrule* the holding of the case. Do we bite the bullet and say so? Or do we make meaningless distinctions and, in Karl Llewellyn's expression, decide if it were a loose or strict precedent?⁵¹ It is essential to study the anatomy of a precedent—what it is, how it is created, how long it should endure, and whether it should be left to wither or should be nourished and strengthened.

We have repeatedly recognized that the principle of *stare decisis* should not be a "confining phenomenon." We are mindful of the observation of Justice Schaefer of the Supreme Court of Illinois. "Precedent speaks for the past; policy for the present and the future. The goal which we seek is a blend which takes into account in due proportion the wisdom of the past and the needs of the present."⁵² The doctrine of *stare decisis* is not a vehicle for perpetuating error, but rather a legal concept which responds to the demands of justice and, thus, permits the orderly growth processes of the law to flourish.

As said before, *stare decisis*, or, in its complete form, *stare decisis et non quieta movere*, is usually translated "[t]o adhere to precedents, and not to unsettle things which are established."⁵³ The classic English statement is attributed to Coke: "[T]hose things which have been so often adjudged, ought to rest in peace."⁵⁴ Blackstone's statement was more detailed:

For it is an established rule to abide by former precedents, where the same points come again in litigation: as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule which it is not in the breast of any subsequent judge to alter or vary from according to his private sentiments.⁵⁵

My dear friend and colleague of happy memory, Roger Traynor, noted:

Stare decisis, to stand by decided cases, conjures up another phrase dear to Latin lovers—*stare super antiquas vias*, to stand on the old paths. One might feel easier about that word *stare* if itself it stood by one fixed star of meaning. In modern Italian *stare* means to stay, to stand, to lie, or to sit, to remain, to keep, to stop, or to wait. With delightful flexibility it also means to depend, to fit or to suit, to live and, of course, to be.⁵⁶

Why do we adhere to precedent? To a considerable extent rules

51. See K. LLEWELLYN, *supra* note 23, at 67-68.

52. Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3, 24 (1966).

53. BLACK'S LAW DICTIONARY 1261 (5th ed. 1979).

54. Spicer v. Spicer, Cro. Jac. 527, 79 Eng. Rep. 451 (K.B. 1620).

55. 1 W. BLACKSTONE, COMMENTARIES *69-70.

56. Traynor, *Reasoning in a Circle of Law*, 56 VA. L. REV. 739, 744-45 (1970).

are grounded in factors of habit, tradition, historical accident, and sheer intellectual inertia. We can also go back to the predictability factor in law, recalling Holmes' definition, "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."⁵⁷ In addition to these social and psychological roots, precedent also appears to rest in the following values:

- (1) *Stability*. It is clearly socially desirable that social relations should have a reasonable degree of continuity and cohesion, held together by a framework of reasonably stable institutional arrangements. . . .
- (2) *Protection of Reliance*. . . . [P]rotection of persons who have ordered their affairs in reliance upon contemporaneously announced law [is a value to be safe-guarded]
- (3) *Efficiency in the Administration of Justice*. If every case coming before the courts had to be decided as an original proposition, without reference to precedent, the judicial work-load would obviously be intolerable. Judges must be able to ease this burden [of the judicial work-load] by seeking guidance from what other judges have done in similar cases.
- (4) *Equality*. [Persons similarly situated should be equally treated.] It is a fundamental ethical requirement that like cases should receive like treatment, that there should be no discrimination between one litigant and another except by reference to some relevant differentiating factor. . . .
- (5) *The Image of Justice*. [This phrase does] not mean that any judicial decision ought to be made on the basis of its likely impact upon the court's public relations, in the Madison Avenue sense, but merely that it is important not only that the court provide equal treatment to persons similarly situated, but that, insofar as possible, the court should appear to do so.⁵⁸

In 1970, Justice Harlan set forth similar values in *Moragne v. States Marine Lines, Inc.*,

Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. The reasons for rejecting any established rule must always be weighed against these factors.⁵⁹

IX.

When do we overrule? We start with Roscoe Pound's warning that the law must be stable, yet it cannot stand still.⁶⁰ No black letter guidelines determine when to follow precedent. Weighty considera-

57. Holmes, *supra* note 1, at 461.

58. Currier, *Time and Change in Judge-Made Law: Prospective Overruling*, 51 VA. L. REV. 201, 235-37 (1965).

59. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970).

60. Pound, *The Theory of Judicial Decision II*, 36 HARV. L. REV. 802, 825 (1923).

tions underlie the principle that courts should not lightly overrule past decisions. Yet, Roger J. Traynor reminds us, "a bad precedent is easier said than undone."⁶¹ Thus, the decision whether to stand still often requires a balancing of hardships. We should not fall into the trap confronted by Gulliver in his Travels:

It is a maxim among these men, that whatever has been done before may legally be done again; and therefore they take special care to record all the decisions formerly made, even those which have through ignorance or corruption contradicted the rule of common justice and the general reason of mankind. These under the name of precedents, they produce as authorities and thereby endeavor to justify the most iniquitous opinions . . .⁶²

The court may be inclined to overrule "if the hardships it would impose upon those who have relied upon the precedent appear not so great as the hardships that would inure to those who would remain saddled with a bad precedent."⁶³ Again, Roger Traynor stated:

Legal minds at work on this word might well conjecture that to *stare* or not to *stare* depends on whether *decisis* is dead or alive. We might inquire into the life of what we are asked to stand by. In the language of *stare decisis*: *Primo*, should it ever have been born? *Secondo*, is it still alive? *Tertio*, does it now deserve to live?⁶⁴

As to be expected, the United States Supreme Court has written extensively on the question of *stare decisis*. "[I]t is indisputable that *stare decisis* is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a judisprudential system that is not based upon 'an arbitrary discretion.'"⁶⁵ *Stare decisis* ensures that the law will not change erratically and "permits society to presume that bed-rock principles are founded in the law rather than in the proclivities of individuals"⁶⁶

The Court is fond of saying that it is difficult to overrule statutory interpretations because theoretically Congress will correct the ruling if dissatisfied. But with the Court it is sometimes a case of "do as I say, not as I do." The deed occasionally speaks louder than the word. Many statutory precedents have been explicitly overruled in the past two decades.⁶⁷ Yet the Court seems to justify its action by suggesting

61. Traynor, *La Rude Vita, La Dolce Giustizia; Or Hard Cases Can Make Good Law*, 29 U. CHI. L. REV. 223, 231 (1962).

62. R. KLUGER, *SIMPLE JUSTICE* 541 (1975) (citing J. SWIFT, *GULLIVER'S TRAVELS* (1726)).

63. Traynor, *supra* note 61, at 231.

64. Traynor, *supra* note 56, at 745.

65. *Patterson v. McClean Credit Union*, 109 S. Ct. 2363, 2370 (1989) (citing *THE FEDERALIST* No. 78, at 490 (A. Hamilton) (H. Lodge ed. 1888)).

66. *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986).

67. See, e.g., *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658 (1978) (overruling *Monroe v. Pape*, 365 U.S. 167 (1961)); *Continental T.V., Inc. v. GTE Sylvia, Inc.*, 433 U.S. 36 (1977) (overruling *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967)); *Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976) (overruling *International Union v. Wisconsin Em-*

categories that inform its occasional inclination to overrule. Because most state and federal cases involve statutory construction, it may be useful to summarize the reasons the Court gives for departing from its stated "general rule" that disfavors overruling statutory precedents:

- Intervening development of the law, either through the growth of judicial doctrine or further action taken by Congress.
- A precedent may be a positive detriment to coherence and consistency on the law, either because of inherent confusion created by an unworkable decision, or because the decision poses a direct obstacle to the realization of important objectives embodied in other laws.
- A precedent becomes more vulnerable as it becomes outdated and after being, in Cardozo's words, "tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare."⁶⁸

It must be remembered that a judicial precedent may reflect as little as 51 percent of the opinion writer's point of view at the time of authorship. Depending upon the interest in the case by the non-writing judges at the time of the decision, their conviction certainly cannot be guaranteed to be any higher. Too many appellate lawyers operate on the assumption that the opinion of a unanimous court reflects 100 percent conviction and endorsement by all members of the court. Often, the minimum of effective persuasion could effectively move a court to a position desired by an advocate if it is realized that, at best, the case holding is but a narrow rule limited to a particular set of facts, and that the slightest change of facts could possibly bring about a different result.

Another factor that must be reckoned with is that we judges do change our minds. What do we say when we do this? I admire what Justice Potter Stewart said, concurring in *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, where the Court reversed itself in a prior decision rendered only eight years before:

When *Sinclair Refining Co. v. Atkinson* . . . was decided in 1962, I subscribed to the opinion of the Court. Before six years had passed I had reached the conclusion that the *Sinclair* holding should be reconsidered, and said so . . . Today I join the Court in concluding "that *Sinclair* was erroneously de-

ployment Relations Bd., 336 U.S. 245 (1949)); *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484 (1973) (overruling *Ahrens v. Clark*, 335 U.S. 188 (1948)); *Andrews v. Louisville & N.R.R.*, 406 U.S. 320 (1972) (overruling *Moore v. Illinois Cent. R.R.*, 312 U.S. 630 (1941)); *Boys Markets, Inc. v. Retail Clerks Union Local 770*, 398 U.S. 235 (1970) (overruling *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962)); *Peyton v. Rowe*, 391 U.S. 54 (1968) (overruling *McNally v. Hill*, 293 U.S. 131 (1934)); see also *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405-13 (1931) (Brandeis, J., dissenting) (collecting cases overruled by the Court prior to 1931).

68. B. CARDOZO, *supra* note 35, at 150. See generally *Patterson*, 109 S. Ct. at 2370.

cided and that subsequent events have undermined its continuing validity”

In these circumstances the temptation is strong to embark upon a lengthy personal *apologia*. But since Mr. Justice Brennan has so clearly stated my present views in his opinion for the Court today, I simply join in that opinion and in the Court's judgment. An aphorism of Mr. Justice Frankfurter provides me refuge: “Wisdom too often never comes, and so one ought not to reject it merely because it comes late.”⁶⁹

I also admire the opinion of Justice Jackson, concurring in *McGrath v. Kristensen*:

And Mr. Justice Story, accounting for his contradiction of his own former opinion, quite properly put the matter: “My own error, however, can furnish no ground for its being adopted by this Court. . . .” [A]n escape . . . was taken by Lord Westbury, who, it is said, rebuffed a barrister's reliance upon an earlier opinion of his Lordship: “I can only say that I am amazed that a man of my intelligence should have been guilty of giving such an opinion.” If there are other ways of gracefully and good-naturedly surrendering former views to a better considered position, I invoke them all.⁷⁰

Or Baron Bramwell's simple statement, in *Andrews v. Styrap*: “The matter does not appear to me now as it appears to have appeared to me then.”⁷¹

Too many advocates and commentators assume that all precedents are equivalent, that all are precedents *fortissimo*. As Judge Walter V. Schaefer has cogently observed, “To the working profession there is no such thing as an opinion which is just ‘a little bit’ precedent or a precedent *pianissimo*. All of them carry the same weight.”⁷² This, however, is simply not so. There are precedents, and there are precedents. All are not currency of equal value.

A limitation upon the binding authority of precedent may be noted by the statement of the Court of Appeals of the State of New York: “But the doctrine of *stare decisis* . . . does not apply to a case where it can be shown that the law has been misunderstood or misapplied, or where the former determination is evidently contrary to reason.”⁷³ From this we can say that one ground for departing from what would otherwise be precedent is an error in the logical argument in the opinion of the prior case. The other ground is that a case should not be followed if it is based upon principles enshrining social or economic conceptions which have been legislatively abandoned or otherwise by-passed. Chancellor Kent wrote:

A solemn decision upon a point of law arising in any given case, becomes an authority in a like case, because it is the highest evidence which we can have

69. *Boy's Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 255 (1970) (Stewart, J., concurring) (citations omitted) (quoting *Henslee v. Union Planters Bank*, 335 U.S. 595, 600 (1949)).

70. *McGrath v. Kristensen*, 340 U.S. 162, 178 (1950) (Jackson, J., concurring) (citations omitted).

71. *Andrews v. Styrap*, 26 L.T.R. (N.S.) 704, 706 (Ex. 1872).

72. Schaefer, *supra* note 52, at 7.

73. *Rumsey v. New York & N.E.R.R.*, 133 N.Y. 79, 85, 30 N.E. 654, 655 (1892).

of the law applicable to the subject, and the judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case.⁷⁴

X.

As explained, all precedents do not have the same bite. Some are less powerful than others. Notable commentators have addressed certain aspects of this phenomenon. For example, Henry Campbell Black observed:

A decision is not authority as to any questions of law which were not raised or presented to the court, and were not considered and decided by it, even though they were logically present in the case and might have been argued, and even though such questions, if considered by the court, would have caused a different judgment to be given.⁷⁵

Black has highlighted the importance of examining carefully the opinion, if not the briefs, in the prior case.⁷⁶ Were the issues presented, considered and decided? If not, even though they could have been, the prior decision should not be considered a binding precedent on unaddressed points. If so, the prior decision is to be considered binding precedent.

To be sure, issues raised in a case stem from the facts presented. *Facts*, therefore, are of controlling importance, as explained by Professor Brumbaugh:

Decisions are not primarily made that they may serve the future in the form of precedents, but rather to settle issues between litigants.

Their use in after cases is an incidental aftermath. A decision, therefore, draws its peculiar quality of justice, soundness and profoundness from the particular facts and conditions of the case which it has presumed to adjudicate. In order, therefore, that this quality may be rendered with the highest measure of accuracy, it sometimes becomes necessary to expressly limit its application to the peculiar set of circumstances out of which it springs.⁷⁷

As emphasized, the use of the precedent's authority depends upon, and is limited to "the particular facts and conditions of the case which it has presumed to adjudicate."⁷⁸ We should not apply precedents blindly. The putative precedent must be analyzed carefully to ascertain the actual holding of the court to determine whether a similarity of facts and issues exists. It must be studied to determine whether the precept emerging therefrom is the case's true holding or merely *dictum*.

74. KENT'S COMMENTARIES 475 (12th ed. 1896).

75. H. BLACK, LAW OF JUDICIAL PRECEDENTS 37 (1912).

76. *Id.*

77. J. BRUMBAUGH, LEGAL REASONING AND BRIEFING 171-72 (1917).

78. *Id.* at 172.

Is the principle or precept deduced from the prior case contained in a thorough, well-reasoned opinion which was, itself, based upon clear and binding precedents? Is the prior case one that is seriously weakened by a trenchant dissent, or by a concurring opinion which casts doubt upon the wisdom of the majority's reasoning? Is the applicable precept found in a single case, or has it been restated and applied in several cases which have reaffirmed its value and social desirability? Clearly, the currency value of precedents varies widely. At one extreme are those that are rock-bound, the precedents *fortissimo*; at the other extreme are those that must be subject to question.

It is important to note again here that only the holding is entitled to recognition and respect as binding authority. *Dictum* is merely persuasive, although in varying degrees. Factors that affect or determine the degree of persuasiveness accorded to *dicta* are many and varied. How pertinent or relevant is the *dictum* to the decision wherein it was uttered? Does the court or judge who authored the *dictum* enjoy a special respect for scholarship and wisdom? Is the *dictum* reasonable? Although prior cases have precedential and persuasive value, their relative value as precedents and as persuasions may differ radically.

A. Precedent and Persuasive Authority

Absent formal overruling, judges must follow a precedent whether they approve of it or not. It binds them and excludes judicial discretion for the future. On the other hand, judges are under no obligation to follow persuasive authority that lacks the force of a true precedent. They will consider it, but will attach to it only the weight such authority seems to deserve.

Persuasive authority can be considered merely historical comment. It depends for its influence upon its own merits, not upon any legal claim which it has to recognition, as opposed to precedent, which is considered a legal source of law. For example, different types of cases are more properly classified as persuasive authority than as binding precedent:

- ++ Dictum.
- ++ Decisions of courts of other jurisdictions.
- ++ Plurality, concurring and dissenting opinions.
- ++ The summary affirmance by the U.S. Supreme Court: a hybrid type that both is and is not precedent.
- ++ The denial of a writ of certiorari.

1. Courts of Other Jurisdictions

A decision of a superior court is an authoritative precedent for all

inferior courts in the same judicial hierarchy. There is a bit of provincialism or parochialism here. A decision of the New York Court of Appeals is authoritative precedent for all New York trial courts, but it is only a persuasive authority for courts in Pennsylvania because those courts are in another judicial hierarchy.

2. Plurality Opinions

In the American tradition, a full-fledged precedent must be pronounced by a majority of the court. An opinion emanating from a court that reflects only a plurality view does not have the power of a majority opinion. Reasons given by the plurality are only persuasive authority. Here we must be careful to distinguish between the specific holding of a case and the reasons that support it. When concurrences are added to a plurality opinion, a true holding of the court has been established: a detailed legal consequence has accompanied a detailed set of facts. But, because the holding is not supported by a majority reasoning, the power and vitality of the holding is diluted.

In *Berkebile v. Brantly Helicopter Corp.*,⁷⁹ for example, the plurality and concurring judges agreed that the trial judge's jury charge on abnormal use in a product liability case improperly directed a verdict for the manufacturer by removing from the jury one of the plaintiff's theories that the helicopter was defectively designed. However, the opinions contained different reasons for this decision. The plurality opinion stated that the requirement that a product be "unreasonably dangerous" should be purged from Pennsylvania strict liability law, the court having previously adopted in *ipsissimis verbis* the entire text of section 401A of the *Restatement (Second) of Torts* as "the law of Pennsylvania."⁸⁰ But only one other justice joined in the writer's opinion; three justices concurred only in the result; and two justices concurred specially, each filing a short opinion.

Later in *Bair v. American Motors Corp.*,⁸¹ a diversity case, the Court of Appeals for the Third Circuit refused to recognize as Pennsylvania law the court's opinion in *Berkebile*, that proof of "unreasonably dangerous" was not necessary in a products liability case because it had originated in a plurality opinion. In so holding, the federal court followed *Commonwealth v. Little*,⁸² in which the Penn-

79. 462 Pa. 83, 337 A.2d 893 (1975) (plurality opinion).

80. *Id.* at 90-91, 337 A.2d at 900 (plurality opinion).

81. 535 F.2d 249, 250 (3d Cir. 1976).

82. 432 Pa. 256, 248 A.2d 32 (1968).

sylvania State Supreme Court declined to follow a prior opinion representing the views of only two of its justices, the court being of the view that an opinion "joined by only one other member of this Court, has no binding precedential value."⁸³

The United States Supreme Court recently agreed to review *Horton v. California*.⁸⁴ At issue is the scope, or continued vitality of the high court's 1971 ruling in *Coolidge v. New Hampshire*,⁸⁵ which allowed the use of evidence found in plain view only if discovered inadvertently. A California appeals court said the 1971 Supreme Court holding is not binding precedent because it was reached by only four, not five, justices.⁸⁶

Because a plurality opinion is not an opinion of the court, all appellate courts should adopt the United States Supreme Court's practice of labeling a plurality opinion as an "Opinion Announcing the Judgment of the Court," rather than simply "Opinion" or "Opinion of the Court." A few years ago we asked West Publishing Company to note this in its headnotes when only a plurality opinion is forthcoming. In such cases West usually now states in the headnotes, for example, "Opinion by Heffernan, C.J., with two others concurring." This is most helpful in determining the precedential value of a case.

3. Summary Affirmance by the United States Supreme Court

Another circumstance that does not have the fullest bite of precedent is a summary affirmance by the United States Supreme Court. In *Illinois Elections Board v. Socialist Workers Party*, the Court explained: "[We] note . . . that summary affirmances have considerably less precedential value than an opinion on the merits. . . . [U]pon fuller consideration of an issue under plenary review, the Court has not hesitated to discard a rule which a line of summary affirmances may appear to have established.'"⁸⁷

4. The Denial of a Writ of Certiorari

It is hornbook law that "[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times."⁸⁸ Prior to 1988, a real difference existed between the two methods of seeking U.S. Supreme Court review: the first, by "a petition for certiorari"; the other, by "appeal by a party."

83. *Id.* at 260, 248 A.2d at 35.

84. 110 S. Ct. 231 (1989).

85. 403 U.S. 443 (1971).

86. *People v. Miller*, 196 Cal. App. 3d 846, 850-51, 242 Cal. Rptr. 179, 181 (1987).

87. *Illinois Elections Bd. v. Socialist Workers Party*, 440 U.S. 173, 180-81 (1979) (citations omitted).

88. *United States v. Carver*, 260 U.S. 482, 490 (1923).

Although the Court seemed bound by law to hear all "appeals" from the state courts (presenting an appropriate constitutional law challenge), because of the vast number of cases, it devised a concept of dismissing appeals "for lack of jurisdiction," ostensibly for the reason that no substantial federal question had been raised. Although recorded case law is scant, if in fact non-existent, many astute lawyers in the criminal law field believed that where a direct appeal from a state court decision in a criminal case had been denied by the Supreme Court, the appellant was then precluded from seeking relief to the federal court under federal habeas corpus,⁸⁹ because the Court had rendered a final decision that no substantial federal question was presented. In other words, this decision was considered to be a binding precedent. Lacking a federal question, federal habeas corpus relief was, therefore, foreclosed.

Congress eliminated this trap for the unwary who mistakenly would take an appeal rather than file a petition for certiorari in such cases. In 1988, it amended section 1257 of title 28 to abolish "appeal" and now provides that final judgment "rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari."⁹⁰ To be sure, the amendment was not designed solely to protect defendants in criminal cases; rather, its purpose was to give the Court almost total discretion to accept cases for review. However, its effect has been to allow the alternative relief of federal habeas corpus review for the unwary counselor who may previously have been bound by a final determination on appeal.

XI.

Well, there it is. I do not know whether I have helped or made a confusing subject even more so. I have tried to suggest guidelines to help you decide whether to kiss or kill the precedential dragon. In either event you must go back to its very definition. In so doing, you recognize that a case holding in the common-law tradition is fact specific. When you compare a putative precedent with the case at bar, you compare facts and not the reasons stated. Yet, I freely admit that my emphasis on facts for definitional purposes is not shared by those who seem to say that the reasons given in the holding are also

89. See 28 U.S.C. §§ 2244, 2254 (1982).

90. *Id.* § 1257 (1988), as amended by Act of June 27, 1988, Pub. L. No. 100-352, § 3, 102 Stat. 662 (1988).

the precedent.⁹¹

I have tried to show that reasons go only to support a decision, and when original reasons are later proved to be faulty, or when social, economic, or political conditions have changed, it is legitimate not to follow the holding because the reasoning is no longer valid. This is the theory that "where stops the reason, there stops the rule." But all is not that quick and easy. There are times when the rule must be held valid for reasons other than those stated in the original opinion.

Judges will continue to struggle with what is and is not precedent. The source of the struggle may be an uneasiness with what are and are not material facts in the compared cases, or it may be a struggle on where to hold the line in the expansion of facts from the specific to the abstract. There are guidelines, to be sure, but often it is a question of a value judgment, what Max Weber described as "'practical' evaluations of a phenomenon which is capable of being . . . worthy of either condemnation or approval."⁹² He distinguished between "logically demonstrable or empirically observable facts" and "the value judgments which are derived from practical standards, ethical standards or world views."⁹³ Then too, as Justice Walter V. Schaefer explained, the personality of a given judge may be the decisive factor:

If I were to attempt to generalize, as indeed I should not, I should say that most depends upon the judge's unspoken notion as to the function of his court. If he views the role of the court as a passive one, he will be willing to delegate the responsibility for change, and he will not greatly care whether the delegated authority is exercised or not. If he views the court as an instrument of society designed to reflect in its decisions the morality of the community, he will be more likely to look precedent in the teeth and to measure it against the ideals and the aspirations of his time.⁹⁴

Tail-tweaking of dragons is not a task for the faint-hearted. But, you know that. You can still hear echoes of law school's first year when professors warned about and demonstrated the very difficult problems in the practice of law. I can only suggest you learn from the experience of dragon-slayers:

"Kiss me!" cried the dragon, which had already devoured many gallant knights for declining to kiss it. "Give you a kiss," murmured the prince; "Oh, certainly, if that's all! Anything for a quiet life."

So saying, he kissed the dragon, which instantly became a most beautiful princess; for she had lain enchanted as a dragon by a wicked magician, till somebody should be bold enough to kiss her.⁹⁵

91. See Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161 (1930). Professor Goodhart's method is summarized in G. CHRISTIE, JURISPRUDENCE 921-44 (1973); R. CROSS, *supra* note 22, at 67-76; see also *id.* at 35-40, 104-05.

92. M. WEBER, *Value Judgments in Social Science*, in MAX WEBER SELECTIONS IN TRANSLATION 69 (W. Runciman ed. 1987).

93. *Id.*

94. Schaefer, *supra* note 52, at 23.

95. A. LANG, *The Lady Dragonissa*, in A CAVALCADE OF DRAGONS (R. Green ed. 1970).