THE METHODS BY WHICH JUDGES UTILIZE LEGAL PRINCIPLES ANNOUNCED IN PAST CASES

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Lawyers and judges think of past cases as a source of law. The rules established by case law gradually change even though the idea is to apply existing law to new facts (1). "There is no change in the official formulation of the norm" (2). Conversely appellate courts sometimes announce a rule change in cases where the outcome could be justified by applying other persisting rules. This paper does not address situations where a judge or the lawyers admit that they seek to overrule or delegitimate old case law.

In a 1947 essay (3), Max Fisch quotes Chauncey Wright as having written in 1873 : "The judge cannot rightfully change the laws that govern his judgments ; and the just judge does not consciously do so. Nevertheless, legal usages change from age to age. Laws, in their practical effects, are ameliorated by courts as well as by legislatures. No new principles are consciously introduced ; but interprétations of old ones (and combinations, under more precise and qualified statements) are made, which disregard old decisions, seemingly by new and better definitions of that which in its nature is unalterable, but really, in their practical effects, by alterations, at least in the proximate grounds of decision ; so that nothing is really unalterable in law, except the intention to do justice under universally applicable principles of decision, and the instinctive judgments of so-called natural law".

At the time, Wright, C. S. Peirce, William James and Oliver Wendell Holmes, Jr., were all members of the Metaphysical Club meeting in Cambridge, Massachussetts. This was the club that gave birth to pragmatism.

If precedent is law, a court is often "obliged to follow" certain decided cases or the principles embodied therein. The hermeneutics of case law may differ from consulting the Koran or the Bible or a statute. But a cadi might have in mind hundreds of illustrations, and a judge might view old cases as applications of a code rather than as independent authority. What seems to be reasoning by analogy may

(1) O. Holmes, The Common Law (1881), p. 35.
(2) Bulygin, On legal Interpretation, page 12, Plenary Lecture, 15th World Congress on Philosophy of Law and Social Philosophy.
(3) Evolution in American Philosophy in *Peirce, Semeiotic* and *Pragmatism* (ed. Ketner and Kloesel, 1986) at p 28.

only be a second application of a broader principle determinative of two distinguishable legal questions (4). The authority of a single old case is limited by the rival authority of all the other old cases. Its authority is also limited by the notion that dicta are not holdings.

A small legal society such as the early English bar is a "community of inquirers", as C. S. Peirce suggests for scientific progress. Modern lawyers search authoritative texts for promising remarks. They do not have long discussions around the Temple table of what the lax should be and is.

The practitioner often has reasons to distinguish, i.e., render irrelevant, an unwelcome old ruling (5). At other times, he wishes to expand the scope of old rulings that other lawyers might not have thought relevant. This is purposive, practical reasoning in action.

Practical reason applies intelligent methods to achieve agreed objectives (6). Case law is one means to resolve disputes in acceptable ways. We are acculturated to submit to the decisions of professional lawyers. We have been convinced that our judges will more or less impartially apply sources of law determined before the specific dispute arose (7). Case law is a by-product of previous resolutions (8) Previous holdings are ready-made solutions so far as they go (9). This foreseen commitment to use today's ruling in tomorrow's dispute keeps the judges honest. The judge can say his hands are tied, he has no choice.

In America, past cases have been a source of law. In recent years, many appellate courts have decided which of their opinions are to be sources of law. Other decisions cannot be cited as authority in subsequent cases. They are ordered not to be published. Judges in lower courts are bound by published holdings of higher courts in their states. American federal courts must apply state case law to disputes between citizens of different states. State courts often apply case law from other states under binding choice of law principles.

Legal theorists note that the law established by cases very gradually changes despite the stated effort to apply existing principles without novelty (10). Case law exhibits the dynamic potential Jakobson attributed to language. According to Deely, natural languages transcend stipulative controls. Case law, like ordinary language, is in touch with the physical world and is produced by many individual thinkers as a social product "constituted by and constitutive of the linguistic (legal) and cultural tradition they express, in a kind of circular feedback relationship" (11).

The plaintiff and defendant typically care only about the outcome and very little about the justification or rationalization therefor (12). So let us consider the effects on the rest of us. The rest of us care about the opinions because of their precedential or law-making value. How many hundreds of pages of authoritative court opinions are produced each year in the United States ? How many hundreds of pages of legislation and regulations ? Abbreviation or consolidation is desirable. That is one reason to codify the law and then to forbid the citation of older law.

(4) See Posner : *Problems of Jurisprudence* (1990), p. 89.
(5) Golding, Substantive Interpretation in Commun Law Elaboration, p. 151, Plenary Lectures, 15th World Congress on Philosophy of Law and Social Philosophy.
(6) Posner, n. 4, p. 107. But see Moffat, Abstracts, 15th World Congress on Philosophy of Law and Social Philosophy p. 66-67.
(7) Giraudo : Legal Reasoning and the Judicial Process, 66 American Bar Association Journal 1170 (1980).
(8) Golding, n. 5, p. 145.
(9) Wright : Precedents, 4 Univ. of Toronto Law Journal 247, 276 (1942).
(10) See Pipe, Abstracts, 15th World Congress on Philosophy of Lax and Social Philosophy, p. 239.
(11) Deely, *Introducting Semiotic*, p. 89-90.
(12) Paton, Ratio Decidendi, 63 Law Quarterly Review 461 (1947).

The United States Supreme Court deals in depth with about 100 cases per year. The French Cour de Cassation in its several chambers disposes of 10,000 cases per year or more. (Chambers resemble the panels found at intermediate appellate levels in America). If precedent is law, a court is obliged to "follow" cases decided by higher courts. These are the highest courts of their nations. Anyone in the society, or at least litigants, would be governed by the generalizable case outcomes or propositions to which a majority of relevant appellate court judges subscribed as well as being governed by the generalities expressed in ordinances, statutes and constitutions. None of us have read or digested all the law to which we are amenable.

The computer may have come along just in time for American citators (13). One must find a general expression before appraising it as binding or as dictum. Even if a series of cases has to be summed up, they must be found and understood before being epitomized. A dissent may include some generalities with which the majority agree. Indeed the majority may agree with all the dissenter's generalities and nevertheless disagree as to the outcome. Note too that future readers of a majority opinion may not admit to any disagreement with the generalities but nonetheless reach an outcome another reader suspects would not have been reached by the prior panel with these new facts before them. See *Keystone Bituminous* (14) disagreeing with *Pennsylvania Coal* (15) without formally overruling it. A case law system requires that the current adjudicator grapple with old cases. One might give varying weight to more respected pas adjudicators or to larger past panels. A judge reading old cases could react to them as he would to an advocate's speech, as persuasive rather than authoritative. This would not be a full-blown theory of precedent as law.

If old cases have been read by a sizable gourp as laying down the law, a judge might think twice about changing the rule. As to a more open question, any ruling involves some unjust retroactivity. But like cases should be decided alike (16) and differences between cases should seem to matter. "A rule extends only so far as its reason" and perhaps only as far as its facts. And see *Wagon Mound I* (17) and *II* (18), and Bulygin (19). French judges are prohibited from laying down general rules ; ideally they cite code sections as requiring this result on these facts (20). In practice, the small appellate bar will be well aware of indisputable case law.

In Paton's 1947 article on Ratio, he counted heads in a certain case and demonstrated that none of the arguments of the winner had been agreed to by a majority of judges (21). Conversely the judges may agree on grounds in cases described as plurality rather tahn majority opinions (22). One argument may convince some, another some more. (Disjunction as protasis). Lawyers sometimes reason that the argument of a dissent has been rejected by a majority when it is only the dissenter's conclusion we can be sure was rejected. A number of well-known cases have provisionally (arguendo) presumed alleged facts only to conclude that the loser still loses. These hypotheticals are difficult for the average lawyer.

(13) R. Lawlor : What computers can do : Analysis and Prediction of Judicial Decisions (1963), 49 A.B.A.J. 337.
(14) 480 U.S. 470 (1987).
(15) 260 U.S. 393 (1922).
(16) Golding, n. 5, p. 143.
(17) (1961) A.C. 388.
(18) (1967) 1 A.C. 617.
(19) N. 2 *supra*, p. 9.
(20) Dawson, *The Oracles of the Law*, (168), p. 400 et seq.
(21) See alsol Honoré : Ratio Decidendi ; Judge and Court, 71 L.Q.R. 196 (1955) on how to count English judges's reasons.
(22) See Plurality Decisions, 94 Harvard Law Review 1127, 1130 (1981).

Paton also points out that a subsequent judge may agree with earlier dicta whether or not he has to. Future uses of a case reveal its ramifications, though the fruit may have been implicit in the seed. Paton also points out that joint drafts usually eliminate idiosyncratic views.

How does a case law lawyer cope with seriatim opinions ? The English have a great deal of experience with a more binding notion of precedent and no majority opinion (at least in the traditional English format). The American rule may be that no opinion is a matter of "stare decisis" unless a majority have concurred in it (23). Before John Marshall's time the United States Supreme Court opined seriatim (24). All of us have experience coping with a group of old cases, none of which are forsworn, which seem to conflict with one another as to reasoning although one could piece together a complex set of rules compatible with all the past cases' outcomes. Cf. Ptolemy's epicycles.

A judicial opinion states the highlights of the reasons for the judge's vote as to the court's judgment. Many intermediate conclusions of law and fact go unexplained. Judges are supposed to apply general governing principles, law, to relevant believed facts. Rational people have reasons for their decisions, but they seldom have to report them formally to the world at large. American judges, when they sit without a jury, have to make formal Findings of Fact and Conclusions of Law in order to facilitate appellate review. The French revolutionaries required judges to state their reasons publicly, what law applied to what facts, in order to facilitate popular sovereignty. This rule did not last long in France. In America, we have rules about panels, collegial action, en banc and one judge as agent for a panel (25). If we want one person to cobble together an opinion with which a decisive group is satisfied, we will to a degree have reconcealed the decider's announceable or mentionable reasons. There may be many paths to the same conclusion. Consider 50 million people deciding to vote for a certain presidential candidate. Luckily they did not have to agree on a write-up of their reasons. Nor did they publish 50 million special concurrences.

In the past, Justice Frankfurter, among others, expressed a desire for each justice to state his relevant reasons separately (26). On the other hand, the establishment view has been that appellate courts should strive for unanimity (27) and to uphold precedent (28). More accomodation could be readily achieved at the sacrifice of outspoken principle (29). Justice Holmes and others have said it is better to go along than to quibble. Should time and effort be spent putting together acceptable majority opinions or are separate opinions the product of there being too many clerks with time to write ? One does not need a separate opinion to apply obvious precedent routinely, e.g., per curiam decisions. As Justice Stevens has noticed, per curiam decisions are not all unanimous these days (30). One might not even have an appeal on which to vote if there is unassailable precedent. Even if a party sought review, the Court would probably not have entertained it. Debatable cases rise to discretionary review. More often than not the lower court has cited what it claimed to regard as decisive precedent or legislation.

(23) 21 Corpus Juris Secundum 306.
(24) See, e.g., *Hylton* v *United States*, 3 Dallas 171 (1796).
(25) See American Bar Association Standards for Appellate Courts (1977°.
(26) *Graves* v *New York*, 306 US 466, 487 (1939).
(27) Pwell, Stare Decisis and Judicial Restraint, p. 15, July, 1990, New York State Bar Journal at p. 20.
(28) *Washington* v *Dawson*, 264 U.S. 219 (1924).
(29) Davis and Reynolds, Judicial Cripples : Plurality Opinions, 1974 Duke 59, 78.
(30) Some Thoughts on Judicial Restraint, 66 Judicature 178 (November, 1982).

Even in England the long-standing view had been that prior cases were only evidence of the law (31). Old decisions that feel right might be deemed instances of justice having been done. From such data or evidence, jurists might attempt to induce rules. Paton compared it to plotting points on a graph. Later we might fit a curve. In a more confident age the legal rulings illustrated a transcendental body of principles. In a more skeptical age the principles became clouded or inaccessible as though we were in Plato's cave.

According to Kempin, "stare decisis" became accepted in the United States, but supreme courts often overrule prior cases. Only a few cases are frequently cited. Se Shepard's Citator. For an informative discussion of state court opinion writing, see Illinois's Justice W. Schaefer's 1955 speech (32).

Reliable court reporters and appellate review are crucial to American case law. A subordinate judge is likely to bow to any quote from a higher court, even in England (33). He will not be too keen on saying that the remarks of his superiors were dicta. So the parties's lawyers, aided now by Lexis and Westlaw, hunt for statements that logically support one or the other litigant's arguments (34). Before the 1870s the English high courts were coordinate or equal and often disagreed as to the law. Opinions of the House of Lords could not be published. Even a unified court could harbor conflicting cases (35).

In England supposedly the court being asked to apply an old case will decide upon its ratio decidendi ant the significance of the old case for the new and will feel free to reject other statements propounded in the law report (36). (In America, we refer to Holding and Dictum (37)). This is so even if the litigants and judge in that old case thought the rejected propositions crucial (38). Compare an English barrister or American lawyer concocting an advisory legal opinion (39). A Goodhart said that every case had a ratio in terms of its facts from the view of the opining judge (40). There will have been a fact-set premise and a legal conclusion. Cf. a jury instruction which implies some law.

The battle continued in an article by Julius Stone (41). He says that even though appellate judges purport to draw rationes from past cases, realistically they may be pouring new wine into old bottles (42).

David Derham, writing on Precedent, explains the narrowing of the ratio as an effort to shrink "binding" law (43). First the judges reduced their liberty by declaring themselves bound. Then they minimized the amount of binding precedent as a Catholic minimizes the amount of ex cathedra, hence infallible, papal doctrine.

Derham cites, inter al., Oliphant's address to the Association of American Law Schools (44). Oliphant sought to "triangulate" the holding of the case. He seems to have thought that the writ system had prevented runaway abstraction or over-generalization. He criticized collections of "judicial generalities" such as the Corpus Juris cyclopedia, an unoutlined form of West's Key Number Digests.

(31) Kempin : Precedent and Stare Decisis, 3 American Journal of Legal History 28 (1959).
(32) Precedent and Policy, 34 U. of Chicago Law Review 3;-25 (1966).
(33) See Paton, n. 12, 1947.
(34) Golding, n. 5, p. 148.
(35) Golding, n. 5, p. 151.
(36) R. Cross, *Precedent in English Law* (3d edition 1977).
(37) K. Greenawalt : Reflections on Holding and Dictum, 39 Journal of Legal Education 431 (1989).
(38) Comment, 36 University of Colorado Law Review 377 (1964).
(39) Ratio Decidendi of a Case, Simpson, 22 Modern Law Review 453 (1959).
(40) Ratio Decidendi of a Case at 22 Modern L. R. 117 (1959).
(41) The Ratio of the Ratio Decidendi, 22 Modern L. R. 597 (1959).
(42) See alsol R. Samek, The Dynamic Model of the Judicial Process and the Ratio Decidendi of a Case, 42 Canadian Bar Review 433 (1964).
(43) 79 L. Q. R. 49 (1963).
(44) A Return to Stare Decisis, 14 A.B.A.J. 71, 159 (1928à.

Lawyers use C.J.S. to find cases not as independent authority for a legal proposition. He seems to have foreseen today's computer concordance technique of legal research.

Scientists have patiently accumulated narrow but trustworthy results. Case law may have a similar virtue if we keep it particular. Former Justice Powell has suggested that the United States Supreme Court has been ruling too broadly (45). Oliphant thought judges' rulings were more valuable tan the reasons they gave. Cf. the views of Carter. The American legal theorist James Coolidge Carter (1827-1903) called the common law unwritten and argued it was preferable to the Codes (46). Like Savigny, he favored slow organic accumulation of case law. Case law leaves loopholes because the rules announced are provisional and subject to being distinguished into irrelevance as to a future case. Codification requires uncommonly good foresight for the just solution of future disputes. See Roscoe Pound's 1911 speech, Courts and Legislation (47). Pound's speech compares precedent-law to a scientist's trial hypothesis. He also discusses "interpretation" as involving application (48). The idea lives on.

(45) See supra note 27.
(46) The Provinces of the Written and the Unwritten Law, 24 American Law Review 1 (1890).
(47) 7 American Political Science Review 361 (1915).
(48) See Bulygin, n. 2, p. 8 and Varga, Abstracts, 15th World Congress on Philosophy of Law and Social Philosophy, p. 77, and Viola, p. 78.