INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF THE UNITED STATES

Seventh Edition

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William Burnham
Professor of Law
Wayne State University Law School

Stephen F. Reed
Clinical Professor of Law
Northwestern University Pritzker School of Law

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E. THE FORM AND GENERAL NATURE OF CASELAW

Having considered statutes in depth, we will now consider the form that caselaw generally takes and the principle of *stare decisis*. Following that, we will discuss the legal reasoning process used in applying caselaw.

1. JUDICIAL OPINIONS AND THEIR STRUCTURE

Types of Opinions: The most important judicial opinions are appellate court opinions. Appellate courts have multiple judges—usually 3, 5, 7, or 9 judges—and the case is decided by a majority vote of the judges on the court. There is an "opinion of the court" which states the decision and detailed reasons for it agreed to by a majority of the judges.[204] This opinion is written and signed by an individual judge who is a member of that majority. The English style in the 1700s, inherited by American appellate courts, was to have *seriatim* opinions by each judge, giving the reader the task of figuring out who was in the majority and what their reasoning was. Chief Justice John Marshall, who served on the Supreme Court from 1801 to 1836, was responsible for breaking with the English practice and requiring a single opinion of the Court.

One or more "dissenting opinions" may be filed by judges who disagree with the majority's conclusion and reasoning, or a judge may simply indicate the fact of dissent without an opinion. There may also be "concurring opinions" written by judges who agree with the conclusion of the majority, but disagree with its reasoning. Clearly, the majority opinion is the most important opinion, but the attentive lawyer will wish to read concurring and dissenting opinions to clarify the impact of the majority opinion.[205]

The assignment to write the majority opinion is usually made by the chief justice or judge. Drafts of proposed majority, dissenting and concurring opinions are circulated among members of the court. In the process, the majority opinion writer often gets suggestions from other members of the majority and may include responses to criticisms by dissenting and concurring opinions. Sometimes there is a need to "bargain" to accommodate demands from members of the majority. This will force the writer to include ideas that are not his or her own, thus sometimes making for a less-than-completely coherent or consistent opinion.

If a majority agrees on the proper result, but less than a majority agrees on a rationale for the decision, no one opinion receives the approval

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[204] The general form of appellate opinions can be seen from *Hoffman v. Jones*, reprinted in the Appendix.

[205] Colorful language is not unheard of in judicial opinions. Justice Scalia, for example, has characterized opinions or legal reasoning with which he disagrees as "jiggery-pokery," "legal argle-bargle," and "pure applesauce." *See* npr.org/sections/itsallpolitics/2015/06/30/418645881/.

of a majority. The opinion supporting the result in the case that has the most votes is referred to as a "plurality opinion." To determine the holding of such a case, the Court follows what has been called the *Marks* rule. It states:

> When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.[206]

However, as debates between the justices in a recent case show, there is not unanimous agreement on the point.[207]

The practical effect of a plurality opinion depends to a large extent on how later majority opinions of the same court treat it. Some plurality opinions have been cited and treated as if they were majority opinions while others have been given little weight or have been completely ignored.

Structure and Content of Opinions: There is no set structure for a majority opinion, but it will usually start with a statement summarizing the case and its procedural posture, a statement of the facts and the legal issues presented, a section discussing in detail the reasons supporting the decision, and the action to be taken in the case. The legal reasoning section of the decision will often be encyclopedic, including extensive citations to and discussions of all prior relevant cases and many secondary authorities, such as law review articles and treatises. Thus, as noted in the Reader's Guide and Bibliographic Introduction to this book,[208] the judicial opinions of some courts—and of the U.S. Supreme Court in particular—often provide a useful "primer" on the law in the general area that the case involves.

2. PRECEDENTIAL EFFECT OF COURT DECISIONS

Stare Decisis: At the center of any system in which court decisions are a source of law for later cases is the rule of *stare decisis*. The precise meaning of *stare decisis* is best expressed by the full Latin phrase from which the term comes: "*stare decisis et non quieta movere*"—"to stand by precedents and not disturb settled points."

The rationales for having a caselaw or precedential law system have been variously stated.[209] Perhaps the most often-stated justification for following precedent is what Karl Llewellyn called "that curious, almost

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206 *Marks v. United States*, 430 U.S. 188, 193 (1977).

207 *See Ramos v. Louisiana*, ___ U.S. ___, 140 S.Ct. 1390 (2020), where three justices asserted that the Court's earlier 4-1-4 decision was not precedent, drawing an extended dissent on the point. 140 S.Ct. at 1427–1433 (Alito, J., dissenting).

208 *See* pp. xi-xii.

209 *See* LLEWELLYN, *supra* note 52, p. 26, where several are discussed.

universal sense of justice which urges that all men are properly to be treated alike in like circumstances."[210] This equality of treatment in turn serves to limit bias and arbitrariness and allows parties to rely with some certainty on how the system has dealt with cases similar to theirs. In addition, following precedent is efficient since similar cases need not be reasoned through "from the ground up."

Since statutes can be subject to differing interpretations, the rationales for a system of precedent apply with equal force to judicial decisions interpreting enacted law. And some have argued, they apply with even more force when statutory interpretation is involved, as discussed below.

Court decisions can have two types of *stare decisis* effect. The effect can be "binding" or it can be only "persuasive."

Binding Stare Decisis Effect: Binding effect is when a court is obligated to follow the rule established by an earlier case. The decisions of a superior court have binding effect on all lower courts in the same court system. Thus, a decision of the Florida Supreme Court, the highest court in the state, has binding effect on all other state courts in Florida. This form of binding effect is sometimes referred to as "vertical" *stare decisis*.

Prior decisions of a court will also bind that *same* court in later cases. This is sometimes referred to as "horizontal" *stare decisis*. However, horizontal binding effect is more flexible than vertical binding effect, so courts sometimes overrule their own precedents. Horizontal *stare decisis* is more closely adhered to in England than in the United States. Indeed, it was only in 1966 that the House of Lords formally adopted the principle that it should feel free in appropriate cases to depart from its own prior decisions.[211]

The Supreme Court has noted that application of *stare decisis* to its own decisions, though "not an inexorable command," is the "preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."[212]

Overruling a case always requires "special justification"—over and above the belief that the precedent was wrongly decided.[213] Special justifications usually include indications that the doctrinal basis for the

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[210] LLEWELLYN, *id.* *See also* EDGAR BODENHEIMER, JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF THE LAW 425–430 (Harvard U. Press 1974).

[211] 1 W.L.R. 1234 (H.L. 1966) (Lord Gardner L.C.).

[212] *Payne v. Tennessee*, 501 U.S. 808, 828, 827 (1991) (overruling case holding that Eighth Amendment bars the admission of victim impact evidence during the penalty phase of a capital trial), discussed in Chapter VIII, p. 529.

[213] *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014) (no "special justification" found for overruling precedent whose basis was not questioned in a serious way).

prior case has been eroded, that the rule it established has proven difficult to apply, and that it conflicts with other cases or statutes.[214] It has been said that adhering to precedent "is usually the wise policy because in most matters it is more important that the applicable rule of law be settled than it be settled right."[215] *Stare decisis* is at its strongest in cases involving property and contract rights, where reliance interests are highest.[216] And it is probably at its weakest when procedural and evidentiary rules are at issue.[217]

Persuasive Stare Decisis Effect: If a court is not obligated to follow precedents established in earlier cases but does so if it is persuaded by the reasoning used, the precedential effect is said to be only "persuasive." The decision of a legal question by the courts of one state will have only persuasive effect on the courts of another state. For example, New York courts will follow a Florida Supreme Court decision in an analogous cases only if they believe it is correctly reasoned. Similarly, federal courts must apply state law in suits between citizens of different states.[218] However, federal courts' interpretations of state law have only persuasive effect on the state courts of that state, since authoritative interpretations of a state's law may only be rendered by that state's courts.[219]

Stare Decisis Effect of Statutory Interpretations: Some have argued for a rule of absolute *stare decisis* effect for caselaw interpreting statutes. The rationale is that the legislature can simply amend the statute if it disagrees with the Court's interpretation of it.[220] An example of such legislative "overruling" is *Patterson v. McClean Credit Union*.[221] In that case, the plaintiff sued claiming her employer harassed her, failed to promote her, and then discharged her because of her race. Suit was brought pursuant to a Civil War-era civil rights act that provided that all persons "shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens."[222] The Court read the statute narrowly, holding that it was did

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214 *Payne v. Tennessee*, 501 U.S. at 828–830 (precedents decided by the "narrowest of margins over spirited dissents" challenging their underpinnings; were questioned by members of the Court in later decisions; and have defied consistent application by the lower courts); *Monell v. New York Department of Social Services*, 436 U.S. 658 (1978) (prior holding "departed from prior practice," misread legislative history and conflicted with other statutes).

215 *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

216 *Id.* (income and excess profits tax on leases).

217 *See, e.g., Payne v. Tennesee, supra* (overruling earlier case on admissibility of evidence about victims).

218 *See* Chapter I, pp. 51–52, and Chapter V, pp. 287–290 (federal courts applying state law).

219 *See* Chapter V, pp. 291–293 (problems with federal courts ascertaining state law on unsettled points).

220 *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446 (2015) (reaffirming rule that royalties cease when patent term ends; "critics are free to take their objections to Congress"). *See* Lawrence C. Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177 (1989).

221 *Patterson v. McClean Credit Union*, 491 U.S. 164 (1991).

222 42 U.S.C.A. § 1981, passed originally in 1866.

not apply to conditions of employment—only to the stage of the initial formation of the employment contract—and that the right to "enforce contracts" language only included employer action that impaired her ability to enforce her contract rights through the legal process. In reaction, Congress promptly amended the statute to support the broader interpretation that the plaintiff had contended for—prohibition of racial discrimination in all aspects of the employment relationship.[223]

Stare Decisis Effect of Constitutional Decisions: Legislatures have the ability to change both common law caselaw and caselaw interpreting statutes. However, legislative "correction" of *constitutional* caselaw can only take place through the process of amending the Constitution—rarely a successful option. For this reason, the Supreme Court has been somewhat more amenable to overruling caselaw interpreting the Constitution.[224] In *Ramos v. Louisiana*,[225] the Court overruled a precedent that would have upheld a non-unanimous verdict in a criminal case. The majority opinion observed:

> [N]o one on the Court today is prepared to say [the precedent] was rightly decided, and *stare decisis* isn't supposed to be the art of methodically ignoring what everyone knows to be true.[226]

The Court noted that while, the precedents of the Court warrant our deep respect as embodying the considered views of those who have come before, *stare decisis* has never been treated as "an inexorable command."[227]

On the other hand, in *Russo v. June Medical Services LLC*,[228] Chief Justice Roberts concurred with the four "liberal" justices to invalidate a Louisiana abortion law that was very similar to one the Court had struck down just four years before in *Whole Woman's Health v. Hellerstedt*.[229] The Chief Justice stated:

> I joined the dissent in *Whole Woman's Health* and continue to believe that the case was wrongly decided. The question today

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223 *See* 42 U.S.C.A. § 1981(b) (adding a subsection defining "make and enforce contracts" to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." *See CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008) (recognizing Congress's action changing its narrow interpretation in *Patterson*).

224 *See Burnet v. Colorado Oil & Gas Co.*, 285 U.S. 393, 406–07 (1932) (Brandies, J., dissenting) ("in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions").

225 *Ramos v. Louisiana*, ___ U.S. ___, 140 S.Ct. 1390 (2020).

226 *Ramos*, 140 S.Ct. at 1405, citing R. CROSS & J. HARRIS, PRECEDENT IN ENGLISH LAW 1 (4th ed. 1991) (attributing the aphorism to Jeremy Bentham).

227 *Id.*

228 ___ U.S. ___, 140 S.Ct. 2103 (2020).

229 ___ U.S. ___, 136 S.Ct. 2292 (2016).

however is not whether *Whole Woman's Health* was right or wrong, but whether to adhere to it in deciding the present case.[230]

F. THE LEGAL REASONING PROCESS IN CASELAW

Two basic types of legal reasoning are used with caselaw: deductive reasoning and analogical reasoning.[231] Deductive reasoning takes caselaw "rules" and applies them in a manner similar to statutes. Analogical reasoning directly compares the facts of the prior precedent to the facts of the case to be decided. The legal reasoning process in common law caselaw and caselaw interpreting statutes is the same, so the two are treated together in this section.

1. DEDUCTIVE REASONING FROM CASELAW RULES

The deductive reasoning process used in caselaw, like the process used with statutes, begins with a rule. However, caselaw involves an added step: one must first determine just what "rule" has been established by prior caselaw. When dealing with one prior case, that "rule" is the "holding" of a case. In England, the holding in cases is the "*ratio decidendi*" ("rationale for the decision").

a. Determining the Holding or Rule of a Case

The "holding" or "rule" of a case is a one or two sentence statement that summarizes the broader, more abstract principle for which the case stands, and for which the case can be used to decide later cases. A holding must be stated in such a way that it will make sense to a person who has not read the case, so a proper holding will contain shorthand references to the facts which were deemed most important for the decision.

For example, assume A owns a boat. B steals the boat. B then sells the boat to C. C pays B fair market value for it and does not know the boat is stolen. A finds out that C has the boat and sues C for possession.[232]

Assume the judge decides for A, the owner. The opinion states in part: "It is argued that C paid fair market value for the boat and did not know it was stolen, and therefore acquired title. We do not agree. The seller B

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[230] 140 S.Ct. at 2133. *See also Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (declining to overrule its 1973 abortion case, largely on *stare decisis* grounds).

[231] For discussions of the modes of legal reasoning, *see* STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING, 3D ED (Aspen 2007); MELVIN A. EISENBERG, THE NATURE OF THE COMMON LAW (Harvard U. Press 1991); RUGGERO ALDISERT, LOGIC FOR LAWYERS, 3D ED (Clark, Boardman 2001). For a comparative study of reasoning from precedents, *see* INTERPRETING PRECEDENTS: A COMPARATIVE STUDY, D. NEIL MACCORMICK & ROBERT S. SUMMERS, EDS. (Dartmouth Publishing 1997).

[232] These illustrations are adapted from Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARVARD L. REV. 353, 375–76 (1978).

acquired the boat by illegal means and thus did not gain any right or title to it. Having no title himself, he was powerless to convey any to C. Moreover, there is benefit in a rule that serves to make it more difficult for thieves to dispose of stolen property. Judgement for A." The holding of the case might be stated as follows: "Where property is stolen from the owner and sold by the thief to a third person, the owner can recover that property from the third-party purchaser even if the purchaser paid full value and had no knowledge that the property was stolen." This rule can then be applied in the same manner as a statute.[233]

There can be broad and narrow statements of the holding of a case. A broad statement is on a higher level of generalization, while a narrow one will stick more closely to the precise facts of the decided case. The statement of the holding just given above is probably a relatively narrow statement of it, though a statement confining the holding to boats alone, would be even narrower. A broader one would be: "An owner can recover *unlawfully-obtained* property from a subsequent purchaser, even if the subsequent purchaser did not know of the property's illegal origins."

The danger of broad statements of holdings is that they can turn out to be *overly* broad. This is illustrated by assuming that after the above case is decided, which we will call Case 1, a Case 2 arises in the same court. In Case 2, a boat was bought with a *fraudulent check* and the defrauding purchaser in turn sold it to a third party. The court holds in Case 2 that the original owner may *not* recover from the third party. Without getting into the reasons why a court might so decide (we will discuss that below), it is clear at least one form of "unlawfully-obtained property" may *not* be recovered from the third-party purchaser for value. The court has detected a difference between outright theft and fraud, and our statement of the holdings in both Case 1 and Case 2 should reflect that fact.

b. Dictum

Judges are expected to give reasons for their decisions. In the process of doing so, they are conscious of the fact that they are not only deciding a case; they are also making law. As a result, they will often seek to elucidate the impact of their decision for future cases. However, not all statements of legal principles by judges deciding a case are part of the holding. Statements that were not necessary to the decision of that case can have no binding authority in a later case, and should be ignored in stating the holding of the case. A statement that is not necessary for decision of the

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[233] Note that this statement of the holding largely ignores the reasoning given in the "opinion" in the earlier case. The extent to which the reasons given by the court in the opinion are to be incorporated into the statement of the holding is a matter of some difference of opinion and the American lawyer is much more likely to include them than the English lawyer. *See* ATIYAH & SUMMERS, *supra* note 28, pp. 124–125 and sources cited therein.

case is called "*dictum*" or "*obiter dictum.*"[234] For example, assume that in Case 1 (outright theft of the boat and later sale; A wins), the court goes on to say that "in a case in which a seller of property obtained that property from the owner fraudulently, the owner could not recover." Or the court might say that "an owner who abandoned his property cannot thereafter sue to recover it from someone who finds it." These comments would not have been necessary to the decision of Case 1 in A's favor and would therefore be *dictum*.

Strictly speaking, *dictum* has no precedential value for future cases. Its hypothetical nature often means that the court will not have thought about the issue as deeply as it might have if the outcome of the case depended on it. And the parties' briefs and arguments will not have addressed the issue as well as they addressed points more central to decision of the case.[235] Consequently, it would be improper to say that the above *dictum* statements from Case 1 apply to determine later cases of fraudulent sale or abandonment of property. However, no sensible lawyer can ignore *dictum*. It shows that the court has thought about how those other cases should be resolved and would so act if those cases came before it. The lawyer whose argument in a case in a trial court is contrary to *dictum* contained in the majority opinion in a recent supreme court case will have a difficult time convincing the court that that *dictum* should not be followed.[236] On the other hand, it is not unheard of for an appellate court to go against its own earlier *dictum*.

c. Multiple and Implied Holdings

It sometimes happens that a court rendering a decision does not explicitly state a holding, but one may be implied from the result and the court's statement of the facts. Assume, for example, in boat Case 2 where the seller procured the boat by fraud and then sold it, the court decides that the purchaser wins instead of the owner. However, instead of explaining its reasons, the court merely states the relevant facts of the case, emphasizing the fact that the purchaser of the boat did not know of the fraud. Any statement of the holding in the case must necessarily include the element of lack of knowledge since the context indicates that the court viewed that as important.

A case can have more than one holding. Thus, in Case 1 above involving the stolen boat, the opinion may have also discussed and decided whether the original owner could get specific recovery of the property (as

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[234] *Dictum* means literally a statement. *Obiter dictum* means a statement uttered in passing.

[235] *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821) (Marshall, C.J.) (making this point).

[236] Many a lawyer in this situation has been met by the trial judge's response, "I don't care if it's *dictum*. The question is, did the court *say* it?"

opposed to recovery of the value of the property) as a remedy. A holding that accounted for this part of the case might be: "An owner of stolen property found in the possession of another may obtain an order for specific relief requiring its return so long as the property can be reasonably identified and the person in possession is subject to the jurisdiction of the court."[237]

d. Synthesizing a Rule from Several Cases

There is a second kind of caselaw rule from which lawyers can argue deductively. It is like the holding or rule of a particular case, but represents a "synthesis" of several cases. By putting together or "synthesizing" the holdings of several cases, the lawyer can come up with an overall legal rule for which a line of decisions stands.

To demonstrate this, assume as before that Case 1 involved a *stolen* boat and the owner was *allowed* to recover. Assume as well that Case 2 involved a *fraudulently obtained* boat and the court held the owner could *not* recover. Now assume a Case 3, in which X has an oil painting. Y obtains the painting from X through fraud. Y then sells the painting to Z. Before this sale, Z had heard rumors that perhaps Y had obtained the painting through some improper means and the price Y was asking was very low. But Z bought the painting anyway. The original owner X now sues Z for possession of the painting. Assume that the court in Case 3 holds that X *can* recover this time. In so deciding, the court notes that, unlike Case 2 (where fraud was also involved), in Case 3, Z paid much less than market price for the painting and had heard from others that Y might have obtained the painting unlawfully. These facts, the court observed, should have put Z on notice that there was something wrong with Z's claim to ownership of the painting. A synthesis of cases 1, 2 and 3 might be stated as follows: "An owner may recover stolen personal property from a subsequent purchaser for value who did not have notice that it was stolen. However, an owner may not recover fraudulently obtained property from a subsequent purchaser unless the purchaser knew of the fraud or had reason to question the seller's title to the property." This synthesized rule, like the rule derived from a single case, can then be applied deductively to a later case much the same way that a statute might be applied.

If a synthesis of cases is a broad one and involves the common law, it is sometimes referred to as a "common law rule." Such rules are abstract statements that summarize a "family" of related holdings. The just-stated synthesis of cases 1 through 3 might be treated this way, though most

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[237] If the court in Case 1 had decided that A could *not* recover because A had failed to prove ownership, and then went on to state the circumstances under which an owner *could* obtain an order for specific relief, then that statement would be *dictum* since it is not necessary to the decision in the case.

common law rules will cover a broader area. Sometimes a court's opinion will helpfully provide a summarized synthesis of cases.[238]

2. ANALOGICAL REASONING DIRECTLY FROM PRIOR CASELAW DECISIONS

There are limits to applying holdings and case syntheses deductively to decide cases like one would apply a statute. Deductive reasoning alone is of little use in deciding whether a case *comes within* a rule distilled from a prior case, unless the new case involves the very same facts as the earlier one. For example, judges who are trying to decide Case 2 (fraudulently obtained boat) can read and reread the facts and *holding* of Case 1 (stolen boat) all they want. But that will not tell them whether the rule of Case 1 *should* cover Case 2. What the judges need to decide is—how is Case 2 *similar to* or *different from* Case 1 and any other precedents on the topic? Answering this question requires the application of analogical reasoning directly from the facts of the prior case.

a. The Analogical Reasoning Process

The analogical reasoning process involves a two-step process of (1) identifying the factual similarities and differences between the case to be decided and the precedent and (2) determining whether those the similarities or the differences are *important* to the issue to be decided in the new case. If the precedent is deemed *similar* in those important respects, it will be *followed*. If it is deemed *different* in those important respects, it will be *distinguished*.[239]

Following or distinguishing precedents involves a simple analogical reasoning process used every day. To take an example anyone with children will recognize, assume that you have decided to let your ten-year-old stay up until 10:00 PM (on a non-school night).[240] Your six-year-old feels

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[238] The court's synthesis may not be correct, or it may skip over important details of the prior holdings. This could be an oversight or it could be that the skipped details are inconvenient to the majority's "agenda" for future cases. If so, it is open to the lawyer to argue that the synthesis should be ignored because it is wrong or because it is *dictum*. *But see supra* note 236 and accompanying text.

[239] *See* BURTON, *supra* note 231, pp. 26–27. Professor Edward Levi explains analogical reasoning from precedent as involving three steps: "similarity is seen between cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case." *See* EDWARD LEVI, AN INTRODUCTION TO LEGAL REASONING 1–2 (University of Chicago Press 1948). Levi is not specific enough about the nature of the "rule of law" involved to judge, but this seems more like deductive than analogical reasoning. Burton's and Golding's view probably more accurately portrays what lawyers and judges actually do, especially in difficult cases—they make direct comparisons between the facts of each case without the intervention of any clearly formulated intermediate "rule." *See* MARTIN GOLDING, LEGAL REASONING 103 (Alfred Knopf 2001); BURTON, *supra* note 231, p. 36. This may be changing. *See* Neil Devins and David Klein, *The Vanishing Common Law Judge?*, 165 U. PENNSYLVANIA L. REV. 595 (2017) (empirical study finding federal district judges' less often distinguishing, limiting, or criticizing higher court precedent, and setting out some of the reasons behind it).

[240] This example is adapted from BURTON, *supra* note 231, pp. 26–27.

the sting of injustice when she is forced to go to bed at 8:00 PM. She appeals to you to allow her to stay up until 10:00, arguing that you let the ten-year-old child stay up. In developing her argument from precedent, perhaps the six-year-old will point out the factual similarities between their situations, *e.g.*, that they are both children and that neither of them has school the next day. If you find the younger child's appeal to the precedent involving the older child unpersuasive, it will be because you have determined that the difference in their ages is more important than whatever similarities might exist. This difference is important because age directly relates to the issue to be decided—bedtimes for children. The difference in ages is important to bedtimes because younger children need more sleep.

Clearly the most difficult part of the analogical reasoning process is evaluating the *importance* of the differences and similarities. Importance cannot be determined in the abstract. It is situational and depends on the issue that is to be decided. In the example with the children, denying the younger child's request to stay up late on the ground that "she's Ann and you're Zelda" is a decision based on an actual difference between them—their names. But different names cannot be a valid basis for deciding the case, because it is based on a difference that has nothing to do with *bedtimes*. On the other hand, "she's Ann and you're Zelda" *is* a relevant difference in determining where each child should be in a line of children that is supposed to be arranged alphabetically by first name.

b. Evaluating Factual Variations in Common Law Caselaw

The issue of the importance of factual differences or similarities among cases for common law caselaw is most often determined by examining a "family" of similar cases and principles underlying them. We will return to the example introduced earlier of the dispute between the owners of property and subsequent purchasers to demonstrate the process.

Analogical Reasoning Applied to a Common Law Example: Assume that a court has decided Case 1 (boat stolen and sold; owner wins). The Court must now decide Case 2 (boat fraudulently-obtained) where the purchaser has also been sued by the boat owner. On the one hand, underlying Case 1 and similar cases protecting owners of property, is the notion that ownership of property is good for society and greater protection will encourage owners to invest in and preserve their property. On the other hand, free commerce in goods is important to society. One could argue that it is unreasonable to burden an innocent purchaser with the risk that the original owner could appear on the scene at any time, even years later, and reclaim the property. The court in Case 1 nonetheless imposed this risk on the purchaser in the case of theft in the name of protecting property ownership and making things more difficult for thieves.[241]

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[241] The "opinion" of the court is set out *supra* pp. 104–105.

Case 2 is arguably different because owners are more able to protect themselves from fraud than from theft. An owner can prevent fraud by insisting on verification of any tender of payment, while theft can take place at any time and is usually unexpected. At the same time, the subsequent purchaser is *less* able to protect himself from the fraud than from theft. Purchasers in the marketplace in general have limited ability to verify assertions of good title. But purchasers have even more trouble verifying title where their seller has obtained the property by fraud. The transaction has all the outward appearances of a *bona fide* sale, complete with a bill of sale signed by the owner. In fact, but for the fact that the check the owner received for the property later turned out to be worthless, the transaction had all the characteristics of a sale, including the fact that the owner, at the time of transfer of the property, voluntarily parted with possession.

On this analysis, assume that the court decides Case 2 in favor of the purchaser. It concludes that, while no title passes by virtue of a theft, many of the elements of a normal sale are present in the fraudulent transaction, including the owner's intent to transfer title, such that it can be said that the defrauding purchaser obtained at least voidable title. Thus, while the owner might be able to sue the *defrauding party* directly to void the title and regain the property, if the property is resold to an innocent purchaser before title is voided, title passes to that purchaser, and the owner cannot recover his property from that purchaser.[242]

Now assume that Case 3 arises, the case in which X's painting was fraudulently obtained by Y and buyer Z paid a low price and had heard rumors about the Y's possibly dubious title. Case 3 is the same as Case 2 except for the fact that the Case 3 purchaser seems to have some reason to suspect that there is a problem with the painting. The discussion in Case 2 would seem to make this factual difference an important one. Underlying that decision is a concern that buyers in the market have great difficulty finding out about defective title in fraud cases. In terms of this factor, the purchaser in Case 3 is different from the purchaser in Case 2, and should have been on notice from the low price and rumors that there should be further inquiry. Another basis for a court deciding Case 3 against the purchaser is the reprehensibility of the conduct of the actors involved. In Case 1, the Court in part justified its decision on the policy of making things more difficult for thieves. In Case 2, it was undisputed that the owner could recover against the *perpetrator* of the fraud. A person who takes advantage of fraud, as the purchaser in Case 3 did, is only slightly better than the thief or the perpetrator of the fraud and should not be allowed to benefit from that conduct. Let's assume that Case 3 is decided

[242] Many jurisdictions have distinguished fraud cases from stolen property cases for the reasons stated, as does the UCC. *See generally* RAY A. BROWN, THE LAW ON PERSONAL PROPERTY §§ 9.4, 9.6 (Callaghan & Co. 1975).

against Z, the subsequent purchaser in a decision that mentions the reasons set out above—that Z's knowledge of the lower price and rumors about Y's title mean that Z will lose if sued by original owner X. In any future case involving the rights of parties in the purchase of property with dubious title, factual differences along these lines would determine whether the new case should follow or be distinguished from Cases 1, 2 and 3.

"Ghost" Precedents: The analogical arguments made here suggest that there may be more "precedents" involved than just the decided cases. For example, it was argued in Case 2, not only that the fraudulent transfer situation was *distinguishable* from the *theft* situation in Case 1, but that the fraudulent transfer was *similar* to a *true sale*. We were given no *real* case involving a true sale. But we can assume hypothetically that a court would reject the claim of an owner who received the price he asked and completed a sale, but then had second thoughts and sought to reclaim the property from his purchaser. A similar hypothetical "precedent" was used to support the decision in Case 3. The court in Case 3 necessarily assumed that the owner *would* win in a contest between the owner and the *perpetrator* of the fraud. It then used that "ghost" precedent as one of its reasons for denying recovery to the purchaser who took advantage of the fraud.

Recasting Precedent: The arguments made in Case 2 and Case 3 also point out how a court dealing with precedent is not necessarily limited to the rationale given in earlier opinions. The opinion in Case 1 relied in part on a rather formal theory that title had not passed to the thief. The case is recast in the decision of the later cases to fit into a more general theory about protecting ownership and purchasers' abilities to protect themselves in the market.[243]

c. Choice of Deductive or Analogical Reasoning: Easy Cases and Hard Cases

Having outlined both deductive and analogical reasoning in caselaw, it is appropriate to consider when judges or lawyers might choose one mode of reasoning over the other. Some judicial opinions or arguments go through a complete analogical analysis of the factual differences between the case to be decided and various precedents. Others will synthesize a rule out of the applicable precedents and apply that rule deductively like a statute. Which approach is used depends on a number of factors, including the personal decision-making style of the judge. But there are some general patterns.

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[243] A classic recasting of precedent is Judge Cardozo's opinion in *McPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916) (recasting precedents to broaden protection from harm caused by "imminently" dangerous products, such as mislabeled poisons, to harm caused by products that are dangerous because they are negligently made, such as an automobile).

Deductive reasoning from general rules established by cases is particularly useful in deciding *easy* cases or easy parts of cases. For example, returning to the property hypothetical, assume that after Case 3 is decided, a Case 4 arises in which the buyer of stolen property actually helped to facilitate the theft of the property. It does not take much pondering on the decisions in the prior 3 cases to figure out that this buyer will lose and why. It is likely that the court would dispose of the case by citing the synthesized common law rule set out earlier,[244] followed by a "string cite" of Cases 1 through 3 and other prominent cases in the particular "family" of cases.[245] Because the matter is so clear, there would be no need for any analogical analysis of the facts of the cases.

Use of deductive application of a rule with string cites is so identified with resolving easy questions that intellectually dishonest or lazy judges or lawyers who want the issue involved to seem easier than it really is will often misuse the technique. In such cases, examination of the facts and holdings of cases in a "string cite" often turn out not to support the proposition claimed.

Indeed, purely deductive reasoning from statements of holdings or rules of prior cases is useful *only* to decide clear or "easy" cases. Often arguments in more difficult cases *start out* with deductive reasoning. But soon disagreement arises over (1) whether a particular synthesized rule is applicable to the case at bar or (2) whether such a "rule" exists at all. When that happens, the arguments turn immediately to analogical reasoning directly from the facts of prior cases—seeking to apply them to or distinguish them by comparing their facts to the facts of the case to be decided.

3. REASONING IN CASELAW INTERPRETING STATUTES

a. Deductive and Analogical Reasoning in Statutory Caselaw

As already discussed when statutory interpretation was outlined, a court faced with applying a statute must examine the text of the statute and any permitted aids to interpretation allowed to be consulted. The court must also consider prior caselaw interpreting the statute. These holdings and syntheses of holdings serve as "sub-rules" of the statutory rule being interpreted and can be applied deductively to decide easy cases. For example, it is common that a criminal statute will punish assault "with a deadly weapon" more seriously than a simple assault. A case arises in which the defendant, who was stopped by a policeman for a traffic violation, tried to run over the policeman with his car. If there is caselaw holding that

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[244] *See supra*, p. 107.

[245] A "string cite" is where a court or lawyer simply "strings" together in a list the case names and citations of several cases without discussing their facts or reasoning.

a car qualifies (or does not qualify) as a deadly weapon, then that caselaw rule is applied as if it were explicitly provided in the statute.[246]

Courts use caselaw interpreting statutes in much the same way that common law caselaw is used—both deductively and analogically. If the caselaw is clear on the subject of whether a car can be a "deadly weapon" if used to try to kill someone, then the case is an easy one, and the rule established can be applied deductively without any need for direct analogical reasoning.[247] If there is no prior precedent that provides a suitable sub-rule holding that is directly on point, the court must resort to analogical reasoning. Perhaps there are cases involving assaults using other implements that were not originally designed to be used as deadly weapons, but which could be and were used as such. The court will then have to use the analogical reasoning process described for the common law decisions discussed and make the factual comparisons and judgments involved.[248]

b. Evaluating Factual Variations in Caselaw Interpreting Statutes

Applying Legislative Policy: The main difference between analogical reasoning in common law and statutory caselaw comes at the point when the court must evaluate the questions of the *importance* of the factual differences and similarities between prior cases and the new case to be decided. In *common law* caselaw, the court refers to principles underlying or enunciated in prior cases or in the common law generally. In dealing with caselaw concerning *statutes*, the importance inquiry must generally be confined to criteria set by the *legislature*.

These legislative criteria are usually found by examining the language, purpose and legislative history of the enactment. However, the relevant legislative policy and purpose have often been sifted through several judicial filters. As Professor Shapiro has cogently observed:

> [J]udges [in the United States] often construct their opinions as mosaics of excerpts from, citations of, and comments about earlier judicial decisions. Even when the case is one of statutory interpretation, the wording of the statute may be buried in a footnote. In many instances, of course, the judge will openly proclaim that the source of the basic legal rule being applied is a previous decision rather than a statutory provision.[249]

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246 Of course, if there is an explicit definition supplied by the legislature, it must be followed instead.

247 *See supra* pp. 104–108.

248 *See supra* pp. 108–111.

249 MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 135 (U. Chicago Press 1981).

In the process of this judicial filtering of legislative policy, more general principles sometimes appear.[250]

"Ghost" Precedents in Statutory Interpretation: As we saw earlier when "ghost" common law precedents were discussed, one need not have *actual* prior caselaw to reason by analogy. So strong is the pull of cases and analogical reasoning that judges or lawyers will often create "ghost" cases from which to argue when interpreting a statute. A court will often construct "paradigm cases" that reflect the problem the legislature was trying to solve or the kinds of positive behavior it was trying to promote. The court will then compare the instant case with the hypothetical cases and reason analogically from them as if they were real cases. Such "ghost" precedents are especially easy to generate in statutory caselaw, because sponsors and supporters of the bill will often use such examples to illustrate the purpose of the legislation.[251]

G. LEGAL RESEARCH TECHNIQUES AND THE FORM OF LEGAL ARGUMENT

1. LIBRARY RESOURCES FOR FINDING PRIMARY MATERIALS

Caselaw: The percentage of appellate court decisions that are published varies widely and has in general been declining in recent years as the number of appeals has increased. Among the federal courts of appeal, fewer than half of their decisions are published. The rest are disposed of summarily or by means of an unpublished opinion. The judges who decided the case make the decision whether to release their decision for publication. Even if not published, opinions are generally available nonetheless from one of the computerized legal research services, discussed below. However, local rules generally prohibit citation to them, maintaining that such opinions have no precedential effect.[252]

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[250] For a discussion of how general principles operate in both common law and statutory caselaw, *see* DWORKIN, *supra* note 51, pp. 23–24 (discussing both a common law example and one involving a statute). *Cf. Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1899) (grandson could not inherit from the grandparent he had murdered despite lack of such disqualification in the statute; court presumed that legislature had "maxims of the common law" in mind when it passed the statute). *See also supra*, pp. 94–95 (statutory interpretation in light of fundamental values).

[251] This technique was used by the Court in a statutory context in the *Holy Trinity Church* case, *supra* p. 86. *See also supra* p. 111 ("ghost" precedents in common law caselaw).

[252] The issue of unpublished opinions without precedential effect was highlighted when one circuit court of appeals found it to be unconstitutional in *Anastasoff v. United States*, 223 F.3d 898, *vacated as moot on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000), but another circuit found it constitutional. *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001). The Supreme Court has not weighed in on the question.