Case Western Reserve Law Review

Volume 9 | Issue 1

1957

Stare Decisis and the Ohio Supreme Court

Robert D. Archibald

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"JUDGES are human beings and like the rest of us they are subject to human limitations." This statement does not shock us today, although not so many years ago, as humanity goes, it might have. We have come a long way from the era of classic natural law when the rules which guided human conduct or at least settled human conflicts were thought to have come straight from God, or at least from an unbelievably mystic reason somehow working through man, man who was not the law-giver but only the law-receiver.

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Now we know. Now we admit that judges make the law, make it in the sense that they must wrestle with a fresh problem in each piece of litigation coming before them and come up with a decision for the parties involved as well as some bit of wisdom which may help future judges in some other problem situation.[1]

In the midst of this comparatively new-found wisdom, we have discovered, moreover, that a judge may draw upon many sources to aid him in making his decision. We have learned to view the judge against his complex background of society where various events occur in varying degrees of complexity and where various theories have been drawn up to explain those events and their intermeshings. Since the judge and the litigational situation he faces are products of that complex background, how that judge reacts to that situation can realistically be explained only in terms of psychology, semantics and science, to name only a few of the sources of a judicial decision which are recognized by today's sociological jurisprudents.

Judicial opinions must still, of course, be included as a legitimate and significant source of later decisions. On the other hand, to what extent is such precedent decisive? The answer suggests the paradox which is the basis of this article and its study. While we are all, as legal professionals, aware in our abstract discussions that there is more to judicial

[1] *See* Frank, *What Courts Do in Fact*, 26 ILL. L. REV. 645 (1932).

decision-making than discovery of precedents, we continue in every way to give the lie to that wisdom. We seem actually to hold precedent and particularly stare decisis in an aura of holiness, the place once reserved for "reason" and then later, judges. Such an attitude is manifested by the expectancy of many an attorney of victory the minute he cites a case he believes to be "in point."

In light of this paradox, the time is ripe for such a study as this. There will follow an analysis of the opinions of the Ohio Supreme Court for the period from January 1, 1951, through December 31, 1955.[2] Perhaps surprisingly, proof will appear in at least partial support of the contemporary theories about the judicial process. Then will come a discussion of some of the discrepancies uncovered in this study and some suggestions for the future.

Statistical Analysis of the Ohio Supreme Court Decisions

Throughout each year the lawyers of this country are beset with case analyses appearing in every law review and loose leaf service. Critical summaries of the work of the United States Supreme Court are provided by several of the larger law reviews.[3] For us in Ohio the Western Reserve Law Review publishes a survey of the decisions of the Ohio Supreme Court each spring. Certainly such surveys and analyses are valuable but they do not reveal much about the methods used by the various judges in arriving at their decisions. The purpose of this study is to examine a doctrine which the judges tell us controls in almost every decision; that is the doctrine of *stare decisis.*

John Merryman, of Stanford University, was the first individual to make such a study as this.[4] Professor Merryman examined the various sources from which a court might draw its authority and analyzed the value of each. He then tabulated the authorities actually cited by the California Supreme Court in the year 1950 and compared these with the sources which seemed to be the best theoretically. The present study was inspired by this pioneer work, which will be referred to whenever valid comparisons can be made.

With this brief background in mind an examination of the tables is now in order. Table I indicates the total number of opinions rendered by the court during these years, the number of opinions written by each judge, and the number of times that each judge wrote for the majority or for the minority.

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[2] This survey covers the cases reported in Volumes 154-164 of the Ohio State Reports.

[3] The Harvard Law Review and the Minnesota Law Review are two of the more prominent ones.

[4] Merryman, *The Authority of Authority,* 6 STAN. L. REV. 613 (1954).

TABLE 1

Opinions Published by the Ohio Supreme Court from 1951 to 1955

	Majority	*Concurring*	*Dissenting*	*Totals*
Weygandt, C.J.	74	3	22	99
Bell, J.	17	0	5	22
Hart, J.	82	9	19	110
Lamneck, J.	20	3	0	23
Matthias, J.	56	5	7	68
Middleton, J.	72	2	16	90
Stewart, J.	87	4	16	107
Taft, J.	85	33	31	149
Zimmerman, J	73	7	18	98
Montgomery, J.	1	0	0	1
Ross, J.	1	0	0	1
Per Curiam	188	0	0	188
Totals	756	66	134	956

Tables 2, 3 and 4 are tabulations of the authorities cited in the majority, concurring and dissenting opinions during the five year period. Table 5 is a compilation of the treatises and other secondary authority cited by any member of the court during the period in question.

TABLE 2

Authorities Cited in the Majority Opinions

	Number of Cases	*Distinguished**	*Contrary‡*
Number of Cases	845		
Ohio Supreme Court	2,446	206	30
Lower Ohio Courts	53	2	2
Ohio Constitution	96		
Statutes	618		
Foreign Courts	883	39	57
United States Sup. Court	181	13	4
United States Const.	5		
Lower Federal Courts	76	6	1
Legal Texts	142		1
Restatements	22		
Law Reviews	19		
A.L.R. & A.L.R. 2d	149	4	11
Ohio Jurisprudence	96		1
American Jur. & R.C.L.	141		
Corpus Juris & C.J.S.	93		
Administrative Boards	7		
Non-legal Texts	10		1

* These cases were distinguished and not followed.

‡ These cases were recognized to be contrary to the majority view and therefore were not followed.

TABLE 3
Authorities Cited in the Concurring Opinions

	Majority	*Concurring*	*Dissenting*	*Totals*
No. of Cases	57			57
Ohio Sup. Ct.	149	13	3	165
Ohio Lower Ct.	0			0
Ohio Const.	5			5
Statutes	27			27
Foreign Cts.	19	1		20
U.S. Sup. Ct.	4			4
U.S. Const.	0			0
Lower Fed. Cts.	2			2
Texts (legal)	3			3
Restatements	0			0
Law Reviews	1			1
A.L.R.	5			5
Ohio Jur.	3			3
Am. Jur. & R.C.L.	5			5
C.J. & C.J.S.	0			0
Admin. Bd.	0			0
Texts (non-legal)	0			0

TABLE 4
Authorities Cited in the Dissenting Opinions

	Majority	*Concurring*	*Dissenting*	*Totals*
No. of Cases	116			116
Ohio Sup. Ct.	285	37	1	323
Ohio Lower Cts.	11			11
Ohio Const.	11			11
Statutes	59			59
Foreign Cts.	88	2	3	93
U.S. Sup. Ct.	36			36
U.S. Const.	0			0
Lower Fed. Cts.	12			12
Texts (legal)	6			6
Restatements	2			2
Law Reviews	4			4
A.L.R.	20			20
Ohio Jur.	6			6
Am. Jur. & R.C.L.	11			11
C.J. & C.J.S.	3			3
Admin. Bd.	1			1
Text (non-legal)	0			0

TABLE 5
Treatises and Other Secondary Authorities Cited

By the Majority
Accountant's Handbook.
Accounting for Lawyers.
Anderson on Declaratory Judgments.
Angell on Limitations.
Appleman on Insurance Law and Practice.
Ballentine's Law Dictionary.
Bancroft's Code Pleading (2).

Bates' Pleading, Practice, Parties and Forms (2).
Berry on Automobiles.
Bigelow on Torts.
Black's Law of Judicial Precedents.
Black on Judgments.
Black's Law Dictionary.
Blackstone's Commentaries.
Blashfield, Cyclopedia of Automobile Law and Practice (2).
Bogert on Trusts (4).
Borchard on Declaratory Judgments.
Boston University Law Review (2).
Bouvier's Law Dictionary.
Britton on Bills and Notes.
Canons of Judicial Ethics.
Cincinnati Law Review.
Cooley on Constitutional Limitations.
Cooley on Taxation.
Cooley on Torts (4).
Cooley's Briefs on Insurance.
Corbin on Contracts.
Couch on Insurance (2).
Davies Ohio Corporation Law (2).
Debates of the Constitutional Convention.
Demann's Ohio Mechanic's Lien Law.
DeWitt's Ohio Mechanic's Liens.
Eager on Chattel Mortgages and Conditional Sales.
Freeman on Judgments.
Funk and Wagnall's Dictionary.
General Accounting.
Harper on Torts (2).
Harvard Law Review (4).
Houser on Ohio Practice.
Jones, Commentaries on Evidence.
Keener on Quasi-Contracts.
Kent's Commentaries.
Lindly on Companies (England).
McQuillin on Municipal Corporations (8).
Mechem on Agency.
Michigan Law Review (3).
Montgomery's Federal Taxes, Estates, Trusts and Gifts.
Nelson on Divorce and Annulment.
New Century Dictionary (2).
North Carolina Law Review.
Ohio State Bar Comment.
Orgel on Valuation Under Eminent Domain.
Oxford English Dictionary (3).
Page on Contracts.
Page on Wills.
Perry on Trusts.
Pomeroy's Code Remedies.
Pomeroy's Equity Jurisprudence (2).
Prosser on Torts (2).
Restatement of Agency.
Restatement of Conflicts (2).
Restatement of Contracts (2).
Restatement of Judgments.
Restatement of Property.
Restatement of Restitution (2).
Restatement of Torts (8).
Restatement of Trusts (4).
Rowley's Modern Law of Partnership.
Schneider's Workman's Compensation.
Scott on Trusts (2).
Scott's Fundamentals of Procedure in Actions at Law.
Sedgwick and Wait on Trial of Title to Land.
Sedgwick on Damages.
Sherman and Redfield on Negligence.
Storey on Equity Jurisprudence.
Sutherland on Damages.
Sutherland, Statutory Construction.
Thompson on Real Property (5).
Thompson on Wills (3).
Tiffany on Landlord and Tenant.
Underhill on Landlord and Tenant.
Underhill's Criminal Evidence.
University of Chicago Law Review (2).
Waite on Sales.
Wambush, How to Use Decisions and Statutes.
Warren's Corporate Advantages without Incorporation.
Webster's Dictionary (3).

White's Supplement to Thompson's Commentaries on the Law of Negligence.
Wigmore (15).
Williston on Contracts.
Williston on Sales (2).
Woerner's American Law of Administration.
Woodward on the Law of Quasi-Contracts (2).
Words and Phrases (2).
Yale Law Journal.
Yokley on Zoning.
By the Concurrer
Beutel's Brennan N.I.L.
Blackstone's Commentaries.
Harvard Law Review.
Thompson on Wills.
By the Dissent
Boston University Law Review
Bouvier's Law Dictionary.
Cooley on Torts.
Cooley's Constitutional Limitations.
Michigan Law Review.
Page on Wills.
Restatement of Torts (2).
Underhill's Law of Wills.
Virginia Law Review.
Wigmore, Evidence.
Yale Law Journal.

As might be expected the decisions most frequently cited were those of the Ohio Supreme Court. However decisions from other courts were cited in the following order: courts of foreign states, the United States Supreme Court, lower federal courts, and finally lower Ohio courts. There were very few citations to decisions of administrative boards.

Excepting the cases having to do with civil procedure, which is essentially a home rule problem, the Ohio Supreme Court cited one foreign state decision for every two times that reference was had to its own decisions. Apparently the concurrers and dissenters were not as taken with foreign courts' logic as was the majority, but they too relied on foreign decisions in a number of instances.

Treatises were cited very infrequently. However, such works as American Law Reports, Corpus Juris Secundum, American Jurisprudence and Ohio Jurisprudence were cited quite often. They rank second only to the Ohio Supreme Court cases and the foreign state decisions.

Statutes

Statutes and constitutions were included in the tables in order to test Justice Frankfurter's recent observation that:

> . . . even as late as 1875 more than 40% of the controversies before the Court were common-law litigation, fifty years later only 5%, while today cases not resting on statutes are reduced almost to zero.[5]

The tables show that the total number of statutes cited approximates quite closely the total number of opinions in Table 1, and that Frankfurter's statement applies to the Ohio Supreme Court as well as to the United States Supreme Court.

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[5] Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947).

IMPLICATIONS OF THE TABLES

In many ways, of course, the tables speak for themselves. For instance, they indicate that although case material was cited quite heavily, other material was often utilized. Note, for instance, the number of citations to such works as Ohio Jurisprudence and A.L.R. However, there are other than surface conclusions to be drawn from this study. We need to examine the kinds of sources which the court purports to use against the background of contemporary legal thought.

Precedent

All courts to a greater or lesser extent pay tribute to the doctrine of *stare decisis*.[6] Stare decisis relieves some of the pressure exerted on our system of law by public opinion. It serves as a substitute for the earlier magical, mystical theories of classic natural law.[7] If judges are to function properly, goes the theory, they must be limited in some way; they must be prevented from being arbitrary and capricious. Stare decisis is thought to provide the limit, but not only do we want our judges to be "fair," we want also to know what our judges are going to do before they do it. We want predictability. Again stare decisis seems to satisfy this longing. Yet today, many people are in doubt that the kind of stare decisis we purport to use actually fills the bill. A stare decisis consisting alone of judicial precedent may not provide either restrictions on the judiciary or predictability of its actions.

It is interesting to note at this juncture that the California Supreme Court seems to follow a doctrine of stare decisis which consists alone of judicial precedent. In 1950 that court cited case authority in the following order: California Supreme Court, lower California courts, courts of other states, United States Supreme Court and finally lower federal courts.[8]

The citation of these cases in the order just recited indicates that the California Court follows a doctrine of strict stare decisis, which has been defined as follows:

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[6] The doctrine of stare decisis has been defined as:

> A deliberate or solemn decision of a court or judge, made after argument on a question of law fairly arising in a case, and necessary to its determination, is an authority, or binding precedent, in the same court or in other courts of equal or lower rank.

13 MONTANA L. REV. 74 (1952), reprinted from CHAMBERLAIN, STARE DECISIS 19.

[7] *See:* CICERO, DE LEGIBUS, Book I, VI; ST. THOMAS AQUINAS, Part II, First Part, SUMMA THEOLOGICA, Question 90.

[8] Merryman, *The Authority of Authority*, 6 STAN. L. REV. 613 (1954).

> Where there is local precedent (in terms of past cases of a particular jurisdiction), it controls the decision of cases falling within it . . . and a series of precedents is almost certain to control.[9]

Many practitioners believe that the Ohio Supreme Court follows this rule — but note what the practice of that court is. Although the Ohio Court looks first to its own prior decisions, it will then accept a foreign state decision before it will consider a case from a lower Ohio court. This is certainly not in keeping with the rule of "strict" stare decisis.

The basis upon which The Ohio Court relies upon foreign cases as authority has been stated as follows:

> . . . although the weight of authority outside of this state on a question of law will and should be considered, its persuasiveness to this court will depend upon the thoroughness with which such questions have been considered.[10]

Of course this same rule should be applied to *all* authorities a court surveys, but it would seem that the court has found a great deal of "thoroughness" in the opinions of foreign justices. Moreover, in many instances, the court disregarded the "weight of authority" in foreign states and stressed the fact that it is the quality of the foreign opinions, not the quantity of them which is most significant.[11]

All that has been said about the citation of authority thus far, with respect to case material, indicates that while the Ohio Court depends upon its own prior cases it often does not feel bound by them, nor does it often feel inclined to follow the lower Ohio cases. It would appear, if we were to stop at this point, that, unlike the California court, stare decisis in its narrow sense is not the guiding light for the Ohio Court. If it were, what need would there be for the numerous citations to foreign state opinions? If there were *any* Ohio case on the subject, it should control, particularly if it were an Ohio Supreme Court case. It is interesting to note from the California study that less than 1/8 of the total citations were made up of foreign state decisions. For those of you who would reply that perhaps the Ohio Court decided a number of cases of first impression during this five year period, it should be pointed out that the court decided only seventeen such cases.

The authority cited by the Ohio Supreme Court could lead us to

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[9] Report on the Cincinnati Conference on *The Status of the Rule of Judicial Precedent*, 14 U. CIN. L. REV. 203, 209 (1940).

[10] Commerce National Bank v. Browning, 158 Ohio St. 54, 60, 107 N.E. 2d 120, 123 (1952).

[11] Commerce National Bank v. Browning, 158 Ohio St. 54, 107 N.E. 2d 120 (1952); and Damm v. Elyria Lodge No. 465, B.P.O.E., 158 Ohio St. 107, 107 N.E. 2d 337 (1952), in which the court recognized that its decision was against the "weight of authority," but for the sake of "justice," disregarded such authority.

either of two conclusions. It is possible that the Court is seeking more than mechanical predictability. The heavy reliance upon foreign decisions gives rise to the inference that our high court is searching for the "just" result in each case rather than blindly following the holding of another court simply because that court happens to be located in the State of Ohio. On the other hand, we may have uncovered a decision-making process which consists of a search and comparison and little more. It may be that:

> Their (the judges') notion of their duty is to match the colors of the cases at hand against the colors of many sample cases spread out upon their desk. The sample nearest in shade supplies the applicable rule.[12]

Before we are too hasty with our conclusions, let us study the other sources upon which the Court has relied.

EXPERT OPINIONS

As Authority

A person reading an opinion can only assume that certain authority was relied upon because the court thought it applicable and believed it stated the law correctly. Hence, by including a source within an opinion, whether it be a primary source or a secondary source, the tribunal has given that authority prestige, and the probabilities of its being depended upon in subsequent cases of a similar nature are increased.

Ordinarily, only primary authorities are considered to be sources of the law; whereas treatises and the like, secondary sources, are not. In reality, what the courts actually do with secondary sources will be determinative of their status. If a treatise is cited in an opinion and relied upon, then certainly no one can argue that it is not primary authority.

> . . . if law is to be viewed as a legal process, and if authority is regarded as the published matter that is actually relied on by a court in its part of the process, then authority varies in degree but not in kind, and statutes and cases are more authoritative than any other legal and non-legal writing, but are no more authority.[13]

Use of Treatises by Ohio Court

At no time during the 5-year period was a legal treatise criticized, and only once did the majority recognize a work of this type as being contrary to the court's decision. Of course, this may be due to the fact that if there is any disagreement between the court and an author, the court merely declines to cite such a work.

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[12] CARDOZO, NATURE OF THE JUDICIAL PROCESS, 20 (1932).

[13] Merryman, *The Authority of Authority*, 6 STAN. L. REV. 613, 621 (1954).

There can be no doubt that authors such as Wigmore, Bogert, Davis and Williston are among the top legal minds that this country has produced, but strangely enough the number of times that the court cited the works of these men were few indeed. Particularly surprising is the fact that only five times in five years did a dissenting judge cite one of these works. Inasmuch as the dissent professes to champion the more advanced or better view, it seems hardly possible that only five times in five years has a dissenting member of the court reached a conclusion similar to one advanced by these men. Therefore, the only possible conclusion is that the Ohio Supreme Court justices feel that sources other than treatises lend more weight to their positions.

Similarly, the infrequent use of the Restatements, 22 times by the majority, twice by the dissent, and not at all by the concurring opinions, would seem to indicate that the judges of the Ohio Supreme Court hold these authorities in as low repute as do some of the critics of these volumes.[14]

Law reviews are another source of skilled legal opinions which, in the past, have not been given their true place in the court decision. According to one author, this has been due to the fact that a law review is not usually ". . . designed for any audience at all. It presents a most unfortunate mess of ill-assorted, heterogeneous articles . . . [and] in its understandable desire for continuity of form, the law review appears to have completely sacrificed continuity of substance."[15] However, Justice Stanley H. Fuld of the New York Court of Appeals, stated that:

> Despite all limitations, law reviews have a vital role to play. . . . The law review should be — and it is — more than a training ground for good positions. It can — and it does — render a real service to lawyers — lawyers on the bench and in the legislatures, as well as those in private practice.[16]

This role, of which Justice Fuld writes, is two-fold. The law review may serve as a repository of case law on a subject; but, more important, it should serve as an analyst of debated doctrines and the evaluator of possible trends. In the words of Chief Justice Warren:

> Through the writings by the professors and the best of their students, through the law reviews, the courts are increasingly dependent upon the law schools for their intellectual capital; that is, for those comments and essays and books for which only the law schools have the necessary time

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[14] *See:* Green, *The Torts Restatement,* 29 ILL. L. REV. 582 (1935); Book Review, 32 ILL. L. REV. 509 (1927); Patterson, THE RESTATEMENT OF THE LAW OF CONTRACTS, 33 COLUM. L. REV. 397 (1933).

[15] Mewett, *Reviewing the Law Reviews,* 8 J. LEGAL ED. 188 (1955).

[16] Fuld, *A Judge Looks at the Law Review,* 28 N.Y.U. L. REV. 915, 917 (1953).

> and the indispensable intellectual disinterestedness. . . . We are indebted to them for this great service.[17]

The law reviews have a significant role to play and are of tremendous potential value to the court. On the other hand it appears, from a view of the tables, that the Ohio Court does not value them highly. In fact, law reviews are cited less often than the Restatements.[18]

Such works as American Law Reports, Corpus Juris Secundum, American Jurisprudence and Ohio Jurisprudence, as we have noted, constitute a large segment of the source material cited. The explanation is two-fold: First, if a court is to do any independent research on any given point of law, the encyclopedias provide a convenient starting point. Secondly, these works are cited constantly in the appellate briefs. A tribunal, because of the time factor, must rely on such works so as to expedite matters. Insofar as these works accomplish this they are to be commended.

However, the use a court makes of these works in its written opinion presents a difficult question. The Ohio Court employs the encyclopedia in two ways: (1) as relators of "the law"; and (2) as repositories of other cases on the point in question. This latter function need not be disparaged since it gives the reader a lead to other cases on the subject, but the former, the citation of such works as being dispositive of "the law," should be discouraged. Whenever this appears in an opinion the necessary inference is that the court has depended upon another's interpretation of a set of cases rather than upon its own reasoning. The experience and knowledge of a court are entitled to far more weight than this.

Of these publications, Professor Wigmore wrote a scathing criticism:

> . . . in the judicial opinions, the superficial products of hasty hack-writers, callow compilers, and anonymous editors, are given equal consideration with the weightiest names of true science. This reliance upon anonymity is always a mark of literary and juristic crudity. Almost any printed page, bound in law-buckram and well advertised or gratuitously presented, constitutes authority fit to guide the courts.[19]

Wigmore's judgment of these works, though somewhat harsh, seems to be justified. A glance at these books will indicate the anonymity of which Wigmore wrote. There is little attempt by these "authors" to constructively criticize, weigh or evaluate the decisions recounted therein. On

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[17] Honorable Earl Warren, Convocation Address, reprinted 1956 LAW FORUM, 279 (1956).

[18] The only Ohio periodical cited during the entire five-year period was the Cincinnati Law Review. In California, Law Reviews were cited 87 times in one year.

[19] I WIGMORE, EVIDENCE § 8a p. 243 (3rd edr 1940).

the other hand, the following statement contained in A.L.R., indicates the *alleged* service rendered by one of these works:

> Valuable as are the reported cases themselves — from all jurisdictions — it is the annotations which have made A.L.R. such a valuable tool to the bench and bar of the country. These annotations are exhaustive on the point of law discussed . . . Here is the lawyer's brief, both ready-made and tailor-made, prepared by editors skilled in the research of the law to whom exhaustiveness is the cardinal consideration and who are backed up by the standing and resources of the publishers.[20]

These publications provide the coins for the "slot machine" process of decision making of which Pound spoke,[21] and which, he concluded if not curtailed would ruin our legal system. The man who has the best card index is not necessarily the wisest judge.

A More Realistic Stare Decisis

When a judge sits down to render a decision in a case, there are many influencing factors besides stare decisis at work on that judge's mind. Some of these factors are direct or conscious elements such as legal and political background, political sympathies, and intellectual and temperamental traits. Other factors are more indirect such as the judge's general and legal education, his family and personal associations, and even his wealth and social position.[22]

Strict stare decisis is supposed to minimize the effect of these personal factors in a judicial decision but we have seen from the tables that, even given such effect, strict stare decisis is not the prevailing guide post in Ohio. There appears to be a tendency for our court to seek out sources other than Ohio cases to support its decisions. Thus, we may fairly conclude that precedent, in Ohio, serves only as an "authoritative starting point for legal reasoning."[23] The question then becomes, how can we predict the result, having found only the starting point? Unfortunately, the courts leave this vital question unanswered.

What it comes down to is that the judicial decision is like an iceberg; only a small fraction of it, the written opinion, shows above the surface. The major part of the decision is inarticulate since it exists only in the thought processes of the judge and the changes in these processes which are wrought by the facts and circumstances present in each case.

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[20] How to Use American Law Reports Annotated 2 (1951). See also: Merryman, *The Authority of Authority*, 6 Stan. L. Rev. 613, 634-646 (1954).

[21] Pound, *Mechanical Jurisprudence*, 8 Colum. L. Rev. 605 (1908).

[22] Haines, *General Observation on the Effects of Personal, Political, and Economic Influences in the Decisions of Judges*, 17 Ill. L. Rev. 96 (1922).

[23] Pound, Report on the Cincinnati Conference on *The Status of the Rule of Judicial Precedent*, 14 U. Cin. L. Rev. 324, 329 (1940).

Apparently, the bench is reluctant to apprise us of the nature of these inarticulate portions of their decisions, so it becomes the lawyer's job to ascertain the nature and importance of these factors. Unfortunately, the picking of a man's brain is a very complicated task and one which even the most highly skilled psychologists have been unable to master completely. How can a lawyer be expected to explore the mind of as inscrutable a figure as a judge?

Of course, every lawyer should and most good ones do consider such things as a judge's temperament, background, reputation, etc., as definite factors in their law suits. On the other hand, much of this is guesswork and, in the final analysis, the lawyer has no idea whether the judge based his decision on sound logic or mere whim and caprice.

The answer to legal certainty then is not to be found in the traditional views of stare decisis. The only real way for us to know how and why a judge is deciding a case in a certain way is for him to tell us, for it is manifestly evident that authority can be found to support either side of any law suit.

CONCLUSIONS

It is certainly beyond the pale of this article to recommend the proper or most acceptable authorities to be cited when trying a case before the Ohio Supreme Court. Rather, the point of this study is to indicate that a doctrine which is as old as the law itself is not accomplishing the purpose which it is meant to, i.e. the guaranteeing of legal certainty.

It is time that the lawyers not only of Ohio but of the other 47 states take notice of this situation. Should some new doctrine be employed as the basis of our adversary system? On the other hand, despite the fact that a judge can decide a case either way and still support his position by precedent, may this be the best system? These are but two of the many questions which we should be asking ourselves.

The answers to the questions which I have raised concerning our legal system must come from the members of the bar, but before there can be any answers there must be more questions. The point of this study is to raise some questions in the minds of at least a few of the members of the Ohio bar, and perhaps to incite some further inquiry not only by Ohio lawyers but by lawyers in other parts of the country. It is only by constantly questioning and re-evaluating the subject of our expertise that we will keep it flexible and in pace with the times.