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The phrase "stare decisis" mystifies; its Latin form suggests its obscuring functions. Judicial discussions usually avoid[1] any mention of the vast academic literature[2] on stare decisis, keeping judicial stare decisis formulations more isolated from the reasoning of commentators than is typical with substantive law formulations. The central purpose of this article is to clarify the concept of stare decisis.

Courts divide judicial precedents into two categories. They refer to precedents in the first category as "stare decisis" and "binding" while calling those in the second category merely "persuasive."[3] On occasion this article uses the phrase "stare decisis precedents" to refer to precedents which courts place in the first category and the phrase "non-stare decisis precedents" to refer to those that courts place in the second. The article employs these phrases to examine judicial usage of the "stare decisis" phrase and concept.

Although the literal meaning[4] of stare decisis covers the relationship between judicial and nonjudicial decisions, no one employs the phrase to apply to these relationships. For example, judges are more "bound" to stand by the decisions of legislators and constitution makers than of judges, yet the term "stare decisis" is not applied to the tendency of judges to follow the decisions of legislators or constitution makers. Moreover, we have coined no such phrase as "stare constitutione." In addition, not only judges but private persons and governmental officials are in some sense "bound" by judicial decisions[5] yet again the phrase "stare decisis" is not employed to refer to the obligation of private or public persons to stand by judicial decisions.

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[1] *E.g.*, Flood v. Kuhn, 407 U.S. 258 (1972); Boys Markets, Inc. v. Retail Clerk's Union, Local 770, 398 U.S. 235 (1970).

[2] STARE DECISIS AND THE DOCTRINE OF LEGAL PRECEDENT: A SELECTED BIBLIOGRAPHY (J. Mubarak & R. Rich, eds., Asa V. Call Law Library Bibliography ser. No. 83, 1978).

[3] *E.g.*, Morgan v. Limbaugh, 75 Ga. App. 663, 666, 44 S.E.2d 394, 397 (1947); Brockton Sav. Bank v. Shapiro, 324 Mass. 678, 684-85, 88 N.E.2d 344, 347 (1949).

[4] "Stare decisis" literally means "to stand by decisions."

[5] *E.g.*, Cooper v. Aaron, 358 U.S. 1 (1958).

This article focuses on stare decisis in American courts. Much American stare decisis commentary confusingly entangles analyses of the American and English precedential systems because it fails to recognize that the United States and Britain have quite different judicial processes. In particular, Goodhart's[6] perceptive analysis of precedent in English law is of limited usefulness, because of differences between the American and English precedential systems.[7]

The article explores the boundaries of the concept of stare decisis by analyzing the distinctions between stare decisis and non-stare decisis precedents. The first section sets forth the basic assumptions underlying the article. The second section analyzes the differences between stare decisis and non-stare decisis precedents arising from the relationship between the court rendering the precedent and the court deciding what deference to pay the precedent. The third section analyzes the differences between stare decisis and non-stare decisis precedents arising from the various parts of earlier cases which courts purport to follow under the principle of stare decisis. The fourth section further explains the stare decisis categories and language set forth in the second and third sections. The article seeks only to explain judicial stare decisis usage, not to justify that usage.[8]

BASIC ASSUMPTIONS

As previously indicated, the main purpose of this article is to elucidate stare decisis. Since one's view of stare decisis depends on one's assumptions about law, several assumptions concerning American law are set forth as a foundation for analyzing stare decisis.

Law is a formal institution by which partly rational beings employ quasi-moral rules enforced by force to partly govern their behavior.[9] Legal rules[10] ideally function both to facilitate the just resolution of disputes and to shape human conduct in ways beneficial

[6] Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161 (1930).

[7] These differences are set forth in Hardisty, *The Effect of Future Orientation on the American Reformation of English Judicial Method*, 30 HASTINGS L.J. 523, 529-36 (1979).

[8] R. WASSERSTROM, THE JUDICIAL DECISION 25-31 (1961), analyzes the distinction between explanation and justification.

[9] *See generally* L. FULLER, THE MORALITY OF LAW 106-18 (rev. ed. 1969); R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 25-30 (rev. ed. 1954).

[10] In this article, such phrases as "legal rules" and "rules of law" are employed in a generic sense to include legal rules, standards, doctrines and principles. *See generally* Pound, *Hierarchy of Sources and Forms in Different Systems of Law*, 7 TUL. L. REV. 475 (1933); H. M. Hart & A. Sacks, The Legal Process 155-60 (1958)(mimeographed course materials published by Harvard Law School)[hereinafter cited as Hart].

to society.[11] As a part of the process of adjudicating the disputes of the litigants before them, courts usually generalize the bases of their decisions and these generalized bases are rules of law which are often "by-products" of the dispute settlement.[12]

To be more precise, it is assumed that the process of adjudication involves the three steps of (1) a determination of the law, (2) a determination of the facts, and (3) an application of the law to the facts.[13] This three-step process produces an argument that is reconstructable in syllogistic form, that is in the form of "a deductive argument in which a conclusion is inferred from two premisses [*sic*]":[14] the formulation of law is the major premise; the formulation of facts is the minor premise; and the result of the application of the law to the facts is the conclusion.[15]

For example, a common syllogism provides: "All humans are mortal" (major premise); and "Socrates is a human" (minor premise); therefore "Socrates is mortal" (conclusion). The process of applying a rule of law to the facts can be similarly formulated. For instance, in *Argersinger v. Hamlin*[16] the following rule approximates

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[11] L. FULLER, *supra* note 9; R. POUND, *supra* note 9, at 31-47; Hart, *supra* note 10 *passim*. *Contra, e.g.*, T. ARNOLD, THE SYMBOLS OF GOVERNMENT 34, 153 *passim* (1935); J. CARTER, LAW: ITS ORIGIN, GROWTH AND FUNCTION 120, 130, 135 *passim* (1907).

[12] Fuller, Adjudication and the Rule of Law, Proceedings of the American Society of International Law at Its Fifty-fourth Annual Meeting 7 (1960); Hart, *supra* note 10, at 367, 662-69.

[13] Hart, *supra* note 10, at 373-83; *see* R. POUND, *supra* note 9, at 48.

[14] I. COPI, INTRODUCTION TO LOGIC 198 (5th ed. 1978). Copi's definition of "syllogism" is broader than that generally used by 20th century logicians.

[15] The syllogistic form of the basic legal method has been noted by many authorities. *See, e.g.*, 3 W. BLACKSTONE, COMMENTARIES 3 W. BLACKSTONE, COMMENTARIES *396; E. BODENHEIMER, JURISPRUDENCE 385-88 (rev. ed. 1974); E. WAMBAUGH, THE STUDY OF CASES 16 n.1 (2d ed. 1894); R. WASSERSTROM, *supra* note 8, at 15; Guest, *Logic in the Law*, in OXFORD ESSAYS IN JURISPRUDENCE 176, 182-88 (A. Guest ed. 1961); Owens, *The Judicial Process, Stare Decisis and the Restatements*, 21 J. ST. B. CAL. 116, 118-19 (1946).

One dissenter is Ronald Dworkin, who has asserted (without citation of authority) that courts "rarely" explicitly set forth rules of law which they are applying to the facts to justify their results. R. DWORKIN, TAKING RIGHTS SERIOUSLY 111 (1977). In contrast, the author's analyses of thousands of cases reveal that courts commonly explicitly set forth such rules. *E.g.*, Fisher v. Carrousel Motor Hotel, Inc., 424 S.W.2d 627, 629 (Tex. 1967) (" 'To constitute an assault and battery, . . . knocking or snatching anything from plaintiff's hand or touching anything connected with his person, when done in an offensive manner, is sufficient.' ").

Henry Hart and Albert Sacks have asserted that judges have a duty to "generalize" the basis of their decision (Hart, *supra* note 10, at 397), apparently meaning that judges must justify their result by stating a rule which they applied to the facts. However, the judiciary has not recognized such a duty. *E.g.*, Houston v. Williams, 13 Cal. 24, 26 (1859); P. CARRINGTON, D. MEADOR & M. ROSENBERG, JUSTICE ON APPEAL 32 (1976). The only alternative that Hart and Sacks suggest is facetious: judges might reach and justify a result by flipping a coin. Hart, *supra* note 10, at 397. A plausible alternative is for judges to decide or justify a result on the basis of their ungeneralized intuition of a just result.

[16] 407 U.S. 25, 37 (1972).

a major premise: "We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at trial." The following facts approximate a minor premise: petitioner was a person who had not waived counsel and had not been represented by counsel at trial. The result approximates a conclusion: petitioner may not be imprisoned for any offense. Because Argersinger's imprisonment was thus illegal, the Court reversed the judgment of the Supreme Court of Florida which had denied his petition for habeas corpus. Although neither *Argersinger* nor any other legal opinion explicitly sets forth its reasoning in strict syllogistic form, all explicit applications of a rule of law implicitly involve deductive reasoning which could be reformulated as a syllogism.

The above analysis focuses on the importance of rules and deductive reasoning in justifying judicial results.[17] The article assumes that judges employ rules of law less extensively in reaching results than in justifying them. For example, in the *Argersinger* case, no contention is made by the author or the Court that the Court's justifying rule preceded its result. In fact, it seems more plausible to assume that most or all of the justices first decided to reverse the Florida judgment, then later formulated the justifying rule. The article thus assumes that deductive reasoning has a minor influence on judicial results in the most novel and difficult cases, such as *Argersinger*, which constitute the bulk of cases in law school casebooks. However, it also assumes that deductive reasoning has a major influence on judicial results in the mine-run cases which constitute the bulk of all judicial cases.[19]

The article also assumes that deductive reasoning plays a minor role in influencing the content of legal rules. The plausibility of this assumption is strengthened by the fact that the alternative assumption that this role is major would involve the use of logic in law, which has drawn the greatest critical fire. An example of such critical fire is Holmes' assertion that "the life of the law has not been logic; it has been experience."[20] Holmes was only asserting that intuitions of morality, public policy and prejudice have been more

[17] In this article the word "result" means "order" in the sense of " 'the formal order' of a court." Montrose, *The Language of, and a Notation for, the Doctrine of Precedent*, 2 U.W. AUSTL. ANN. L. REV. (pt. 1) 301, 308 (1952).

[18] *See* R. WASSERSTROM, *supra* note 8.

[19] *See, e.g.*, B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 163-64 (1921).

[20] O. HOLMES, THE COMMON LAW 1 (1881).

important "than the syllogism in determining the rules by which men should be governed;"[21] he was not questioning use of the syllogism once rules of law have been formulated.[22]

The assumptions set forth in this section are all worth exploring in their own right, but their exploration is beyond the scope of this article. The assumptions are not set forth with the contention that they have been established, although they are widely shared in the American legal community. The assumptions are to be accepted for the purposes of the article as useful bases from which to reason about stare decisis in American law.

DISTINCTION BETWEEN STARE DECISIS AND NON-STARE DECISIS PRECEDENTS BASED ON IDENTITIES OF PRECEDENTIAL AND DECISIONAL COURTS

In this article, the phrase "precedential court" refers to the court rendering the precedent.[23] Similarly, the phrase "decisional court" refers to the court considering what effect to give the precedent. Based on the relationship between the precedential and decisional courts, precedents can be arrayed in terms of their influence, other things being equal. For example, Table I sets forth such an array limited to questions of federal law and to interrelationships between the United States Supreme Court and the United States Court of Appeals for the Ninth Circuit.

A table similar to Table I but arraying all American precedential court-decisional court relationships would have tens of thousands of entries. One important type of entry in such an expanded table would be the relationships between particular state court-of-last-resort precedential courts and particular federal decisional courts

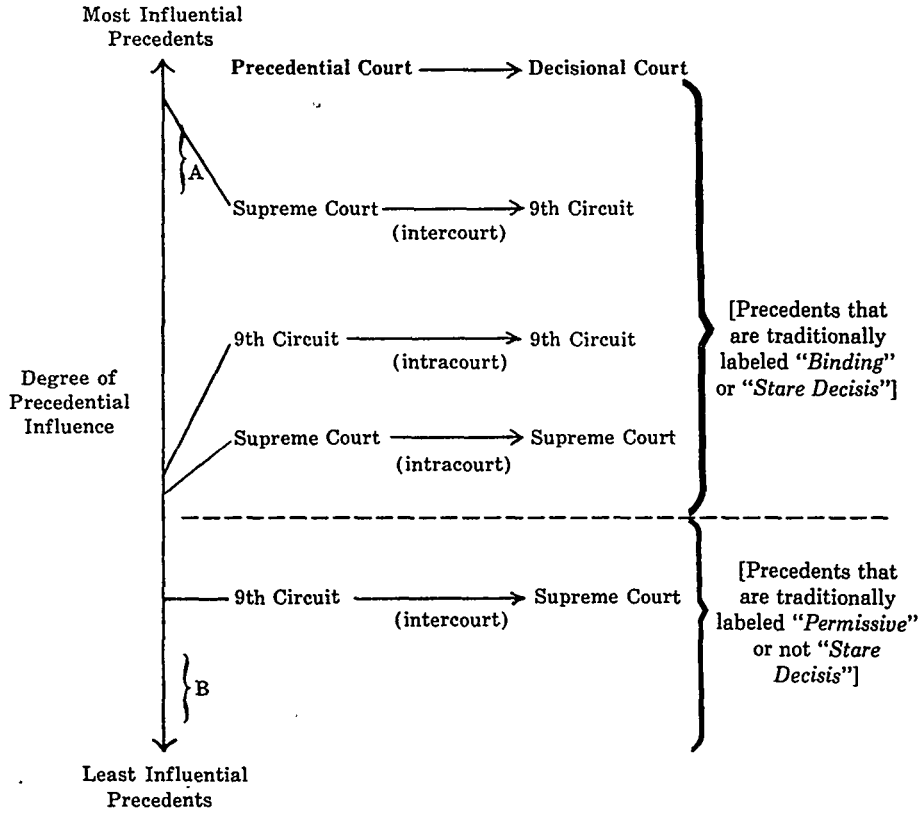
[21] *Id.*

[22] After formulating the above, the author discovered similar observations about this passage by Holmes in E. BODENHEIMER, *supra* note 15, at 392.

[23] For example, when the district court in Barnette v. West Virginia State Bd. of Educ., 47 F. Supp. 251 (S.D.W. Va. 1942), *aff'd*, 319 U.S. 624 (1943), was deciding what weight to give the pertinent Supreme Court precedent of Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940), the district court was the "decisional court" and the Supreme Court was the "precedential court."

TABLE I [24]

CONTINUUM OF DEGREE OF INFLUENCE OF PRECEDENTS CATEGORIZED IN TERMS OF PRECEDENTIAL-DECISIONAL COURT RELATIONSHIPS



[24] The phrases "intracourt" and "intercourt" were invented by Marjorie Dick Rombauer. A precedent is "intracourt" if the same court is both the precedential and decisional court. All other precedents are "intercourt."

The only problematical assumption underlying Table I is the assumption that Ninth Circuit precedents are more persuasive in Ninth Circuit decisions than Supreme Court precedents are in Supreme Court decisions. This assumption is based on the author's impressions from reading thousands of cases. It is supported by the Ninth Circuit rule prohibiting one panel of three Ninth Circuit judges from overruling a Ninth Circuit precedent (even when a panel of three different judges decided the precedent) and instead requiring the panel to refer the case to the full Ninth Circuit en banc for possible overruling. Ninth Circuit panels are reluctant to require an en banc session in part because this requires the judges to travel.

A court of last resort such as the United States Supreme Court is generally looser with intracourt precedents than is an intermediate appellate court such as the Ninth Circuit. One reason for this difference is that a court of last resort has greater power to reinterpret all earlier authorities in its jurisdiction to make them more harmonious with each other, with social

applying state law under *Erie Railroad Co. v. Tompkins.*[25] (These relationships would be located at "A" in Table I.) Another would be the relationships between courts of different states in cases not involving choice of law problems. (These relationships would be at "B" in Table I.) However adding such entries would not only make Table I unwieldy, it would also make for numerous problematical distinctions between relationships of similar influence.

As implied by Table I, judges and commentators assume that the principle of "stare decisis" applies both to precedents by a hierarchically superior court and to intracourt[26] precedents.[27] However, when the precedential court is inferior to the decisional court, "stare decisis" does not apply and the precedent is said to be only "persuasive."[28]

As also suggested by the table, perhaps the distinction between precedents governed by stare decisis and those not so governed is a difference in degree masquerading as a difference in kind. The distinction between stare decisis and non-stare decisis precedents is primarily a difference in the degree of influence of the precedent. Supreme Court justices partly defer both to Ninth Circuit and Supreme Court decisions, but they defer much more to the latter. If there is more than this difference in degree between stare decisis and non-stare decisis precedents, it is not clear what it is.

Any difference in kind between the categories of stare decisis and non-stare decisis precedents would be manifested in the precedential effects of the least influential stare decisis precedents (intracourt precedents) but not in the precedential effects of any non-stare decisis precedents. As examples, this article analyzes whether intracourt precedents have any precedential effects differing in

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conditions and with the court's sense of justice. Intermediate appellate courts can also serve such a harmonizing function, but to a lesser degree. Moreover intermediate appellate court judges develop a habit of deference to precedents of a hierarchically superior court which may carry over to intracourt precedents. Supreme Court justices have no such habit.

[25] 304 U.S. 64 (1938). *Erie* increased the degree of influence of state court precedents in certain federal cases, particularly those in which federal jurisdiction was based on the fact that the parties were citizens of different states.

[26] For a definition of "intracourt" see note 24 *supra.*

[27] *E.g.,* American Employers' Ins. Co. v. Yellow Cab Co., 49 Ill. App. 3d 275, 280, 364 N.E.2d 948, 952 (1977); Brockton Sav. Bank v. Shapiro, 324 Mass. 678, 684-85, 88 N.E.2d 344, 347 (1949); Davis v. Sharp, 30 N.Y.S.2d 441, 444 (Sup. Ct. 1941); M. ROMBAUER, LEGAL PROBLEM SOLVING 21 (3d ed. 1978). However, a few commentators have used the phrase "stare decisis" to refer to the general precedential impact of out-of-state decisions. Green, *The Development of the Doctrine of Stare Decisis and the Extent to Which It Should Be Applied,* 40 ILL. L. REV. 303 (1946); Shapiro, *Toward a Theory of Stare Decisis,* 1 J. LEGAL STUD. 125 (1972).

[28] *E.g.,* M. ROMBAUER, *supra* note 27.

kind from those of the precedents of hierarchically inferior courts. This analysis is illustrated herein by the Supreme Court's treatment of its own and Ninth Circuit precedents.

The very existence of the separate categories of stare decisis and non-stare decisis precedents suggests that there might be some difference in kind between them. Courts sometimes state that stare decisis precedents are "binding,"[29] but they never state that non-stare decisis precedents are "binding." An analysis of the concept of "bindingness" in the context of intracourt precedents might reveal a characteristic of those precedents not shared by persuasive precedents.

If a court is "bound" by its own earlier decisions, what is it "bound" to do? A court's own decisions might be "binding" on it in the sense that it was "bound" either to follow them or to take account of them in deciding whether to follow them. In both of these meanings, a court could be "bound" in the sense of being under a legal duty or a moral duty, or being compelled by necessity or by some unspecified force. No doubt, one function of the word "bound" is to blur all of these meanings.

With respect to its prior decisions, the most plausible meaning of "bound" is that a court is under a self-imposed legal duty. Such a self-imposed legal duty means that a court imposes on itself a rule prescribing that the court shall or shall not do something or shall do it only in a prescribed way.[30] If there is any such self-imposed rule governing an American court's treatment of its earlier cases, it is murky.

Distilled from the murkiness are the following possible self-imposed rules, each of which would establish a duty on a court with respect to its own precedents: (1) A court must follow intracourt precedents subject to specific exceptions. (2) A court must take following intracourt precedents into account as a positive factor influencing how it decides later cases. (3) A court must justify the failure to follow any intracourt precedents cited to it.

Historically, several courts have followed forms of the first suggested rule by requiring themselves to follow their own decisions unless specific conditions were met. For example, the House of Lords followed one such conditional rule from 1898 to 1966: the House required itself to follow its decisions unless they were inconsistent with a post-precedent act of Parliament.[31] The English Court

[29] *E.g.*, Brockton Sav. Bank v. Shapiro, 324 Mass. 678, 88 N.E.2d 344 (1949); Staten v. State, 191 Tenn. 157, 159, 232 S.W.2d 18, 19 (1950).

[30] *See* Hart, *supra* note 10, at 145.

[31] R. CROSS, PRECEDENT IN ENGLISH LAW 107-13 (3d ed. 1977). The same rule arguably

of Appeals (Civil Division) apparently follows another such rule: the Court requires itself to follow its decisions unless they were given *"per incuriam"* or were inconsistent with another of its decisions, with a decision of the House of Lords or with an act of Parliament.[32] Under such rules, both the House of Lords and the Court of Appeals have been both "bound" by their earlier decisions and under a "duty" to follow them, according to the ordinary usages of "bound" and "duty." This is true, even assuming both that the courts could have changed the rules at any time and that they have had a certain power of categorization in determining whether prior actions were inconsistent or *"per incuriam."* American courts have never articulated or followed any such rule when following or overturning intracourt decisions.[33] Thus American courts are not "bound" to follow intracourt precedents in the sense of having a "duty" under this first suggested rule. Therefore, the analysis to this point does not suggest a difference in kind in the impact of Ninth Circuit and Supreme Court precedents on Supreme Court decisions.

In contrast, the second suggested rule accords with the way American courts treat their prior published precedents. The second rule, that a court must take following its precedents into account as a positive factor influencing how it decides later cases, can be reformulated as follows: a court must follow intracourt precedents unless this would be inappropriate.[34]

However, as with the first suggested rule, this second suggested rule does not involve a difference in kind between judicial treatment of the published precedents of the deciding court and those of a hierarchically inferior court. Courts operate under a rule that they are obligated to give some weight to the desirability of following both kinds of precedents. Moreover, the tendency to follow both kinds of precedents advances the same purposes behind the princi-

existed before 1898. *Id.* Moreover, before 1966, the House of Lords may have recognized certain other exceptions to the flat rule of following earlier cases. R. CROSS, PRECEDENT IN ENGLISH LAW 130-33 (1st ed. 1961).

[32] R. CROSS, PRECEDENT IN ENGLISH LAW 113-16 (3d ed. 1977).

[33] *See, e.g.,* cases cited note 1 *supra;* Yates v. Lansing, 9 Johns. 395 (N.Y. 1811); D. CHAMBERLAIN, THE DOCTRINE OF STARE DECISIS (1885); Goodhart, *Case Law in England and America,* 15 CORNELL L.Q. 173 (1930). However, on occasion, American courts in effect have articulated the stare decisis duty as an obligation to follow certain precedents subject to *amorphous* exceptions. *E.g.,* United States v. Minnesota, 113 F.2d 770, 774 (8th Cir. 1940)("[T]he doctrine of stare decisis . . . should ordinarily be adhered to, unless the reasons therefor [apparently meaning for the precedential rule] no longer exist, are clearly erroneous, or manifestly wrong.")

[34] *Cf.* Hart, *supra* note 10, at 588 (suggesting that there is "a presumption in favor of refusal to re-examine past holdings, which should yield only to a strong showing of probable error"). *See also* note 33 *supra.*

ple of stare decisis; for example, predictability, efficiency, stability, impersonality, and uniformity of decision.[35]

The usage of "bound" that would be a corrollary to this second suggested rule is that a court is bound by a precedent if it takes following that precedent into account as a positive factor influencing its decision. Under this definition of "bound," the Supreme Court would be bound by both Ninth Circuit and its own published precedents because it takes following both such kinds of precedents into account as a positive factor influencing its decisions and does so to advance the same stare decisis purposes.[36] But this definition of "bound" seems strained. In particular, this definition would be uncustomary, as it would cover precedents (such as Ninth Circuit decisions in the Supreme Court) which are traditionally said to be "persuasive" but not "binding."

The third suggested rule with respect to intracourt precedents is that a court must justify the failure to follow any such precedents cited to it. Again, American courts operate on such a rule. They refer to their own in point precedents cited to them from which they are departing and they give reasons for their departure.[37] This rule differentiates stare decisis from non-stare decisis precedents because in justifying their decisions, American courts often fail to mention[38] non-stare decisis precedents from which they depart, even when such precedents have been cited to the court by counsel. Thus, this rule is the only one of the three which indicates a difference in kind between Supreme Court treatment of Ninth Circuit and its own opinions: the Supreme Court is not "bound" to mention Ninth Circuit decisions that it is overruling, but is "bound" to justify departing from its own precedents. Again, however, it somewhat twists ordinary word usage to say that a court's own precedents are "binding" merely because it is duty "bound" to justify its departure from them.

The French legal system offers an interesting comparison with respect to the above three rules. It is said both that the French courts do not follow the doctrine of stare decisis[39] and that they are

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[35] *See, e.g.*, E. BODENHEIMER, *supra* note 15, at 425-26; R. WASSERSTROM, *supra* note 8, at 60-81; Hart, *supra* note 10, at 587-88.

[36] *See, e.g.*, Bowen v. United States, 422 U.S. 916 (1975).

[37] *E.g.*, Pokora v. Wabash Ry., 292 U.S. 98 (1934).

[38] *E.g.*, Harris v. New York, 401 U.S. 222 (1971). In *Harris*, the petitioner cited to the Court the decisions of six federal courts of appeals and fourteen state appellate courts in support of his argument. *See* Brief for Petitioner at 12-13. Although Justice Brennan cited these decisions in his dissent, *see* 401 U.S. at 231 n.4, the majority did not mention them.

[39] R. DAVID, FRENCH LAW 55 (1972).

not "bound" by any judicial decisions.[40] The French courts follow neither the first nor the third suggested rules: there is *no* rule requiring them to follow the prior judicial decision of any court subject to specific exceptions;[41] and they need not justify the failure to follow any prior judicial decision.[42] Indeed, the Court of Cassations, the leading French appellate court, never mentions any judicial precedents in its opinions.[43] Moreover, the French courts are prohibited from stating rules of law to justify their results except for rules already stated in statutes.[44] In contrast, the French courts do follow the second suggested rule in that they do in fact give some weight to the desirability of following earlier judicial decisions.[45] In summary, the formal precedential authority of French judicial decisions is most like the authority of Ninth Circuit decisions in the Supreme Court: only the second rule is followed with respect to such decisions and they are said to be not stare decisis and not "binding."

One plausible explanation for the existing usage of "binding" and "persuasive" with respect to American precedents is historical. In English law prior to 1966, if the precedential court was the same as, or hierarchically superior to, the decisional court, then the decisional court followed the first rule articulated above: it was required to follow the earlier decisions, subject to specific exceptions.[46] Thus, these English precedents were "binding" in the ordinary language meaning of "binding." The American courts and commentators may simply have borrowed the English categories. They may have followed the English pattern in categorizing together as "binding" both intracourt decisions and decisions by hierarchically superior courts, even though they did not follow the English rule requiring courts to follow intracourt decisions subject to specific exceptions. Thus, the present American usage of "binding" and "persuasive" may be an historical anomaly.

Another plausible explanation for the division of American precedents into categories of stare decisis and non-stare decisis is that the division served rhetorical functions. Even if the origin of the categories in American law was primarily historical, the retention of the categories largely serves rhetorical functions. These rhetorical

[40] *Id.* 182. Doctrines analogous to res judicata and the law of the case are exceptions which are beyond the purposes of this article.

[41] *Id.* 179-88.

[42] *Id.*

[43] *Id.* 180.

[44] C. CIV. art. 5; R. DAVID, FRENCH LAW 180 (1972).

[45] R. DAVID, FRENCH LAW 183-88 (1972).

[46] R. CROSS, PRECEDENT IN ENGLISH LAW, 103-46 (1st ed. 1961).

functions will be explored later in the article.

In conclusion, the categories of stare decisis and non-stare decisis precedents create an illusion of noncontinuity. Instead, it is helpful to visualize the degree of influence of precedents as varying continuously along a line from the slightest influence to the greatest influence. Many factors,[47] such as a precedent's age,[48] affect at what point on this line the precedent would be placed. One of the most important factors affecting the position on this continuum at which a decisional court would place a precedent is the decisional court-precedential court relationship. There are thousands of such relationships, each creating a slightly different degree of deference toward a precedent. Judges differ somewhat, both about at what point on the continuum they would place each precedent and about the order in which they would rank precedential courts in terms of influence.

The position on the continuum at which a judge would place a precedent depends largely on his perception of the bearing of the various purposes of stare decisis, such as neutrality, predictability, and uniformity. These stare decisis purposes push toward deference toward all precedents, both "binding" and "persuasive"; but the importance of these purposes varies with each precedential court-decisional court relationship. The same stare decisis purposes are relevant in analyzing the referents of "decisis."

INDETERMINATE REFERENTS OF DECISIS

In the phrase "stare decisis," the referents of "decisis" are indeterminate. More precisely, opinion is divided concerning what parts of earlier cases are to be followed under stare decisis.[49] Frequently, jurists[50] do not seem to be aware of this division of opinion.

Jurists typically assume that the term "decisis" (or "decisions") stands for one or both of two[51] referents. In this article, these two stare decisis concepts will be called "rule stare decisis" and "result

[47] A discussion of several such factors can be found in M. ROMBAUER, *supra* note 27, at 40-43.

[48] On the relevance of the age of a precedent, see Landes & Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249 (1976).

[49] *E.g.*, E. BODENHEIMER, *supra* note 15, at 432-39; M. ROMBAUER, *supra* note 27, at 45-76; Sartorius, *The Doctrine of Precedent and the Problem of Relevance*, 53 ARCHIVES FOR PHILOSOPHY OF L. & SOC. PHILOSOPHY 343 (1953).

[50] The word "jurists" denotes both commentators and judges.

[51] The author acknowledges that it is somewhat artificial to force the referents of "decisis" into two categories. Nevertheless, this dichotomy is useful for purposes of presentation.

stare decisis."[52] Jurists commonly embrace "rule stare decisis" by explicitly or implicitly assuming that "decisis" denotes judicial decisions to adopt certain rules.[53] They sometimes embrace "result stare decisis" by explicitly or implicitly assuming that "decisis" denotes judgments[54] or other judicial orders given in light of the material facts.[55]

Rule Stare Decisis

As previously discussed,[56] appellate courts commonly apply rules to facts to justify their judgments. Under rule stare decisis, a court follows stare decisis when it adheres to these rules of law expressly stated in "binding" precedents.

For example, under rule stare decisis, a court adheres to *Argersinger v. Hamlin*[57] when it expressly applies the generalization that absent "waiver, no person may be imprisoned for any offense, . . . unless he was represented by counsel at trial."[58] Under rule stare decisis, there should be no judicial decisions which distinguish *Argersinger* on its facts[59] and imprison an unrepresented criminal defendant. In fact there have been no such reported decisions.[60]

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[52] For an earlier analysis of these two concepts, see Hardisty, *supra* note 7, at 532-34.

[53] *E.g.*, Kirby v. Illinois, 406 U.S. 682, 683 (1972) (plurality opinion by Stewart, J.); Duncan v. Louisiana, 391 U.S. 145, 184 n.24 (1967) (Harlan, J., dissenting); Hudson v. Guestier, 10 U.S. (6 Cranch) 281 (1810); Groshart v. United States, 392 F.2d 172 (9th Cir. 1968); K. LLEWELLYN, THE COMMON LAW TRADITION 79 (1960); Oliphant, *A Return to Stare Decisis*, 14 A.B.A.J. 71 (1928); Owens, *supra* note 15; *accord*, R. CROSS, *supra* note 32, at 76-79, 103-06.

[54] In this article, the word "judgment" means "the ultimate order of a court." Montrose, *supra* note 17. This is the usual American meaning of "judgment." *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 269-72 (1978). In Britain, "judgment" usually means "the entire judicial utterance containing both [the ultimate order of the court] and the judges' reasoning leading to the [order]." Montrose, *supra* note 17, at 310-11.

[55] *E.g.*, Harris v. New York, 401 U.S. 222 (1971); Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953)(per curiam); State v. Butler, 19 Ohio St. 2d 55, 249 N.E.2d 818 (1969); K. LLEWELLYN, *supra* note 53, at 78, 86; Brilmayer, *Judicial Review, Justiciability and the and the Limits of the Common Law Method*, 57 B.U.L. REV. 807, 813 (1977); Sartorius, *supra* note 49; *accord*, R. CROSS, *supra* note 32, at 60, 103-06.

[56] See notes 12-22 & accompanying text *supra*.

[57] 407 U.S. 25 (1972).

[58] *Id.* at 37. See note 16 & accompanying text *supra*.

[59] Argersinger was sentenced to 90 days in jail for carrying a concealed weapon, an offense punishable by imprisonment up to 6 months and/or a $1,000 fine.

[60] This conclusion is based on the author's research in the reported cases. *Cf.* Ingraham, *The Impact of Argersinger—One Year Later*, 8 LAW & SOC'Y REV. 615, 623, 637 (1974) (noting that impact studies reveal little deliberate evasion of *Argersinger* and that those few recalcitrant courts are apparently ignoring *Argersinger* rather than distinguishing it on its facts). There are reported decisions limiting the scope of *Argersinger* to its justifying rule. *E.g.*, Scott v. Illinois, 99 S. Ct. 1158 (1979); Rollins v. State, 299 So. 2d 586, 588-89 (Fla.), *cert. denied*, 419 U.S. 1009 (1974); Mahler v. Birnbaum, 95 Idaho 14, 501 P.2d 282, 283 (1972).

Indeed, rule stare decisis is such a strong part of our system, at least where the rule is unambiguous and clearly formulated to control future court decisions, that it would be surprising if any prosecuting attorneys have argued that *Argersinger* should be limited to its facts in order that an unrepresented defendant could be imprisoned.

Prospective holdings furnish other examples of the judiciary embracing rule stare decisis. Especially pertinent are those cases in which a court announces a new rule of law, to be followed in the future, but applies the old rule of law to the case at bar.[61] In these cases a court tells later judges to follow the promulgated rule and ignore the result. It is particularly clear that such a court is itself implicitly defining stare decisis to mean rule stare decisis.

These judicial definitions of stare decisis are the most crucial ones. To be sure it is an interesting question to what extent the rules of stare decisis are either judicial inventions or, in contrast, inherent in the nature of adjudication. This latter natural law aspect of stare decisis rules is suggested by the tendency of French courts to adhere to judicial decisions in opposition to orthodox theory.[62] It is also suggested by the advantages to decisionmaking bodies of incrementalism, given that stare decisis is a form of incremental decisionmaking.[63] However, in the last analysis, judges themselves have the power to decide to what part of earlier decisions they will adhere.

Commentators have criticized judges for adhering (or purporting to adhere) to judicial rules rather than judicial results.[64] This criticism has been part of the general academic attack[65] on rules in particular, and formality in general. These commentators, who attack rule stare decisis, appear to assume implicitly that courts ought not to frame and follow a rule of law that will facilitate "private orderers"[66] and others but rather ought to seek solely the most just solution for the immediate litigants. However, these criticizing commentators have left the reasons behind rule stare decisis unexplored.

In the face of this criticism courts generally have continued to

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[61] *E.g.*, Great N. Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358 (1932); State v. Jones 44 N.M. 623, 107 P.2d 324 (1940).

[62] R. DAVID, FRENCH LAW 182-88 (1972).

[63] Shapiro, *Stability and Change in Judicial Decision-Making: Incrementalism or Stare Decisis*, 2 LAW TRANSITION Q. 134 (1965).

[64] *E.g.*, Oliphant, *supra* note 53; Radin, *The Trail of the Calf*, 32 CORNELL L.Q. 137 (1946).

[65] *E.g.*, T. ARNOLD, *supra* note 11. *See generally*, 1 R. POUND, JURISPRUDENCE 195-287 (1959); W. PROBERT, LAW, LANGUAGE AND COMMUNICATION 3-23 (1972); M. WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM (new ed. 1957); Powers, *Formalism and Nonformalism in Choice of Law Methodology*, 52 WASH. L. REV. 27, 28-37 (1976).

[66] This phrase is from Hart, *supra* note 10, at 183.

follow the rules applied in precedents.[67] An important part of the explanation for this judicial tendency lies in the reasons for the syllogistic form of legal argument and for stare decisis itself.

There are several reasons why articulation of a justifying rule constitutes part of the paradigmatic appellate court opinion.[68] One reason is that such articulation better allows the appellate court to shape future decisions by citizens, attorneys, governmental officials, and lower court judges. From the perspective of those guided by the rules, an appellate court's articulation of the rule of law for which its opinion stands increases the predictability of future court decisions, thereby facilitating decisions whether and how to act, to settle, and to litigate. Such increased predictability tends to reduce litigation and increase the efficient operation of the judicial system. Such articulation of rules of law also serves to increase the uniformity, deliberateness, correctness, impersonality, and objectivity of judicial decisions, serving as a check on judicial arbitrariness and bias. The generalization of judicial results increases not only the actuality but also the appearance of these benefits, thereby increasing public acceptance of the judiciary and of the law.

Appellate courts articulate rules of law for the same reasons that they follow the principle of stare decisis. The reasons of guidance, predictability, efficiency, uniformity and impersonality,[69] which explain why courts articulate rules of law in the first place, also explain why courts adhere to those rules in later cases. If there were no tendency to adhere to the rules, they would only be a snare for those who relied on them since they were set out for the very purposes of guidance and predictability. The courts, having articulated the rules in order to increase efficiency, uniformity and impersonality, must generally follow the rules in order to achieve these values. Moreover they must appear to follow the rules in order to appear to achieve these values. Thus, the same factors that explain why a court applies rules to facts to justify its judgment also partially explain why precedential justifying rules are among the referents of decisis in stare decisis.

[67] *E.g.*, Scott v. Gossett, 66 Idaho 329, 335-36, 158 P.2d 804, 807 (1945); American Employers' Ins. Co. v. Yellow Cab Co., 49 Ill. App. 3d 275, 364 N.E.2d 948, 952 (1977); Horne v. Moody, 146 S.W.2d 505, 509 (Tex. Civ. App. 1940). These three cases all define stare decisis in terms of standing by a judicially articulated rule.

[68] Similar arguments can be made as to why the typical trial court opinion also contains a justifying rule.

[69] For examples of commentators articulating these factors as justifications for stare decisis, see E. BODENHEIMER, *supra* note 15, at 426-27; R. WASSERSTROM, *supra* note 8, at 60-79; Hart, *supra* note 10, at 587-88.

French judicial practice offers an instructive comparison. The French judicial system rejects both judicial promulgation of rules and stare decisis.[70] The French Civil Code prohibits judges from setting forth judge-made rules of law in their opinions.[71] Any other position would be inconsistent with French rejection of stare decisis, since there is no reason to articulate justifying rules if there is no tendency to adhere to the rules in later cases. The French courts do justify their results by reference to statutory rules and do accept an obligation to adhere to statutes.[72] This French rejection of the American judicial practice of articulating and following judicial rules is seemingly both a cause and a result of the fact that French judges have less power and prestige[73] than American judges.

American judges see value in standing by an announced judicial rule. Of course, they often see competing values to be weighed against the advantages of adhering to such a rule. Since one of the main reasons for articulating a rule is future guidance, judges are sometimes reluctant to articulate a rule: they may instead choose to keep future decisions open and to prevent others from relying on an unreliable standard.

Result Stare Decisis

Under result stare decisis, a court adheres to an otherwise "binding" precedent regardless of whether it adheres to its justifying rule, as long as similarity in results follows similarity in facts and a difference in results reflects a difference in facts. An example of result stare decisis is furnished by the way *Baltimore & Ohio Railroad v. Goodman*[74] was adhered to in *Pokora v. Wabash Railway Co.*[75] In *Goodman*, the Court adopted the justifying rule that "if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look."[76] The Court then concluded that because the truck driver in that case had neither stopped nor gotten out of his vehicle

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[70] R. DAVID, FRENCH LAW 179-83 (1972).

[71] *Id.* 180; C. CIV. art. 5.

[72] R. DAVID, FRENCH LAW 155 (1972).

[73] In support of the assertion that French judges have less power and prestige than American judges, *see generally id.*; J. MERRYMAN & D. CLARK, COMPARATIVE LAW 551-649 (1978); Salmond, *The Theory of Judicial Precedents*, 16 LAW Q. REV. 376 (1900).

[74] 275 U.S. 66 (1927).

[75] 292 U.S. 98 (1934).

[76] Baltimore & O.R.R. v. Goodman, 275 U.S. 66, 70 (1927).

before he was hit by a train at a railroad crossing he was contributorily negligent as a matter of law. In *Pokora*, the Court explicitly abandoned the justifying rule of *Goodman*, adopting instead a new rule and applying it to overturn judgment for Wabash Railway Co. The Court found the difference in results between *Goodman* and *Pokora* was justified by a difference in facts. The Court further stated that the "result" in *Goodman* was "correct,"[77] indicating that this same result would have been reached in *Goodman* if the *Goodman* court had adopted the justifying rule of *Pokora*. The Court in *Pokora* did not purport to be "overruling" *Goodman* although it did acknowledge limiting it.

Several factors explain why courts sometimes follow result stare decisis. First, in articulating the earlier rule, the earlier court may not have had certain later disputes in mind.[78] Second, even if it had them in mind, the adversary method produces data and arguments more pertinent to a good adjudication of the dispute before the court than to good adjudications of other disputes which would be covered by the justifying rule. Third, the earlier rule may have been an unsuccessful experiment.[79] Fourth, a later judge may be able to reformulate a precedential rule in a way that better achieves its purposes.[80] This capacity of a later judge to fine tune a rule may in part be due to feedback the judge obtained from the operation of the original rule. Fifth, social conditions and values may have changed from the time the earlier rule was laid down. In general, these same needs for flexibility in judicial decisions explain not only why courts sometimes follow result stare decisis but also why they occasionally overrule earlier cases.

Distinction Between Holding and Dictum

The problem of the distinction between holding and dictum is a sub-aspect of the problem of the referent of decisis. Under rule stare decisis, decisis refers only to those precedential rules of law labeled "holdings" (or "rationes decidendi") not to those labeled "dicta."[81] Indeed, the word "dictum" itself points toward rule stare decisis rather than result stare decisis: "dictum" implies that some rules of law articulated by the precedential court are not dictum; such non-dictum rules are, by implication, binding.

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[77] Pokora v. Wabash Ry., 292 U.S. 98, 102 (1934).

[78] *See, e.g.*, Radin, *supra* note 64.

[79] *See, e.g.*, Shapiro, *supra* note 63.

[80] *See, e.g.*, K. LLEWELLYN, *supra* note 53, at 99, 298 *passim*.

[81] *See, e.g.*, Staten v. State, 191 Tenn. 157, 159-60, 232 S.W.2d 18, 19 (1950).

In customary usage, the concepts "holding" and "dictum" are used in the following way: Every legal rule stated in an opinion can be classified in one or the other of two mutually exclusive categories labeled "holding" and "dictum." Some legal rules not stated in a precedential opinion, but for which the precedent can be said to stand, are also placed in the "holding" category.[82] A rule of law that is the "holding" of a case is "binding" and stare decisis, whereas a rule which is only "dictum" is not "binding" and not stare decisis.[83] A dictum is a judicial statement of a legal rule which was not "necessary" to the judicial result.[84]

The last statement is the most popular definition of dictum.[85] Its popularity seems due to the ambiguity in the word "necessary." Under one meaning of necessary, a precedential rule of law was unnecessary if the precedential court could have reached the same result by applying a different (often narrower) rule of law.[86] This meaning of "necessary" is very popular, since by means of it the derogatory label dictum can be applied to devalue any precedential rule of law: every precedential result can be justified by a different rule than that employed by the precedential court. Under this popular construction of "necessary" a court can both pay verbal deference to rule stare decisis, and at the same time, achieve de facto the advantages of result stare decisis because it may call any undesired precedential rule "unnecessary" and therefore "dictum" and therefore not "binding."

There are a number of factors which make a rule of law for which a case stands more persuasive. In effect, the words "holding" and "dictum" are employed to indicate that one or more of these factors are present or absent with respect to a rule of law and thus to intimate reasons for regarding or disregarding the rule. For example, a precedential rule is more persuasive if it was explicitly articulated in the precedent. Moreover, if the rule was articulated in the precedent, it is made more persuasive by each of the following circumstances: The rule was necessary to the result in the sense that the court set forth no alternative rule to justify its result.[87] The rule was necessary to the result in the sense that the opposite party would

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[82] *See, e.g.*, E. WAMBAUGH, *supra* note 15, at 20-28.

[83] *See, e.g.*, United States v. Polan Indus., Inc., 196 F. Supp. 333, 337-38 (S.D.W. Va. 1961); Staten v. State, 191 Tenn. 157, 159-60, 232 S.W.2d 18, 19 (1950).

[84] *See, e.g.*, Knight v. State, 273 Ala. 480, 486, 142 So. 2d 899, 905 (1962); Rodriguez v. Cascade Laundry Co., 185 Kan. 766, 770, 347 P.2d 455, 458 (1959).

[85] *See, e.g.*, cases cited note 84 *supra*.

[86] *See, e.g.*, Rodriguez v. Cascade Laundry Co., 185 Kan. 766, 347 P.2d 455 (1959).

[87] *See, e.g.*, Knight v. State, 273 Ala. 480, 486, 142 So. 2d 899, 904-05, (1962).

have won if the court had adopted the opposite rule.[88] The rule was necessary to the result in the sense that the court applied the rule to the facts to justify its result.[89] (Or, alternatively, the rule was necessary to the result in the sense that the court set it forth as part of the chain of reasoning by which it derived the rule which it applied to the facts to justify its result.) The rule was necessary to the result in the sense that it was narrowly confined to the facts. Each of the above factors makes a rule of law more persuasive and thus more likely to be laudatorily labeled as a holding. These factors make the rule of law more persuasive because they indicate it was more central to the precedential court's tasks: it was more a necessary by-product flowing from the judicial tasks of adjudicating cases and generalizing each result by stating a justifying rule.[90]

In summary, a rule of law labeled holding is deemed more influential in later decisions than a rule of law labeled dictum. The primary difference between holding and dictum seems again to be a difference in degree of precedential influence disguised as a difference in kind. Again, if there is any difference in kind between holding and dictum, it is unclear what it is.

No Referent of Decisis

Perhaps "stare decisis" should not be analyzed into two words with each word having a referent. The courts have not so divided the phrase. Instead, "stare decisis" might be seen as a single phrase standing for a general theory of "binding" precedent.

Usage of the word "overruling" furnishes a clue to one such theory. "To overrule a decision" is used as an antonym of "stare decisis." If courts distinguish precedents by either result stare decisis or rule stare decisis, they do not say that their decisions "overrule" the precedents. Instead they maintain that their decisions are consistent with the principle of "stare decisis" if they distinguish all precedents on either basis.

To elaborate, under result stare decisis, a court does not "overrule" a precedent if it adopts a new justifying rule which is consistent with the results in both the precedent and the case at bar even though its result is inconsistent with the justifying rule of the precedent. *Pokora*[91] is an example.

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[88] E. WAMBAUGH, *supra* note 15, at 17-18.

[89] *See, e.g.*, Montrose, *supra* note 17, at 326-27.

[90] See notes 12-22 & accompanying text *supra*.

[91] Pokora v. Wabash Ry., 292 U.S. 98 (1934).

Similarly, under rule stare decisis, if a court in a later case adopts a new justifying rule which was not considered in the precedent, it does not purport to "overrule" the precedent as long as the court adheres to the precedential justifying rule, even if the new justifying rule is inconsistent with precedential result. For example, prior to *Furman v. Georgia,*[92] the United States Supreme Court repeatedly had affirmed judgments involving the imposition of the death penalty against a variety of constitutional challenges.[93] Until *Furman,* however, the Court had never considered whether the death penalty itself violated the constitutional prohibition on governmental imposition of cruel and unusual punishment.[94] The Court concluded in *Furman* that the cruel and unusual punishment clause at least partly outlawed the death penalty. In so doing the Court necessarily rejected the implicit assumption of these precedents that the death penalty itself was constitutional. Among the opinions supporting the Court's judgment in *Furman,* the justifying rule in each justice's opinion was inconsistent with the results of these earlier capital punishment cases. However, because these precedents had not explicitly decided whether to adopt a rule that capital punishment constituted cruel and unusual punishment in some or all cases, none of the justices in *Furman* indicated that the Court was overruling these precedents.

Bouie v. City of Columbia[95] is a second example of rule stare decisis in which the Court did not purport to "overrule" precedents although it adopted a new justifying rule which was inconsistent with precedential results. In *Bouie* the Court held for the first time that a state court violated the due process clause[96] by expanding a criminal statute retroactively. This rule is inconsistent with the results of uncited earlier Supreme Court decisions[97] which had affirmed judgments based on state court retroactive enlargement of criminal statutes. The Court had only "decided" in those earlier cases that retroactive judicial enlargement of criminal statutes did not violate the constitutional provision prohibiting states from passing any "ex post facto law."[98] The opinions in those earlier cases

[92] 408 U.S. 238 (1972).

[93] *E.g.,* McGautha v. California, 402 U.S. 183 (1971), *vacated in part sub nom.,* Crampton v. Ohio, 408 U.S. 941 (1972); Williams v. New York, 337 U.S. 241 (1949).

[94] The Court has interpreted the 8th and 14th amendments of the Constitution to prohibit state imposition of cruel and unusual punishment. *E.g.,* Coker v. Georgia, 433 U.S. 584 (1977); Robinson v. California, 370 U.S. 660 (1962).

[95] 378 U.S. 347 (1964).

[96] U.S. CONST. amend. XIV, § 1.

[97] Frank v. Mangum, 237 U.S. 309, 344 (1915); Ross v. Oregon, 227 U.S. 150, 161 (1913).

[98] U.S. CONST. art. I, § 10.

did not consider whether to adopt the rule of *Bouie* that such laws violated the due process clause, although again the results of those cases implicitly rejected such a rule. The Court in *Bouie* did not purport to "overrule" those cases seemingly because it implicitly accepted their justifying rule while rejecting their results.

To summarize, it is consistent with judicial usage of "stare decisis" to say that a case is consistent with earlier precedents and with the principle of stare decisis if the precedents are distinguished by means of either result stare decisis or rule stare decisis. Thus, one theory of stare decisis is that it obligates the court to defer either to the results of the precedent or to the ratio decidendi of the precedent.[99] If a court decides a case consistently with either the result or the rule of a precedent, it can assert that it is following the true spirit of stare decisis because it can answer "no" to the basic question posed by the principle of stare decisis: Has this been decided before? If the precedent had either materially different facts from the case at bar or did not consider the justifying rule of the case at bar, then in a real sense the decisional court is pondering how to decide a question that has never been decided.

Variation in Referent of Decisis

The development of the technique of prospective overruling is inconsistent with the theory of stare decisis set forth in the previous subsection. Courts have not, and seemingly would not, establish a rule of law by a prospective holding and then later reject that rule by substituting a new rule while maintaining that it was not overruling the earlier case. The more clearly the precedential court has created reliance interests by adopting rule stare decisis in its opinion, the more hesitant a decisional court would be to adopt a different theory in its opinion.

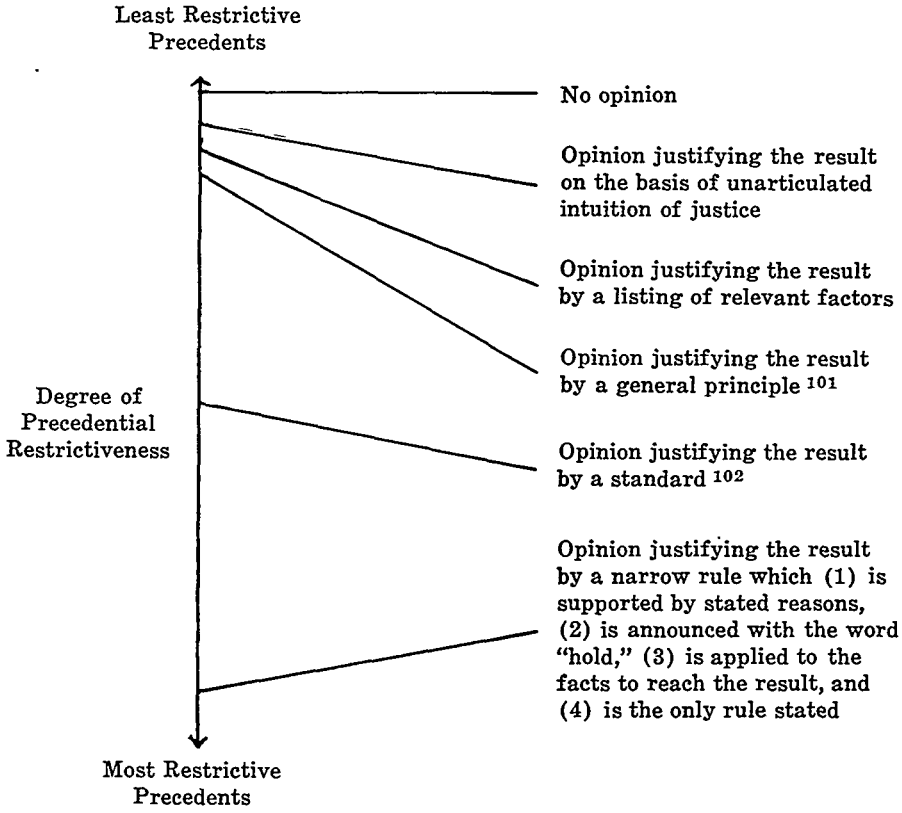
In general, there appears to be a continuum of the extent to which courts tie themselves and inferior courts down for the future when deciding a case. This is illustrated by Table II.

Thus, the precedential opinion affects whether future courts will emphasize rule stare decisis or result stare decisis. If the precedential court has laid down a narrow rule for predictability, this will push toward interpretations of that opinion based on rule stare decisis. This tendency will be especially marked if the advantages of the rule flow only if private orderers follow the rule or if the form of

[99] Wambaugh's theory of precedent was somewhat similar to this theory. E. WAMBAUGH, *supra* note 15.

TABLE II [100]

CONTINUUM OF RESTRICTIVENESS OF PRECEDENTS CATEGORIZED IN TERMS OF THE FORM BY WHICH THE PRECEDENTIAL COURT JUSTIFIES ITS RESULTS



the rule is designed to encourage reliance on it. In contrast, if the opinion in the first case was unconcerned with predictability, this will point to result stare decisis.

Stare decisis can be understood better by thus recognizing that in writing opinions, judges are often not trying to be as precise as

[100] Of course a variety of other factors affects the restrictiveness of a precedent. For example, reported precedential results and opinions are more restrictive than unreported ones. In addition, precedential results and rules are more restrictive to the extent they are more consonant with sound reasons and societal values. *See also* Table I at note 24 *supra*.

[101] A principle is a very vague legal proposition. *See, e.g.*, Pound, *supra* note 10; Hart, *supra* note 10.

[102] A standard is a somewhat vague legal proposition. *See, e.g.*, Pound, *supra* note 10; Hart, *supra* note 10.

possible.[103] Instead they are reaching for the right degree of vagueness. They seek properly to balance predictability and flexibility in light of the times, the subject area and the purposes of the law. Indeed just as the vague statutory prohibition of "unfair methods of competition"[104] is a way of delegating power to the Federal Trade Commission, so a vague judicial standard is a way of delegating power to future courts.

However, even if a precedential court has applied a vague standard, such rule stare decisis purposes as uniformity and predictability are still important. For example, there is considerable vagueness in the reasonable person tort standard: A person is generally liable for the damages caused by his acts if his acts fell below the behavioral standard of a reasonable, prudent and ordinary person under similar circumstances.[105] This standard is so vague that there is limited uniformity and predictability of results in cases to which it is applied. Nevertheless, adherence to this reasonable person formula contributes to uniformity of decision because it contributes to uniformity of procedure in similar cases. In one sense like cases are decided alike if like cases are decided by like decisionmaking procedures. For example, the results may be different in jury trials of two similar negligence cases, but the two cases are decided alike in the procedural sense that the same verbal formula was given to a jury in both cases. This predictability of what verbal formula will be followed in jury instructions may also contribute slightly to the predictability of the result.

In summary, when the justifying rule of a decision is vague, there is less of a tendency to stand by it than when it is precise because it is less designed for reliance. But there is some desirability in standing by a vague justifying rule to facilitate evenhandedness and predictability of procedure.

Conclusion

The categories of binding and persuasive parts of a precedent make a continuous relationship falsely appear to be a dichotomous one. Instead of using these categories, it is more helpful to see the amount of influence of parts of precedents varying continuously along a line from the least influential to the most influential.[106]

[103] Similar ideas have been expressed in related contexts. *E.g.*, Curtis, *A Better Theory of Legal Interpretation*, 3 VAND. L. REV. 407 (1950); Hart, *supra* note 10, at 125-29, 155-60.

[104] Federal Trade Commission Act, § 5, 15 U.S.C. § 45 (1976).

[105] W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 32, at 150 (4th ed. 1971).

[106] Llewellyn similarly concluded that our precedential system involves differences of de-

Thousands of factors and interactions, some of them previously mentioned,[107] influence where on this continuum a decisional court would place each part of each precedent. For example, one factor affecting the degree of deference that a decisional court would pay to a part of a particular precedent would be whether the part was a justifying rule.

In determining what weight to give each part of each precedent, courts naturally resort to their visions of the purposes behind the principle of stare decisis, such as uniformity and neutrality. As discussed above these purposes behind stare decisis support some judicial deference toward all precedents. These same stare decisis purposes point toward deference towards all parts of a precedent. Uniformity and neutrality are furthered by some deference to every precedential result, to every precedential rule, and to every reason cited in a precedent in support of a rule.

In summary, in this area, too, the stare decisis categories create illusions. We are again confronted with the problem of determining what function these illusions serve.

EXPLANATION OF STARE DECISIS USAGE

There are many reasons why stare decisis is such a vague and confusing concept. The vagueness of stare decisis is functional; it allows judges flexibility to adapt the law to new conditions.[108] A vague stare decisis concept is also functional because it provides a rubric under which judges of conflicting views can coalesce. A judge's theory of stare decisis is dependent on the judge's theory of law. Because judges have different visions of the nature of law, they will have different resulting assumptions about how stare decisis should and does work. They will have different presumptions about how much decisional courts should and do defer to various precedential courts. They will have different beliefs about what it is in an earlier decision that later judges should and do stand by. There is a need for a concept such as "stare decisis" which is formally adhered to by judges and yet is vague enough to encompass the disparate precedential theories held by different judges. In the law's house, there are many mansions.

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gree as indicated by his "Law of Leeways": "[T]he degree of need dictates the degree and manner in which it is really correct and proper to exploit the formally available correct and proper techniques for handling authorities." K. LLEWELLYN, *supra* note 53, at 22-23.

[107] See notes 87-90 & accompanying text *supra*.

[108] For a more general discussion, see notes 78-80 & accompanying text *supra*.

Stare decisis is a confusing concept because keeping this vagueness hidden serves rhetorical functions.[109] Categories such as binding-persuasive and holding-dictum help to hide the vagueness. Similarly, the particular categorical labels, such as "stare decisis," "binding," and "persuasive," also help to hide the vagueness.

The law gains from the *appearance* of restrictions on judges, predictability, and deciding like cases alike. The stare decisis categories and labels serve rhetorical functions by *seeming* to increase the amount of such restriction, predictability and fairness. For example, both the categories themselves and such labels as "binding" suggest that courts are more restricted by past precedents than they are in fact. The categories and labels thus increase the *apparent* force of legal restrictions on the judiciary which in turn increases public acceptance of both judicial pronouncements and other law. To the extent that judges *appear* to be "bound" by the law, litigants and the general public will tend to accept the law as "binding" on themselves as well.

More generally, the stare decisis categories and labels tend to disguise differences in degree as differences in kind. When legal differences in degree are successfully disguised as differences in kind, then the apparent predictability and fairness of law increase.

Legal participants, like people generally, consciously or unconsciously tend to present themselves and their work product in a favorable light. In thousands of ways legal participants have created a greater illusion of legal certainty than there has been in actuality. Legal language, explanations and justifications are partly real and partly illusion. The part that is illusion will always exist because it is to the advantage of the law and of legal participants to give a greater appearance of predictability and fairness than there is in reality. Although flexibility needs to be sacrificed to obtain predictability and uniformity, it need not be sacrificed (as much) to obtain the *appearance* of predictability and uniformity. So, by their choices of words, concepts, and theories, legal participants tend to create a greater illusion of certainty than there is in reality. The law's functions of controlling behavior and resolving disputes are furthered if the law appears predictable and fair. The power exercised by judges as elite, nonelected officials is more acceptable to the public if it is masked. The retention of the categories and phrases "stare decisis," "bound," "persuasive," "holding," and "dictum" serves these rhetorical functions.

[109] On the rhetorical functions of law, *see generally* W. PROBERT, *supra* note 65; Hardisty, *Mental Illness: A Legal Fiction*, 48 WASH. L. REV. 735 (1973).

In particular, the often unacknowledged multiplicity of referents of decisis serves these functions of beclouding subsurface judicial maneuvers. Courts say that they are standing by precedents if they stand by the announced rule but come to a different judgment on the same facts by adopting a previously unconsidered rule. Courts also say that they are standing by precedents if they abandon the announced rule but stand by precedential results. In both cases, judges are putting their decisions forth clothed with stability. Since judges define stare decisis, in both cases they *are* following stare decisis by *saying* that they are following stare decisis if they follow any part of a prior decision.

Another aspect of understanding why there are many referents of decisis grows out of the relationship between stare decisis and our adversary system. An attorney in a lawsuit seeks to buttress his arguments with as much authority as possible. He sees earlier cases as devices for showing that his arguments have been previously accepted. Ideally he will seek to rely on earlier cases in which the facts were the same as the instant case; the result was the same as the result the attorney seeks in the instant case; the earlier court explicitly articulated and applied a rule of law which would require the result the attorney seeks in the instant case; and the earlier court stated reasons for adopting the rule which also apply in the instant case. But lacking such cases on all fours, an attorney will adhere to as much of earlier cases as is helpful to his arguments. If the facts and results of the earlier case were similar, an attorney will rely on them even though no rule was given. If the rule articulated in the earlier case produces the sought for result in this case, an attorney will use it to buttress his position even though the facts were inapposite and no reasons were given. If the reasons given in an earlier case are helpful to an attorney's position, he will rely on them and ignore vast differences in the pertinent facts and rules of law.

But there are two sides to the adversary system. An attorney trying to undercut judicial reliance on an earlier case will distinguish it in as many ways as possible. If the rule of law applied in the earlier cases literally covers this case but the facts are distinguishable, the rule of law will be stigmatized as mere dictum for being unnecessary (unnecessarily broad) to the earlier decision. If the facts of the earlier case were similar and the results unfavorable, the attorney may advance new rules of law or new reasons not considered in the earlier case and distinguish it because they were not considered.

So the uses lawyers make of authorities in briefs and otherwise

depend to a considerable extent on the lawyers' rhetorical purposes. An attorney relying on an authority will rely on all relevant similarities; an attorney distinguishing an authority will rely on all relevant differences (and often some irrelevant differences).

When the judges come to write an opinion justifying their result, the same tendency to use authority rhetorically will be present as with practicing lawyers, but to a muted extent. There is some tendency for courts to borrow arguments and treatments of authority from the winning brief. Beyond that, an opinion is a quasi-brief. It is an instrument of persuasion as well as description. It seeks to convice other judges on the court that the result is right in order to gather and hold their votes; it seeks to persuade the parties and attorneys that they received fair treatment; it seeks to persuade the public, the bar, and judges making future decisions that the result was right.[110] Of course, the author of the opinion will also be trying to convince himself that the result is right.

Because of these persuasive functions of opinions, in writing an opinion each judge consciously or unconsciously strives to convince himself and others of the high predictability of the resulting judgment. He also strives to persuade everyone that the result and justifying rule are harmonious with the rest of law and thus that like cases are being decided alike.

In view of the advantages of the actuality and appearance of adhering to and harmonizing with authorities, judges will seek to support their result by pointing to similarities of fact, rule or reason articulated in earlier cases or, if possible, some combination of these. Similarly, opinions will emphasize the ways in which they are adhering to earlier cases even when they are following the authority in part and undercutting it in part. If they can distinguish the facts or the rule of the earlier case, then they may claim that they are not overruling the earlier case, but instead are following stare decisis.

Thus the multiplicity of referents of decisis serves the persuasive purposes of judges and practicing lawyers and would seem to be endemic to an adversary system based on justification in terms of similarity to and differences from prior decisions.

Another possible reason for dichotomous stare decisis categories is that the human mind might have a natural affinity for dichotomous thinking.[111] Thus, people might have a tendency to impose dichotomous categories such as "binding" and "persuasive" on relationships that are continuous.

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[110] For a similar list, see K. LLEWELLYN, *supra* note 53, at 132.

[111] There is a "proneness in the human mind to attack problems by binary classification." E. WILSON, ON HUMAN NATURE 181 (1978).

Moreover, "reason" has a high honorific value in law. The employment of mutually exclusive categories requires a demonstration of the operation of deductive reasoning. Dichotomous categories such as "holding" and "dictum" thus serve the function of increasing the apparent role of reason in the solution of legal problems.

The law disguises differences in degree as differences in kind in many subject areas other than precedent. One notable example is the much criticized two-tier method of analysis in equal protection cases.[112] Another is the omission-commission dichotomy. Many of the above explanations of stare decisis categories can be applied in slightly modified form to partly explain these and other legal dichotomies. For example, the vagueness allows the law the flexible capacity to adapt to changed conditions and the individual case; it also allows seeming consensus among judges of disparate views. In addition, hiding the vagueness creates the illusion of greater neutrality, predictability and uniformity than there is in actuality. Moreover, the dichotomies may reflect a binary vision of the law as manifesting order and reason.

It should be noted that the above-mentioned categories are being used at intermediate stages of legal analysis: the court's choice of one or another category does not itself determine whether there is legal liability. In contrast are legal categories serving as conclusions such as guilt-innocence, attempt-preparation, mental illness-mental health,[113] and insanity-sanity.[114] In these latter dichotomies, courts necessarily draw an artificial line between opposite paradigms by virtue of the requirement of finding a defendant either liable or not liable. It should also be noted that many of the above-mentioned legal dichotomies derive from moral or other lay analogs.[115] Altered forms of the reasons set forth in this section also help to explain these lay analogs.

CONCLUSION

Superficially, the law draws a discrete line between stare decisis and non-stare decisis precedents; but underneath the surface, the law presents a continuum of degrees of influence along which precedents and parts of precedents are arrayed. Legal words, concepts and theories join in furnishing this surface appearance of stability

[112] *See, e.g.*, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).
[113] *See* Hardisty, *supra* note 109.
[114] Hardisty, *Insanity as a Divorce Defense*, 12 J. FAM. L. 1 (1972).
[115] *See, e.g., id.*; Hardisty, *supra* note 109.

while allowing subterranean change.

What the law presents as black and white resolves on analysis into shades of grey.