"STARE DECISIS" IN THE CIVIL AND IN THE COMMON LAW*

by

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CHAPTER I : THE NEED FOR DECISIONAL LAW

The problem of the wisdom of following precedents has a different scope depending on the general structure of the legal system within which it arises. There is a great deal of difference between acceptance of a law of precedents largely in-lieu-of statutory law according to the common law pattern and its use in aid of statutory law according to the civil law model. Where statutes are considered an exceptional phenomenon and customary law is no longer felt to be adequate to satisfy social needs, precedents are accepted as a matter of sheer necessity; they are safeguards of legal continuity, indeed, of the unity of the legal system. Realization that the guidance they afford is very often but verbal and that the pretense as though it were not the decision itself but the eternal "reason" behind it that constitutes "law" is fictitious, must yield to this necessity. With expansion of statutory law, recognition of precedents as sources of law ceases to be imperative, but the ideology that they, rather than statutes are of the essence of law pervades the legal system, so that abandonment of the rule of precedents is not even seriously considered. In countries of the common law statutes are not sufficiently acclimatized to be accepted as full substitutes for case law. The latter is still deemed paramount to the former.(1) Countries of common law tradition have indeed invented a method which permits immediate incorporation of case law into the statutes: the decision becomes part of the statute which it interprets. This stress on case law is so deeply ingrained in the ideology of these countries that statutory abrogation of the rule whereby statutes are construed according to the "reason of the Common Law" have proved

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(1) Jurisprudentially this is manifested in emphasis being placed on case law even in areas of law of wholly statutory origin.

ineffective.[2] The great merit of this system of binding interpretative decisions lies in the fact that once such decision is rendered, legislators are put on notice of the meaning which judges will henceforth assign to the statute. Of course, legislators can prevent continuation of the resulting policy by repealing or amending the statute.

In the heydays of the "libre recherche" movement some civil law philosophers exhibited perhaps excessive admiration for case law, but there has hardly been a noticeable drive to substitute case law for code law. Nor are judicial decisions viewed as incorporated by reference in the statutes which they interpret. Nevertheless, there is felt to be a growing trend toward acceptance of judicial decisions as an avowed source of law. Perhaps it is related to a decline of the method of "authentic interpretation," whereby the legislators themselves construe an ambiguous statute——a method never accepted in the United States because of its incompatibility with the principle of separation of powers. Perhaps also contact with the common law world has given "case law" a new impetus, though examples of very far reaching influence of judicial decisions on legal development are of pre-world War II vintage.

My submission is that a combination of code and case law is a desideratum today both in the common and in the civil law world. The need for such combination arises from the semantic limitations of statutory formulation in an age dominated by stress on new systems of logic and new approaches to language critique, on the one hand, and the analytical and social wastefulness of pure case law, on the other hand.

The Benthamite trust in statutes, as affording greater "certainty" than "custom,"[3] has been somewhat shaken, since so-called "common language"——in which, in Bentham's view, codes ought to be formulated——is no longer thought to be a fully reliable transmitter of shared meaning. In fact, case law, particularly where it develops——as it does according to early tradition as well as to some recent trends——by way of demonstration, rather than by way of formulized linguistic enunciation, of principles, may help to establish standards of precision within the framework of statutory language, which the latter is by itself incapable of conveying. It may thus remedy shortcomings of so-called "written law."

The scope of this paper does not permit extensive discussioin of the inherent limitations of statutory language. Perhaps those of the language which has been most highly recommended for drafting use, the "common language," may serve as an illustration. That language has been so recommended for the obvious reason that it is thought to be best suited for expression of so-called "plain meaning." One might expect "plain meaning" to be uncontroversial. But the history of law records abundant examples of judicial disagreement on the

(2) See on this *Max Radin, Anglo-American Legal History* 337 (St. Paul, Minn., West Publishing Co., 1936).

(3) *Jeremy Bentham, The Theory of Legislation* 156—157 (Hildreth transl. from French, Ogden ed., London, Routledge & Kegan Paul Ltd, 1931).

meaning of statutory words, notwithstanding agreement that such meaning is "plain."[4] In fact, in law "plain meaning" is in a sense a paradox, since legal "plainness of meaning" is not a natural attribute of words but the result of legal interpretation. Even if it were possible to grasp a "natural" or "common language" meaning of statutory words, there could be no guarantee of permanency of the relationship between word and meaning. For the life of a word is dynamic, and the evolution of its social meaning does not necessarily correspond to either constancy or transformation of rational statutory purpose.

Wurzel believed that the growth of the social meaning of a word is necessarily reflected in the meaning of its statutory version.[5] He called "projection" the extension of a statutory concept to phenomena not originally contained in it because not comprised in the group of images forming that concept at the time of enactment but subsequently entering into it without effecting a change of its nature. As example of "projection" he cited extension of a statute passed in 1,700 imposing a tax on mills "run by machine power" to steam or electric mills, which were unknown at the time of enactment. Wurzel thought that "projection" *is inherent in "juridical thinking."* That the extension described by Wurzel is "inherent" or necessary may well be doubted, at any rate when a criminal statute is in issue and restrictive interpretation is postulated. That which is "inherent," however, is the question how far one may go in excluding all "projection." For example, would any, even very minor, technical improvement in a "train" have the the effect of taking the latter out of the category symbolized by the term "train" as used by a legislator?[6] Obviously, restrictive interpretation cannot in social reality mean perfect stability of statutory designation of genera of things.

In situations such as those exemplified, creative judicial interpretation is a response to an obvious social demand. The controversy regarding the judicial role actually reduces itself to disagreement on the reach of such creativity. Should a judicial interpretative decision have an impact on future decision making? If so, should one interpretative decision suffice, or should only a consistent line of similar decisions have this effect? The distinction between the position taken by the common law and that taken by the civil law is said to be limited to the fact that the former assumes a single decision to constitute a precedent, whereas the latter ascribes this effect only to several consistent decisions, *jurisprudence constante, ständige Rechtsprechung, doctrina legal.* The formulation of the distinction in these terms, however, is misleading. There are instances in civil law of one decision being as authoritative as a statute, and at common law the precedent value of a single decision is often largely verbal.

(4) See on this Helen Silving, *A Plea for a Law of Interpretation*, 98 U. Penna L. Rev. 499, at 513, 514 (1950).

(5) Wurzel, *Methods of Juridical Thinking*, in *Science of Legal Method* 286, at 342 *et seq.* (1921).

(6) The Supreme Court of Japan (Showa 15, decision of 8.22, 1940) held that a gasoline car qualified within the statutory description "train" for purposes a criminal statute, although at the time of enactment gasoline operated trains were unknown. I owe this reference to Dean Paul K. Ryu.

The differences between the two systems lie mainly in techniques of operation and underlying and motivating legal philosophies.

Since as compared with case law, statutory law has the advantage of economy, efficiency and equality of administration, the utility of case law must be sought in such of its qualities which are unique. To the extent that verbalization without undue verbalism is possible, statutes today are preferable to case law. Only where statutes prove to be inadequate, cases, functioning as "examples," should be preferred to abstract doctrinal interpretations. But case law today can no longer serve a useful social function when it assumes unmanageable dimensions. There is a clear need for conscious direction in the use of case material. Perhaps a statutory guide to methods and orders of citation is as necessary today as it proved to be in the days of the "Law of Citations."(7)

CHAPTER II: DECISIONAL LAW IN CIVIL LAW COUNTRIES

In civil law codes precedents are either expressly or tacitly excluded from the list of "sources of law."(8) A consistent series of uniformly decided cases of highest courts, however, is interpreted to constitute "customary law," and such law is generally accepted to be a "source of law" either by virtue of express qualification as a source coordinated to "statutes" (*Gesetz, loi*)(9) or by virtue of doctrinal inclusion within the term "*Gesetz*." In Germany "customary law" is often deemed to be a source of law not of choice but of necessity, on the theory that if a statute were to exclude it, that statute could itself be repealed by customary law.(10) If, indeed decisional law is customary law, it would seem to follow that it partakes of this quality of the latter and is thus an "inherent" and not eliminable legal source. The assertion that "customary law" is a logically or sociologically "necessary law" may be questioned; to what extent it is not eliminable, would seem to depend on what its constituent elements are, which is uncertain.(11) Given particular views as to such elements, one might doubt that decisional law would in realistic terms qualify as such law. Surely, even a *ständige Rechtsprechung* need not amount to an *inveterata consuetudo*, an immemorial custom, upon which, as is often thought, the existence of "customary law is predicated. Some believe that the "*opinio juris sive necessitatis*"—which, as is mostly, though not invari-

(7) Act of Emperor Valentinian, passed A.D. 426, prescribing the degree of authority of certain Roman jurists.

(8) § 12, Austrian *Allgemeines Bürgerliches Gesetzbuch* expressly bars use of legal decisions as authority. The Italian *Codice Civile* (Capo I. "*Delle fonti del diritto*") and the Swiss *Zivilgesetzbuch* (Art. I. "*Anwendung des Rechts*") do not mention precedents among the sources of law. But in the latter code precedents may be included in the term "customary law."

(9) Swiss *Zivilgesetzbuch*, Art. I.

(10) *Enneccerus-Nipperdey, Allgemeiner Teil des Bürgerlichen Rechts* 165 (14th rev. ed., 1952).

(11) On this see Helen Silving, "*Customary Law:" Continuity in Municipal and International Law*, 31 Iowa L. Rev. 614, 621—627 (1946).

ably, postulated, must accompany the repetition of a practice to qualify it as "customary law" —must reflect a popular "collective conscience;" but conformance to a popular conscience is not, by definition, a required part of decisional law.

Whatever may be the ultimate jurisprudential basis of their authority, consistent decisions of highest courts are in practice treated as undeniable sources of law in all civil law countries. In some instances their authority is expressly sanctioned by legislative provisions establishing formal conditions under which such decisions may be at all overruled. Thus, in Austria—where the Civil Code expressly denies to judicial decisions the status of legal sources[12]—an Imperial Supreme Resolution[13] prescribes that certain settled decisions of the *Oberster Gerichtshof*[14] be recorded in the so-called "*Spruchrepertorium*" and "*Judicatenbuch*," and decisions thus recorded may not be overruled except in a prescribed qualified manner, by appropriately enlarged judicial collegia.[15]

In Germany, the Law concerning the Organization of Courts[16] provides for a procedure intended to secure consistency of decisions of the various divisions of the *Bundesgerichtshof*.[17] Particularly noteworthy is the rationale advanced for authorization of any "Senate" (*Senat*—Division) of the *Bundesgerichtshof*, before which a case involving a matter of "fundamental importance" (*grundsätzliche Bedeutung*) is pending, to request its resolution by a "Great Senate" (*Grosser Senat*); the Senate seized of such matter may submit it when it believes this to be required in the interest of "further development of law or assurance of uniform adjudication" (*Fortbildung des Rechts oder Sicherung einer einheitlichen Rechtsprechung*).[18]

Nor is "development of general law" by a judicial decision rendered in a single case —implying an attribution to courts of a law creative power which courts of the common law world have rarely so bluntly avowed to possess[19]— a post-war innovation introduced under the impact of Anglo-American models. A glance at a pronouncement of the Joint Criminal Senates (*Vereinigte Strafsenate*) of the former German *Reichsgericht*[20] may show that such

(12) Compare *supra*, note 8.

(13) *Allerhöchste Entschliessung* of August 7, 1872.

(14) Highest Court in Civil and Criminal Matters.

(15) Act of February 24, 1907 (Reichsgesetzblatt 41).

(16) *Gerichtsverfassungsgesetz*, text of September 12, 1950 (BGBl, 455; III 300—2), as amended, Act of September 8, 1961 (BGBl. I 1665).

(17) §§ 136, 137, id. The Bundesgerichtshof is the highest court of the German Federal Republic in Civil and Criminal Matters.

(18) 137, id.

(19) In the United States, the Federal Supreme Court will grant certiorari, for instance, to resolve a conflict of decisions in the several circuits (intermediate appellate courts). See, *e.g.*, Meyer v. United States, 364 U.S. 410, 411, 81 S.Ct. 210, 211 (1960); United States v. Union Central Life Insurance Co., 368 U.S. 291, 293, 82 S. Ct. 349, 351 (1961). But the avowed purpose of this exercise of jurisdiction is to bring about uniformity of decisions, not "further development of law," as suggested in a literal reading of the German term "*Fortbildung des Rechts.*"

(20) The *Reichsgericht* was the Supreme Court of the German Reich in Civil and Criminal Matters until collapse of the "*Reich*" with the National Socialist regime.

judicial legislation has been long since deemed a natural prerogative of courts of appropriate level and composition.[21] This is what the *Reichsgericht* said:

> "In deciding upon this controversial legal question, the Joint Senates have the authority and the obligation of performing an act of legal creativity for the purpose of filling a statutory gap of procedural law, hence of exercising an influence, which reaches beyond the concrete case, upon the decisions of the *Reichsgericht* as well as those of other courts. In this supplementary law creation, they must work as the legislator does. The latter devises the system of criminal procedure, supplying it with rules and exceptions, in such a manner as to reach his objective, particularly that of truth finding and that of establishing to what extent the legal interests of the guilty person may be justly curtailed. Hence, the decision of the Joint Senates on the questions submitted ot them is also determined by considerations of utility. It should be noted that the *Reichsgericht* has frequently performed such legally creative tasks also in other fields..."

The question thus decided by the Joint Criminal Senates of the *Reichsgericht* was indeed of fundamental significance, cutting deeply into the philosophy of criminal law and procedure: Whether an accused could be convicted where, though there has been ample proof that he has committed either larceny or receiving stolen property, there has been no sufficient evidence showing which of the two crimes it was. The court held that a conviction (for the lesser crime) on such "alternative findings" (*Wahlfeststellung*) was proper in the case, since in the light of "the community sense of justice,.....the conduct of the receiver is subject to the same ethical censure as that of the thief." Simultaneously the court warned against admitting convictions of this type where the several competing offences "require diverse mental states of the actor and call for a different ethical evaluation." These pronouncements of the Joint Senates were elaborated in a subsequent series of decisions—one might say, in typical common law fashion—into the rule that convictions on alternative findings are permissible provided that "the alternative acts charged ⌈are⌋ legally-ethically and psychiologcally comparable."[22] In this form the ruling of the *Reichsgericht* survived the repeal of a later statutory provision generally authorizing "alternative fact findings"[23] —a survival which may well be taken as a special demonstration of the vitality of German "common law" judicial legislation.

Should one be inclined to assume that such judicial legislation in Germany is but "interstitial"[24] or "gap filling"—the latter being the *Reichsgericht's* description of its own function in the cited case—, he might find certain recent activities of the *Bundesgerichtshof* hardly reconcilable with such assumption. The latter court has preempted via a single case disposition an entire virgin field of law, generally thought to involve basic legislative policy. The field of law referred to is that of "legal error."

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(21) Decision rendered May 2.1934, 68 BGSt. 257 (1934).

(22) 9 BGHSt. 309 (1957). The Bundesgerichtshof is the highest court of the German Federal Republic in Civil and Criminal Matters.

(23) § 2 b of the German Penal Code, inserted by an Act of June 28, 1935 (RGBl. I. 839), was repealed as product of National Socialist ideology by the Allied Control Council Law No. 11 of January 30, 1946 (Art. 1). See *Schönke-Schröder*, *Strafgesetzbuch*, *Kommentar* 54/55 (8 th ed., Becksche Verlagsbuchhandlung, München und Berlin 1957).

With utmost hesitation, English and United States courts made occasional inroads into the fortress guarding the old maxim, *error juris haud excusat.* In *Long v. State,*[25] the Supreme Court of Delaware excused one charged with bigamy where, in reliance on the advise of an attorney and the minister who performed the marriage ceremony, he believed that his former marriage was validly dissolved. The error in this instance was one of "subsumption" of relevant facts under the bigamy statute—an error occupying a border area of error of fact and error of law. In *Lambert v. California,*[26] the Supreme Court of the United States, against the vigorous dissent of Mr. Justice Frankfurter,[27] held ignorance of a duty to act in a crime of omission excusable, on the constitutional ground that in crimes of this type knowledge of such duty is an essential of *mens rea.* It would seem that the court's reliance on *mens rea* opens potentialities of amplification. But the care with which the majority opinion limited its ruling and the general jurisprudential atmosphere with which the dissent surrounded it rather warrant the forecast that the general principle of the irrelevance of legal error will remain in force in common law countries for some time to come.

In Germany the principle of "*error juris nocent,*" born out of an erroneous interpretation of a passage in the Digests, was as deeply imbedded in law as it is in the common law.[28] Moreover, that principle in Germany appears to have a statutory foundation, though the latter is expressed in but a negative form: "error of law" is clearly excluded from the Penal Code's provision on "guilt-exempting" error. § 59 of the Code provides that "factual circumstances" (*Tatumstände*) "which belong to the statutory description" of a crime (*welche zum gesetzlichen Tatbestand gehören*) are not imputed to a person who had no knowledge of them. Such "factual circumstances" do not, within any of the several known doctrines of error, comprise criminality of the pertinent total conduct. Nor has any other Code provision been read to incorporate the defense of legal error. Indeed, no contention has even been made that admission of such defense is part of an implied legislative intent or that the legislator has left in this area of law a "gap" to be filled. Thus, when in 1952 the Great Senate in Criminal Matters of the *Bundesgerichtshof* ruled the excuse of "error of law" to be an integral part of German Criminal law,[29] the choice it made was quite as legislative in nature and scope as was the choice made by the German legislators when they enacted any of the other guilt exemption grounds, duress, insanity, necessity. The policy in this instance, in contrast to that professed

(24) This term has been used by Justice Holmes to describe a common-law judge's legislative function: "I recognize without hesitation that judges must and do legislate, but they do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say, I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court." Southern Pacific Co. v. Jensen, 244 U.S. 205, 221.

(25) 44 Del. 262, 278, 65 A. 2 d 489, 497 (1949).

(26) 355 U.S· 225, 78 S.CT, 240 (1957).

(27) *Supra,* 355 U.S. 230, 78 S.CT. 244,

(28) See on this Paul K. Ryu & Helen Silving, *Error Juris: A Comparative Study,* 24 U. Chi. L. Rev 421, 425—427 (1957).

in the above cited *Reichsgericht* case,[30] was declared to be not a "utility" consideration but adherence to the "guilt" principle, which though neither defined nor clearly enunciated in the Penal Code, allegedly pervades the entire German criminal law.[31] On this doctrinaire jurisprudential basis, the Great Senate, while answering a narrow question submitted to it in a specific case, proceeded to dictate an elaborate legislative program to be followed by itself as well as by any other future German court. The question was whether an attorney charged with violating § 240 of the Penal Code (defining "coercion"—Nötigung) by forcing a client to make certain fee payments under threat of discontinuing her representation could set forth in his defense that he had no consciousness that such act was illegal; should this question be answered in the affirmative, the further query was whether the defendant's guilt would be excluded even if his error was due to negligence. On these limited facts, the court elaborated a comprehensive "meaning of guilt," bearing on the total philosophy of criminal justice and each an every one of its aspects, in a manner comparable to the method used by legislators in expanding the legislative policy of a new criminal code (*Motivenbericht*). The philosophy thus set forth by the Great Senate has since dominated German decisions far beyond the confines of the doctrine of legal error.

German Supreme Courts have performed similar legislative functions when introducing into the law the concepts of "suprastatutory necessity" (*Übergesetzlicher Notstand*)[32] and of "nonexigibility of law abidance" (*Unzumutbarkeit rechtmässigen Verhaltens*).[33] On such occasions they invariably assumed full legislative authority in dictating a comprehensive program rather than limiting their rulings to the specific point raised in the case. In some such cases (as, for instance, in that regarding error of law), of course, this feature of the decisions is intimately connected with the fact that the issue, though posed within the framework of a concrete case, is submitted to the highest tribunal as a request for an abstractly formulated rule, a declaration of principle, rather than for a judgment on the specific facts alone. But

(29) 2 BGHSt. 194 (1952).

(30) *Supra*, at note 21.

(31) On this consult Ryu & Silving, *supra*, at 449—458.

(32) "So-called extralegal necessity" —says *Reinhart Maurach*, *Deutsches Strafrecht*, *Allgemeiner Teil* 259 (2nd ed., C.F. Müller Karlsruhe, 1958)—"presents one of the most striking instances of formation of customary law." This notion emerged in the first place from the need to resolve "difficulties of a concrete life sphere, namely, abortion for the purpose of averting a serious danger to the body and life of the mother." While physicians claimed a right to intervene in such cases to be self-evident, written law clearly prohibited such intervention. Unless the pregnant woman was the physician's near relative, in which case § 54 of the Penal Code (on "necessity action") would be applicable, the physician would not even be excused. Moreover § 54 could not be applicable unless the pregnancy was not "caused by the fault" of the pregnant woman, and "fault" in this context was given a variety of interpretations. The *Reichsgericht* introduced in this instance a novel ground of justification(and not merely an excuse), incidentally formulating a general principle of law, which has since become an integral part of German law. Decision of the First Senate, March 11, 1927 g. Dr. St., 61 RGSt. 242 (1928).

(33) 6 BGHSt. 46 (1954).

mainly is this feature the result of the civil jurists' tendency to concentrate on doctrinaire principles of broad scope (*Rechtswissenschaft*—science of law) rather than on pragmatic, casuistic solutions.

A student of German court decisions may perhaps notice that their concern with fundamentals when analyzing the contents of particular decisions to be made is not paralleled by a similarly thorough systematic consideration of the jurisprudence of decision making itself. Apart from occasional pronouncements, such as that cited above, they have shown relatively little self-awareness, that is, consciousness of the nature and scope of their decision making process and of its role in political and legal reality. A decision of the Federal Constitutional Court (*Bundesverfassungsgericht*), rendered in 1953,[34] purporting to expand the constitutional philosophy of the judicial law making role, seems to be at odds with other repeated pronouncements of the same court, when it declares that separation of powers is not an essential of a Rule of Law (*Rechtsstaat*) but merely a "fundamental organizational principle," that may be overridden by other principles rooted in the constitution.[35] According to this decision, if delegation of legislative authority to courts is implicit in such other principles, it is proper, provided that "legal security" is not thereby impaired. This avowed relaxation of the traditional bar imposed upon judicial legislation by the principle of separation of the judicial from the legislative power—a bar hardly ever mentioned in common law countries, even those most insistent on separation[36]—is new in Germany. Moreover, it seems to be conditioned upon the presence of conflict of the principle of separation with other constitutional tenets. Even in the presence of such conflict, judicial legislation is permissible only provided that "legal security" is safeguarded, for the latter, in the court's view, is an essential of the *Rechtsstaat*. The ultimate limit of judicial legislation under any circumstances hence seems to be set at the point of impairment of "legal security." But at what point is "legal security" impaired? The court thought that there can be no such "security" where judges are called upon to make decisions depending on their "personal philosophies and political views."

Does then classification of policy determinations into those requiring expression of "personal philosophies and political views" and all others afford the crucial line of demarcation between the area of legislative monopoly, not open to courts, and the area of potential judicial legislation? The numerous adherents of the view that law is an expression of, and should reflect, prevailing culture rather than "personal philosophies" or even personal "political views"

(34) December 18, 1953, 3 BVerfGE 225,

(35) Division of powers was mentioned in the enumeration of the "basic principles which the Constitution comprises in the concept of a free democratic basic order" in the Socialist Reich Party case. Judgment of Oct. 23, 1952, Bundesverfassungsgericht (I.Senat), 2 BVerfGE 1, at 14 (1952). This enumeration was quoted in the judgment of August 17, 1956, Bundesverfassungsgericht (I. Sen), 5 BVerfGE 85 (1956), outlawing the Communist Party (Chapter II, item 1).

(36) On this see Helen Silving, *The Twilight Zone of Positive and Natural Law*, 43 Calif. L. Rev. 477, at 504 (1955).

of legislators, might wonder whether within the test set forth by the Constitutional Court in the cited case there is anything left over which legislators have exclusive jurisdiction. One might further wonder whether a division along the lines suggested by the court is practically meaningful, considering the fact that the several Supreme Courts of Germany themselves hold divergent views of the nature of their interpretative function. Thus, the Great Senate of the *Bundesgerichtshof* in Criminal Matters ruled that the expression "lewd conduct" (*Unzucht*) in the Penal Code (§ 180) must be read in the light of immutable principles of Christian morality rather than in that of community mores.[37] On the other hand, the *Bundesverfassungsgericht*, in an illuminating decision rendered in 1960,[38] interpreted the term "conscience" (*Gewissen*) in Art. 4, par. 3 of the Constitution of the Federal Republic in the sense of "common language usage" (*im Sinne des allgemeinen Sprachgebrauches*) rather than in that of particular historically-culturally developed beliefs or patterns.[40] Both decisions have been vigorously attacked by various commentators.[41] That they involved "personal philosophies" or "political views" of the judges who rendered them, is hardly deniable.

German jurisprudence today is torn between "statutory positivism" (*Gesetzespositivismus*), traditional in Germany, and novel ingredients of a "judicial kingdom" (Richterkönigtum) of Anglo-American style. There is noticeable a strange combination of both elements. A striking feature is the attempt to give the very judicial legislation a systematic legislative foundation. For example, a ruling such as that of the Constitutional Court on the constitutionality of the Law concerning General Military Service[42] possesses, by virtue of an express statutory provision,[43] the same legal effect as a statute (*Gesetzeskraft*). Such regulation of the effect of the decisions upon general legal development is a phenomenon unknown in countries of the common law. In Germany it seems to be needed to satisfy the illusion of "*Gesetzesstaat*" even as a basis of judicial legislation.

Assuming that judicial legislation will continue to develop, there will soon be felt an urgent need to systematize decisional law not only by defining the conditions of recourse to courts and the general effects of decisions but also by providing a conscious methodology of decision

(37) Cited supra, note 33.

(38) Judgment of December 20, 1960, reported in 14 *Neue Juristische Wochenschrift* 355 (1961).

(39) "No one must be compelled contrary to his conscience to perform military service with arms".

(40) All that is necessary is a showing of an individual's sincere persuasion as a source of objection against armed military service in any war. The contents of "conscience" evince from the concrete situation (*situationsbezogen*) rather than from any difinite pattern.

(41) On the *Bundesgerichtshof* decision see, for example, Jescheck, "Zur Frage der Kuppelei gegenüber Verlobten", in *Monatsschrift für Deutsches Recht* 1954, 645—649. On the *Bundesverfassungsgericht* case see, for example, Gustav W.Heinemann, Note to the report of the case in 14 *Neue Juristische Wochenschrift* 355—356 (1961); also Adolf Arndt, *Sprache und Recht*, in 14 id. 1200 (1961).

(42) *Supra*, note 38.

(43) Act of March 12, 1951, concerning the Federal Constitutional Court (*Bundesverfassungsgerichtsgesetz*) (BGBl. IS. 243), Text of Acts of July 21, 1956 (BGBl. IS. 662), of June, 26, 1959 (BGBl. I 297), of Sept 8, 1961 (BGBl. I S. 1665), and of August 3, 1963 (BGBl. I S. 589), 31(1).

making. One might expect English and American law to afford some guidance in the choice of such methodology, in the light of the long experience of the common law in case analysis and application. But the common law itself had until rather recent times proceeded on largely unconscious grounds, and the recent realization in the common law world that there is not "one common law method" but rather a variety of available conflicting and competing case law methods has brought about a "crisis of decisional law."

Nevertheless, the debate over the "proper" method of case law, in which British and American scholars are now engaged, affords both a rich reservoir of selection and many constructive arguments, which might prove to be highly useful to judges, legislators and legal scholars everywhere in the course of policy making and policy projects. An important consideration in deciding upon the "proper" method of case law should be the nature of the function which that law is expected to perform in a given legal system. In civil law countries —soon this may also be true of common law countries—case law must be fitted into a scheme of comprehensive codification; its role must be subsidiary to codes and statutes. Its usefulness begins where the statutes prove inadequate. This suggests that the test of the proper function of interpretative decisions should be their capacity of demonstrating the operation of statutes by affording concrete "examples" rather than by merely multiplying the rapidly growing number of highly abstract rules.

Among the significant Anglo-American contributions to case analysis is a trend which stresses the "non-verbal behavior" of courts, advancing as *ratio decidendi* (ground of decision) not "what the court says" nor "what it says that it does" but "what it actually does," whatever may be meant by "actually" in this context. German jurisprudence is far from adopting this position. But it has made a substantial step in this direction when it assumed the position that the binding force of pertinent decisions of the Constitutional Court is to be attributed solely to the judgment rendered by the court and not to the grounds of decision.[44] The *Bundesgerichtshof* rationalized this position by pointing to the uncertainty of drawing a line between "decisive" and merely "supporting grounds of decision" and to the danger evincing from such uncertainty for both legal security and separation of powers. But what is the correct division between a "ruling" and "grounds of decision?" German courts might, by taking as a basis the formal division between the "judgment" and its "grounds" (*Urteil* and *Urteilsgründe*), seek protection against the vicissitudes of the common law method. If so, they will probably be disillusioned in due course. The uncertainties of that method result to a large extent from the relativity and mutual interdependence of the nature and scope of a "judgment" and its "grounds." To find a functional solution, one must take account of that relativity and form a policy decision as to how the two factors should be conceived to bear on each

(44) 13 BGHZ 265 (1954), where the *Bundesgerichtshof* deals with the effect of certain decisions of the *Bundesverfassungsgericht*.

other. A conscious decision on what procedure should be adopted for determining the so-called "*ratio decidendi*" of cases is the most significant task of the future jurisprudence of judicial law making.

The foregoing description of "case law" in Germany would be quite inadequate without at least an indication of the legal philosophy prevailing in Germany. The reflection of "law" in popular and juristic thinking is an integral part of the control apparatus of "law," of the "life of the law" in a given community. So is, of course, the philosophy of law that pervades the "law" itself. Jurisprudence "within the law" may be said to have a more immediate effect on "legal" development than "metalegal jurisprudence." For this reason, it is most significant to note in studying the impact of "common law" thinking on civil law that it has not as yet penetrated—and perhaps never will fully penetrate—the "philosophy within the law" itself. Typical "common law" phrases, such as that the law is a process of "trial and error," may be occasionally encountered in a German case, but there is reason to doubt that a civil law jurist reacts to such pronouncements either rationally or emotionally in the same manner as common law jurists do. An opinion of wide fame in Germany, in which that sentence occurs, is that accompanying the Judgment which outlawed the Communist Party.[45] But the total philosophy of constitutional law on which that Judgment is based, the very notion of a constitutional, that is, statutory, provision conferring upon the Constitutional Court an original authority and duty of declaring a political party "unconstitutional",[46] is hardly a reflection of the spirit of "trial and error" or, indeed, of any phase of common law ideology.

Perhaps the most striking expression of the philosophical climate pervading civil law jurisprudence, notwithstanding any deviant legal theories that may have originated in civil law soil, is the fact that Eugen Ehrlich died in Europe in obscurity. To a civil lawyer the "Law" is primarily composed of "rules." If these happen to be incomplete or inconsistent, then there is felt to be a need for supplementation or for a concordance in the style of a *concordantia discordantium canonum*. If there is no general conformance to the law in the books, then perhaps a reform is in point. But the "case law" ideology has no genuine roots in civil law countries. A "case" does not mean the same in Germany as it does in the United States. It may hence be useful to introduce the reader into "common law" thinking by first pointing out certain jurisprudential, philosophical differences between it and "civil law" ideas.

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(45) Cited *supra*, note 35.

(46) Art. 21 of the Basic Law (*Grundgesetz*), which provides in para. 2 that "Parties which by reason of their aims or the behavior of their supporters seek to impair or destroy the free democratic basic order or to endanger the existence of the Federal Republic of Germany are unconstitutional. The Federal Constitutional Court decides on the question of unconstitutionality." Translated in Edward McWhinney, *Judicial Restraint and the West German Constitutional Court*, 75 Harv. L. Rev. 5, at 21, n. 64 (1961). See *id.* for background ofthe decision, at 20—22.

CHAPTER III: PRECEDENTS IN THE COMMON LAW WORLD: JURISPRUDENTIAL BACKGROUND

An assertion that in the common law, in contrast to the situation obtaining generally in the civil law, one decision constitutes a precedent, presents a superficial picture of jurisprudential reality. In matters of "comparative law" verbal formulae are mostly misleading. Better insights may be reached if the comparison is cast in terms of what the persons performing roles in "legal" processes "do" in the systems in issue, given certain comparable factual circumstances. But even such "doing" may reflect but a minor portion of social or legal life. The matter must be approached with the attitude of an anthropologist, trying to penetrate into the ideology behind the legal rituals.(47) That ideology may be unconscious, even in the case of the most learned in law. To evaluate the "comparative law of precedents," the observer must concern himself with the question of whether the pertinent queries are at all directed in the several laws to the same issue. Of course, these queries must be posed in operational terms: What do the various actors in the legal drama "do" with a judicial decision? Who utilizes it and how is it being utilized? But however "operationally oriented," an investigation of that type cannot remain within the confines of "operational thinking." An important further query is: What do the actors themselves and others, whom one might describe as the "chorus" in the drama of law, think or feel about such "doing?" Do any of these people consciously advert to it at all, and if so, what stage of awareness or of sophistication has been reached, and what is the distribution of such awareness and intensity of concern among the actors and the chorus?

These questions ultimately lead to primary problems of jurisprudence: What is "law?" What is "authority" or "binding force?" In the context of policy making these questions can hardly be answered purely cognitively; there is, no doubt, a minimum concept of "law" of comparative scope, that is used, inarticulately perhaps in international law context and might evolve from conscious cooperative analysis of international jurists, if they really chose to engage in one; such concept might be cognitive. Apart from such comprehensive analysis, the stated problems are not susceptible of being understood without regard to the total complex of the values of a given society. Is "certainty" of law or "security" or stability a virtue, and if so, what rank does it occupy in the hierarchy of virtues? What is the proper function in society of a lawyer and a judge, as compared with the academic "scholar?" Is substance more important than procedure or vice versa? Inextricably combined with all these

(47) *Bronislaw Malinowski, Crime and Custom in Savage Society*, Introduction, (London, Routledge & Kegan Paul Ltd. 1926), showed how preconceived ideas about the ideologies of primitive communities have handicapped anthropological insight. We are similarly handicapped when undertaking study of the laws of communities with which we are not intimately acquainted and of which we have no first hand or sufficiently comprehensive knowledge.

questions is how law came to be and whether and to what extent it can be detached from its past. In the last analysis, there is no such a thing as a "comparison of laws;" all that can be compared are certain partial aspects of their total images. Nevertheless, such limited comparison may be instructive, in showing that, even though the very term "law" may not have the same meaning in two systems, there obtains in them a remarkable parallelism of certain phenomena. It may be thus instructive to note that in the common law, as in the civil law, it mostly requires more than one case to establish a workable "precedent," meaning, one which will in all probability be followed in the belief that it affords a "binding authority." Though the latter term may not mean the same in the two legal systems, its social meanings in these systems are "tangential." To some limited extent, they represent similar social consequences. Thus, as there is—notwithstanding differences of interpretation and of pertinent legal philosophies—a minimum common understanding among men regarding the symbolic reference of the term "law," so there is a minimum notion of "precedent," as source of law.

Much has been said in both legal and psychological literature about the significance of expressing "meaning" in non-verbal" operational terms, and this approach is assumed here to be basically correct, *i.e.*, functional. However, this approach is subject to limitations. Verbalization, particularly in law, is an essential of any experience. Examples, to "exemplify" anything, must be verbalized.

Obviously, the first question which should be answered—and cannot be answered "non-verbally"—before engaging in any comparison of the "law of precedents" is what a "precedent" is. No doubt, such comparison would be entirely devoid of meaning if the symbol "precedent" were not taken to convey some minimum common denotation in all the pertinent systems. In the widest sense, "precedent in law means any practice that is relied on, and is at present mostly taken to refer to use of judicial decisions in this manner. But the sense in which a "precedent" is "relied on" poses the first problem that may be disparately answered in various laws. It is usually formulated in terms of the "authority" or "binding force" of a precedent, and upon closer scrutiny may be shown to involve the comprehensive and more fundamental issue, already mentioned, of what "law" is. Assuming that we know what "binding" means, the further question is: What in a decision "is binding?" These and many other questions are not uniformly answered in the civil and in the common law, as has been already suggested when it has been said that civil law jurists look upon the law predominantly as a system of "rules." But neither are the mentioned questions uniformly answered in all parts of the common law world. Indeed, even within the same jurisdiction, or before, or by, an identical court, divergent answers to these questions may be given or suggested.

Particularly where the lack of uniformity pertains to the question as to "what in a decision is binding," civil law jurists might be inclined to doubt the utility of the use of precedents. On the other hand, the apologists of the common law consider this very lack of uniformity

in methodology to be one of the common law's greatest virtues.[48] The possibility of resort to various competing methods of "case analysis" is said to enable lawyers to find in the "existing" law authority for diverse policy arguments, without breach of legal continuity. This does not mean—we are told—that any position, however arbitrary, may be thus supported, but only means that "rationality," "reasonableness,"—or "legitimacy" is not a monopoly of any single solution. Scholastically rather than forensically oriented civilians prefer legal certainty to the flexibility of the common law method, which favors a problem-solving, socratic, argumentative approach to law.

The difference in evaluation of the relative merits of certainty and flexibility may perhaps be explained by the fact that common law jurists do not react to uncertainty with the same amount of anxiety as civilians do. This, in turn, may be connected with the strong historical orientation of common lawyers, their belief that history sets a limit to chaos. Finally, through history, as one showing continuity of the common law, there seems to be afforded an assurance of rationality. So deeply rooted is the common lawyer's association of law and precedent with history, that he assumes, notwithstanding Holmes's persuasive arguments to the contrary, that "judicially developed norms applied in a particular case have always been the law. This rule, at the least, symbolizes the common assumption (spoken or tacit) that all present and future developments in common law principles are somehow already implicit in the common law existing hitherto."[49] It is probably due to this orientation that the inconsistencies of the case law methodologies have until quite recently passed practically unnoticed in the common law world.

In the civil law, with its focus on "timeless" scholastic principles or systematic considerations, a case is readily detachable from its past. By contrast, in the common law each decision is viewed in the light of history and projects that history into the future, uniting past and future cases. Possibly, this feature has also obscured the difference in the impact as authority of one decision and of several decisions, obliterating the transition from "custom" to "precedent,"[50] and now facilitates uncritical acceptance of universality of the formula that "one decision is a precedent."

This historical orientation, in which past and future combine into one, is also a constituent element of the legal philosophy which is at present dominant among common law jurists, the Holmesian view of "law" as a probability judgment, based on past experience, as to what courts will do in the future.[51] Within such view, assimilating "law" to an empirical law of nature, "binding force" or "authority" of a precedent cannot have the same meaning as it

(48) Julius Stone, *The Ratio of the Ratio Decidendi*, 22 Modern L. Rev. 597, 598—600(1959).

(49) Ibid.

(50) *Frederick Pollock and Federic William Maitland*, I *HISTORY OF ENGLISH LAW* 183 (sec. ed., Cambridge, University press 1923).

(51) "The prophecies of what the court will do in fact, and nothing more pretentious, are what I mean by the law." *Oliver Wendell Holmes, The Path of the Law*, 10 Harv. L. Rev. 457—462 (1897).

has within the civil law conception that the "law" is a "rule." Cynics might compare the efforts of courts of the common law to arrive at their own decision in terms of a "probability judgment" inferable from past decisions to Baron Münchhausen's attempt to pull himself out of a mudpool by his own pigtail.(52) So the simile of the "probability judgment" cannot be taken to be strictly apposite in all situatons. Justice Holmes's famous phrase, "The life of the law has not been logic: it has been experience",(53) seems to be applicable to his very definition of law as a "probability judgment." By this phrase, of course, he did not mean to say that law can dispense with logic, but rather suggested that the process of decision making requires other tools in addition to logic. Next to "the story of a nation's development through many centuries," he mentioned as such "tools," "[t]he felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men." He wound up by saying that "[t]he substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient.(54) Wherein lies the "probability judgment" which these tools are supposed to facilitate? It would seem that it must consist in the judge's projection of his own decision into the future, in the evaluation of the chances of its social acceptance. Shared "prejudice," present "convenience," and "existing theories of legislation" combined with history, serve as basis for a forecast, whether conscious or unconscious, of what the same and future courts may be expected to accept as "authority." A decision in the style of common law thinking is always oriented to the future, as it is to the past. Consideration of "future acceptance" is, in fact, the only rational meaning that can be given, in the light of critical rationalistic analysis, to the view that law can be tested by a method of "trial and error."

Of course, whatever may be its meaning, a "probability judgment" cannot be "binding" in the same sense in which a "rule" is referred to as "binding." Such judgment always connotes a "degree of probability." One might say that once a judgment of probability has been accepted by the precedent court and has been incorporated into its process of adjudication as sufficient to serve as a basis of a decision, it is transformed into the "rule" of that decision, which is "binding. This, in fact, is the meaning attributed to the "binding force of a precedent" by many courts and writers. But if this were the only meaning of "binding," the continuity of

(52) *Max Planck*, *Vom Wesen der Willensfreiheit* (1939), pointed out that it is impossible to predict one's own conduct without at the same time influencing such conduct by self-observation. Of course, this does not render prediction of one's own judgment, playing a role in the process of reaching such judgment, impossible. But except where such self-observation is directed to elimination of prejudice and thus to prediction in reverse, the idea of "law as prediction" when applied to the decision maker himself is awkward.

(53) *Oliver Wendell Holmes*, *The Common Law* 1 (Forty-fiifth Printing, Boston Little, Brown and Company, 1923).

(54) *Op. cit.*, at 2.

the process of "probability" estimation would come to an end as regards such "rule," the sole question that remains possibly open being what it is that is "binding" in a precedent.

Other meanings of "binding" as regards a precedent are hence suggested. For example, it may be assumed that a precedent would or should be accepted by future courts if the same judgment of probability as expressed in the precedent is repeated. This need not render the precedent superfluous, if it is taken to afford a presumption of continued validity of the precedent's probability judgment.

Of greatest significance is the fact that the degree of the value of a case as a precedent is not a constant quantity. There are strong and weak precedents and more or less settled "rules." There are many elements that enter into the degree of the "binding force" of a precedent, its closeness or remoteness, e.g., in time to the date in which it is relied on, in situational analogy, the relation of the forum of the precedent to that of court before which the issue arises, the method or methods whereby that which in the precedent decision is supposed to constitute the "precedent" is reached. One speaks of the "binding force" of a precedent if it has been significantly taken into consideration in reaching a new decision or if its likely to be thus taken into consideration. Beyond a minimum of such "significance," there are many varieties. In this sense, "binding force" is not a purely "normative" concept, as civilians might understand it. It is perhaps a composite comparable to that which in common law is designated as a "mixed question of law and fact." Civilians might say that a precedent as a source of law is either "valid" or "not valid" and that *tertium non datur*. But to the common lawyer the "validity of a precedent" is not fixed in this sense: there are degrees of validity. To such lawyer, this in fact may be the most striking difference between a statute and a precedent.

Perhaps this "validity" of a precedent expressed in terms of degree can be best observed against the background of a case in which a United States Federal District Court is called upon to decide a case transferred to it from a State Court. Such Federal Court is "bound" to apply State substantive law, and since *Erie R. Co v. Tompkins*,[55] is thus "bound" to follow State precedents. The question then arising within the *Tompkins* holding is to what extent State precedents may be said to reflect "state law" for Federal purposes, what State precedents are to be deemed "binding," and what in a State precedent may be deemed "binding." Binding does not have the same meaning in these contexts. A most instructive case, in which the plurality of the meaning of the term "binding precedent" is rather dramatically demonstrated, is *Bernhardt v. Polygraphic Company of America*.[56]

In the *Bernhardt* case the issue was whether an arbitration agreement concluded between the now litigating parties in New York was "binding" in a Federal court sitting in Vermount. The chances that the Supreme Court of the United States would overrule the *Tompkins* holding

(55) 304 U.S. 64 (1938).
(56) 350 U.S. 198, 76 S. Ct. 273, 100 L. Ed. 203 (1956).

whereby Federal courts must follow State substantive law, were at the time when the *Bernhardt* case was being litigated too remote to be seriously taken into account, although this does not preclude all possibility of its reversal at some future time. The "probability" that *Tompkins* would be followed was for the time being one verging on certainty, and thus the degree of the value of the case as a precedent was extremely high, meaning that its "binding force" was practically absolute. The effect of this decision could still be avoided by a successful argument that the arbitration agreement in issue before the court was a matter of procedural law, to which the *Tompkins* holding does not apply. The chances of such or a contrary ruling were rather difficult to estimate, in the light of the fact that the Supreme Court of the United States had held within a single year the statute of limitations to be a matter of substance in one context[57] and a matter of procedure within another context.[58] A civilian would probably rather assume that an arbitration agreement, which purports to deprive a court of jurisdiction, should be deemed a matter of procedure. But the Supreme Court of the United States held that it was a matter of substance. In this it relied on *Guaranty Trust Co. v. York*,[59] where the running of a state statute of limitations in an equity suit was held "binding" upon a Federal court, on the theory that "⌈t⌋he nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of a State court a block away should not lead to a substantially different result."[60] "The change from a court of law to an arbitration panel"—said the Court in *Bernhardt*[61]—may make a radical difference in ultimate result." To be sure, it might. But is there any litigious issue which might not make such a difference? What type or probable degree of impact upon the "ultimate result" would be deemed sufficient to constitute "a radical difference?" Would psychological or sociological reality factors be taken into consideration? Factors of this nature have been deemed legally determinative in other contexts in the United States.[62] What then is the value of the *Bernhardt* case as a precedent in future cases arising

(57) Guaranty Trust Co. of New York v. York, 326 U.S. 99, 65 S. Ct. 1464 (1945).

(58) Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945). This was not a case arising under the *Tompkins* rule, but one presenting an issue under the Fourteenth Amendment: whether a State statute which lifted the bar of the statute of limitations in a pending litigation amounted to taking of property without due process of law from the one in whose favor it ran? The Court said:

> "Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost."

(59) *Supra*, note 57, cited in 350 U.S. 203—204, 76 S. Ct. 276—277.

(60) Notice, however, Justice Rutledge's vigorous dissent in the *York* case, based on the contention that, notwithstanding *Tompkins*, the statute of limitations in an equity suit is a matter of procedure. 326 U.S. 112, 65 S. Ct. 1464.

(61) 350 U.S. 203, 76 S. Ct. 276.

(62) For instance, in Poe v. Ullman, 367 U.S. 497, 81 S. Ct. 1752 (1961), where the complaint alleged that the State's Attorney of Connecticut "intends to prosecute any offenses against Conne-

under *Tompkins* on the issue of the procedure-substance dilemma? Added to the *York* case, *Bernhardt* could undoubtly be expected to help in resolving some issues while in others reliance upon it by a court might merely serve as a guise for what was aptly called the "inarticulate major premiss" in the decision making process.(63)

Having decided that whether the arbitration agreement—being a matter of substance—was binding(64) must be determined by Vermont law for the purpose of the *Tompkins* rule, the United States Supreme Court was further faced with the question as to what was Vermont law on this issue at the *Bernhardt* ligitation. To determine this was a matter of considerable difficulty. The last decision rendered on the subject by the Supreme Court of Vermont dated back to 1910, and that decision relied on another one, decided in 1803.(63) The United States Supreme Court took into consideration the possibility that Vermont law on the point might have changed since 1910, even though such change was not documented by either legislative or decisional authority. If finally found that the Vermont cases referred to could be taken to reflect Vermont law in force at the relevant time, since (1) the Federal District Judge who rendered the decision below, relying on these two cases, came from the Vermont bar; and (2) no dicta, doubts or ambiguities of Vermont judges, no legislative development that promises to undermine the judicial rule, could be found.(66) Concurring, Mr. Justice Frankfurter advanced an even broader jurisprudential view of the scope of Vermont law, which a Federal court must consider as "binding:"(67)

> "...'estimates' are necessarily often all that federal courts can make in ascertaining what the state court would rule to be its law..... [T]he mere fact that Vermont in restated its old law against denying equitable relief for breach of a promise to arbitrate a contract made under such Vermont law, is hardly a conclusive ground for attributing to the Vermont Supreme Court application of this equitable doctrine in 1956 to a contract made in New York with explicit

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cticut law, and that he claims that use of advice concerning contraceptives would constitute offenses" (367 U.S. at 301, 81 S. Ct. at 1754), it was held that such verbal threat by the State's Attorney would not be sufficient a threat of prosecution in the event of violation, in the light of the fact that the record did not disclose a history of actual prosecutions under the pertinent law.

(63) *Holmes, The Common Law, supra*, at 35—36, said:

> "The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis."

(64) This is another meaning of "binding," but does not in this context necessarily refer to "binding" as a precedent.

(65) Mead's Admr. v. Owen, 83 Vt 132, 74 A 1058 (1910); Aspinwall v. Tousey (Vt) 2 Tyler 328 (1803).

(66) *Supra*, 350 U.S. 204—205, 76 S. Ct. 277.

(67) *Supra*, 350 U.S. 205, 205, at 209—210, 76 S. Ct. 277, at 279—280.

agreement by the parties that the law of New York which allows such a stay as was here sought.....should govern.....Law does change with times and cicumstances, and not merely through legislative reforms. It is also to be noted that law is not restricted to what is found in Law Reports, or otherwise written."

In support of the first sentence Mr. Justice Frankfurter said:[68]

"It is peculiarly true of the problem before us, that law is a prophecy 'of what the courts will do in fact.'"

As may be seen, the degree of the "precedent value" of a decision rendered by a State Supreme Court depends on a number of variables, foremost among these on its date in a *Tompkins* context, though in other contexts the ancientness of a decision is not deemed to detract from its validity.

Thus, in the *Bernhardt* case there may be found at least three instances of precedents, the "binding force" of which may be said to be different, in the sense that each of them could have been predicted to be followed in the case with greater of lesser probability. Does this feature of precedents render them less useful as legal sources than statutes? The chances that a statute will be applied in future cases also differ in degree, depending on variables. The difference between a statute and a precedent in this regard rather lies in the fact that it is not customary to use a statute as a "more or less valid authority," whereas it is customary to do so in the case of precedents at common law.

CHAPTER IV: PRECEDENTS IN THE COMMON LAW WORLD: WHAT IN A DECISION IS THE PRECEDENT?

As suggested above, one of the items to be considered in determining the degree of "binding force" to be attributed to a case is the method or methods whereby that which in the precedent decision is supposed to constitute the "precedent" is reached. In the civil law methodology of precedents, except in special situations,[69] the court's statement in the opinion constitutes the "precedent," provided that it is repeated in several cases, even though it is thus uttered by the court in all or some of these cases not in direct relationship to the judgment. By contrast, in common law countries, such statement of a court not related to the judgment is not a "precedent." To be a "precedent", a factor must be related more or less directly to the judgment, but what that factor is or should be or how it must be related to the judgment or who determines whether it is thus properly related, are highly controversial questions. The dispute is known as one concerning the so-called "*ratio decidendi*" of the case, as contrasted with a "*dictum*" or "*obiter dictum*" (apparently less than a "*dictum*")—a statement of the court not related to the judgment.

An observer might query how it is possible that throughout many hundreds of years of

(68) Ibid., note 3 at 350 U.S. 209, 76 S. Ct. 279.

(69) Compare *supra*, at note 44.

common law development no firm idea has crystallized regarding the crucial issue as to what in a decision is "binding." The answer perhaps may be found in a historical-jurisprudential phenomenon. At first a case was deemed an "example" (*exemplum*) of a "custom," and custom was thought susceptible of extension by analogy. But we must not think of any of the operative concepts of this proposition in terms of our own frames of reference. We do not know all the legal phenomena which were comprehended in "custom"[70] or what degree of authority they possessed at various historical stages. As pointed out by Pollock and Maitland,[71] Bracton who in his age stood quite alone in elaborately citing cases "had not our modern notions of 'authority.'" And he apparently thought that analogous application of a custom required authorization by the great assembly of prelates and barons. In evaluating the origins of "precedent," it is well to keep in mind that we generally tend to project our own jurisprudential conceptions onto the past as well as onto other cultures. This impedes understanding that "authority" of law has various meanings in various cultures and denotes various intensities of the experience of authority. In early cultures it is often combined with anarchical elements.[72] A thorough socio-psychological study of the nature and origins of custom as source of law is outstanding. Such study might perhaps convey a better insight into later forms of "authority," for undoubtedly there is a connection between "custom" and later evolving sources of law, and it may be surmised that there exists between them a historical-ideological transition, not yet comprehended by us.

It is thus not clear how the "example" of "custom" later came to be regarded as "evidence" —"evidence" no longer of "custom" but of a preexisting "rule of law" discovered and not invented by the judges. "Custom" in early society seems to have been a phenomenological social reality of things done in a certain way rather than a mystical metaphysical entity. Magic itself, which plays an important role in early law, seems to have been conceived of not as a distinctive event but as integral part of the rest of all life happenings. We do not know how out of such notions of "custom" and its exemplification there emerged the duality of "law," as a "brooding omnipresence' of Reason," and "precedent" as its mere "evidence."

(70) Notice particularly the manner in which apparent "custom" operated in the Roll of Esther. The King had called his advisers to consultation on how to treat the recalcitrant Queen Vashti. Their qualification as such advisers consisted in their knowledge of custom. He called them because they "knew the times, (for so was the king's manner toward all that knew law and judgment." Esther 1 : 13. But the advice of these wise men did not refer at all to any existing custom; it was rather concerned with the policy to be followed, in the light of the probable impact of Vashti's treatment on future matrimonial power relationships, and the policy thereafter adopted was enacted and published as royal decree. Esther 1 : 16—22. Compare also *Roscoe Pound, The History and System of the Common Law* 56 (P.F. Collier & Sons, New York 1939).

(71) Pollock & Maitland, *op. cit., supra*, note 50, at 183—184.

(72) *Bronislaw Malinowski, Crime and Custom in Savage Society* (London, Routledge & Kegan Paul Ltd. 1926), showed such anarchical elements to be present even in savage societies, contrary to the view until then held by anthropologists that the savage is blindly and without reservation obedient to the authority of the legal ritual.

To understand the full, perhaps atavistic origins and meaning of "precedent," such knowledge would seem to be essential. It is regrettable that the matter has not been more elaborately studied by social psychologists.

Bentham has bluntly observed that on each occasion on which a judge renders an original decision, "the rule to which ⌈h⌋e gives the force of law, is one which, on this very occasion, he makes out of his own head."(73) But not until Holmes has the jurisprudential realization that a decision is not merely "evidence of preexisting law" significantly influenced common law jurisprudence. Until then the duality of "law," as a transcendental eternal and omnipresent entity, and of "decisions," as not even manifestations but merely as "evidence" of such "law," was part of the juristic religion of the common law.(74) Holmes succeeded in persuading common law jurists that not only are decisions controlling formulations of "law," but that they are "law itself:" for there is no such thing as "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute".(75) "Law" is rather the enunciated dictate of the sovereign, the State: "Law" is the "decisions," as well as the statutes, of the State.

The change of "jurisprudential atmosphere" which paved the way to acceptance of the Holmesian view—while Bentham's similar view was not taken seriously—was, of course, connected with a shift in the general epistemological "climate" of opinion regarding the overall relationship between "evidence" and that of which it is "evidence." Formerly it seems to have been felt that since the "law" is in existence regardless of being perceived, whether a medium of its discovery is true or false, right or wrong, is in the course of time demonstrated by the nature of the *probandum* as "law"; the latter ultimately proved itself, being in the last analysis "self-evident." As an incident of such immanent proof of "law" quasi by its "revelation," it might perhaps be demonstrated whether the method of precedent used in the evidentiary process was correct; in any event, such method was not necessarity uniform, as there are varieties of methods of proving the same *probandum*. Inherent in this philosophy was the feeling that there is less significance in that which in a medium of evidence is evidentiary than in that which in a "thing" is its "essence." When belief in such "essence" of law, its metaphysical substance as "Reason omnipresent and eternal," was lost, a Copernikan turn was accomplished: attention for the first time focussed on the so-called process of evidence of "law," for on the type of methodology used henceforth depended what was to be "the law." Thus, there arose a dispute over what in a precedent is the "precedent."

However, long before the time when critical philosophy was thus first applied to the law of "precedents," it had been established that, whatever may the "evidence" of law in a case,

(73) *Jeremy Bentham, Justice and Codification Petitions* (1829) *Petition for* Codification, p. 2.

(74) See on this Mr. Justice Frankfurter's summary in Guaranty Trust Co. v. York, *supra*, note 57, 326 U.S. at 101—104, 65 S. Ct. at 1466—1467.

(75) *Supra*, 326 U.S. at 103, 65 S. Ct. at 1467.

it is not "the words" used therein. Francis Bacon emphasized this "non-verbal" character of decisional law to be its distinctive trait, as compared with statutory law:[76] "⌈*N*⌋*eque enim ex verbis regulae petenda est probatio, ac si essent textus legis; regula enim legem indicat non statuit*" (Proof cannot be derived from the words of the rule, as if it were the text of a statute; for the rule indicates the law but does not constitute it). In time "precedent" was defined[77] as being "not...the exact words used in this or that judgment, nor even...all reasons given, but only...the principle recognized or applied as necessary grounds for the decision." This definition contains hardly an operative ingredient that has remained uncontroversial. Nor is the list of controversial subjects exhausted by those mentioned.

Even Bacon's characterization of the "*regula*" as "non-verbal" has been only superficially upheld. For, while no specific single expression of the judge's version of the "rule of the case" is insisted on, the so-called "classical view" postulates that such rule is what the judge deems it to be and that what he deems it to be is "expressed" in the opinion which he „writes." In fact, the most vigorous efforts in the struggle for rationalization of the law of precedents are directed precisely at restoration of the "non-verbal" character of the principle of law expressed in the case.

Key questions concerning the "*ratio decidendi*" variously answered by courts and writers are: What ground or grounds are necessary" for a given decision?; Is the "principle" which constitutes the "authority" in the case that which the precedent court has "recognized" to be such "principle" or that which a later court "follows" or applies as such "principle?"; Is the "principle" revealed in a "statement of principle" or in the material facts?; Are the operative facts of a case derived from those stated by the court or from those appearing in other parts of the record?; Are they those which the precedent court finds to be the operative or material facts or those which a later court, purporting to apply the former case as authority finds to be the material facts? Thus, the possibilities of interpretation of a case have multiplied, opening the door to innumerable possibilities of finding the allegedly one and only "*ratio decidendi.*" A variety of arguments, among them often contradictory contentions, can be based on the same case. One begins to wonder whether the "example" still "exemplifies" anything, whether "Reason" is still a "rationale" and not rather a "rationalization," and whether it would not be wiser to abandon this game of wits and of hidden meanings, and choose a more up-to-date and less self-deceptive method of policy making.

It is of utmost significance to realize whenever questions of ultimate policy are posed that legal philosophy is not merely a dispassionate observer of law, looking upon it from the outside, but a passionate active participant in the law itself. "Law," or whatever is called thus, has a notion of its own of what it is or should be. There are reflected in it the various

(76) *William Searle Holdsworth, Some Lessons From Our Legal History* 17 n. 30 (New York, Macmillan Co. 1928).

(77) Cited *op. cit.*, at 17.

moods and temperaments of those who shape it. As regards the described so-called "unruliness" of the law of precedents, the diverse reaction to it among jurists adds confusion to the general state of chaos. Some, of more anarchical or more contentious "forensic" mood, find in such "unruliness" a source of infinite satisfaction. They praize the opportunity it affords for argument, asserting that in it lies the very "freedom" of the legal profession. They eulogize the manner in which it helps to solve the eternal legal dilemma of continuity and change.(78) They extoll as one of its virtues a feature which Bagehot found so attractive to the public mind in the English Constitution, a combination of the misleadingly theatrical with the venerable and dignified.(79) Other jurists, of more pedantic, orderly temperament, find such unruliness disconcerting. To them harmony, symmetry, consistency and predictability are of the essence of law itself. Application of democratic principles of government to law, the so-called "Rule of Law," is predicated upon these virtues. Some of these jurists emphasize that the period of common law creation in the unruly fashion is over; it was perhaps appropriate to the type of social and economic life of former days, but cannot serve the complex purposes of contemporary mobile industrial and urban society. A final and perhaps psychologically-culturally most interesting feature of the "*stare decisis*" dilemma is the fact mentioned before, that until the nineteentwentieth no one seemed to notice that it existed. Justice Story in *Swift v. Tyson*(80) was satisfied that decisions could not be "law" because they were frequently changing, and he noticed general agreement among lawyers on this characterization of decisions as not "law" on the stated ground. Of course, precedents do not "change" more frequently than statutes; they merely do so less noticeably. But jurisprudence in Story's days was apparently still in a state of general complacency, so that any type of rationalization was acceptable.

Nor is it perhaps quite correct to say that the uncertainty of decisional law was as great in the history of the common law as it has become as a result of added versions of the nature of *ratio decidendi*. In the light of the "classical view," whereby the *ratio decidendi* is the principle of law which the judge considered necessary to the decision of the particular case before him,(81) a precedent was more comparable to statutes than it was within Bacon's version. Indeed, in choosing among the various linguistic versions in which the judge may have expressed what he deemed necessary to his decision, the interpreter was in not a *toto genere* different position from that of the hermeneuticist of former days. The real difference even under the classical view between a precedent and a statute arose from the jurispruden-

(78) "I have often wondered how this perpetual process of change can be reconciled with the principle of authority and the rule of *stare decisis*." Lord Wright, quoted in *Julius Stone, The Province and Function of Law* 166—167 (Harvard University Press, Cambridge, Mass. 1950).

(79) *Walter Bagehot, The English Constitution* 7—10 (Twenty-Third Thousand, London, Kegan Paul, Trench, Trubner & Co. Ltd. 1925).

(80) 41 U.S. (16 Pet.) 1 (1842).

(81) *George Whitecross Paton, A Text-Book of Jurisprudence* 160 (sec. ed. Oxford, Clarendon Press 1961).

tial ideology whereby decisions, like customary law and in contrast to statutes, are susceptible of analogous application. This gave rise to the technique of assimilating and distinguishing a case at bar from a potential precedent case "on their facts"—a technique which in due course developed into an art and became the basis of a highly sensitive precision instrument of justice. Apparently, the device of distinguishing was then also applied even where the principle of the precedent case was presumably broad enough to cover the new case. The closeness of extensive interpretation and analogy created a penumbra within which forensic argument could flourish.

Whatever rule the judge might consider necessary to the decision before him, even within the classical view, his judgment came to be qualified by the tenet that "no rule can be the *ratio decidendi* from which the actual judgment does not follow."(82) Could the judge advance as ground of his judgment a proposition which no one else would consider to support such judgment? If he could, the distinction between *ratio decidendi* and *dictum* might be obliterated. What margin of error is he allowed in declaring with finality what is the *ratio decidendi?* The potential conflict between the judicial evaluation of the *ratio* and the more or less objective rationality of such evaluation sets a necessary limit to the classical view, whereby the precedent judge determines what in his opinion is the "precedent."

Seldom does the deciding judge simply announce the principle of decision and the judgment thereon. In trying to persuade, he formulates that principle repeatedly in various alternative versions; nor does he necessarily abide by one version of the statement of operative facts. He thus impairs his own authority, himself creating the need for a critical outsider's choice among the alternative versions. This factor, combined with semantic difficulties presented in even a single version, creates the legal niceties of "narrowing" or "broadening" the rule. In appellate courts, which are collegiate, each or some of the several judges may insist on offering distinctive or alternative versions.(83) They may also while agreeing on the result, that is, on the judgment, disagree on the *ratio decidendi*, perhaps simply because they take a different view of the operative facts. In a so-called "multi-point decision," that is one in which several points have been argued and the decision could rest on all or some of them, there may be found "an intermediate type of authority," such decision standing on "several legs."(84) To it comes that the several participating judges may concur in one result, while resting their *rationes decidendi* on diverse points in a multi-point assignment of error.(85)

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(82) *Karl N. Llewellyn, The Bramble Bush* 45—46 (New York, Oceana Publications 1960).

(83) In the English courts of appeal it is the common practice for each judge successively to give his opinion on the case.

(84) Llewellyn, *op. cit., supra*, at 47.

(85) For example, in Rochin v. California, 342 U.S. 165 (1952), where the Supreme Court of the United States reversed a conviction based on evidence of morphine capsules extracted forcibly from the accused's stomach, the majority thought that such reversal was required by the due process clause of the Constitution, whereas justices Black and Douglas concurred, arguing, however, that the case should have been decided on the basis of the privilege against self incrimination.

Thus, even within a basic acceptance of the "classical view," the doctrine of precedent is not a unitary phenomenon. It is, as described by Llewellyn, "Janus-faced." "It is not one doctrine, nor one line of doctrine, but two, and two which, *applied at the same time to the same preredent, are contradictory of each other*.....[T]here is one doctrine for getting rid of precedents deemed troublesome and one doctrine for making use of precedents that seem helpful.....[T]hese doctrines exist side by side."(86)

Llewellyn was one of those jurists who believed this Janus-face of the doctrine of precedent a most welcome feature of the common law. So did other American legal realists, notably Judge Jerome Frank. In his view, following precedents was men's response to the "drag of childish nostalgia for the over-secure and the impossibly serene," so that most men, most of the time, prefer routines, thus "avoiding the pain of suspended judgment."(87) "The modern mind is a mind free of childish emotional drags, a mature mind,"(88) Happily, however, "the precedent doctrine, the precedent theory, is very different from the precedent practice."(89) There are many ways of avoiding an unwelcome precedent.(90)

Stress on judicial freedom to avoid or evade an unwelcome precedent placed the question of ultimate authority to formulate what in a decision is the precedent, even given the "classic view" as point of departure, into the limelight. Carleton K. Allen(91) reminded the reader that, historically, a case was thought of as an "*illustration* of some real or supposed proposition of law" rather than an exposition containing "an absolute formulation of a rule of law (like an article of a code)." In Allen's view, it is with qualifications that one can deem the Judge "bound" by precedents:

> "We say that he is 'bound' by the decisions of higher Courts. But he is bound only at his own discretion, according to his own judgment. Nothing can make the process of 'binding' merely automatic and mechanical, for the Judge has first to decide, according to his own lights, whether the illustration is really apposite to the principle he is seeking. The humblest judicial officer can disregard the most authoritative declaration of the House of Lords unless he considers that the precedent cited is 'on all fours'."

This statement, of course, is itself subject to several qualifications. Firstly, as shown above, "bound" in the jurisprudence of the common law world is susceptible of a variety of degrees and shades of meaning. Secondly, gradation within the concept of "authority" is particularly noticeable in the law of precedents. Thirdly, it is true of all "authority" that it is ultimately predicated upon "jurisdiction to decide." Whether the "humblest judicial officer *can* disregard the most authoritative declaration of the House of Lords," depends on the meaning attributed to the term "can." So long as he has jurisdiction to decide the case before him, he "can"

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(86) Llewellyn, *op. cit., supra*, at 68.
(87) *Jerome N. Frank, Courts on Trial* 272 (Princeton, New Jersey, Princeton University Press 1949).
(88) *Jerome N. Frank, Law and the Modern Mind*) 252 (Coward-McCann, Inc., New York 1949).
(89) *Frank, op. cit., supra*, note 87, at 280.
(90) *Id.*, at 286.
(91) *Carleton Kemp Allen, Law in the Making* 164 (Oxford, Clarendon Press 1927).

render a right as well as a wrong decision, and unless an appeal is taken, his "wrong" decision may well stand. Whether he has such discretion as attributed to him by Allen, depends on whether, if an appeal is taken, an appellate court, ultimately the House of Lords, will recognize such discretion or rather reverse his judgment, declaring him "bound" by the former House of Lords decision. Fourthly, the House of Lords may upon examination of the decision of the "humblest judicial officer" and perhaps other factors, decide that it ought to overrule its prior holding. The term "can" attributed to the "humblest officer" in this instance has a distinctive sociological meaning.

The question as to who decides what is the *ratio decidendi* of a case may be best answered by comparison with the question as to who decides what a statute means. Given certain procedural configurations, the "humblest judicial officer" may decide the latter as well as the former question. However, in an appellate situation, it is normally assumed—and this is described as the rule governing the meaning of statutes—that a statute ultimately means whatever the legislators, objectively or subjectively, chose it to mean and not what the "humblest officer" decided that it means. In precedents, by contrast, there is no comparable common assumption. Whether the precedent judge or the judge called upon to follow the precedent decides what the "*ratio decidendi*" is, depends in this sense upon what rule on the methodology of precedents is adopted. At present there is no uniform rule on this subject, and the rule suggested by Allen is actually but an application of general methodology, governing any issue arising in law.

Nevertheless, Allen's attempt to shift the weight of the precedent making process from the precedent court to the court of decision is significant in incidentally drawing attention to the issue of the realistic meaning of the "binding force" of a precedent. The "binding force" of a statute also is much less absolute than is mostly assumed. But it is, no doubt, more "binding" as a general rule than a precedent, and this to a large extent is due to the fact that the methodology of precedents is less settled than that of statutes.

As regards the contents of the precedent or *ratio decidendi*, Allen's views are completely fallacious. He said:(92) "The difference between authoritative and unauthoritative precedent is only the difference between what is logically relevant and what is not." Clearly, relevance for the purpose of precedent authority is not a purely "logical" quality. Even in the case of statutes in which analogous application is not involved, the problem of semantic ambiguity combined with fact-finding vicissitudes makes "subsumption" a complex operation. Thus, even if a precedent were linguistically formulated with comparable accuracy as a statute, and apart from the analogy issue characteristic of precedents, as contrasted with statutes, application of the precedent to a new situation could not be said to be a merely logical operation. To it comes that precedents are not thus verbally fixed even within the "classic view,"

(92) *Ibid.*

whereby the precedent judge formulates what is the *ratio decidendi*, and that at this time the "classic view" itself is by no means dominant, no fixed methodological doctrine existing that might determine how a *ratio decidendi* is or ought to be established. Moreover, whatever may be the role of logics in "subsumption," in the operation of "analogy," where the issue is "similarity" of facts or principles rather than a fitting of facts under a given principle, "logics" is of no avail apart from some assumed doctrine of "similarity."

Julius Stone brilliantly demonstrated that the application of a "precedent" to a case is not but a "logical operation." He said:(93)

> "The English theory of precedent, as formulated by textwriters, imports that a particular decision is explained by one *ratio decidendi*, and which is 'required' or 'necessary' to explain that particular decision.".....
>
> "In the logician's sense, however, it is possible to draw as many general propositions from a given decision as there are possible combinations of distinguishable facts in it. By looking at the facts it is impossible *logically* to say which are to be taken as the basis for the *ratio decidendi*. If there are ten facts, 1, 2, 3, etc., to 10, as many general propositions will explain the decisions as there are possible combinations of those facts. The question—What single principle does a particular case establish? is, it has been said, 'strictly nonsensical, that is, inherently incapable of being answered'".

Moreover, since the facts of a case can be and frequently are stated by the precedent judge at various levels of generality, one decision can never be a compelling authority for another case; the subsequent judge always has a choice, although that choice is not an absolute one. Successive series of precedents narrow the choice; but they mostly also introduce new variables, so that the "rule of *stare decisis*" is a process of constant "self-perpetuating self-renewal of what the comlmon law contains."(94)

Stone also belongs to those who believe such fluidity of the "rule of *stare decisis*" to be a virtue. But others found in it a source of ultimate failure of the common law as a functional tool of social control. Felix S. Cohen enumerated the question "What is the holding or *ratio decidendi* of a case?" among "problems" which "are in fact meaningless, and can serve only as invitations to equally meaningless displays of conceptual acrobatics,"(95) He suggested that "[f]undamentally there are only two significant questions in the field of law. One is, 'How do courts actually decide cases of a given kind?' The other is, 'How ought they decide cases of a given kind?' Unless a legal 'problem' can be subsumed under one of these forms, it is not a meaningful question and any answer to it must be nonsense."(96)

One might query—and a civil lawyer would undoubtedly pose this question—why Cohen believed it more pertinent to ask "how courts actually do and should decide cases of a given

(93) Stone, *op. cit.*, *supra*, note 78, at 187.

(94) Stone, *supra*, note 48, at 603—605, 610—620.

(95) F.S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Col. L. Rev. 809, 822—829 (1935).

(96) *Ibid.*

kind?" than to inquire into either the problem of "how legislators dispose or should dispose of certain issues?" or the problem of "how agencies of sentence execution, police officers, etc., resolve the issues which face them?" Stress on judicial behavior is a typical common law jurisprudential "choice." While there is no objection in principle against purging some of our jurisprudential symbols, among them also the doctrine of "*ratio decidendi*" in its present state of rationalization, there is good reason to believe that if courts are to remain the center of our attention, there will appear among the question of "How they should decide cases?" one akin to, or substituting for, the present queries for the "*ratio decidendi.*"

Cohen's approach is to some extent a revival of an older theory which preached both departure from the doctrine of *stare decisis* as it has come to be in the twentieth century and return to the experimentalism of an earlier *stare decisis.* Oliphant, noting the almost infinite variety of potential generalizations of *rationes decidendi* of cases and the consequent unmanageability of the common law, suggested "deverbalization" in judicial government, following the pattern of original common law tradition:(97)

> "When an answer is looked for, it will be well to consider whether the answer must of necessity be a statement. There may be some gratuity in assuming that the answers to all questions are inevitably so. The answer to some questions, including this one, may be, not a statement, but an attitude, not a matter of affirmation but a method".

The method he proposed is to search for the predictable element in

> "what courts have done in response to the stimuli of the facts of the concrete cases before them. Not the judges' opinions, but which way they decide cases, will the dominant subject-matter of any truly scientific study of law."
>
> .....
>
> "When the facts stimulating 「judges」 to action taken are studied from a particular and current point of view, which our present classification prevents, we acquire a new faith in *stare decisis.* From this viewpoint we see that courts are dominantly coerced, not by the essays of their predecessors but a surer thing, by an intuition of fitness of solution to problem....."

In a "methodical empiricism" of this type disregard of the judges' "verbal behavior" must include their version of the facts of cases. In the United States this presents no obstacle to continued study of case law, since in cases which reach the stage of appellate review, there is mostly available a voluminous printed record containing a verbatim report of all the events in the case, pleadings, evidence, etc. But such "deverbalization" of the law of precedents presents another major difficulty. To avoid all "verbal behavior of judges," it would be necessary in each case to go back to the records of all previous cases, and such task is hopeless in the present state of case law development. Any other consideration of all pertinent cases requires some verbalization, whether by judges or by Oliphant's empirical scientists. There is hardly any reason to trust the latter more than the former. Dependence on the word form is one of the tragic aspects of law. It can be limited, but cannot be wholly eliminated.

(97) Herman Oliphant, *A Return to Stare Decisis*, 6 Am. L. School Rev. 215 (1928).

A much less ambitious approach to solution of the problem of the unmanageability of the doctrine of *stare decisis* has been that advanced by Professor Goodhart.(98) It bears significantly on the present acuteness of the crisis of this doctrine that discussion of the eminent writer's theory set forth in 1930 has been recently taken up with great vigor.(99) Goodhart suggested that "[t]he principle of the case is found by taking account (a) of the facts treated by the judge as material, and (b) his decision as based on them".(100) According to the author, it is not by any particular reason or reasons, but "*by his choice of material facts that the judge creates law.*"(101) The reasons which the judge gives in his opinion or his statement of the rule of law which he is following, are of peculiar importance, "for they may furnish us with a guide for determining which facts he considered material and which immaterial." This distinction between the evidentiary and the *probandum* function of the "reasons given by the judge" or his "statement of the rule of law which he is following" is reminiscent of the old distinction between "decision" and "law." The "reasons" and the "rule" are referred to as "peculiarly" evidentiary. An express or implied averment or denial by the judge of what he considers the material facts may well be deemed partial statements of such "reasons" or "rule." As I view it, the crux of Goodhart's position lies rather in the fact that it deprives of immediate significance the judge's "verbal" version of the reasons of the rule, that is, that to some extent, it carries back to the idea "*non ex verbis regulae.*" To be sure, it does not do so fully, since express statements or denials of "material facts" are taken to override any implications to the contrary.(102) Also, Goodhart's theory may be said to afford some guide for choosing, in an otherwise irreconcilable conflict, among diverse versions of a judge's statement of the rule. Since all facts assumed in these versions must be accepted in formulating the *ratio decidendi*, obviously all these versions are in a sense controlling. This follows a fortiori from Goodhart's proposition that in the event of incon-

(98) Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 Yale L.J. 161 (1930); reprinted in *Essays in Jurisprudence and the Common Law* 1 (1931).

(99) J.L. Montrose, *Ratio Decidendi and the House of Lords*, 20 Modern L. Rev. 124 (1957); *The Ratio Decidendi of a Case*, id. 587 (1957); A. W. B. Simpson, Note, *The Ratio Decidendi of a Case*, 22 Modern L. Rev. 453 (1959); Julius Stone, *The Ratio of the Ratio Decidendi*, *id.* 597 (1959).

(100) *Supra*, at 182. Goodhart also set forth nine further rules; among them notice particularly: (3) If there is an opinion, then the facts as stated in the opinion are conclusive and cannot be contradicted from the record.....(5) All facts which the judge specifically states as immetarial must be considered as immaterial. (6) All facts which the judge impliedly treats as immaterial must be considered as immaterial. (7) All facts which the judge specifically states to be material must be considered material.....(9) If in a case there are several opinions which agree as to the result but differ as to the material facts, then the principle of the case is limited so as to fit the sum of all the facts held material by the various judges."

(101) In his reply to his critics, *The Ratio Decidendi of a Case* 22 Modern L. Rev. 117 at 119 (1959), he underscored this statement.

(102) Professor Goodhart explained the reason for preference of "material facts" over the statement of reasons to be that such statement may be too wide or too narrow. If so, answers Professor Simpson, so are the "material facts."

sistent versions of several concurring judges, all the material facts assumed by all of them must be taken to be true in formulating the rule. The difficulty with Goodhart's position lies in his insistence that, notwithstanding control of all such facts, a judge's statement may be "too broad."

Stone's criticism of all the disputant's failure to distinguish between the "descriptive" and the "prescriptive senses" of the term "*ratio decidendi*"(103) is much less apposite in an atmosphere of Holmesian jurisprudence than it would be in one dominated by Austinian or Kelsenian thought. Stone suggests that we try, in the first place "scrupulously to respect the distinction between that use of the term *ratio decidendi* which describes the process of reasoning by which decision was reached, and that which identifies and delimits *the* reasoning which a later court is bound to follow". Where, as in pre-Holmesian days in the United States and until today in other common law countries, the assumption prevails "that all present and future developments in common law principles are somehow already implicit in the common law existing hitherto,"(104) there is hardly such rigid dividing line between a "descriptive" and a prescriptive use of the term *ratio decidendi*. And this is a fortiori true within a Holmesian view of decisional "authority." Prediction based on judicial statements or behavior are not strictly classifiable into such categories.

The ultimate question to be answered in the light of such relativity of common law methods and the fluidity of its concepts is whether this situation is still, as some maintain, a felicitous one, and if it is not, whether anything can be done to adjust decisional law to present day needs.

The nub of the celebrated "common law method," as seen by writers such as Llewellyn, Judge Frank and Julius Stone, is its very inchoateness. While other writers, such as Goodhart, are willing to sacrifice the ensuing flexibility to certainty, and have attempted to introduce some uniform methodology into decisional law, these attempts have been singularly unsuccessful. One of the reasons advanced against Goodhart's method has been that it does not do away with all uncertainty.(105) The fact is that it reduces it to some extent— for example, in declaring express statements or denials of material facts by the judge to be controlling—, though perhaps not sufficiently to warrant the price in historical arbitrariness of its choice to the exclusion of others.

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(103) Julius Stone, *supra*, note 96, at 600—603, To the same effect is the main objection advanced by Montrose against Goodhart and Simpson. See 20 Modern L. Rev. at 585—589. Goodhart's answers to it is (22 *id.* at 121—122) that unless *ratio decidendi* means that it is "binding," "the whole discussion seems to be meaningless."

(104) Stone, compare *supra*, text at note 49.

(105) In answer to Stone's criticism that Goodhart's rules "for determining 'material' facts are artificial and in part indeterminate, requiring guesses as to what facts the courts tacitly took as material," Goodhart states (22 Modern L. Rev. 124) : "It is not a valid criticism of a system.....to say that some precedents will always remain indeterminate. This is due to the subject-matter itself, and not to the system which is applied to it. Guesswork must always play a part in legal interpretation: this is what makes the law so interesting."

CHAPTER V: WHAT PRICE CERTAINTY? HEREIN ALSO ON CONSTITUTIONAL PRECEDENTS

It is highly unlikely that any individual attempt such as Goodhart's or return to the "classical view" can succeed in bringing at least a modicum of order into the present chaos, as long as opposing lawyers continue to urge divergent methods of case analysis and find support for them in the existing methodology reservoir. Various means of coping with this chaos have been suggested and, indeed, tried.

Of greatest importance among these is the colossal undertaking of the American Law Institute to prepare Restatements of the several branches of the Common Law. But the primary virtue of these Restatements is preparation of a "concordance" and consolidation of conflicting rules, as found in the Common Law; this is to yield a uniform rule to be adopted as a point of departure, and thus overcome the need of going back on each occasion through thousands of cases.(106) Though a Restatement is "something less than a code and something more than a treatise" and affords not more than a sort of presumption, so that "⌈a⌋ny lawyer, whose interest in litigation requires him to say that a different view of the law shall be taken, will have upon his shoulders the burden to overturn the statement,"(107) even such presumptive authority is not expected to reach beyond a certain point of time, for "⌈t⌋he judicial process is to be set in motion again" and the judges "set free."(108)

Among the writers who have shown great concern with the problem of reconciling freedom for judicial creativeness and growth of the law with some principle of order and predictability, perhaps the most oratorially gifted and hence appealing was Judge Benjamin N. Cardozo.(109) The solution he suggested, on the basis of the Holmesian jurisprudence of precedennts and Ehrlich's sociological approach, was adoption of a definite philosophy that would enable us to estimate probabilities of the outcome of cases even in advance of any decisions on the pertinent points. "Law" —he said— is something more than a succession of isolated judgments which spend their force as law when they have composed the controversies that led to them." It is rather the general body of "doctrine and tradition" from which these judgments were derived and by which we criticize them. Their study is "the study of principles of order revealing themselves in uniformities of antecedents and

(106) See *Benjamin N. Cardozo, The Growth of the Law* 6—11 (New Haven: Yale University Press 1924), on the organization plans and prospects of the Restatements.

(107) Address of Mr. Root at the organization of the Institute (1923) as chairman of the meeting. Cited in Cardozo, *op, cit., supra*, at 10.

(108) 35 Harv. L. Rev. 113, 117, cited *ibid.*

(109) Cardozo, *op. cit., supra*, 21 passim; also *Cardozo, The Nature of the Judicial Process* 98—180(New Haven, Yale University Press 1921).

consequents."(110) Part of this order is a basic philosophy of pragmatism, which apparently each judge must assume, so that the "teleological concept of his function.....be ever in [his] mind." Teleology, of course, must be geared to some end, and Cardozo apparently assumed that the conception of the end of the law "finds its organon, its instrument, in the method of sociology." While the "*mores* of the day" cannot be taken automatically to shape rules, it is in them that the judge must seek a guide to such end. "The standards or patterns of utility and morals will be found by the judge in the life of the community."(112)

As community life in modern society grows more complex and less homogeneous, and as community *mores* and community morality often clash, it becomes increasingly difficult to explain in "pragmatic," "teleological" terms what exactly is expected from a judge when he is told.(113)

> "His duty to declare the law in accordance with reason and justice is seen to be a phase of his duty to declare it in accordance with custom. It is the customary morality of right-minded men and women which he is to enforce by his decree."

Most importantly, however, the crude combination ot ethical and sociological method suggested by these words seems hardly appropriate as a legal tool in our times. Surely, the verbal haven it promises is not a substitute for the certainty of a well defined methodology of precedents.(114)

Perhaps a Restatement of Common Law Method rather than, or in addition to, Restatements of various specific legal branches, might modify—even if not entirely eliminate —the continuing uncertainty of the Common Law, as it progresses. A more reliable alternative would be enactment of a statute that would determine with force of law, what in any authoritative judicial decision should be its 'binding" factor. Before suggesting a more definite formulation of such statutory rule, it may be proper to discuss the problem of decisional law, as it appears particularly in American constitutional law at the present stage of development.

Recently the inchoateness of the law of "precedents" has been most vigorously challenged in the area of American Constitutional decision making. The United States Supreme Court Justices have been criticized for not founding their decisions on principles of "adequate neutrality and generality," transcending "any immediate result that is involved;"(115)

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(110) *Cardozo, The Growth of the Law, supra*, note 106. at 36—38.

(111) *Cardozo, The Nature of the Judicial Process, supra*, note 109, at 102.

(112) *Id.*, at 104—105.

(113) *Id.*, at 106.

(114) The problem of who are "right-minded men and women" and how their views might be ascertai ned has been posed in Repouille v. United States, 165 F. 2d 152 (2d Cir. 1947), and further discussed by various writers. The present writer believes that the most difficult problem is not one of ascertainment of community views or mores but one of discrepancy between community practices and community preachings; in criminal law context, the issue is of constitutional dimensions.

(115) Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 15—20 (1959).

for not supplying "the underpinning of principle which is necessary to illumine large areas of the law;" for failing to articulate and develop "impersonal and durable principles of constitutional law."(116) They have been urged to try to "hammer out" their differences by "a process of collective deliberation."

These comments seem to point to a trend toward a development rather resembling the type of judicial legislation for "large areas" characteristic of decisions of the Supreme Courts of Germany.(117) This American trend contrasts strangely with the "spirit of self-restraint" in the American style at present featured by German constitutional law adjudication.(118)

Of course, inadequate "reasoning" is not tantamount to inadequacy of "reasons." Assuming Oliphant's view as a basis of critique,(119) one may very well perceive in recent United States Supreme Court decisions coverage of "large areas" of the law, though these areas may not correspond to conventional legal categories and, thus, appear to be arbitrary to those conditioned by conventional ways of thought. In fact, the critics of the Supreme Court, while purporting to press for "neutral and general principles" in the Court's decisions, actually advance their own additional preferences, which, were they themselves members of the Court, would multiply rather than simplify the issues and further confuse the litigants. One example must suffice to illustrate the type of potential constructive synthetic criticism, attempting to derive from Supreme Court decisions realistic social-ethical principles covering "large areas," on the one hand, and the purely analytical, destructive censorship, accompanied by wholly subjective new proposals of the critics, on the other.

Professor Wechsler (120) criticizes the school "desegregation decision"(121) now of world fame for not affording sufficiently broad and explicit reasons for the Court's choice, that would also apply to desegregation in other social contexts, transportation, restaurants, etc. He points out that, in advancing as ground of the decision resentment of segregation by Negro children and consequent detriment to their learning ability, the Court made it appear as though the judgment turned upon the facts proven in the case. He then proceeds to set forth his own view on the matter. In his view "assuming equal facilities, the question posed by state-enforced segregation is not one of discrimination at all," since it imposes a burden upon White and the Negro citizens alike. To him, desegregation is rather justified on the ground of the postulate of "freedom of association."

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(116) Henry M. Hart, *Forward: The Time Chart of the Justices*, *id.* 84, at 99—100.

(117) Compare *supra*,text at notes 19—24, 28—33.

(118) McWhinney, *supra*, note 46. Notice also in other countries of common law origin trends to eliminate the unruly element of decisional law. In Canada, for example, notice the proposal of chief Justice Rinfret that the Supreme Court formulate only one (signed) decision. See on this McWhinney, "Die Bedentung des Sondervotums in der Verfassungsgerichtsbarkeit," 16 *Juristenzeitung* 655 at 656 (1961).

(119) Compare *supra*, text at note 97.

(120) *Supra*, note 111, at 31—34.

(121) Brown v. Board of Educ., 347 U.S. 483 (1954).

There is no denying the fact that the reasons advanced by the Supreme Court in support of the desegregation decision are not only per se unsatisfactory but, above all, flagrantly disproportionate in significance to the social and ethical stature of the judgment they are supposed to carry. Most adherents of desegregation are certainly not primarily concerned with the learning difficulties of particular groups of children. As a basis of prediction, however, this decision, in the total setting in which it was rendered affords a sufficiently reliable guide to later dispositions of desegregation in contexts other than that of education. Its predictive value undoubtedly covered "large areas of law," in fact, areas immeasurably larger than those that might be covered under the reasoning suggested by Professor Wechsler, namely freedom of association, a freedom not even mentioned in the United States Constitution.(122)

The basic objection against the critics of the Supreme Court, however, should be addressed not to their deviations from the Court's philosophies on merits but to a part of their methodological postulates. Judicial legislation on a high level of abstraction constitutes a striking departure from the traditional common law policy that "courts should avoid deciding any question not directly and unavoidably in issue,"(123) granting that in reasoning, abstraction is unavoidable and that in this sense it is impossible to supply "reasons" exclusively for solutions of questions "directly in issue."

There is need for going back to fundamentals of governmental and institutional structures and querying whether it is at all the proper function of a court to "illumine large areas of law," and whether American courts particularly have not already unduly transgressed the proper limits of separation of powers.(124) Granting that no exact line of demarcation can be drawn between adjudication and legislation, a total obliteration of any limits hardly corresponds to the spirit of the American Constitution. True, in the field of Constitutional Law itself separation is not as apposite as it is in other areas,(125) and the need for a combination of continuity and change, as may be best realized in judicial legislation, is greater. (126) Yet, the Constitution also is but a qualified statute, and while the Supreme Court in constitutional adjudication should be "set free"—indeed, much more "free" than in other contexts—, to reach a policy decision on the issue before it, it should not, if it is to remain a Court, attempt to preempt legislation for "large areas."

But another aspect of the methodological criticism of Supreme Court constitutional and

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(122) See on this Charles E. Wyzanski, *The Open Window and the Open Door*, 35 Calif. L. Rev. 336 (1947).

(123) Thurman Arnold, *Professor Hart's Theology*, 73 Harv. L. Rev. 1298, 1312 (1960).

(124) See on this Silving, *Twilight Zone etc.*, supra, note 36, at 504.

(125) Compare 3 BVerfGE 225 (Germany 1954); see Silving, *supra*, at 503—504.

(126) It is the United States Supreme Court's " considered practice not to apply *stare decisis* as rigidly in constitutional as in nonconstitutional cases." Glidden Company v. Zdanok, 370 U.S. 540, at 543, 82 S. Ct. 1459, at 1469 (1962).

other adjudication seems to be ripe for discussion. Unless Oliphant's proposal is accepted and any "verbal behavior" of judges disregarded or accorded at best a subsidiary significance, it would seem that there is need for ridding the law of precedents of as much of the "guessing game" as possible. It is desirable beyond doubt to avoid the Justices talking "past each other" rather than reaching as much agreement as may be on what the issue before the court is. An essential minimum demand should be that each Justice face the issue or issues presented by the case squarely and address himself consciously to this issue or issues, as appearing to him. Above all, self-deception ought to be avoided. In this age of philosophical and jurisprudential analysis, the process of decision making should be conscious and articulate; it should be geared to answering the questions that are posed, and for this purpose begin with formulation of what questions are posed.

To achieve this end, there is need for a conscious choice of a methodology of precedents, that would enable courts—both the precedent courts and the precedent-bound courts—to take stock of the exact scope of the "precedent." My submission is that either by statutory fiat or rules of court there be imposed systematic rules on decision writing. These rules should require the courts on all levels to make specific findings of fact and conclusions of law. Grounds of decision should be specified in a distinctive part of the decision in brief propositional form; whatever arguments a court or judge chooses to advance should be stated separately. This should not preclude concurrence or dissent, provided that either of these be formulated in the same style as the majority opinion.

No contention is advanced that such systematic decision writing would introduce a panacea of understanding—a panacea that can never be achieved in the area of linguistic expression. But no doubt, many misunderstandings and inconsistencies can be thus eliminated. Apart from the area of constitutional decision making, statutory law creation is rapidly taking over traditional spheres of the common law. The law creativeness of a judicial decision within a system of largely statutory law is, of course, quite different in scope from that of a decision operating within a system of common law. To the extent that statutes can be formulated without undue verbosity and ambiguity, they are preferable to common law dispositions. The function of a decision is to express that which a statute cannot convey with equal convenience; this is the case when there is need for an exemplification or demonstration rather than for a highly abstract exposition. But between a concrete example and the abstract proposition which it is purported to demonstrate there are many intermediate stages of abstraction, and the function of grounds of decision is to establish the link between them. When such decisions supported by grounds become incorporated in the statute and made a part thereof, there is created a body of law endowed with a combination of abstractness and concreteness that affords the greatest possible certainty and thus the best approximation to a "Rule of Law."