CASE LAW AND
THE DOCTRINE OF PRECEDENT

A MANUAL FOR PRACTITIONERS

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FROM THE AMERICAN PEOPLE
Introduction

Project

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Feedback

While every effort has been made to create a manual that is accurate, user-friendly and appropriate in its coverage, we recognise that changes will be needed in future editions as new cases arise, legislation changes etc.

If readers have any suggestions for items that should be altered or added, or any other feedback on the manual, please do contact us with your views. We will seek to incorporate these where possible into future editions and our wider project work.

Many thanks.

Godfrey Cromwell
Director, The British East-West Centre
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The purpose of this manual is to introduce you to the fundamental legal principles that comprise the United Kingdom, the United States and continental European legal systems. This manual is intended for Armenian judges who have not completed law school at a U.S. or U.K. law school. This manual can be used during the training prepared by the British East West Center and ABA/CEELI, as a reference, or for self-study.

The approach to this manual has been to provide a sufficiently detailed summary of the legal systems in the United Kingdom and the United States, but it is not meant to be a comprehensive course book. Where there are areas where more information would be useful (or areas with unnecessary information), please let us know. Because this manual has been published in loose-leaf format, we expect and hope that it will be supplemented by your own work and research and by additional training and information provided from other sources. We hope that the manual will provide you with a real "feel" for the common law system and enable you to make your own judgment as to how such a system will be applied in the Armenian legal system.

Chapter I of this manual will provide an overview of the doctrine of precedent and the use of case law in the legal systems of the United Kingdom and the United States. It contains introductory lectures on the UK and US legal systems and selected materials relating to key issues that arise in relation to the doctrine of binding precedent.

Chapter II of this manual contains a short UK case report and breaks down a U.S. Supreme Court opinion into its constituent parts.

Chapter III focuses on legal reasoning and the writing of judgments in the common law systems.

Chapter IV contains materials on how legislation is interpreted and applied within the common law systems.

Chapter V contains extracts from leading cases in the UK and the US to illustrate how common law judges use the doctrine of precedent and analyse and apply case law to develop and refine specific areas of law. The cases deal with issues relating to criminal law, human rights, the law of negligence and issues of the courts jurisdiction.

Chapter VI evaluates how areas of Armenian substantive law have developed by reference to case law and the authority of the higher courts.

Chapter VII provides useful forms in hard-copy format and compact disc format for your modification and use after the training.
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1. Overview of the doctrine of precedent and the use of case law in the legal systems of the United Kingdom and the United States.

The common law in the British constitutional context

1. Although all common law systems are based on the English common law system, each country within the common law tradition has developed within its own particular constitutional context.

1.2 The British Constitution is based on the interaction of three doctrines, namely
- the rule of law;
- the separation of powers; and
- the legislative supremacy of Parliament.

1.3 The rule of law is so widely accepted as the basis of constitutionalism that it needs no further discussion here.

1.4 The idea which underlies of doctrine of the separation of powers is also widely accepted in many constitutions, but the degree to which the doctrine is actually reflected in practice is subject to significant variations. The British constitution reflects only a limited version of the doctrine, with the most important factor for the present purposes being that the courts make law through the doctrine of binding precedent.

1.5 The doctrine of the legislative supremacy of Parliament is by no means as widely accepted as either the rule of law or the separation of powers. In practice, and in headline form, this doctrine means two things:
- Parliament can pass any legislation it wishes to pass; and
- only Parliament can repeal legislation which Parliament has passed.

Perhaps the most important aspect of the legislative supremacy of Parliament for the present purposes is that the courts cannot quash an Act of Parliament (because only Parliament can repeal one of its own Acts), although the courts can - and do - quash delegated legislation where the delegated legislator has exceeded his powers. In other words, there is no Supreme Court in the British Constitution. The collection of courts which, taken together, form the Supreme Court under the Supreme Court Act 1981 - namely the Crown Court, the High Court and the Court of Appeal - does not even include the Appellate Committee of the House of Lords (in other words, the House of Lords as a court). The terminology ‘supreme court’ is, therefore seriously misleading. Moreover, when the Appellate Committee of the House of Lords is replaced by a body called the Supreme Court in 2008, the legislative supremacy of Parliament will remain unchanged. The Supreme Court will be supreme in name only. Even an Act

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1 English law extends only to England and Wales. Northern Ireland has a separate, though similar common law system, to that of England. Scotland has a different legal system which combines elements of common and civil law. There is no such thing as British law; laws which apply throughout the whole of the United Kingdom are United Kingdom laws. The House of Lords is the final appeal court in domestic law for England and Wales, Northern Ireland and Scotland.
of Parliament which is contrary to the European Convention on Human Rights cannot be quashed by any court.

1.5 Of course, the fact that Parliament is the supreme law maker does not mean that the courts cannot also make laws. But it does mean that any decisions that the courts make can be overturned by Parliament. And it has the additional consequence that, in very many cases, the courts are conscious that their law-making powers should be exercised with caution (or not at all).

1.6 It will be obvious, therefore, that the British Constitution is characterised by a degree of tension between its underlying doctrines. When should the courts be primarily conscious of their limited status according to the doctrines of the legislative supremacy of Parliament and the separation of powers, and therefore refuse to make new law, on the basis that that is Parliament’s role? Alternatively, when should they assert themselves as the guardians of the rule of law?

1.7 Many people coming to the British Constitution for the first time are puzzled. How can the legislative supremacy of parliament co-exist alongside the rule of law? The traditional answer to this has always been that the political system (together with the freedom of the media) is sufficiently robust to ensure that Parliament does not abuse its power. On the other hand, in any system, someone must be trusted with ultimate power; and many democracies feel more comfortable putting their trust in judges rather than politicians.

2. **Stare decisis**

2.1 The Latin tag of *stare decisis* which translates as ‘to stand by decisions’ is usually attached to the doctrine of binding precedent but in itself the phrase adds nothing to an understanding of the concept. In English law, the doctrine of binding precedent states that all courts bind all lower courts, and some courts may also bind themselves. The idea of precedent is not peculiar to the English common law system; to some extent the courts in any developed legal system will follow some kind of precedent. ‘At a very basic level most people would probably accept that justice requires similar cases to be dealt with in a similar way. So there is nothing surprising in the fact that judges in developed legal systems tend to follow each other’s decisions. What is unusual about the Common Law system is that, theoretically at least and in certain circumstances, judges are *bound* to follow decisions made in earlier cases.’

2.2 It is now appropriate to turn to the question of how the doctrine of binding precedent works in the context of the English common law, with particular reference to

- the way in which the courts decide what it is that is binding in earlier decisions;
- and
- the extent to which, and the circumstances in which, the highest court should feel free to depart from its own previous decisions.

3. **Ratio decidendi and obiter dictum**

3.1 Although the doctrine of binding precedent states that all courts bind all lower courts and that to some extent lower courts also bind themselves, it would be wrong to suppose that everything said by judges in the decisions of the courts are of equal weight. The traditional English view distinguishes between the ratio decidendi of a judgment (the binding part) and the obiter dicta (the non-binding part).

3.2 The Latin phrase ratio decidendi can be translated as the reason for the decision. The label is not significant, what matters is, how we identify the ratio of a case. Formulating the ratio of a case is not simply a matter of identification; it will rarely (if ever) be explicitly identified in a judgment. Articulating the ratio of a case is a creative enterprise, and one which will often involve choosing between various possibilities.

3.3 Goodhart’s view on the concept of ratio ‘is that the ratio can be discovered by taking into account the material facts and the decision based on those facts. Furthermore, facts as to person, time, place, kind and amount are all presumed to be not material unless there is good reason to the contrary. Identifying the ratio by reference to the material facts is explicable on the basis that it is reasonable to suppose that both the judge and the advocates were concentrating on the law as it related to those facts, and therefore the quality of those parts of the judgment which relate to the material facts is likely to be higher than the quality of anything else which the judge says.’ Two consequences flow from this analysis. Where a court makes a determination on a preliminary point of law the ratio may carry reduced weight in terms of precedent. In such cases the facts will not be decided unless the case proceeds to trial. In Re Hetherington [1989] 2 All ER 129, the High Court had to decide whether it was bound by the decision of the House of Lords in Bourne v Keane [1919] AC 815. In Bourne the House had assumed the point in question to be the law without hearing argument. Sir Nicolas Browne-Wilkinson VC said:

‘In my judgment the authorities... clearly establish that, even where a decision of a point of law in a particular sense was essential to an earlier decision of a superior court, but that superior court merely assumed the correctness of the law on a particular issue, a judge in a later case is not bound to hold that the law is decided in that sense.’

3.4 The problem of formulating the ratio of a case is not, however, solved by simply identifying the material facts of a case. In fact it begs yet another question, namely: who decides which facts are material – the earlier judge or the later one? This is usually solved by accepting that the phrase ratio decidendi can be used in two distinct ways: descriptively and prescriptively.

3.5 Descriptively the term ratio decidendi is used to describe the way in which the earlier judge reached the decision but the question for the later judge is not how did the earlier judge come to the decision? but what is it in the earlier case which binds the later court? The answer is to identify the prescriptive ratio of the earlier case, that is, the statement of law derived from the earlier case which that case prescribes as being the law for later courts to follow.

‘Should we not ... try scrupulously to respect the distinction between that use of the term ratio decidendi which describes the process of reasoning by which a decision was reached (the ‘descriptive’ ratio decidendi), and that which identifies and delimits the reasoning which a later court is bound to follow (the

3 The Ratio Decidendi of a Case (1930) 40 Yale LJ 161

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‘prescriptive’ or ‘binding’ ratio decidendi?’ (The Ratio of the Ratio Decidendi (1959) 22 MLR 597.)

3.6 In terms of formulating the rule which will subsequently become binding in the instant case the later judge has a vital role in interpreting earlier cases. As Lord Jessel MR said in Osborne to Rowlett (1880) 13 ChD 774:

‘The only thing in a judge’s decision binding as an authority upon a subsequent judge is the principle upon which the case was decided: but it is not sufficient that the case should have been decided on a principle if that principle is not itself a right principle, or one not applicable to the case; and it is for a subsequent judge to say whether or not it is a right principle, and, if not, he may himself lay down the true principle. In that case the prior decision ceases to be a binding authority or guide for any subsequent judge.’ (Emphasis added.)

3.7 As well as identifying the material facts of a case a later judge will also have to decide the appropriate level of generality, or abstraction of the ratio. The more general, or abstract, the statement of the facts is, the greater the number of subsequent cases which will fall within the principle which is being formulated, and therefore the wider the ratio will be. McLeod provides the following illustration from Donoghue v Stevenson [1932] AC 562, a case on the tort of negligence. In that case the House of Lords held that a manufacturer of ginger beer could be liable to the ultimate consumer if the ginger beer became contaminated during the manufacturing process by the presence of a dead snail and the consumer became ill as a result of drinking the ginger beer. If the case were approached on a very specific basis it would be binding only in relation to precisely similar facts. Thus the earlier case would not be binding in a later case where the drink was lemonade. Such a distinction, between ginger beer and lemonade, would be difficult to justify on any rational basis and at the very least the principle of Donoghue must apply to all items of food and drink.

Formulating the principle of Donoghue in terms of ginger beer will produce a very narrow ratio, whereas formulating it in terms of food and drink will produce a relatively wide ratio. Going one stage further and formulating the principle in terms of manufactured goods will produce a still wider ratio. The latter approach was applied in Grant v Australian Knitting Mills [1936] AC 85, so that a manufacturer of woollen underwear was held liable when the garments contained chemicals which caused dermatitis.

3.8 Clearly the outcome of a later case will often depend on the level of generality which a later court can be persuaded to accept as being appropriate. Sometimes the comments of subsequent judges may result in the ratio of a case becoming so narrow that the decision is effectively confined to its own facts, which is a way of saying that unless absolutely identical facts were to recur – and this, of course, is unlikely to the point of impossibility – the case should never be binding at all.

3.9 Perhaps one way forward would be for courts to produce just a single judgment. This does occur in the House of Lords and Court of Appeal where one judge effectively delivers the leading judgment, to which the other judges add statements of concurrence. In some cases even these short statements of concurrence are omitted and the leading judgment is stated to be ‘the judgment of the court’. On the whole

7 See, for example, Leeds City Council v Price [2005] EWCA Civ 289; [2005] 1 WLR 1825.
the English Common Law tradition has rejected the idea of single judgments, partly this stems from the fear that single judgments would often be compromises, partly from the feeling that dissenting judgments can usefully sow the seeds of future legal developments. In *Saunders v Anglia Building Society* [1970] 3 All ER 961 Lord Reid noted a particular danger of single judgments:

‘I think that it is desirable to try to extract from the authorities the principles on which most of them are based. When we are trying to do so, my experience has been that there are dangers in there being only one speech in this House. The statements in it have often tended to be treated as definitions and it is not the function of a court or of this House to frame definitions: some latitude should be left for future developments. The true *ratio* of a decision generally appears more clearly from a comparison of two or more statements in different words which are intended to supplement each other.’

3.10 In English law, the concept *obiter dictum* is defined negatively, to embrace all those parts of a judgment which are capable of being statements of law but which do not fall within the definition of *ratio deciden
di*. At a functional level it is usually said that *obiter dicta* are not binding. The reason for this is that the court may not have heard full argument on the points covered by the *dicta*, but also that, even where full argument has been received, it is likely that the court will have delivered the *dicta* without giving them the same careful consideration which would be appropriate to the more central aspects of the case.

3.11 Although *dicta* are not binding, it does not follow that they are worthless in terms of the doctrine of precedent. Indeed, it is quite clear that *dicta* may be persuasive, and that their degree of persuasiveness will vary from virtually nothing to something which in practice is indistinguishable from *ratio*. To explain this distinction some commentators employ the terminology *gratis dicta* and *judicial dicta*. *Gratis dicta* are mere throwaway remarks and thus of little, if any, value or persuasive force. *Judicial dicta*, on the other hand, will have been preceded, not only by a great deal of careful thought, but also by extensive argument on the point in question. In reality, therefore, judicial dicta may be so strongly persuasive as to be practically indistinguishable from *ratio*. An example will make the matter clear. In *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575, the facts were that *A* gave *B* a banker’s reference about *C*. The reference was stated to have been given ‘without responsibility’, but *B* nevertheless relied on it and extended credit to *C*. The reference was inaccurate and *B* suffered financial loss as a result. The House of Lords decided that, in principle, there could be liability in negligence for a misstatement resulting in financial loss. However, on the present facts, all the House of Lords needed to do was to say that, even if liability existed in principle, the disclaimer would be effective to prevent *B* from succeeding against *A*. Therefore, on the material facts of the case, there was no need to decide whether the liability did actually exist in principle, and it follows that the statement to this effect could be regarded as an *obiter dictum*.

Nevertheless, the House of Lords actually examined the issue of principle in great detail, even though on the present facts the disclaimer operated to negate any liability there may have been. It follows that it would be wholly artificial to discount the statement that such liability exists in principle simply because that statement was not strictly necessary to the actual outcome of the case. As Cairns J said, in *Anderson (W B) & Sons Ltd v Rhodes* [1967] 2 All ER 850:

‘When five members of the House of Lords have all said after close examination of the authorities that a certain type of tort exists, I think that a judge of first instance
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should proceed on the basis that it does exist, without pausing to embark on an investigation whether what was said was necessary to the ultimate decision.’

4. The House of Lords and binding precedent

4.1 Until the mid-19th century the House of Lords took the view that it was not bound by its own previous decisions (Bright v Hutton (1852) 3 HLC 341). However, shortly after that decision, in Beamish v Beamish (1861) 11 ER 735, the House changed its mind and for just over a century the House regarded itself as bound by its own previous decisions. The main reason for seeing itself as bound was that the Law Lords considered that a final court of appeal should maintain finality in terms of its decisions.

4.2 The current position is set out in the Practice Statement of 1966 in which Lord Gardiner LC, with the concurrence of all the other Law Lords, issued a practice statement to the effect that the House was changing its practice in relation to the self-bindingness of its own decisions. The full text of the statement, which is reported under the heading Practice Statement (Judicial Precedent) [1966] 3 All ER 77, is as follows:

‘Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what the law is and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.
‘Their Lordships nevertheless recognize that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict proper development of the law. They propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.
‘In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into, and also the especial need for certainty as to the criminal law.
‘This announcement is not intended to affect the use of precedent elsewhere than in this House.’

4.3 A Press Release issued in connection with the Practice Statement said that the new power to depart would be exercised only rarely. Perhaps the most startling aspect of the contrast between the attitude which the House of Lords developed in the 19th century and the 1966 revision of that attitude is that a single factor – the position of the House of Lords as the highest court of appeal – is used to justify diametrically opposed conclusions, namely that it should not, or conversely should, have power to depart from its own previous decisions.

4.4 Turning to the way in which the Practice Statement has been put into operation, there is the purely practical point that the Practice Direction (House of Lords: Preparation of Case) [1971] 2 All ER 159 requires a party who intends to invite the House to depart from one of its own previous decisions to draw attention to this intention in the appeal documents. The normal practice will then be for a seven-member court to be convened.

4.5 The example of Jones v Secretary of State for Social Services [1972] 1 All ER 145 illustrates the principles of precedent that the House of Lords considers significant in
deciding whether or not to use the Practice Statement.
Under the industrial injuries legislation in force at the time, claims for long-term benefit were determined in two stages, by two different tribunals. In the first place, the question was whether an injury had been caused by an accident arising out of employment. If this question were answered in the affirmative, the second stage was to decide the extent of the disablement, and therefore the amount of benefit payable. The legislation stated that the answer to the first question was to be ‘final’. In *Re Dowling* [1967] AC 725, the House of Lords had held that the tribunal determining the second question could not reopen consideration of the first question.
In *Jones*, the legislation was substantially the same as that which was before the court in *Dowling*, the majority of a seven-member House of Lords decided to follow *Dowling*. On the face of it, this decision may appear to be unexceptionable. However, the fact that four Law Lords thought that *Dowling* was wrongly decided, but only three were willing to depart, seems rather odd, and therefore the case requires some closer analysis. Four significant points emerge. First, the House made it clear that the power to depart from earlier decisions should be exercised very sparingly. In other words, the advantage of finality should not be thrown away lightly. In other words, the advantage of finality should not be thrown away lightly. Secondly, it had not been shown that the rule in *Dowling* was causing administrative inconvenience.
The other two points are neatly encapsulated in a short passage from Lord Reid’s speech:

‘I would not seek to categorize cases in which [the Practice Statement] should or cases in which it should not be used. As time passes experience will provide some guide. But I would venture the opinion that the typical case for reconsidering an old decision is where some broad issue is involved, and that it should only be in rare cases that we should reconsider questions of construction of statute or other documents ... Holding these views, I am firmly of opinion that *Dowling’s* case ought not to be reconsidered. No broad issue of justice or public policy is involved nor is any question of legal principle. The issue is simply the proper construction of complicated provisions in a statute. There must be a large number of decisions of this House of this character.’

However, Lord Reid did acknowledge that overruling could actually promote certainty rather than undermining it:

‘It is notorious that where an existing decision is disapproved but cannot be overruled courts tend to distinguish it on inadequate grounds. I do not think that they act wrongly in so doing: they are adopting the less bad of the only alternatives open to them. But this is bound to lead to uncertainty for no one can say in advance whether in a particular case the court will or will not feel bound to follow the old unsatisfactory decision. On balance it seems to me that overruling such a decision will promote and not impair the certainty of the law.’

It may seem odd that the House of Lords was prepared to follow an earlier decision which it thought was wrong, but as Lord Pearson noted:

‘If a tenable view taken ... in the first appeal could be overruled by ... another tenable view in a second appeal, then the original tenable view could be restored by ... a third appeal. *Finality of decision would be utterly lost.*’

4.6 The Practice Statement of 1966 reaffirmed the importance of the doctrine of binding precedent generally, but indicated that the House would nevertheless be willing to depart from its own decision where it appeared to be right to do so. The House has been restrained in its use of the Practice Statement. In civil cases it is clear that mere wrongness is not enough, and that some additional factor, such as changed circumstances or an issue of principle, is also necessary. In criminal cases the House
began by being particularly reluctant to use the Practice Statement, but subsequently it relaxed this attitude to some extent. Experience has shown that the House uses the Practice Statement relatively infrequently, and with a reasonably high degree of predictability.
CHAPTER I  
Introduction to Case Law in the United States

2. Introduction to the Doctrine of Binding Precedent in the USA

The United States is a common law country. Every U.S. State has a legal system based on the common law, except Louisiana, which relies on the French civil code. Common law has no statutory basis; judges establish common law by applying previous decisions (precedents) to present cases. Although typically affected by statutory authority, broad areas of the law, most notably relating to property, contracts, and torts are traditionally part of the common law. These areas of the law are mostly within the jurisdiction of the States, and thus state courts are the primary source of common law. Federal common law is relatively narrow in scope; primarily limited to clearly federal issues that have not been addressed by a statute.

In this Chapter, we present a very cursory overview of the U.S. legal system, beginning with its historical development, its different components and structure, and some of its characteristics that are particular to a common law system.

A. The Power of Judicial Review in the United States Court System

Supreme Court Justice Charles Evans Hughes wrote in The Supreme Court of the United States (1966) that the Court "is distinctly American in conception and function, and owes little to prior judicial institutions." To understand what the framers of the Constitution envisioned for the Court, another American concept must be considered: the federal form of government. The Founders provided for both a national government and a system of state governments in which the state courts are bound by federal laws. However, final interpretation of federal laws could not be left to a state court and certainly not to several state tribunals, whose judgments might disagree. Thus, the Supreme Court must interpret federal legislation. Another of the Founders' intentions was for the federal government to act directly upon individual citizens as well as upon the states.

Given the Supreme Court's importance to the U.S. system of government, it was perhaps inevitable that the Court would evoke great controversy. Charles Warren, a leading student of the Supreme Court, said in The Supreme Court in United States History: "Nothing in the Court's history is more striking than the fact that while its significant and necessary place in the Federal form of Government has always been recognized by thoughtful and patriotic men, nevertheless, no branch of the Government and no institution under the Constitution has sustained more continuous attack or reached its present position after more vigorous opposition."

During its first decade the Court decided only about 50 cases. Given the scarcity of Supreme Court business in the early days, Chief Justice Jay's contributions may be traced primarily to his circuit court decisions and his judicial conduct.

Perhaps the most important of Jay's contributions, however, was his insistence that the Supreme Court could not provide legal advice for the executive branch in the form of an advisory opinion. Jay was asked by Treasury Secretary Alexander Hamilton to issue an opinion on the constitutionality of a resolution passed by the Virginia House of
Representatives, and President Washington asked Jay for advice on questions relating to his Neutrality Proclamation. In both instances, Jay's response was a firm "No," because Article III of the Constitution provides that the Court is to decide only cases pertaining to actual controversies.

John Marshall served as chief justice from 1801 to 1835 and dominated the Court to a degree unmatched by any other justice. Marshall's dominance of the Court enabled him to initiate major changes in the way opinions were presented. Prior to his tenure, the justices ordinarily wrote separate opinions (called "seriatim" opinions -- Latin for "one after the other") in major cases. Under Marshall's stewardship, the Court adopted the practice of handing down a single opinion. Marshall's goal was to keep dissension to a minimum. Arguing that dissent undermined the Court's authority, he tried to persuade the justices to settle their differences privately and then present a united front to the public. Marshall also used his powers to involve the Court in the policy-making process. Early in his tenure as chief justice, for example, the Court asserted its power to declare an act of Congress unconstitutional, in *Marbury v. Madison* (1803).

This case had its beginnings in the presidential election of 1800, when Thomas Jefferson defeated John Adams in his bid for reelection. Before leaving their offices in March 1801, however, President Adams and departing Federalist Congress created several new federal judgeships. To fill these new positions Adams nominated, and the Senate confirmed, loyal Federalists. In addition, Adams named his outgoing secretary of state, John Marshall, to be the new chief justice of the Supreme Court.

As secretary of state it had been Marshall's job to deliver the commissions of the newly appointed judges. Time ran out, however, and 17 of the commissions were not delivered before Jefferson's inauguration. The new president ordered his secretary of state, James Madison, not to deliver the remaining commissions. One of the disappointed nominees was William Marbury. He and three of his colleagues, all confirmed as justices of the peace for the District of Columbia, decided to ask the Supreme Court to force Madison to deliver their commissions. They relied upon Section 13 of the Judiciary Act of 1789, which granted the Supreme Court the authority to issue *writs of mandamus* -- court orders commanding a public official to perform an official, nondiscretionary duty.

The case placed Marshall in a predicament. Some suggested that he disqualify himself because of his earlier involvement as secretary of state. There was also the question of the Court's power. If Marshall were to grant the writ, Madison (under Jefferson's orders) would be almost certain to refuse to deliver the commissions. The Supreme Court would then be powerless to enforce its order. However, if Marshall refused to grant the writ, Jefferson would win by default.

The decision Marshall fashioned from this seemingly impossible predicament was evidence of sheer genius. He declared Section 13 of the Judiciary Act of 1789 unconstitutional because it granted original jurisdiction to the Supreme Court in excess of that specified in Article III of the Constitution. Thus the Court's power to review and determine the constitutionality of acts of Congress was established. This decision is rightly seen as one of the single most important decisions the Supreme Court has ever handed down. A few years later the Court also claimed the right of judicial review over actions of state legislatures; during Marshall's tenure it overturned more than a dozen state laws on constitutional grounds.
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“Outline of the U.S. Legal System” online: USInfo
http://usinfo.state.gov/products/pubs/legalotln/federal.htm

1. States and the National Government in the Federalist System

Federalism in the United States has two dimensions: “Vertical” federalism (or the relationship between the states and the federal government) and “horizontal” federalism (or the relationship of the states to each other).

2. American Common Law

a. Development

Although the United States and most Commonwealth countries are heirs to the common law legal tradition of English law, American law tends to be unique in many ways. This is because the American legal system was severed from the British system by the Revolution, and afterwards, it evolved independently from the British Commonwealth legal systems. Therefore, when attempting to trace the development of traditional judge-made common law principles (that is, the few that have not already been overridden by newer laws) American courts will look at British cases only up to the early 19th century.

Although the courts of the various Commonwealth nations are often influenced by each other's rulings, American courts rarely follow post-Revolution Commonwealth rulings unless there is no American ruling on point, the facts and law at issue are nearly identical, and the reasoning is strongly persuasive. The earliest American cases, even after the Revolution, often did cite contemporary British cases, but such citations gradually disappeared during the 19th century as American courts developed their own principles to resolve the legal problems of the American people. Today, the vast majority of American legal citations are to domestic cases. Sometimes, courts, and casebook editors, do make exceptions for opinions on issues of first impression by brilliant British jurists, like William Blackstone or Lord Denning.

Some adherents of originalism and strict constructionism such as Justice Antonin Scalia of the United States Supreme Court argue that American courts should never look for guidance to post-Revolution cases from legal systems outside of the United States, regardless of whether the reasoning is persuasive, with the sole exception of cases interpreting international treaties to which the United States is a signatory. Others, such as Justices Anthony Kennedy and Stephen Breyer, disagree, and cite foreign law from time to time, where they believe it is persuasive, useful or helpful.

http://en.wikipedia.org/wiki/Law_of_the_United_States#American_common_law

b. Common Law and Stare Decisis

The United States is a common law country. Every U.S. state has a legal system based on the common law, except Louisiana (which relies on the French civil code). Common law has no statutory basis; judges establish common law by applying previous decisions (precedents) to present cases. Although typically affected by statutory authority, broad areas of the law, most notably relating to property, contracts, and torts are traditionally part of the
common law. These areas of the law are mostly within the jurisdiction of the states, and thus state courts are the primary source of common law. Federal common law is relatively narrow in scope; primarily limited to clearly federal issues that have not been addressed by a statute.

Reported decisions of the U.S. Supreme Court and of most of the state appellate courts can be found in the official reporter of the respective courts. Those decided from at least 1887 to date can also be found in the National Reporter System, a system of unofficial reporters. Decisions of lower state courts are not published officially but can usually be found in unofficial reports. When referring to a case, a citation typically includes the name of the case and the volume and pages of the reporter, as well as the date for example, Kleppe v. New Mexico, 426 U.S. 529 (1976). Citations to federal courts of appeals are found in volumes abbreviated F., F.2d, or F.3d, and district courts are in volumes abbreviated F. Supp. The decisions of other specialized federal courts such as Claims of bankruptcy decisions are also reported.

“Introduction to the United States Legal System.” Online: Tenant Net
http://www.tenant.net/Court/Legsystm/uslawsum.html

c. Retroactivity vs. Prospectivity

1. Civil Cases

One of the distinguishing features of an advisory opinion is that it lays down a rule to be applied to future cases, much as does legislation generally. It should therefore follow that a court could not decide purely prospective cases, cases which do not govern the rights and disabilities of the parties to the cases. Courts have regularly asserted that this principle is true, only applying the decision retroactively effect to the parties in the immediate case. Yet, occasionally, the Court did not apply its holding to the parties before it, and in a series of cases beginning in the mid–1960s it became embroiled in attempts to limit the retroactive effect of its—primarily but not exclusively —constitutional–criminal law decisions. The results have been confusing and unpredictable.

Prior to 1965, “both the common law and our own decisions recognized a general rule of retrospective effect for the constitutional decisions of this Court . . . subject to [certain] limited exceptions.” Statutory and judge–made law have consequences, at least to the extent that people must rely on them in making decisions and shaping their conduct. Therefore, the Court was moved to recognize that there should be a reconciling of constitutional interests reflected in a new rule of law with reliance interests founded upon the old. In both criminal and civil cases, however, the Court’s discretion to do so has been constrained by later decisions.

What the rule is to be, and indeed if there is to be a rule, in civil cases has been evenly disputed in recent cases. As was noted above, there is a line of civil cases, constitutional and nonconstitutional, in which the Court has declined to apply new rules, the result often of overruling older cases, retrospectively, sometimes even to the prevailing party in the case. As in criminal cases, the creation of new law, through overrulings or otherwise, may result in retroactivity in all instances, in pure prospectivity, or in partial prospectivity in which the prevailing party obtains the results of the new rule but no one else does. In two cases raising

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the question when States are required to refund taxes collected under a statute that is subsequently ruled to be unconstitutional, the Court revealed itself to be deeply divided.


a. Finality of Judgments

Once a final judgment has been handed down in a lawsuit, subsequent judges who are confronted with a suit that is identical to or substantially the same as the earlier one will apply res judicata or collateral estoppel to preserve the effect of the first judgment.

Res judicata includes two related concepts: claim preclusion, and issue preclusion (also called collateral estoppel), though sometimes res judicata is used more narrowly to mean only claim preclusion.

Claim preclusion focuses on barring a suit from being brought again on a legal cause of action that has already been finally decided between the parties.

Issue preclusion bars the relitigation of factual issues that have already been necessarily determined by a judge or jury as part of an earlier claim.

It is often difficult to determine which, if either, of these apply to later lawsuits that are seemingly related, because many causes of action can apply to the same factual situation and vice versa. The scope of an earlier judgment is probably the most difficult question that judges must resolve in applying res judicata. Sometimes merely part of a subsequent lawsuit will be affected, such as a single claim being struck from a complaint, or a single factual issue being removed from reconsideration in the new trial.

Rationale

Res judicata is intended to strike a balance between competing interests. On one hand, it assures an efficient judicial system that renders final judgments with certainty and prevents the inequity of a defendant having to defend the same claim or issue of law repeatedly. On the other hand, it protects the plaintiff's interest in having issues and claims fully and fairly litigated.

Exceptions to application

Res judicata does not restrict the appeals process, which is considered a linear extension of the same lawsuit as it travels up (and back down) the appellate court ladder. Appeals are considered the appropriate manner by which to challenge a judgment rather than trying to start a new trial, and once the appeals process is exhausted or waived, res judicata will apply even to a judgment that is contrary to law.

However, there are limited exceptions to res judicata that allow a party to attack the validity of the original judgment, even outside of appeals. These exceptions—usually called collateral attacks—are typically based on procedural or jurisdictional issues, based not on the wisdom of the earlier court's decision but its authority or competence to issue it. A collateral attack is
more likely to be available (and to succeed) in judicial systems with multiple jurisdictions, such as under federal governments, or when a domestic court is asked to enforce or recognize the judgment of a foreign court.

In addition, in cases involving due process, cases that appear to be res judicata may be re-litigated. An example would be the establishment of a right to counsel. People who have had their liberty taken away (i.e., imprisoned) may be allowed to be re-tried with a counselor as a matter of fairness.

Failure to apply

When a subsequent court fails to apply res judicata and renders a contradictory verdict on the same claim or issue, if a third court is faced with the same case, it will likely apply a "last in time" rule, giving effect only to the later judgment, even though the result came out differently the second time. This situation is not unheard of, as it is typically the responsibility of the parties to the suit to bring the earlier case to the judge's attention, and the judge must decide how broadly to apply it, or whether to recognize it in the first place.

1. Application in Civil Law (Legal System)

The civil law doctrine of res judicata is much narrower in scope than its common law counterpart.

In order for a second trial to be dismissed on a motion of res judicata in a civilian jurisdiction, the trial must be identical to the first trial in the following manner: (1) identical parties, (2) identical theories of recovery, and (3) identical demands in both trials. In other words, the issue preclusion or collateral estoppel found in the common law doctrine of res judicata is not present in the civilian doctrine. In addition if all else is equal between the two cases, minus the relief sought, there will be no dismissal based on res judicata in a civil law jurisdiction.

While most civilian jurisdictions have slightly broadened the doctrine through multiple exceptions to these three requirements, there is no consensus on which exceptions ought to be allowed.

Note: Louisiana (USA), a civil law jurisdiction, has in the last twenty years, begun to follow the common law doctrine of res judicata.


2. Application to Criminal Law

The phrase Nulla poena sine lege (Latin: "no penalty without a law") refers to the legal principle that one cannot be penalized for doing something that isn't prohibited by law. This principle is accepted as just and upheld by the penal codes of virtually all modern democracies. It is related to the principle called "Nullum crimen, nulla poena sine praevia lege poenali", which means penal law cannot be enacted retroactively.
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One complexity is the lawmaking power of judges under common law. Even in civil law systems that do not admit judge-made law, when does the function of interpretation of the criminal law end and judicial lawmaking begin?


In the United States, the prohibited retroactive application of substantive criminal laws is called ex post facto laws and they are summarized from one of the oldest U.S. Supreme Court cases as follows:

I will state what laws I consider ex post facto laws, within the words and the intent of the prohibition. … Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. [criminalizing non-criminal behavior] … Every law that aggravates a crime, or makes it greater than it was, when committed. … Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. [aggravating the punishment] … Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender [that is, reduce the quantity of evidence required to convict a defendant]. All these and similar laws are manifestly unjust and oppressive.


d. Case Law in Form and Function

1. Judicial Opinions and Their Structure

In the US judiciary, opinion is the word used for a higher court's published decision which either meaningfully expands or reverses existing precedent. Cases decided by the US Supreme Court, for example, sometimes become well-known because they express the court's "opinion" on how federal law (or the Constitution) is to be interpreted, which can have very wide implications (e.g. Roe v. Wade). This usage of the word opinion is different from the common usage (outside the legal field), because the court's opinion is not the opinion of any person, but the court's decision after careful deliberation of the case, and is binding on relevant future cases in lower courts. Other appeals courts, such as state appeals courts, also file opinions which serve the same function at the state level. An opinion can also be published at the insistence of a dissenting judge on the case.

Not every case decided by a higher court results in the publication of an opinion; in fact most do not, since an opinion is usually only published when the law is being interpreted in a novel way, or the case is a high-profile matter of general public interest and the court wishes to

9 See also Stogner v. California, 539 U.S. 607 (2003).
make the details of its ruling public. In the majority of cases, the judges issue what is called a *memorandum opinion* instead, which simply points out how state or federal law applies to the case and affirms or reverses the decision of the lower court. A memorandum opinion does not establish legal precedent or re-interpret the law, and cannot be invoked in subsequent cases to justify a ruling. Opinions, on the other hand, *always* establish a particular legal interpretation.

In the United States, a state appeals court does not re-evaluate the facts of the case, but is called on (according to the appellant's specific reason for appeal) to decide whether the law was applied correctly, or if there were errors in the trial process that invalidate the verdict or entitle the plaintiff or defendant to a new trial.

2. Precedential Effect of Court Decisions

Under the doctrine of stare decisis, when a court has laid down a principle of law as applying to a certain set of facts, it will adhere to that principle and apply it to all future cases where the facts are substantially the same. The rule of stare decisis is a judicial policy, based on the principle that, absent powerful countervailing considerations, like cases should be decided alike in order to maintain stability and continuity in the law. The doctrine is the means by which courts ensure that the law will not merely change erratically but will develop in a principled and intelligible fashion.

Stare decisis is the preferred course because it promotes evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. Stare decisis is intended to insure that people are guided in their personal and business dealings by prior court decisions, through established and fixed principles they announce. Stare decisis reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right. Stated otherwise, stare decisis is the most important application of a theory of decision-making consistency in our legal culture and it is an obvious manifestation of the notion that decision-making consistency itself has normative value.

The doctrine of stare decisis permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact. The doctrine of stare decisis is crucial to the system of justice because it ensures predictability of the law and the fairness of adjudication.

20 Am. Jur. 2d Courts § 129

3. The Legal Reasoning Process in Case law

Two basic types of legal reasoning are used in the case law system: deductive reasoning and analogical reasoning. Deductive reasoning takes case law “rules” and applies them in a manner similar to statutes. Analogical reasoning directly compares the facts of the prior precedent to the facts of the case to be decided. Legal reasoning, which may be referred to herein as “analysis,” will be discussed in more detail in Chapter III of this manual.

E. THE JUDICIAL SYSTEM

1. The Relationship between Trial and Appellate-Level Courts

All the court systems in the United States, state and federal, have two basic types of courts: trial courts and appellate courts. The two courts have different functions and characteristics. Below is a brief summary of each court.

a. Trial Courts
A trial court or court of first instance is the court in which most civil or criminal cases begin. Not all cases are heard in trial courts; some cases may begin in inferior limited jurisdiction bodies such as the case of the jurisdiction of an administrative body that has been created by statute to make some kind of binding determination under the law and were simplified procedural practices may apply similar to arbitration.

The trial court receives evidence and determines “findings of fact” following the applicable procedural law. The court also makes “findings of law” based upon the applicable law. Findings of fact are determined by the trier of fact (judge or jury), and the findings of law are always determined by the judge or judges. In most common law jurisdictions, the trial court consists of a jury and one judge; though some cases may be designated "bench trials" — either by statute, custom, or by agreement of the parties — in which the judge makes both fact and law determinations.

A trial court is distinguished from an appellate court, which reviews cases that have already been heard in the trial court. In appellate review, the record of the trial court must be certified by the clerk of the trial court and transmitted to the appellate body. Most appellate courts do not have the authority to hear testimony or take evidence, but must rely upon the record below. Most trial courts are courts of record. The trial court is the court where the record of the presentation of evidence is created and must be maintained or transmitted to the appellate court.

In the United States, the United States district court is the sole trial court of general jurisdiction in the federal judicial system. State court systems refer to their trial courts by a variety of names, including "district court", "circuit court", "superior court", and (in New York) "Supreme court".

http://en.wikipedia.org/wiki/Trial_court

b. Appellate Courts: Intermediate Appellate Courts and Supreme Courts

The U.S. appellate courts have no original jurisdiction whatsoever; every case or controversy that comes to one of these intermediate level panels has been first argued in some other forum. These tribunals, like the district courts, are the creations of Congress, and their structure and functions have varied considerably over time.

Basically, Congress has granted the circuit courts appellate jurisdiction over two general categories of cases. The first of these is ordinary civil and criminal appeals from the federal trial courts. In criminal cases, the appellant is the defendant because the government is not free to appeal a verdict of not guilty. In civil cases, the party that lost in the trial court is usually the appellant, but the winning party may appeal if it is not satisfied with the lower-court judgment. The second broad category of appellate jurisdiction includes appeals from certain federal administrative agencies and departments and also from independent regulatory commissions, such as the Securities and Exchange Commission and the National Labor Relations Board.
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The U.S. Supreme Court is the only federal court mentioned by name in the Constitution, which spells out the general contours of the High Court's jurisdiction. Although the Supreme Court is usually thought of as an appellate tribunal, it does have some general original jurisdiction. Probably the most important subject of such jurisdiction is a suit between two or more states.

The High Court shares original jurisdiction (with the U.S. district courts) in certain cases brought by or against foreign ambassadors or consuls, in cases between the United States and a state, and in cases commenced by a state against citizens of another state or another country. In situations such as these, where jurisdiction is shared, the courts are said to have concurrent jurisdiction. Cases over which the Supreme Court has original jurisdiction are often important, but they do not constitute a sizable proportion of the overall caseload. In recent years less than 1 percent of the High Court's docket consisted of cases heard on original jurisdiction.

The U.S. Constitution declares that the Supreme Court "shall have appellate Jurisdiction...under such Regulations as the Congress shall make." Over the years Congress has passed much legislation setting forth the "Regulations" determining which cases may appear before the nation's most august judicial body. Appeals may reach the Supreme Court through two main avenues. First, there may be appeals from all lower federal constitutional and territorial courts and also from most, but not all, federal legislative courts. Second, the Supreme Court may hear appeals from the highest court in a state -- as long as there is a substantial federal question.

Most of the High Court's docket consists of cases in which it has agreed to issue a writ of certiorari -- a discretionary action. Such a writ (which must be supported by at least four justices) is an order from the Supreme Court to a lower court demanding that it send up a complete record of a case so that the Supreme Court can review it. Historically, the Supreme Court has agreed to grant the petition for a writ of certiorari in only a tiny proportion of cases -- usually less than 10 percent of the time, and in recent years the number has been closer to 1 percent.

Another method by which the Supreme Court exercises its appellate jurisdiction is certification. This procedure is followed when one of the appeals courts asks the Supreme Court for instructions regarding a question of law. The justices may choose to give the appellate judges binding instructions, or they may ask that the entire record be forwarded to the Supreme Court for review and final judgment.


   a. Appellate Courts Rule on Legal – Not Factual -- Questions

A working proposition of state and federal appellate court practice is that these courts will generally not hear cases if the grounds for appeal are that the trial judge or jury wrongly amassed and identified the basic factual elements of the case. It is not that trial judges and juries always do a perfect job of making factual determinations. Rather, there is the belief that they are closer to the actual parties and physical evidence of the case, and, therefore, they will do a much better job of making factual assessments than would an appellate body reading a transcript of the case some months or years after the trial. However, legal matters -- which
laws to apply to the facts of a case or how to assess the facts in light of the prevailing law -- are appropriate for appellate review.

b. Trial Court Actions that are Renewable

1. The Final Judgment Rule

Appeals lie only from "final decisions." A final decision is "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." The rationale behind the final judgment rule is that piecemeal review is inefficient. Since trial judges are affirmed more often then they are reversed time is saved by holding off all issues until the final appeal.

Under the "final judgment rule" appeals are only allowed after all the issues involved in a particular lawsuit have been finally determined by the trial court.

"Appeals." Online: Lawschoolhelp.com
http://www.west.net/~smith/appeal.htm

2. Interlocutory Appeals

An appeal that occurs before the trial court's final ruling on the entire case. 28 USCA § 1292(b). Some interlocutory appeals involve legal points necessary to the determination of the case, while others involve collateral orders that are wholly separate from the merits of the action.

Black's Law Dictionary (8th ed. 2004), appeal. A criminal defendant may for example file an interlocutory appeal of a pretrial detention order.

3. Mandamus

Mandamus is a judicial remedy which is in the form of an order from a superior court to any government, subordinate court, corporation or public authority to do or forbear from doing some specific act which that body is obliged under law to do or refrain from doing, as the case may be, and which is in the nature of public duty and in certain cases of a statutory duty. It cannot be issued to compel an authority to do something against statutory provision.

Mandamus can be supplemented by the statement that it is not only the command to do but also a command not to do a particular thing against the rights of the petitioner. Mandamus is supplemented by legal rights. It must be judicially enforceable and legally protected right before one suffering a legal grievance can ask for a mandamus. A person can be said to be aggrieved only when he is denied a legal right by someone who has a legal duty to do something and abstains from doing it.


F. CIVIL PROCEDURE
Civil procedure is the body of law that sets out the process that courts will follow when hearing cases of a civil nature (a "civil action"). These rules govern how a lawsuit or case may be commenced, what kind of service of process is required, the types of pleadings or statements of case, motions or applications, and orders allowed in civil cases, the timing and manner of depositions and discovery or disclosure, the conduct of trials, the process for judgment, various available remedies, and how the courts and clerks must function.

http://en.wikipedia.org/wiki/Civil_procedure

1. The pleading stage of the case

   a. Plaintiff’s Complaint

   In the common law, a complaint is a formal legal document that sets out the basic facts and legal reasons (see: cause of action) that the filing party (the plaintiffs) believes are sufficient to support a claim against another person, persons, entity or entities (the defendants) that entitles the plaintiff(s) to a remedy (either money damages or injunctive relief).

http://en.wikipedia.org/wiki/Complaint

   b. The Defendant’s Response to the Complaint

   An answer is any counter-statement or defense, a reply to a question or objection, or a correct solution of a problem. In the common law, an answer is the first pleading by a defendant, usually filed and served upon the plaintiff within a certain strict time limit after a civil complaint or criminal information or indictment has been served upon the defendant. It may have been preceded by an optional "pre-answer" motion to dismiss or demurrer; if such a motion is unsuccessful, the defendant must file an answer to the complaint or risk an adverse default judgment.

   The answer establishes which allegations (cause of action in civil matters) set forth by the complaining party will be contested by the defendant, and states all the defendant's defenses, thus establishing the nature and parameters of the controversy to be decided by the court.

http://en.wikipedia.org/wiki/Answer

   c. Amendment of Pleadings

   An “amendment of pleadings” is a changed written pleading in a lawsuit, including complaint or answer to a complaint. Pleadings are amended for various reasons, including correcting facts, adding causes of action (legal bases for a suit), adding affirmative defenses, or responding to a court's finding that a pleading is inadequate as a matter of law.

   “Amended Pleading.” Online: The Free Dictionary

G. Administrative Law
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Administrative law is the body of law that arises from the activities of administrative agencies of government. Government agency action can include rulemaking, adjudication, or the enforcement of a specific regulatory agenda. Administrative law is considered a branch of public law. As a body of law, administrative law deals with the decision-making of administrative units of government (e.g., tribunals, boards or commissions) that are part of a state regulatory scheme in such areas as international trade, manufacturing, the environment, taxation, broadcasting, immigration and transport. Administrative law expanded greatly during the twentieth century, as legislative bodies world-wide created more government agencies to regulate the increasingly complex social, economic and political spheres of human interaction.

Examples in the United States are:

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<td>(2) Department of Energy (DOE),</td>
<td>(2) Water Resources Department,</td>
<td>(2) Country and City Building Codes Department</td>
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<td>(3) Institute Commerce Commission (ICC),</td>
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<td>(4) Internal Revenue Service (IRS),</td>
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<td>(7) National Labor Relations Board (NLRB),</td>
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<td>(8) Federal Drug Administration (FDA).</td>
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In the United States legal system, many government agencies are organized under the executive branch of government, rather than the judicial or legislative branches. The departments under the control of the executive branch, and their sub-units, are often referred to as executive agencies. The so-called executive agencies can be distinguished from the many important and powerful independent agencies, that are created by statutes enacted by the U.S. Congress. Congress has also created Article I judicial tribunals to handle some areas of administrative law.

The actions of executive agencies independent agencies are the main focus of American administrative law. In response to the rapid creation of new independent agencies in the early twentieth century (see discussion below), Congress enacted the Administrative Procedure Act (APA) in 1946. Many of the independent agencies operate as miniature versions of the tripartite federal government, with the authority to "legislate" (through rulemaking), "adjudicate" (through administrative hearings), and to "execute" administrative goals (through agency enforcement personnel). Because the United States Constitution sets no limits on this tripartite authority of administrative agencies, Congress enacted the APA to establish fair administrative law procedures to comply with the requirements of Constitutional due process.
This excerpt is from an article concerning the rising use of the composite (or single) judgment in civil law cases particularly in the Court of Appeal (Civil Division). Munday is not a keen supporter of composite judgments; seeing them as alien to the common law tradition. He does intimate, however, that it should be easier to identify the *ratio decidendi* of a case where there is a single composite judgment of the court. He identifies that the courts see composite judgments as an appropriate means for:

- handing down general guidance on the operation of a statute;
- giving an authoritative statement of how particular rules are to be applied; and
- handling ‘big’ cases in terms of both mass litigation and/or major issues.

He questions the use of composite judgements when the courts deal with cases where the conduct of lawyers and law enforcement agencies are at issue.

He then turns his attention to the methods used by judges to create a composite judgment and notes that it can be:

- the acknowledged work of a single judge on the bench;
- mostly the work of one judge to which the others have made *some* contribution;
- a judgment to which all the judges have contributed and upon which all agree; or
- a judgment of the majority opinion in the case.

Usefully (for our purposes at least) Munday then compares the position of the Court of Appeal (Civil Division) with that of the Court of Appeal (Criminal Division) where by tradition the court hands down a single unanimous judgment.

In conclusion he looks to the US experience of composite judgments and suggests that the composite judgment can lead to an “intellectual dilution” with judgments based on the lowest common denominator.

Although not discussed in the excerpt it is worth noting that judges in both the Court of Appeal (Civil Division) and the House of Lords often simply concur, either in full or in part, with the reasoning of and decision of another judge. A “concurring judgement” creates something of a middle way between each of the judges giving full reasons for her or his decision on the one hand and the composite judgment on the other. In concurring judgments where there is agreement unnecessary repetition is avoided but where there is disagreement differences of opinion can be openly aired.


‘‘ALL FOR ONE AND ONE FOR ALL’’
THE RISE TO PROMINENCE OF THE COMPOSITE JUDGMENT WITHIN THE CIVIL DIVISION OF THE COURT OF APPEAL
Roderick Munday

When first instructed in common law… law students are routinely presented with a portrait of the English judge as individualism personified… according to the conventional wisdom, Continental civilian courts generally opt for a system of collegiality, in which their benches of judges hand down anonymous, formal, collective judgments… In contrast, the common law judge speaks entirely as an individual, even when sitting with colleagues.

…

[In] September 2001, the present writer speculated on the possible consequences of some of the new methods of composing and delivering judgment with which common law courts have begun to experiment. One, but not the only, featured shift in method was the way in which the Court of Appeal, the Divisional Court, and even the House of Lords on rare occasions, have chosen to deliver single, united, composite judgments. In short, as will be demonstrated, in comparatively recent times English courts, to a surprising degree, have espoused something resembling a civilian judicial procedure.

…

The simple fact is that within a very short space of time the composite judgment has established itself as a standard means whereby the Civil Division of the Court of Appeal now despatches between 10% and 15% of its business.
CHAPTER I Single or Composite Judgments

...  

A. The Court of Appeal, Civil Division and the composite judgment

This paper will contend that the composite judgment has in recent times become a favoured device of judges of the Civil Division of the Court of Appeal.

...  

This may cause us to re-evaluate our expectations: do we really believe that members of an appellate court ought invariably to make a visible contribution to the finished product, i.e., the court’s decision? On the other hand, we might also wish to consider the consequences that would follow were all members of every judicial triumvirate to deliver their individual judgments in every case, even when the second and third judges were broadly in agreement with the judge first to give judgment. The impenetrability of all too many rationes decidendi under such conditions might not conduce to the most effective system of precedent.

...  

B. Which issues appear most calculated to drive the Court of Appeal into composite mode?

The Court of Appeal occasionally delivers quite explicit hints as to why it may have chosen to deliver a composite judgment in a particular case. Take B v. B, an appeal against an occupation order made under the Family Law Act 1996... The court had reserved judgment, and Butler-Sloss L.J.’s stated reasons for reserving judgment in the case also seem to explain why the court handed down a composite judgment. As her Ladyship explained, this was the first case under Part IV of the 1996 Act to reach the Court of Appeal. Hence, by implication, it provided an appropriate vehicle for handing down general guidance on the operation of the statute. The case was also unusual on its facts, and the court was especially anxious that its reasons were not misunderstood and that its judgment did not “give the wrong message” to those parties, practitioners and courts who had to deal with Part IV of the Act on a day-to-day basis.

...  

One obvious use to which composite judgments may be put is to issue a single, authoritative statement of how particular rules are to be applied. A definitive ruling on a ticklish point of law has much to recommend it. Often, that is the context in which one encounters the composite judgment. Sometimes, however, composite judgments form just one part of a more extensive process of streamlining or managing multiple lawsuits arising out of an especially problematical area of law. The automatic directions provisions, contained in Ord. 17, r. 11 of the County Court Rules, and a resulting trio of Court of Appeal composite judgments designed to reduce the uncertainty surrounding them, furnish a good example... In Bannister v. S.G.B. plc, [Saville L.J. related how], the court had originally been invited to spend seven weeks ploughing through a veritable welter of litigation. After three weeks, in March 1997, however, the court determined to make a representative selection of 19 appeals and two applications out of the 100 and more cases then awaiting disposal. The stated objective was in part to give us the opportunity of dealing with a very large number of unresolved issues on the proper interpretation of Order 17, rule 11 of the County Court Rules. We are also using the occasion to restate the law on this topic in a single judgment. Such is the scale of the difficulties that have been confronting the lower courts that we have asked that a copy of this judgment should be sent immediately to every county court in England and Wales (for distribution to the judges who sit in that court), as well as to all the parties in all the appeals and applications awaiting decisions by this court.

...  

Allen v. British Rail Engineering Ltd. provides another strong example of the Court of Appeal employing the composite technique to deal authoritatively with a complex mass of litigation. The appeal arose out of a four-week trial of four cases in which claimants sought compensation for vibratory white finger syndrome contracted at work. As Schiemann L.J. pointed out, these were only sample test cases; there were hundreds more such cases waiting in the wings.

...  

A more debatable category of case... consists of cases where the conduct of the lawyers or officers of the law is called into question.

...  

In Chief Constable of West Midlands Police v. Heaven, the police lodged an appeal against an adverse judgment arising out of an action for trespass, false arrest, assault and malicious prosecution. Sedley L.J... pointedly delivered “the judgment of the court.” By analogy, when a case raises general issues affecting the regulation of an arm of the legal profession, the Court of Appeal is liable to go into composite mode. Thus, in Colley v. Council for Licensed Conveyancers, a case that posed at least five significant questions relating to the disciplinary regime set in place to regulate the profession of licensed conveyancers by Part II
of the Administration of Justice Act 1985, Sir Andrew Morritt V.-C. gave the judgment on behalf of a united court.

In these circumstances… [a] unified judicial response can obviously lend weight to the court’s findings. It emphasises that all three members of the court have taken the matter seriously. A court cannot safely brush aside allegations of misconduct that affect the administration of justice. However, some risk attaches to this approach. The closing of ranks and the convenient exact concurrence of the appellate court could arouse a suspicion that the legal profession is just looking after its own.

... It would seem that the Court of Appeal sometimes sees the composite judgment as the appropriate response in big cases. By this, I would mean “big” either in terms of the legal issues raised or in terms of the parties and interests involved. A substantial proportion of the cases already mentioned in this paper exemplifies this point.

C. Techniques of composition

The cases reveal that a number of different techniques and permutations are available to a court that elects to deliver a composite judgment… The court may delegate preparation of the judgment to one of its number… Alternatively, it may tell us who was responsible for the lion’s share of the drafting.

Henry L.J.’s phraseology in Vadera v. Shaw, to the effect that “this is the judgment of the court, to which each member has contributed and on which we are agreed”, could even imply that there are cases where the members of the tribunal have each been nominated to draft a portion of the judgment but the court has not strictly required that each judge should have agreed with every portion of his brethren’s opinions.

The most recent development in this field has been the phenomenon of judges collaborating in the composition of a majority judgment. In Bellinger v. Bellinger (Attorney General intervening) the Court of Appeal was required to pronounce upon the validity of a marriage entered into by a man and a transsexual female. The majority held that since the “woman” had been correctly designated a male at birth, it was a matter for Parliament to determine whether as a matter of public policy it was fitting to treat a person who had undergone a sex change for all purposes as someone of the opposite sex to the one correctly assigned to “him” at birth. The two majority judges, Dame Elizabeth Butler-Sloss P. and Robert Walker L.J., handed down a single (presumably, composite) judgment under their joint names. Thorpe L.J., however, delivered a dissenting judgment...

It could be argued that the adoption of the composite majority judgment, with the individual members of the bench forming into judicial clusters, aligns the English Court of Appeal more closely with the practices of the world’s pre-eminent courts, including the United States Supreme Court, the Australian High Court and the European Court of Human Rights. Like all the other changes chronicled in this paper, however, this further departure from established practice seems to have occurred without prior consultation and without consideration for the consequences.

D. The Court of Appeal, Criminal Division, vibrating in sympathy

Although the focus of this paper is the activities of the Civil Division of the Court of Appeal, something ought also to be said about the methodology followed in criminal appellate cases… By tradition, in criminal cases the Court of Appeal delivers a single, unanimous judgment. The culture, then, is composite… A member of the court may not deliver a dissenting speech. Indeed, the Supreme Court Act 1981, s. 59 goes further, specifically providing:

Any judgment of a court of the criminal division of the Court of Appeal on any question shall, except when the judge presiding over the court states that in his opinion the question is one of law on which it is convenient that separate judgments should be pronounced by members of the court, be pronounced by the judge presiding over the court or by such other member of the court as he directs and, except as aforesaid, no judgment shall be separately pronounced on any question by any member of the court. (emphasis added)

I am unaware of any case in modern times where the presiding judge in the Criminal Division has actually authorised the delivery of multiple judgments or where one of the wing judges sought the privilege of delivering a concurring judgment.
Although the Criminal Division avoids dissent at all costs, disagreements will sometimes divide the court. If a dissident minority judge is unwilling simply to suppress a discordant opinion, in *Shama* Lloyd L.J. described the procedure that caters for this eventuality. In essence, there is said to be a “well established” practice whereby the dissenting judge can request that the case be relisted, usually before a five-member court, for rehearing. At this second hearing the majority view will prevail. This procedure seems not to have been much employed, if at all… All the same, the procedure described in *Shama*, little employed though it is, still underlines the premium placed upon the court appearing to speak with a single voice.

Why does the Criminal Division not tolerate any differences of opinion? Dissent, after all, is now an integral feature of the English legal tradition. Disagreement is normally taken to betoken healthy debate. It has a long history. Dissenting judgments began to form part of the practice of English courts from the sixteenth century… In criminal cases, because of the importance of the interests upon which it is pronouncing—the liberty of the subject is at stake and the courts are channelling the force of the state against its own citizens—it is thought inappropriate for the court to speak with a divided voice. Clear and emphatic statements of the law, then, are prized in criminal matters. An interesting recent development that appears to reinforce this philosophy is that on one occasion even the House of Lords, which has hitherto handed down multiple judgments in criminal cases, has delivered itself of a single composite judgment in one criminal decision. In *Forbes*, a decision which now dictates when the police are obliged under Code D of the Police and Criminal Evidence Act 1984 to hold an identification parade, it is significant that Lord Bingham of Cornhill… delivered what he termed “the considered opinion of the Committee”. The House’s single collective judgment was obviously intended to give police forces the clearest guidance on how to interpret their duties under PACE Code D.2.3.

The Criminal Division may also have recourse to selfconsciously composite judgments in cases of legal difficulty.

…

One cannot of course always be sure exactly why a court has elected to emphasise its unanimity of view. In *Dyson*, for example, Gage J. stressed: “Each member of the Court has read the papers in the matter and the grounds of appeal. We entirely agree with the observations of the Single Judge.”

E. Concluding observations

This paper has brought to the fore the growing significance of the composite judgment… it has emerged that in a high proportion of cases only one judgment is ever delivered… it comes as something of a shock that in 1999, 2000 and 2001 in only roughly half of the Court of Appeal’s non-criminal cases did more than one judge deliver a judgment. Given the complexity of the questions the Court presumptively has to address, this does seem to represent a surprising measure of judicial consensus.

…

In the future, it seems highly likely that the proportion of composite judgments will continue to rise. This is not simply a matter of extrapolating from the figures. Other influences may play a role. Since the entry into force of the Human Rights Act 1998, every recess of English law has been exposed to a Court, many of whose judgments routinely take composite form. English lawyers are already thoroughly familiar with the composite judgments of the European Court of Justice, a court that will brook no dissent. If the composite judgment acquires complete respectability either as a judicial labour-saving device—an auxiliary to the other forms of case management, or as a means of handing down decisions that minimise potential uncertainty by providing united, authoritative statements of the law, one must wonder whether the very style of English judgments will not alter over time.

It could be mentioned that in one common law system, the United States, there is evidence that this intellectual dilution does occur. In a revealing paper, delivered a few years ago as part of a symposium on judicial writing, Justice Patricia Wald, a federal appeals court judge… offered some sharp comments on the effect of collegiate judgments written “for the court”. She wrote:

Predictably… most judges will compromise their preferred rationale and rhetoric to gain a full concurrence from other members of the panel. In an appellate court composed of strong-minded men and women of different political and personal philosophies, consensus is a formidable constraint on what an opinion writer says and how she says it. Her best lines are often left on the cutting room floor.
4. Arguments for and against a power of prospective overruling

Extract from Jones v. Secretary of State for Social Services (1972)

Excerpt 1.4

The following excerpt includes material from Legal Method (Ian McLeod Palgrave Macmillan 2005) and from Lord Simon’s judgment in Jones v Secretary of State for Social Services [1972] 1 All ER 145. It looks at the retrospective effect of the common law in terms of prospective overruling. It shows that there is no strong support among the English judiciary for prospective overruling and suggests that the prospective overruling would:

- deter claimants from pursuing cases when they might not benefit from any changes in the law;
- not create (technically at least) binding precedents in law;
- be constitutionally objectionable because it involves judges legislating.

Judicial law reform causes injustice in individual cases

[An] element of unfairness is that in any case where the court changes the law, that change is retrospective in the sense that new law is being applied to an old situation. Furthermore, other cases which are in the pipeline will then be decided according to the changed law. The first of these points (but not the second) could be met by the adoption of the American practice of prospective overruling, under which the court decides the present case on the basis of the pre-existing authority, while announcing that, for the future, that authority is overruled and will not be followed again.

Although prospective overruling reduces the unfairness of retrospectivity (by limiting it to only those cases in the pipeline) it may have the practical consequence of deterring some people from litigating in pursuit of law reform, since even if they win the argument in principle they will still lose the case. Admittedly this would not apply equally to all litigants. For example, large organizations involved in much litigation of a repetitive nature may find it worth pursuing a point in one case because of the future value of a reforming judgment, but such pursuit of law reform would make unrealistic demands on the altruism of ordinary individuals.

There are other objections to the introduction of prospective overruling. First, at the purely technical level of precedent, any judicial statement that the pre-existing authority was being overruled would necessarily be obiter, on the basis that it could not be necessary to the actual decision on the dispute between the parties. It must, however, be conceded that this argument is purely technical, since in practice subsequent courts would no doubt disregard cases which had been prospectively overruled.

Secondly, prospective overruling may be said to be constitutionally objectionable, because it confers naked legislative power upon the courts. Whether or not you find this latter point convincing depends partly on your assessment of the degree of legislative power which the courts already have, and partly on whether you think it matters if that power is naked or interstitial in nature.

The introduction of prospective overruling into the English legal system was canvassed by Lord Simon in both Jones v Secretary of State for Social Services [1972] 1 All ER 145 thus:
‘I am left with the feeling that, theoretically, in some ways the most satisfactory outcome of these appeals would have been to have allowed them on the basis that they were governed by the decision in Dowling’s case, but to have overruled that decision prospectively. Such a power - to overrule prospectively a previous decision, but so as not necessarily to affect the parties before the court - is exercisable by the Supreme Court of the United States, which has held it to be based on the common law: see Linkletter v. Walker (1965) 381 U.S. 618. In this country it was long considered that judges were not makers of law but merely its discoverers and expounders. The theory was that every case was governed by a relevant rule of law, existing somewhere and discoverable somehow, provided sufficient learning and intellectual rigour were brought to bear. But once such a rule had been discovered, frequently the pretence was tacitly dropped that the rule was pre-existing: for example, cases like Shelley’s Case (1581) 1 Co.Rep. 93b, Merryweather v. Nixan (1799) 8 Term Rep. 186 or Priestley v. Fowler (1837) 3 M. & W. 1 were (rightly) regarded as new departures in the law. Nevertheless, the theory, however unreal, had its value - in limiting the sphere of lawmaking by the judiciary (inevitably at some disadvantage in assessing the potential repercussions of any decision, and increasingly so in a complex modern industrial society), and also in emphasising that central feature of our constitution, the sovereignty of Parliament. But the true, even if limited, nature of judicial lawmaking has been more widely acknowledged of recent years; and the declaration of July 20, 1966 [the Practice Statement], may be partly regarded as of a piece with that process. It might be argued that a further step to invest your Lordships with the ample and more flexible powers of the Supreme Court of the United States would be no more than a logical extension of present realities and of powers already claimed without evoking objection from other organs of the constitution. But my own view is that, though such extension should be seriously considered, it would preferably be the subject-matter of parliamentary enactment. In the first place, informed professional opinion is probably to the effect that your Lordships have no power to overrule decisions with prospective effect only; such opinion is itself a source of law; and your Lordships, sitting judicially, are bound by any rule of law arising extra-judicially. Secondly, to proceed by Act of Parliament would obviate any suspicion of endeavouring to upset one-sidedly the constitutional balance between executive, legislature and judiciary. Thirdly, concomitant problems could receive consideration - for example, whether other courts supreme within their own jurisdictions should have similar powers as regards the rule of precedent; whether machinery could and should be devised to apprise the courts of the potential repercussions of any particular decision; and whether any court (including an Appellate Committee on your Lordships’ House) should sit in banc when invited to review a previous decision.’

Lord Simon raised the issue again in Miliangos v George Frank (Textiles) Ltd [1975] 3 All ER 801 and it was supported in principle by Lord Diplock in Jones. Furthermore, in R v Governor of Her Majesty’s Prison, Brockhill ex parte Evans (No 2) [1998] 4 All ER 993, where the skeleton argument of one advocate in the Court of Appeal was prefaced by a note explaining the American case-law on prospective overruling, Lord Woolf MR commented that the practice ‘results in a much more flexible position than that which exists within this jurisdiction ... [and] ... has much to commend it’. When the case proceeded to the House of Lords (see [2000] 4 All ER 15), the idea of prospective overruling received a mixed reception, with Lord Slynn’s speech being the most favourable, albeit not unequivocally so:
‘I consider that there may be situations in which it would be desirable, and in no way unjust, that the effect of judicial rulings should be prospective or limited to certain claimants ... But even if such a course is open to English courts, there could in my view be no justification for limiting the effect of the judgment in this case to the future. The respondent’s case has established the principle and she is entitled to compensation for false imprisonment.’

At the other end of scale, Lord Hobhouse was much more traditional, although he too was not completely unequivocal:

‘The constitutional role of the courts is to decide disputes and grant remedies. The disputes will include disputes whether a previous decision still represents the law and should be followed or overruled. It is a denial of the constitutional role of the courts for courts to say that the party challenging the status quo is right, that the previous decision is overruled, but that the decision will not affect the parties and only apply subsequently. They would be declining to exercise their constitutional role and adopting a legislative role deciding what the law shall be for others in the future ... Such a decision would by definition not be part of the ratio decidendi of the case and therefore would not constitute an authoritative decision.

‘There is an exception to this, decisions on the practice and procedure of the courts ... The reason for this is that in relation to procedure the courts do have a legitimate quasi-legislative function ... The law of remedies can also provide an exception to the general rule.’

Lord Browne-Wilkinson, Lord Steyn and Lord Hope were more or less neutral, although Lord Hope did say:

‘My Lords, I am in sympathy with the view that the issue of retrospectivity is likely to assume added importance when the Human Rights Act 1998 is brought into force ... As for the suggestion that a decision might be given effect to prospectively only, it is worth noting that there is an important difference between the situation where a decision is to take effect from the date of its pronouncement and that where the court wishes to suspend the effect of its decision until some date in the future. It is commonly understood that decisions which indicate an alteration in the court’s practice or which are designed to lay down guidelines for the assistance of judges operate prospectively as from the date of their pronouncement. But that is not the kind of issue with which we are dealing in this case ... The working assumption is that where previous authorities are overruled decisions to that effect operate retrospectively.

....

‘But I think that this not an appropriate case for detailed consideration of these arguments. I do not see how it can be sensibly argued that [the relevant statutory provision] meant one thing at the time when the governor made his calculation and another when its meaning was determined authoritatively by the Divisional Court.’

However, as we saw in Kleinwort Benson Ltd v Lincoln City Council [1998] 4 All ER 513, Lord Goff rejected the idea of prospective overruling.
Chapter II  Structure of Judicial Opinion in the United States

2. STRUCTURE OF A JUDICIAL OPINION IN THE UNITED STATES

This section of the manual will examine the basic structure of an appellate judicial opinion in the United States legal system. Using a model opinion from the United States Supreme Court, this section will explain and examine each section of the judicial opinion in detail. The goals of this section are: (1) to introduce the various components of a judicial opinion for a case law system; (2) to explain how and why each component of the judicial opinion contributes to a case law system; (3) to provide the tools for briefing, reading and understanding other judicial opinions; and (4) to provide an introduction to legal reasoning and to legal writing discussed in more detail in Chapter III.

Generally speaking, most judicial opinions in the United States legal system follow the same or similar structure. This structure generally includes the following sections:

(1) the case caption;
(2) the votes and separate opinions of the justices, as well as the names of the lawyers representing the parties, and the names of any amicus curie;
(3) the summary of the case and procedural history;
(4) the summary of the facts;
(5) the summary of arguments;
(6) the legal analysis, discussion, or legal reasoning; and
(7) the conclusion/holding/directions of the court.

We have selected Maryland v. Buie, 494 U.S. 325 (1990), which can be found on the U.S. Supreme Court webpage in the searchable database at http://www.supremecourtus.gov/.
Chapter II  Structure of Judicial Opinion in the United States

1. The Case Caption

<table>
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<th>U.S. Supreme Court</th>
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<tr>
<td>MARYLAND v. BUIE,</td>
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<td>494 U.S. 325 (1990)</td>
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<td>494 U.S. 325</td>
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MARYLAND v. BUIE
CERTIORARI TO THE COURT OF APPEALS OF MARYLAND
No. 88-1369.
Argued December 4, 1989
Decided February 28, 1990

The first section of a judicial opinion is the case caption. The case caption has substantive, procedural, and administrative value.

Substantively, the case caption reveals the posture of the parties. In other words, this is the portion of the opinion that describes the parties: which is the party filing the lawsuit (plaintiff), defending the lawsuit (defendant), making the appeal (appellant), or petitioning the court (petitioner), to name a few. In the United States, most courts place the plaintiff, appellant, petitioner name to the left of the “versus” line, and the defendant, the appellee, or the respondent name goes to the right. Interestingly, this is also how the parties are positioned in court before the judge.

As you can see above, the parties in this case are Maryland (the State) and Buie (an individual). Because Maryland is listed first or to the left of the “versus” line, Maryland is the Petitioner to the U.S. Supreme Court, or the party that filed the writ of certiorari. Buie is the respondent.

Procedurally, the case caption reveals at least three important pieces of information: (1) the court in which the case is being decided; (2) if it is an appellate opinion, the case caption will reveal the lower court that decided the case as well; and (3) the date when the case was filed, argued, and/or decided. As you can see from the case caption, the court in which the case is being decided is the U.S. Supreme Court. We know it is an appellate decision accepted to the U.S. Supreme Court on a Writ of Certiorari from the Court of Appeals of Maryland, which is the highest court in the State of Maryland.

Administratively, the case caption reveals the case citation or location of this particular judicial opinion in the published reporter for U.S. Supreme Court opinions: 494
U.S. 325. This reporter is the official volume of opinions from the U.S. Supreme Court. This same opinion also might be published in a private commercial reporter system such as an online reporter system like Westlaw or Lexis/Nexis. The first number in a citation is the number of the volume of the reporter, and the second number is the first page number where the opinion appears in that particular volume of the reporter. We also know the judicial opinion number: No. 88-1369. Every case filed in the United States receives a case number or file number. This number is important for case management purposes. All of this administrative information helps the court administration, judges, law clerks, lawyers, law students, and the public (1) find this particular opinion, (2) research this particular opinion, and (3) use this particular opinion in subsequent briefs or judicial opinions.

Using opinion numbers and a uniform reporting system creates a unified legal management system, and, for example, all lawyers, judges, law students, and members of the public can find any opinion from any court in the United States using the same information.
2. Votes and Opinions of Justices; Attorneys; and Amicus Curiae

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BLACKMUN, STEVENS, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. STEVENS, J., and KENNEDY, J., filed concurring opinions. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined.

Dennis M. Sweeney, Deputy Attorney General of Maryland, argued the cause for petitioner. With him on the briefs were J. Joseph Curran, Jr., Attorney General, Gary E. Bair, Mary Ellen Barbera, and Ann N. Bosse, Assistant Attorneys General, and Alexander Williams, Jr.

Lawrence S. Robbins argued the cause for the United States as amicus curiae urging reversal. With him on the brief were Solicitor General Starr, Assistant Attorney General Dennis, Deputy Solicitor General Bryson, and Kathleen A. Felton.

John L. Kopolow argued the cause for Respondent. With him on the brief were Alan H. Murrell, Michael R. Braudes, Nancy S. Forster, and Gary S. Offutt.

Gregory U. Evans, Daniel B. Hales, Emory A. Plitt, Jr., Judith A. Ronzio, George D. Webster, Jack E. Yelverton, Fred E. Inbau, Wayne W. Schmidt, and James P. Manak filed a brief for Americans for Effective Law Enforcement, Inc., et al. as amici curiae urging reversal.

Ira Reiner, Harry B. Sondheim, and Eugene D. Tavris filed a brief for the Appellate Committee of the California District Attorneys Association as amicus curiae.

JUSTICE WHITE delivered the opinion of the Court.
The second section of the opinion identifies the votes of the justices (if there is a panel of more than one judge) and which justice drafted a separate opinion (if this is allowed). In the U.S. Supreme Court, the history of drafting separate opinions is interesting. In the beginning of the Court, each justice drafted his own opinion. When Justice Marshall became Chief Justice of the U.S. Supreme Court in 1789, he believed that separate opinions destroyed the credibility of the Court, because by filing separate opinions, the Court was not unified. Therefore, in the Judiciary Act of 1789, he ensured that only one opinion would be delivered by the Court thus presenting a unified judiciary to the public. As the U.S. Supreme Court case law developed, dissenting and concurring justices were allowed to submit separate opinions, but only one majority opinion is delivered as the judgment of the Court, and it is only this majority opinion that is the binding precedent.

In this section of the Maryland v. Buie opinion, you also can see which justices joined the majority opinion (REHNQUIST, and BLACKMUN, STEVENS, O'CONNOR, SCALIA, and KENNEDY) which justices concurred with the opinion but felt that additional *dictum* was necessary or valuable and drafted concurring opinions (STEVENS and KENNEDY) and which justices disagreed with the majority and concurring opinions and together drafted a dissenting opinion (BRENNAN and MARSHALL).

In this section of the opinion, you also can see the names of the lawyers representing the parties, and the parties that filed *amicus curiae* (“friend of court”) briefs. Sometimes this information is omitted from judicial opinions. This is unfortunate, because much of the responsibility for the quality of opinions (good and bad) belongs to the attorneys. It is also interesting and useful to know the names and interests of the *amicus* parties. Sometimes the name of the group/individual/or body itself clearly indicates the position of the *amicus*, but other times, the relief the group seeks in its *amicus* brief is also included. For example, in Maryland v. Buie, the *amicus* brief by Americans for Effective Law Enforcement, Inc. urges the U.S. Supreme Court to reverse the Maryland Court of Appeals.
Chapter II  Structure of Judicial Opinion in the United States

3. Summary of the Case and Procedural History

A "protective sweep" is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding.

In this case we must decide what level of justification is required by the Fourth and Fourteenth Amendments [of the United States Constitution] before police officers, while effecting the arrest of a suspect in his home pursuant to an arrest warrant, may conduct a warrantless protective sweep of all or part of the premises.

The Court of Appeals of Maryland held that a running suit seized in plain view during such a protective sweep should have been suppressed at respondent's armed robbery trial because the officer who conducted the sweep did not have probable cause to believe that a serious and demonstrable potentiality for danger existed. 314 Md. 151, 166, 550 A. 2d 79, 86 (1988). We granted certiorari, 490 U.S. 1097(1989).

We conclude that the Fourth Amendment would permit the protective sweep undertaken here if the searching officer "possesse[d] a reasonable belief based on `specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant[ed]' the officer in believing," Michigan v. Long, 463 U.S. 1032, 1049, 1050 (1983) (quoting Terry v. Ohio, 392 U.S. 1, 21 (1968)), that the area swept harbored an individual posing a danger to the officer or others.

We accordingly []vacate the judgment below and remand for application of this standard.

This section of the judicial opinion is very instructive and important to the overall effectiveness of a judicial opinion in a case law system. In the United States, most courts today include a summary at the beginning of the judicial opinion. The summary section clearly and unambiguously summarizes the question before the Court.

From above, you can see that the question before the U.S. Supreme Court in the Maryland v. Buie case is: what level of justification is required by the Fourth and Fourteenth Amendments [of the United States Constitution] before police officers, while effecting the arrest of a suspect in his home pursuant to an arrest warrant, may conduct a warrantless protective sweep of all or part of the premises. By summarizing the question before the Court at the beginning of the judicial opinion, the Court guides the reader of the opinion (lawyers, judges, individuals, law students) through the facts and the law with the particular question in focus. This concept of issue or question spotting will be addressed in more detail in Chapter III.

The summary section of the judicial opinion also is very important because it explains the procedural history of the case. For appellate courts, this is mandatory information, and it provides the following information: first, what was the particular ruling of the trial judge and/or appellate bench, if any, that is crucial to this Court on appeal, and second, if possible, what were the reasons supporting that decision or those decisions. The procedural history also answers whether the case below was on a motion to dismiss or a final judgment. Another way to look at this is to ask: who won below and what procedural device did the winner invoke?
Isolating this procedural information at the beginning of the judicial opinion serves the following purposes: (1) it helps to organize the opinion, (2) it helps to guide the reader through the case with the knowledge of what the previous court decided and why, and (3) it helps to identify the issue on appeal in terms of the law and the fact questions.

Even more importantly, in a case law system, the procedural history is necessary to understand how lower courts will be affected by the appellate court decision. In the *Maryland v. Buie* case, for example, the U.S. Supreme Court vacates and reverses the Maryland Court of Appeals. This means that the previous decision by the Maryland Court of Appeals is no longer valid and is no longer good law in Maryland. All lawyers and judges must either refer to this current U.S. Supreme Court opinion on this subject, or if available, refer to the new judgment of the Maryland Court of Appeal once this case is decided again on remand.
Chapter II  Structure of Judicial Opinion in the United States

4. Summary of Facts

On February 3, 1986, two men committed an armed robbery of a Godfather's Pizza restaurant in Prince George's County, Maryland. One of the robbers was wearing a red running suit. That same day, Prince George's County police obtained arrest warrants for Respondent Jerome Edward Buie and his suspected accomplice in the robbery, Lloyd Allen. Buie's house was placed under police surveillance.

On February 5, 1986, the police executed the arrest warrant for Buie. They first had a police department secretary telephone Buie's house to verify that he was home. The secretary spoke to a female first, then to Buie himself. Six or seven officers proceeded to Buie's house. Once inside, the officers fanned out through the first and second floors. Corporal James Rozar announced that he would "freeze" the basement so that no one could come up and surprise the officers. With his service revolver drawn, Rozar twice shouted into the basement, ordering anyone down there to come out. When a voice asked who was calling, Rozar announced three times: "this is the police, show me your hands." Eventually, a pair of hands appeared around the bottom of the stairwell and Buie emerged from the basement. He was arrested, searched, and handcuffed by Rozar. Thereafter, Detective Joseph Frolich entered the basement "in case there was someone else" down there. He noticed a red running suit lying in plain view on a stack of common law clothing and seized it.

The presentation of the summary of facts differs depending on the court. For example, a trial court in the United States likely will present all or most of the facts argued by the parties or presented to the jury. This is because the trial court (whether by judge or by a jury) is the fact-finder challenged with making a decision based on the facts of the case.

For appellate courts, the summary of facts will be presented differently than trial courts. Appellate courts usually accept the finding of facts from the trial court (whether by judge or by a jury) and rarely revisit the facts as presented in the appeal. This is because the question on appeal usually relates to a question of law. In the rare circumstances where the appellate court must decide a factual question, the presentation of the summary of facts will resemble the trial court’s presentation. Generally, though, the summary of facts for an appellate court is shorter and directed to the critical facts of the case or the material facts to the question of law before the court.
5. Summary of Arguments

It is not disputed that until the point of Buie's arrest the police had the right, based on the authority of the arrest warrant, to search anywhere in the house that Buie might have been found, including the basement. "If there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law." Payton v. New York, 445 U.S. 573, 602-603 (1980). There is also no dispute that if Detective Frolich's entry into the basement was lawful, the seizure of the red running suit, which was in plain view and which the officer had probable cause to believe was evidence of a crime, was also lawful under the Fourth Amendment. See Arizona v. Hicks, 480 U.S. 321, 326 (1987). The issue in this case is what level of justification the Fourth Amendment required before Detective Frolich could legally enter the basement to see if someone else was there.

Petitioner, the State of Maryland, argues that, under a general reasonableness balancing test, police should be permitted to conduct a protective sweep whenever they make an in-home arrest for a violent crime. As an alternative to this suggested bright-line rule, the State contends that protective sweeps fall within the ambit of the doctrine announced in Terry v. Ohio, 392 U.S. 1 (1968), and that such sweeps may be conducted in conjunction with a valid in-home arrest whenever the police reasonably suspect a risk of danger to the officers or others at the arrest scene.

The United States, as amicus curiae supporting the State, also argues for a Terry-type standard of reasonable, articulable suspicion of risk to the officer, and contends that that standard is met here.

Respondent [Buie] argues that a protective sweep may not be undertaken without a warrant unless the exigencies of the situation render such warrantless search objectively reasonable. According to Buie, because the State has shown neither exigent circumstances to immediately enter Buie's house nor an unforeseen danger that arose once the officers were in the house, there is no excuse for the failure to obtain a search warrant to search for dangerous persons believed to be on the premises. Buie further contends that, even if the warrant requirement is inapplicable, there is no justification for relaxing the probable-cause standard. If something less than probable cause is sufficient, [R]espondent [Buie] argues that it is no less than individualized suspicion - specific, articulable facts supporting a reasonable belief that there are persons on the premises who are a threat to the officers. According to Buie, there were no such specific, articulable facts to justify the search of his basement.
Chapter II Structure of Judicial Opinion in the United States

This section of the judicial opinion summarizes the arguments before the Court. As previously mentioned in Chapter I, the work product of lawyers is usually the basis of the judicial opinion. Through legal briefs and other legal papers, lawyers on both sides and even amicus curiae make their arguments to the court. As will be discussed in more detail in Chapter III, these arguments are made by legal reasoning of the particular facts of the case and the applicable law.

The court’s job is to review the parties’ arguments, the relevant facts, the applicable law, and to reason its own decision. In many cases, the court’s reasoning greatly resembles a well-reasoned argument made by one or both of the parties. For a practicing lawyer, having a court accept your argument by using part or all of it in the court’s own legal reasoning or conclusions is one of the greatest professional compliments.

From the summary of argument in the Maryland v. Buie case, the Court first states what is undisputed: “police had the right, based on the authority of the arrest warrant, to search anywhere in the house that Buie might have been found, including the basement.” Then, the Court summarizes each of the parties’ arguments, including the amicus curiae U.S. Government.

First, as the Petitioner, Maryland argues that “police should be permitted to conduct a protective sweep whenever they make an in-home arrest for a violent crime.”

In contrast, the Respondent, Buie argues “that a protective sweep may not be undertaken without a warrant unless the exigencies of the situation render such warrantless search objectively reasonable.”

Finally, the U.S. Government, as amicus curiae in support of Maryland, argues that protective “sweeps may be conducted in conjunction with a valid in-home arrest whenever the police reasonably suspect a risk of danger to the officers or others at the arrest scene.”

Like the previous sections of the judicial opinion, the summary of argument section also provides a useful roadmap for readers of the opinion. The different parties’ positions are clear and provide a guide for the Court’s analysis. Furthermore, through the summary of argument, the precise issue legal issue on appeal becomes evident. In Maryland v. Buie, the legal question before the Court is whether the police may conduct a protective sweep of a house without a warrant according to the law of the United States, including case law and the Fourth Amendment of the U.S. Constitution.

6. Discussion/Legal Reasoning/Analysis
It goes without saying that the Fourth Amendment [of the U.S. Constitution] bars only unreasonable searches and seizures, Skinner v. Railway Labor Executives’ Assn., 489 U.S. 602 (1989). Our cases show that in determining reasonableness, we have balanced the intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests. United States v. Villamonte-Marquez, 462 U.S. 579, 588 (1983); Delaware v. Prouse, 440 U.S. 648, 654 (1979). Under this test, a search of the house or office is generally not reasonable without a warrant issued on probable cause. There are other contexts, however, where the public interest is such that neither a warrant nor probable cause is required. Skinner, supra, at 619-620; Griffin v. Wisconsin, 483 U.S. 868, 873 (1987); New Jersey v. T. L. O., 469 U.S. 325, 340-341 (1985); Terry v. Ohio, 392 U.S. at 20.

The Terry case is most instructive for present purposes. There we held that an on-the-street “frisk” for weapons must be tested by the Fourth Amendment’s general proscription against unreasonable searches because such a frisk involves “an entire rubric of police conduct - necessarily swift action predicated upon the on-the-spot observations of the officer on the beat - which historically has not been, and as a practical matter could not be, subjected to the warrant procedure.” Id. We stated that there is “no ready test for determining reasonableness other than by balancing the need to search . . . against the invasion which the search . . . entails.” Id., at 21 (quoting Camara v. Municipal Court of San Francisco, 387 U.S. 523, 536-537 (1967).

Applying that balancing test, it was held that although a frisk for weapons "constitutes a severe, though brief, intrusion upon cherished personal security," 392 U.S., at 24-25, such a frisk is reasonable when weighed against the "need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest." Id., at 24. We therefore authorized a limited pat down for weapons where a reasonably prudent officer would be warranted in the belief, based on "specific and articulable facts," Id., at 21, and not on a mere "inchoate and unparticularized suspicion or hunch," Id., at 27, "that he is dealing with an armed and dangerous individual," Id. ***

The ingredients to apply the balance struck in Terry and Long are present in this case. Possessing an arrest warrant and probable cause to believe Buie was in his home, the [police] officers were entitled to enter and to search anywhere in the house in which Buie might be found. Once he was found, however, the search for him was over, and there was no longer that particular justification for entering any rooms that had not yet been searched.

That Buie had an expectation of privacy in those remaining areas of his house, however, does not mean such rooms were immune from entry. In Terry and Long we were concerned with the immediate interest of the police officers in taking steps to assure themselves that the persons with whom they were dealing were not armed with, or able to gain immediate control of, a weapon that could unexpectedly and fatally be used against them. In the instant case, there is an analogous interest of the officers in taking steps to assure themselves that the house in which a suspect is being, or has just been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack. The risk of danger in the context of an arrest in the home is as great as, if not greater than, it is in an on-the-street or roadside investigatory encounter. A Terry or Long frisk occurs before a police-citizen confrontation has escalated to the point of arrest.
Chapter II  Structure of Judicial Opinion in the United States

A protective sweep, in contrast, occurs as an adjunct to the serious step of taking a person into custody for the purpose of prosecuting him for a crime. Moreover, unlike an encounter on the street or along a highway, an in-home arrest puts the officer at the disadvantage of being on his adversary's "turf." An ambush in a confined setting of unknown configuration is more to be feared than it is in open, more familiar surroundings.

We recognized in Terry that "[e]ven a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." Terry, supra, at 24-25. But we permitted the intrusion, which was no more than necessary to protect the officer from harm. Nor do we here suggest, as the State does, that entering rooms not examined prior to the arrest is a de minimis intrusion that may be disregarded. We are quite sure, however, that the arresting officers are permitted in such circumstances to take reasonable steps to ensure their safety after, and while making, the arrest. That interest is sufficient to outweigh the intrusion such procedures may entail.

We agree with the State, as did the court below, that a warrant was not required. We also hold that as an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. Beyond that, however, we hold that there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene. This is no more and no less than was required in Terry and Long, and as in those cases, we think this balance is the proper one.

We should emphasize that such a protective sweep, aimed at protecting the arresting officers, if justified by the circumstances, is nevertheless not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found. The sweep lasts no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises.
In this section of the judicial opinion, the Court presents its legal reasoning or analysis of the legal issue presented. Legal reasoning will be discussed in greater detail in Chapter III, but as an introduction, the basic approach to legal reasoning is to evaluate how and why the legal issue presented and the relevant facts are affected or governed by the applicable law.

In *Maryland v. Buie*, there are two important lessons to highlight. First, the Court is bound by precedent and must ensure that its decision follows the law, or, if it does not follow the law, provide strong, justifiable reasons for noncompliance. Remember, the issue before the U.S. Supreme Court in this case is the scope of a search of a house incident to an arrest without a warrant. Here, *Terry* and *Long*, both U.S. Supreme Court cases, are the controlling precedent in this area of law, because both cases address the scope of a police officer’s right to search incident to an arrest without a warrant. Therefore, the Court is careful to address both cases and apply their legal holdings to this case. To the extent there are differences between the *Maryland v. Buie* case and *Terry* and *Long*, the Court is also careful to note the differences.

The second interesting lesson to highlight in this portion of the opinion is how the Court addresses public policy and constitutional concerns in its analysis. This is especially true when the Court discusses the balance between police officer safety and the sanctity or privacy of the home. Such policy considerations are often appropriate factors in the resolution of cases, particularly in the U.S. Supreme Court. This concept of policy considerations and other determining factors will be explored in more detail in Chapter V of this manual.
Chapter II  Structure of Judicial Opinion in the United States

7. Conclusion/Holding and Directions by the Court

We conclude that by requiring a protective sweep to be justified by probable cause to believe that a serious and demonstrable potentiality for danger existed, the Court of Appeals of Maryland applied an unnecessarily strict Fourth Amendment standard. The Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene. We therefore vacate the judgment below and remand this case to the Court of Appeals of Maryland for further proceedings not inconsistent with this opinion.

It is so ordered.
Chapter I

Structure of Judicial Opinion in the United States

The conclusion or holding of the judicial opinion indicates the court’s decision. This is one of the most important elements of a judicial opinion. It should be clear and unambiguous. There should be no question about the court’s decision and the basis for that decision. This portion of the judicial opinion should include any directions by the court. For appellate decisions, these directions are usually made to the lower court on remand or for any courts bound by this decision.

As you can see in the conclusion in the Maryland v. Buie case, the Court very clearly and unambiguously states that the Court of Appeals of Maryland applied an unnecessarily strict Fourth Amendment standard to the case in the proceedings below. In other words, the Maryland Court of Appeals incorrectly required a protective sweep of the house to be justified by probable cause to believe that a serious and demonstrable potentiality for danger existed.

The Court further concluded that the Fourth Amendment allows a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable believe based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene.

Finally, this portion of the opinion provides a direction for the lower court. Specifically, the U.S. Supreme Court’s decision vacates or nullifies the judgment below by the Maryland Court of Appeals and sends the case back or remands the case to the Maryland Court of Appeals for new proceedings consistent with this opinion.

In conclusion, this case is an excellent example of a well-written, well-reasoned, and well-organized appellate judicial opinion. It is a good model for any court.

In the next Chapter, we will focus on the legal reasoning or analysis portion of the judicial opinion and introduce legal writing skills.
Animal--Bird--Protection--"Offers for sale"--Advertisement under "classified advertisements"--"bramblefinch cocks, bramblefinch hens, 25s each"--Whether offer for sale--Whether invitation to treat--Bird with easily removable ring-- Whether "close ringed"--Protection of Birds Act, 1954 (2 & 3 Eliz. 2, c. 30), s. 6 (1) (a).

The appellant inserted an advertisement in a periodical, "Cage and Aviary Birds" for April 13, 1967, containing the words "Quality British A.B.C.R. ... bramblefinch cocks, bramblefinch hens ... 25s each," which appeared under the general heading "classified advertisements." In no place was there any direct use of the words "offers for sale." In answer to the advertisement, T. wrote, enclosing a cheque for 25s, and asked that a hen be sent to him. The hen arrived wearing a closed ring which could be removed without injury to the bird.

The appellant was charged with unlawfully offering for sale a bramblefinch hen contrary to section 6 (1) of the Protection of Birds Act, 1954. The justices were of the opinion that the hen, being a bird included in schedule 4 to the Act of 1954, was not a closed-ringed specimen bred in captivity because it was possible to remove the ring, convicted him.

On appeal, the appellant contending that his advertisement was merely an invitation to treat and not an offer for sale, and that the mere fact that it was possible to remove the ring from the bird's leg did not mean that it was not of a closed-ring specimen:--

Held, allowing the appeal, that while "close-ringed" in section 6 (1) (a) of the Act meant ringed by a complete ring which was not capable of being forced apart or broken except by damaging it, so that the bird in question was not a closed-ring specimen; the advertisement inserted by the appellant under the title "classified advertisements" was not an offer for sale but merely an invitation to treat; and that, accordingly, the appellant was not guilty of the offence charged.


Per Lord Parker C.J.: There is business sense in construing advertisements and circulars, unless they come from manufacturers, as invitations to treat and not offers for sale.

CASE STATED by Chester Justices.

On June 19, 1967, an information was preferred by the prosecutor, Anthony Ian Crittenden, on behalf of the R.S.P.C.A., against the appellant, Arthur Robert Partridge, that he did unlawfully offer for sale a certain live wild bird, a Brambling, being a bird included in schedule 4 to the Protection of Birds Act, 1954, of a species which is resident in or visits the British Isles in a wild state, other than a close-ringed specimen bred in captivity, contrary to section 6 (1) of the Act of 1954.

The justices heard the information on July 19, 1967, and found the following facts. On April 13, 1967, there appeared in the periodical "Cage and Aviary Birds" an advertisement inserted by the appellant containing, inter alia, the words "Quality British A.B.C.R. ... bramblefinch cocks, bramblefinch hens, 25s each." By letter to the appellant dated April 22, 1967, Thomas Shaw Thompson of Hoole, Chester, requested the dispatch to himself of an A.B.C.R. bramblefinch hen as advertised in "Cage and Aviary Birds" and enclosed a cheque for 30s On
May 1, 1967, the appellant dispatched a bramblefinch hen which was wearing a closed ring to Mr. Thompson in a box by British Rail. Mr. Thompson received the bird on May 2, 1967.

The box was opened by Mr. Thompson in the presence of the prosecutor. Mr. Thompson attempted to and was, in fact, able to remove the ring without injury to the bird. Even taking into account that the bird had travelled from Leicester in a box on British Rail its condition was rough, it was extremely nervous, had no perching sense at all and its plumage was rough.

A bramblefinch or brambling, as it is also called, was a bird included in schedule 4 to the Act of 1954. The expression "close-ringed" was nowhere defined nor was there any universally recommended size ring for a bramblefinch. The ring was placed on the bird's leg at the age of three to 10 days at which time it was not possible to determine what the eventual girth of the bird's leg would be.

It was contended by the appellant that there was no offer for sale in the county of Chester as alleged since the advertisement in "Cage and Aviary Birds" was merely an invitation to treat; and that an offence was not committed under section 6 (1) of the Act of 1954 merely because it was possible to remove the ring from the bird's leg.

It was contended on behalf of the prosecutor that the advertisement was an offer for sale in Chester; and that a bird was not a close-ringed specimen bred in captivity if it was possible to remove the ring from its leg.

The justices were of opinion that the advertisement was an offer for sale in Chester on April 22, 1967, and that the brambling so offered for sale by the appellant was not a close-ringed specimen bred in captivity because it was possible to remove its ring. They accordingly found the case proved and fined the appellant £5, and ordered him to pay £5 5s advocate's fee and £4 9s 6d witnesses' expenses.

The question for the opinion of the court was whether the justices were right in law in holding that the advertisement was an offer for sale in Chester on May 1, 1967, and that a bird was not a close-ringed specimen bred in captivity within the meaning of the Act of 1954 if it was possible to remove the ring from its leg.

Representation


The following cases, in addition to those referred to in the judgment, were cited in argument:


LORD PARKER C.J.

Ashworth J. will give the first judgment.

ASHWORTH J.:

This is an appeal by way of case stated from a decision of Chester justices. On July 19, 1967, they heard an information preferred by the prosecutor on behalf of the R.S.P.C.A. alleging against the appellant that he did unlawfully offer for sale a certain live wild bird, to wit a brambling, being a bird included in schedule 4 to the Protection of Birds Act, 1954, of a species which is resident in or visits the British Isles in a wild state, other than a close-ringed specimen bred in captivity, contrary to section 6, subsection (1) of the Act.
The case arose because in a periodical known as "Cage and Aviary Birds," the issue for April 13, 1967, there appeared an advertisement inserted by the appellant containing, inter alia, the words "Quality British A.B.C.R. ... bramblefinch cocks, bramblefinch hens, 25s each." In the case stated the full advertisement is not set out, but by the agreement of counsel this court has seen a copy of the issue in question, and what is perhaps to be noted in passing is that on the page there is a whole list of different birds under the general heading of "Classified Advertisements." In no place, so far as I can see, is there any direct use of the words "Offers for sale." I ought to say I am not for my part deciding that that would have the result of making this judgment any different, but at least it strengthens the case for the appellant that there is no such expression on the page. Having seen that advertisement, Mr. Thompson wrote to the appellant and asked for a hen and enclosed a cheque for 30s A hen, according to the case, was sent to him on May 1, 1967, which was wearing a closed-ring, and he received it on May 2. The box was opened by Mr. Thompson in the presence of the prosecutor, and the case finds that Mr. Thompson was able to remove the ring without injury to the bird, and even taking into account that the bird had travelled from Leicester in a box on the railway, its condition was rough, it was extremely nervous, it had no perching sense at all and its plumage was rough.

Stopping there, the inference from that finding is that the justices were taking the view, or could take the view, that from its appearance, at any rate, this was not such a bird as a person can legitimately sell within the Act of 1954. The case goes on to find:

"The expression 'close-ringed' is nowhere defined nor is there any universally recommended size ring for a bramble finch.

(g) The ring is placed on the bird's leg at the age of three to 10 days at which time it is not possible to determine what the eventual girth of the bird's leg will be."

Having been referred to the decision of this court in Fisher v. Bell the justices nonetheless took the view that the advertisement did constitute an offer for sale; they went on further to find that the bird was not a close-ringed specimen bred in captivity, because it was possible to remove the ring. Before this court Mr. Pitchers for the appellant, has taken two points, first, this was not an offer for sale and, secondly, that the justices' reason for finding that it was not a close-ringed bird was plainly wrong because the fact that one could remove the ring did not render it a non-close-ringed bird.

It is convenient, perhaps, to deal with the question of the ring first. For my part I confess I was in ignorance, and in some state of confusion, as to the real meaning and effect of this particular phrase in the section, and I express my indebtedness to Mr. Havers, for the prosecutor, for having made the matter, as far as I am concerned, perfectly clear. I would say if one was looking for a definition of the phrase "close-ringed" it means ringed by a complete ring, which is not capable of being forced apart or broken except, of course, with the intention of damaging it. I contrast a closed-ring of that sort -- it might take the form, I suppose, of an elastic band or of a metal circle ring -- with the type of ring which sometimes exists which is made into a ring when a tongue is placed through a slot and then drawn back; that is a ring which can be undone and is not close-ringed. In this case what is contemplated, according to Mr. Havers, and I accept it, is that with a young bird of this sort between three and ten days after hatching a closed-ring of the type described is forced over its claws, which are obviously brought together so as to admit the passage of the ring, and it is then permanently on or around the bird's leg, and as it grows, it would be impossible to take that ring off because the claws and the like would have rendered a repetition of the earlier manoeuvre impossible.

Therefore, approaching the matter this way, I can well understand how the justices came to the conclusion that this was not a close-ringed specimen, because they could take the ring off. If that were the only issue, I should not find any difficulty in upholding their decision. But the real point of substance in this case arose from the words "offer for sale," and it is to be noted in section 6 of the Act of 1954 that the operative words are "any person sells, offers for sale or has in his possession for sale." For some reason which Mr. Havers for the prosecutor has not been able to explain, those responsible for the prosecution in this case chose, out of
the trio of possible offences, the one which could not succeed. There was a sale here, in my view, because Mr. Thompson sent his cheque and the bird was sent in reply; and a completed sale. On the evidence there was also a plain case of the appellant having in possession for sale this particular bird. But they chose to prosecute him for offering for sale, and they relied on the advertisement.

A similar point arose before this court in 1960 dealing, it is true, with a different statute but with the same words, in Fisher v. Bell. The relevant words of section 1 (1) of the Restriction of Offensive Weapons Act, 1959, in that case were: "Any person who ... offers for sale. ... (a) any knife. ..." Lord Parker C.J., in giving judgment said:

"The sole question is whether the exhibition of that knife in the window with the ticket constituted an offer for sale within the statute. I confess that I think that most lay people and, indeed, I myself when I first read the papers, would be inclined to the view that to say that if a knife was displayed in a window like that with a price attached to it was not offering it for sale was just nonsense. In ordinary language it is there inviting people to buy it, and it is for sale; but any statute must of course be looked at in the light of the general law of the country."

The words are the same here "offer for sale," and in my judgment the law of the country is equally plain as it was in regard to articles in a shop window, namely that the insertion of an advertisement in the form adopted here under the title "Classified Advertisements" is simply an invitation to treat.

That is really sufficient to dispose of this case. I should perhaps in passing observe that the editors of the publication Criminal Law Review had an article dealing with Fisher v. Bell in which a way round that decision was at least contemplated, suggesting that while there might be one meaning of the phrase "offer for sale" in the law of contract, a criminal court might take a stricter view, particularly having in mind the purpose of the Act, in Fisher v. Bell the stocking of flick knives, and in this case the selling of wild birds. But for my part that is met entirely by the quotation which appears in Lord Parker's judgment in Fisher v. Bell, that "It appears to me to be a naked usurpation of the legislative function under the thin disguise of interpretation."

I would allow this appeal and quash the conviction.

BLAIN J.

I agree.

LORD PARKER C.J.

I agree and with less reluctance than in Fisher v. Bell, and Mella v. Monahan I say "with less reluctance" because I think when one is dealing with advertisements and circulars, unless they indeed come from manufacturers, there is business sense in their being construed as invitations to treat and not offers for sale. In a very different context in Grainger & Son v. Gough Lord Herschell said dealing with a price-list:

"The transmission of such a price-list does not amount to an offer to supply an unlimited quantity of the wine described at the price named, so that as soon as an order is given there is a binding contract to supply that quantity. If it were so, the merchant might find himself involved in any number of contractual obligations to supply wine of a particular description which he would be quite unable to carry out, his stock of wine of that description being necessarily limited."

**Representation**

Solicitors: R. G. Frisby & Small, Leicester; Rex Taylor & Meadows, West Kirby.

Appeal allowed with costs.
FN1 Protection of Birds Act, 1954, s. 6 (1): "If, save as may be authorised by a licence granted under section 10 of this Act, any person sells, offers for sale or has in his possession for sale -- (a) any live wild bird, being a bird included in schedule 4 to this Act of a species which is resident in or visits the British Isles in wild state, other than a close-ringed specimen bred in captivity ... he shall be guilty of an offence against this Act."

FN2 [1895] 1 Ch. 480.

FN3 (1873) L.R. 8 Q.B. 286.

FN4 [1892] 2 Q.B. 484; [1893] 1 Q.B. 256, C.A.

FN5 (1870) L.R. 5 C.P. 561.


FN8 Ibid. 399.


FN11 Ibid. 400.


FN13 [1961] Crim.L.R. 175, D.C.


FN15 Ibid. 334. It seems to me accordingly that not only is it the law but common sense supports it.
3.1 LEGAL REASONING AND LEGAL WRITING IN THE US

This section of the manual will outline and explain the most popular approaches to legal reasoning and legal writing used in the United States. As you know from Chapter II, the “Discussion or Analysis” section of a judicial opinion is where the Court provides the legal reasoning for its holding, or in other words, where the Court explains its legal decision. You also know from Chapters I and II that the single most important section of a judicial opinion for stare decisis purposes is the “Discussion or Analysis” section. That is because stare decisis requires a Court to follow a binding holding, and the “Discussion or Analysis” section of a judicial opinion provides the legal reasoning or explanation for a binding holding. It is the legal reasoning or explanation that helps other courts, lawyers, and judges use and follow the binding holding in subsequent proceedings as stare decisis requires. In other words, consider the “Discussion or Analysis” section as the “instructions” for applying the decision in subsequent cases. And, in order for the “instructions” to be followed in subsequent cases, they must be well reasoned and well written.

You will see in this chapter that the words “reasoning” and “writing” are synonymous in practice, because a well-reasoned judicial opinion must be well-written and vice versa. Again, if you consider the legal reasoning of a judicial opinion as “instructions,” you catch a better picture of the type of reasoning and writing that must be done.

Specifically, the legal reasoning must provide a detailed explanation of how and why the court made its decision. As stated in Chapter II, the how and the why of legal reasoning is determined by the following elements: (1) the question or the legal issue before the court; (2) the material or relevant facts of the case; (3) the legal rule that comes either from a judicial opinion, constitution, or legislation; and (4) any other considerations before the court such as public policy, human rights, and/or social change.

To reveal the how and the why, the Court must find a way to address all of the above-stated elements in a coherent and systematic way. The most coherent and systematic approach to legal reasoning used in the United States is IRAC, which is short for ISSUE, RULE, ANALYSIS, and CONCLUSION. IRAC has become the primary methodology for legal reasoning and legal writing in all law schools in the United States. That means that almost every U.S. lawyer, judge, or law student will understand exactly what you mean when you simply say “IRAC.” The next section, Section A, explains IRAC and the legal reasoning process in more detail. Section B provides a short hypothetical fact pattern, which will be used to demonstrate the IRAC process, and then Section C provides useful legal writing skills for IRAC.
CHAPTER III  Legal Reasoning and Legal Writing in the US

A. IRAC

The most popular methodology for legal reasoning and legal writing employed both by judges, lawyers, and law students in the United States is known as “IRAC,” which is short for Issue Rule Analysis and Conclusion. The IRAC system is a useful tool because it enables the legal writer to approach legal reasoning in a systematic way. To better understand IRAC, you must understand each step in the process.

1. ISSUE: Identify and state the legal issue or problem for consideration

Identifying the legal issue or legal problem is the first and most important step in legal reasoning. A misunderstood or ill-defined legal issue can distract or misdirect legal reasoning to the point of being incorrect.

Identifying the legal issue or legal problem may seem easy from the outset, but often the issue is not presented by the parties in a comprehensible way or a party might try to confuse the legal issues as a litigation strategy.

Also, not all potential issues are justiciable or able to be resolved by the court. For example, there may be a policy issue that is more appropriately addressed by the legislature, or there is an issue of a personal nature that affects the case or the parties but is not a violation of law or appropriate to be decided by a court. For example, one party may try to raise an emotional issue about the party or the case to distract the court from the legal issue.

There are many examples and strategies lawyers employ when making arguments to the court. Your job is to identify all of the justiciable legal issues (even those not identified by the parties) and narrow them down to the one or few that are truly related to the case before the Court.

2. RULE: State the legal rule and its parameters.

Once you identify the issue or issues before the court, the next step in the IRAC process is to identify and to state the rule and to state the parameters. “Rule” is a short way of referring to the law. Rules of law come from a variety of sources. A rule can be determined by the “holding” or “conclusion” of a judicial opinion that has binding stare decisis effect. A rule of law also can come from the Constitution, legislation, or international treaties.

The parameters of the rule of law explain the application criteria. The holding in a judicial opinion, for example, might include criteria for applying the holding to subsequent cases. For example, the Court might conclude that its decision is applicable only in cases with identical facts—a narrow holding—or the Court might indicate that its decision is applicable in a variety of cases—a broad holding. Whether narrow or broad, these are the parameters for judicial decisions.
The parameters for Constitutional or legislative rules of law are found in the text itself and in the legislative history. Parameters will be discussed in more detail later.

A rule from a “holding” or “conclusion” of a case is often called a judge-made rule or a common law rule, because it is created and upheld by the courts. This rule of law is typically a one or two-sentence statement that summarizes or consolidates the broader, more abstract holding or conclusion for which the judicial opinion stands, and for which the judicial opinion can be used to decide subsequent cases.

A rule of law from a Constitution, legislation or international treaty will be more simply stated. Instead of consolidating the analysis from another case, this rule will come directly from the text of the Constitution, legislation, or treaty.

The parameters and application for legislation or Constitutional provisions are similarly easy to identify. The legislative history is insightful on the legislative intent behind a particular legislative provision, and it usually includes the parameters or application of the legislation. The legislative intent generally describes how broadly or narrowly the rule of law from the legislative provision should be applied in general. For specific parameters for a particular legislative provision, judicial opinions would be the best source.

The parameters of a Constitutional provision generally come from judicial opinions. In other words, judges determine how the constitutional provision should be applied in a variety of factual situations.

The parameters for a judge-made rule of law are more complicated. First, a legal rule can be stated as a broad or narrow statement of the holding or conclusion. A broad statement of the holding or conclusion is on a higher level of generalization. A broad statement of the holding is not based on the relevant facts of the case; it is a general statement of the law. The danger of broad statements of holdings is that they can turn out to be overly broad and not as useful in subsequent cases.

A narrow statement of the holding is a statement of the law as confined to a particular set of relevant facts. While narrow statements of holdings provide more accurate parameters for applying the rule in subsequent cases, they are often more difficult to apply in subsequent cases because usually fact patterns are not identical.

3. **ANALYSIS**: Use analogies and/or distinctions to explain **how** and **why** the case will be decided.

After you identify the issue, the rule of law and parameters applicable to the particular issue, the next step in the IRAC process is analysis. This is the part of legal reasoning and legal writing where you explain **how** and **why** you are making your legal decision.

The heart of the IRAC process is the analytical section or, as we have called it in this manual, the legal reasoning. Legal reasoning is also, not surprisingly, the most difficult and engaging component of legal writing. Legal reasoning is difficult because, as mentioned above, fact patterns are usually never identical. There are cases where the fact patterns are identical, and of course there are cases where the legal reasoning consists
of applying a Constitutional, legislative or treaty provision. In those cases, the legal reasoning will not be as difficult and developed. But, more often than not, the types of cases you confront will require some legal reasoning even if just to explain how and why you are applying the relevant rule provision.

Because you will confront cases with dissimilar fact patterns, it is rarely possible to extract a narrow statement of a judicial holding, as described above, from a prior case and apply it mechanically to the facts of the present case. Instead, you must compare the similarities (analogies) and/or the differences (distinctions) between the facts of the current case before you and the narrow statement of the holding extracted from one or several previous judicial opinions. In other words, you must reason or explain how and why the narrow statement of the holding of the previous case should be applied to the facts and other considerations of the present case before you. This type of legal reasoning is called “analogical.”

Analogy of key facts, while helpful in determining similarities and differences between the binding precedent and the fact pattern before you, is not enough to build a convincing argument. The binding precedent should be further analogized to the situation at hand by comparing and distinguishing on the basis of rationales expressed in the earlier opinions.

In other words, you must critically examine the how and why of each element of the synthesized rule and consider whether the previous court’s explanations or instructions would similarly support the applicability of the rule to the current case. Stated even more simply, you must apply the same line of reasoning employed by the court from which you have extracted the rule to the case before you. You should explain in the most straightforward terms possible whether that line of reasoning is valid/invalid to the facts of the present case. This critical analysis will lend greater weight to your ultimate conclusion.

Where the facts are similar or where the case falls under the parameters of a Constitutional, legislative or treaty provision, you can usually apply a previous holding or the rule provision mechanically to the facts of the present case. This type of legal reasoning is called “deductive” legal reasoning. Both analogical and deductive legal reasoning are discussed in more detail below, and we will begin with deductive reasoning.

a. Deductive Reasoning

We begin with deductive reasoning, because it is typically the least complicated legal reasoning approach. Deductive reasoning is a means of extracting a judge-made rule statement from a judicial opinion or a constitutional, legislative, or treaty provision and applying it in another case. Generally speaking, when using deductive reasoning, the rule statement usually will be broad rather than narrow.

In deductive reasoning the rule statement (whether it comes from a judicial opinion, Constitution, statute or treaty) is applied to the present case in a mechanical manner. In other words, there is hardly any factual analysis, because the facts are unnecessary. There is simply a rule and parameters, and if the facts of the present case
fall within the rule parameters of the binding precedent, the rule is applied to the present case.

For example, let us imagine that a case has been filed with facts exactly like the facts in *Maryland v. Buie*, the case from Chapter II of this manual. Let us assume that the *Maryland v. Buie* case is still binding U.S. Supreme Court law, and there is no question that the court in which the case is filed is obligated to follow *Maryland v. Buie*. Using deductive reasoning, you can simply extract the holding or conclusion from the *Maryland v. Buie* case and argue or conclude that the same rule is applicable and binding. There is no need to provide any reasoning or analysis of the facts; the holding from *Maryland v. Buie* is the law of the land regarding the scope of warrantless searches of a home incident to an arrest, and it is binding on all cases with similar or same facts.

There is a second example of deductive reasoning that is particularly useful for judge-made rules. Instead of using the holding of one case, you would use several rules or holdings from several different cases and argue deductively. This group of holdings represents the “synthesis” of several cases. By putting together or “synthesizing” the holdings of several cases, you create an overall legal rule for which a line of decisions stands. If the synthesized rule is broad enough, it is sometimes referred to in the United States as a “common law rule.” Such common law rules are abstract statements that summarize a “family” of synthesized holdings.

For example, you could conclude that the holding in *Maryland v. Buie* and all subsequent cases that applied the same holding represents the “common law rule” for warrantless searches of a home incident to an arrest. Using the common law rule further emphasizes the binding effect of the precedent.

b. **Analogical Reasoning**

As you can see from the previous section, deductive reasoning is mechanical and broad. There is very little or no discussion of the facts of the case, because the facts make little difference to the automatic application of the rule.

Analogical reasoning is just the opposite. Instead of a mechanical application of the rule without a critical analysis of the facts, analogical reasoning is all about the facts.

The analogical reasoning process generally involves two steps: (1) identifying the factual similarities and differences between the new case to be decided and the precedential case and (2) determining whether the current case is either similar to or different from the precedent in important respects relevant to the issue to be decided. If the precedent is similar in those important respects, it will be followed. If it is deemed different in important respects, it will be distinguished. In either situation, every relevant fact must be considered and determined similar or different. Clearly, the most difficult part of the analogical reasoning process is evaluating the importance of the differences and similarities between cases.

For example, again imagine a case is filed where the facts are different from the facts of the *Maryland v. Buie* case from Chapter II. The primary difference in the facts is the police searched a closet in the house instead of a basement in the house. This is the
difference, but for this example, you believe it is not different in important respects, and you believe the holding of Maryland is still applicable. Using the holding from the Maryland v. Buie case, you would reason something like the following:

In this case, the question before the court is whether a warrantless police search of a closet was constitutional. In Maryland v. Buie, the U.S. Supreme Court held that the Fourth Amendment of the U.S. Constitution permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene. While the Maryland case addressed a search of a basement of a house not a closet, the holding of that case is still applicable in this case for the following reasons . . . .

Some of the reasons you might state include all of the analogies between a closet and a basement and any other relevant facts or policy considerations. Specifically, you might note that the police officer safety and expectations that danger could be found lurking in a closet is the same as in a basement, and that the expectation of privacy in that closet is outweighed by the safety concerns. In so doing, you are stating how and why the holding of Maryland v. Buie is applicable.

On the other hand, you could also determine that the difference between a basement and a closet is important and thus argue that Maryland is not applicable. For such an analysis, you would focus on the distinctions between a basement and a closet.

Another way to think about it is analogical reasoning is like making a compare-write of two different documents. The compare-write tool highlights the differences and similarities between two documents. Therefore, the first step in the compare-write tool is to identify the differences and/or similarities. Once you identify the differences and similarities, you evaluate them. Are the differences or similarities significant? Are they still valid or have time and societal changes altered them? Are they relevant? Are the differences or similarities common in other cases? Has any other court addressed these differences or similarities? After you ask these and other questions of the differences and similarities, you have answered the how and the why of the case.

4. State a legal conclusion for the present case.

This portion of the IRAC process is probably the easiest. After the hard work of legal reasoning in the Analysis process, the Conclusion should come very easily. The most important point to remember for the conclusion is to write a clear, unambiguous conclusion. You never want anyone to misunderstand the conclusion.

Remember, legal reasoning is about providing instructions for future cases. This is the primary purpose of a case law system and the principle of stare decisis. Good instructions on how and why a legal decision should be followed helps to preserve and to develop the law. We will see how good instructions work in more detail in Chapter V, when we evaluate how five (5) particular areas of substantive law developed through cases in the
United States. In the next section, we will see how the IRAC process is applied using a hypothetical fact pattern.
B. EXAMPLE AND EXPLANATION OF IRAC

In this section of the manual, we will examine how IRAC is applied using a hypothetical fact pattern. The purpose of this exercise is to prepare you for the legal reasoning and legal writing you will be doing at the end of the training. As you read through the hypothetical, try to work through the IRAC process on your own. This hypothetical is strictly an example. The case law cited is only meant to be illustrative, and may not represent actual jurisprudence. Please read and consider the following hypothetical fact pattern:

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John Whitkin, a Native American Indian, is a 29-year old lifelong resident of the State of New Hampshire in the United States of America. Mr. Whitkin worked for 10 years at a New Hampshire marble quarry in Nashua, New Hampshire. Shortly after losing his job due to alleged poor performance, Mr. Whitkin became an alcoholic and started using illegal drugs. After he was fired from his job and while he was using drugs and alcohol, Mr. Whitkin committed a botched bank robbery in nearby Andover, New Hampshire, which resulted in the accidental murder of a bank teller. Mr. Whitkin was arrested at the bank, tried, and convicted in a New Hampshire court for murder. When he was arrested, Mr. Whitkin confessed to his responsibility for the murder and admitted that he abused drugs and alcohol, which he blamed for his criminal actions at the bank. Mr. Whitkin was convicted primarily because of his confession, which was introduced without objection by his court-appointed attorney during his trial. The Prosecutor in Mr. Whitkin’s trial did not include Mr. Whitkin’s statement that he was using alcohol and drugs at the time he committed the murder, and Mr. Whitkin’s attorney never presented the statement.

Currently, Mr. Whitkin is serving a lifetime sentence in a Norfolk, New Hampshire prison. As an integral aspect of his Native American religious practice, Mr. Whitkin has always maintained his hair at a four-foot length and braided in one braid down his back. During his murder trial, Mr. Whitkin testified that Native American Indian males who are members of his tribe believe hair is a gift from God and should only be cut when a family member dies. Mr. Whitkin’s tribe believes that male members who do not maintain long hair in the absence of a death of a family member may not participate in any religious traditions. Mr. Whitkin has not lost a family member.

New Hampshire Prison Rule 101 (a) regarding prisoner conduct promulgated by the New Hampshire Legislature provides that “all inmates shall keep hair no longer than collar-length due to prison safety concerns.” In the legislative history for Prison Rule 101(a), the legislative body states that the law is concerned with prisoners smuggling contraband or other dangerous materials in their hair, gang identification symbols, difficulty identifying prisoners who may easily change their appearance, etc. The law also is concerned with administrative costs. If prisoners are allowed to maintain hair longer than collar-length, prison officers and officials would have to conduct more frequent searches adding to the number of officers on the payroll. Additional searches would also lead to more frequent conflicts between inmates and prison staff. Further, the legislative history states that exempting Native American Indians from the hair length regulation could cause resentment among the other inmates with different religious requirements for hair.
The New Hampshire Legislature also considered the religious freedom arguments but stated that such democratic considerations were outweighed by the safety concerns for prisoners and prison officers and officials.

When he was imprisoned, Mr. Whitkin’s hair was cut to just above collar length. Since that time, Mr. Whitkin has, in accordance with his Native American religious laws and beliefs, not participated in any religious ceremonies. Mr. Whitkin believes that the New Hampshire law is discriminatory.

In his first legal action since his murder conviction, Mr. Whitkin filed a civil rights complaint in the same New Hampshire trial court that tried his murder case and convicted him. Mr. Whitkin prepared the legal papers largely himself but used a pro bono attorney from the local law school to actually file the legal complaint in the court. In a decision based on the papers submitted by counsel, the New Hampshire trial court held that prison officials operated legally according to state law, that the New Hampshire prison law is neutral and non-discriminatory, and that the New Hampshire Legislature narrowly construed the law according to such considerations, and that Mr. Whitkin’s constitutional right of freedom of religion has not been violated.

Mr. Whitkin has appealed to the New Hampshire Supreme Court on all available grounds and also raises an issue regarding the sufficiency of his legal representation during his murder trial. You are the judge responsible for writing the opinion for this case. (Adapted from Hamilton v. Schriro, 74 F.3d 1545 (D. Mo.1996).

1. Identification of the Issue

   Please take a moment to consider the possible legal issues in this hypothetical case. As previously stated in Chapter II, issue spotting is crucial to determining the proper legal outcome for a given set of facts. In order to apply the correct rule of law and to conduct proper legal reasoning, the key legal issues must be selected out of a jumble of otherwise useless or non-justiciable information. Keep in mind that either side in the case may include issues that are irrelevant or prejudicial in order to sway your judgment in their favor. Accordingly, it is important to separate legally determinative issues from emotional appeals. The legally determinative issues should clearly stand out in your opinion, because you will rely on them in the legal reasoning of the applicable law.

   You will notice that there are many facts and issues that do not seem relevant or even justiciable. For example, the fact that Mr. Whitkin lost his job is irrelevant, as is the fact that he became an alcoholic and drug user. This case is not about employment issues or criminal use of illegal drugs, and it cannot be about Mr. Whitkin’s personal substance abuse problem. All of these issues, however, make Mr. Whitkin a more sympathetic party, and his defense counsel likely will raise these issues in his briefs to make an emotional appeal to the court.
Similarly, Mr. Whitkin’s criminal act of murder, for which he was tried and convicted in the lower court, is not on appeal and therefore not an issue for the Court. The State might include this information in its briefs to make Mr. Whitkin look less sympathetic.

Other facts and issues, however, might seem more relevant and justiciable. Consider, for example, the fact that Mr. Whitkin was primarily convicted and sentenced because of his confession, which was made at the scene of the crime. His court-appointed defense attorney at the trial made no objections to the admission and consideration of this confession. Mr. Whitkin’s defense counsel also did not argue for mitigating circumstances by using Mr. Whitkin’s confession that the crime was committed under the influence of drugs and alcohol.

All of these facts might point to an insufficiency of counsel issue. Before pressing forward on the legal reasoning of this issue, however, you must evaluate whether the issue is justiciable or can the court even consider the issue as a legal matter. This determination involves knowing whether the time for appeal on this issue has elapsed. This fact is not included in the hypothetical, so you would need to do more fact finding before you proceeded with this issue. On the facts above, however, you can assume that the time for appeal has elapsed because the appeal period is quite short in the United States (usually less than ninety (90) days), and the fact that Mr. Whitkin is already in prison indicates that the appeal period has elapsed. Nevertheless, as a judge, you should ensure that you have all of the facts before you. Once you are sure of the facts and you determine that the appeal period has elapsed, the issue of insufficiency of counsel is non-justiciable and should not be considered by the court—no matter how sympathetic you are to this issue and Mr. Whitkin’s unfair treatment at trial.

Now, consider the facts relating to Mr. Whitkin’s religion. These facts are relevant, and they support a relevant, justiciable issue of law, including the issue of whether New Hampshire Prison Rule 101 (a) deprived Mr. Whitkin of his religion and his right to practice religion as guaranteed by law.

One of the things you have probably noticed by this point is that issue spotting is practically impossible without some basic knowledge of the law. For example, it was important to understand the procedural rules related to appeals in order to disregard the insufficiency of counsel issue. Similarly, you needed to know the general principles of discrimination and the right to freedom of religion in order to identify those specific legal issues.

Specifically, you might consider the statutory provision in the United States Code relating to violation of religious freedom in the form of a civil rights action. Title 42 of the United States Code Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights … secured by the Constitution and laws, shall be liable to the party injured in an action at law.
You might also consider the First Amendment to the United States Constitution, which states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

The next step in identifying the issue is identifying the material facts that support that issue. These material facts will be used in the remaining IRAC process, and it is important to filter through all possible facts and select only those that are material to the legal issue before you and on which you are called upon to decide.

To briefly illustrate how reliance on material facts may work, if a lawyer wants you to follow the judicial decision he/she has cited to the court, he/she will describe the case’s material facts in broad terms. If a lawyer does not want you to follow the judicial decision cited by his/her opponent, he/she will describe that case’s material facts in narrow terms and seek to distinguish those facts from the facts in the present case. This strategic use of material facts can be described as the "ladder of abstraction," with lawyers going up towards general similarities between the facts of two cases or going down to specific differences in the material facts in an effort to distinguish and to exclude a previous case. Therefore, even if you are an appellate judge not tasked with fact finding, it is your responsibility to evaluate all material facts whether presented by the parties in their briefs or not.

Once you have identified the issue and the material facts that support it, you are ready to identify the rule of law.

2. **Statement of the Rule**

You know from the previous section that the rule of law often will be extracted and synthesized from past cases with similar fact patterns. In many instances, the applicable rule will be taken in part from several different sources. Typically, rules are not expressly stated in any of these cases. Instead, you must formulate the general principles based on facts and holdings of relevant cases.

In Mr. Whitkin’s case, the extracted rules of law (as previously mentioned) might be stated in the following way:
In a 42 U.S.C. § 1983 action, it must be determined whether the conduct complained of deprived a person of a right, privilege, or immunity secured by the Constitution or laws of the United States.

Prison inmates in the United States do not forfeit all Constitutional protections by reason of their conviction and confinement in prison. However, lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying the U.S. penal system.

Several factors are to be considered when evaluating the reasonableness of a prison regulation such as New Hampshire Prison Rule 101(a): 1. whether there is a valid, rational connection between the regulation and the asserted governmental interest; 2. whether alternative means for exercising the right remain open to the prisoner; and 3. the availability of ready alternatives to the regulation.

This rule statement comes directly from the legislation of the United States Code, and the parameters for applying the legislation are set out in the criteria of the legislation. As you can see, the legislation does not explain how to apply the criteria to a particular set of material facts. Instead, you must look to how the courts have applied this legislation to various fact patterns. From these cases, you will develop a “rule proof” to illustrate how each criterion of the rule has been used in a previous case. A “rule proof” is an illustration of how the application of a rule of law to a particular set of facts raised in a previous case lead to a particular holding. An effective “rule proof” will explain the rule of law in the context of the case from which it was extracted.

When formulating the “rule proof” it is best to use binding precedent, if possible. You also want to find cases that have fact patterns most similar to your case. You want to avoid cases in which the rule’s application are unclear or in which the facts of the case are not suitable to the case before you. Also, you want to avoid lengthy explanations of all the circumstances surrounding the case that you proof. In other words, you do not want to confuse the parameters of the rule. Simply state the facts that are legally relevant to your issue (the material facts) and provide sufficient background facts to put the material facts in context (the explanatory facts). You should include the holding or conclusion of the case, and you may want to make a limited mention of any compelling policy arguments the previous court considered in its decision. The following is an example of a rule proof from cases that might be useful in Mr. Whitkin’s case:
In *Gregory v. Workman*, 242 F.2d 55, 58 (2nd Cir. 1993), a prisoner who wished to organize a prisoners’ labor union was denied that opportunity by the Warden. The *Gregory* court, in allowing the formation of the union, stated that constitutional protections, especially the guarantee of free speech, should in most every case be extended to those incarcerated.

However, in *Ross v. Bakaj*, 300 F. Supp. 521(D. Vt. 1995), prisoners not only organized a labor union but actively solicited new members via mailings within the penal system. In addition, membership required dues paid monthly. The court ruled a ban on solicitation and membership dues to be a rational limitation on free speech, as it was rationally related to the reasonable objectives of prison administration in enforcing order. Although organizations and associations amongst prisoners should be allowed, the economic burden imposed on prisoners and the ensuing economic inequality that would become endemic would upset the balance of a well-run and safe prison. Further, some prisoners might find solicitations bothersome and foment further unrest in what should otherwise be a controlled environment. *Id.* at 524.

In contrast, in *Daley v. Pitney*, 12 F. Supp.2d 89 (N.D. Ohio 2000), a Sioux Indian prisoner was denied access to a sweat tent, which was an important aspect of his religion. Without such access, he argued, he was being denied his constitutional right to free exercise of religion. The court found a rational connection between allowing inmates to meet in a completely enclosed area and the type of harm prison officials feared would occur in a sweat lodge. In addition, alternative means existed for the prisoner to exercise his religion, such as access to prayer with other inmates from his tribe. Finally, the court found that construction of a sweat lodge would have an adverse reaction on prison staff and other inmates, due to the risk of assaulting or ostracizing participants of such exclusive ceremonies. *Id.* at 93-96.

From this rule proof of cases, you can formulate a rule for your analysis. In other words, your rule would include a mechanical statement of the legislation and cases that explain how the legislation works with different fact patterns.
3. **Analysis/Application of the Rule to the Facts**

   Once you have identified the rule, the next step is to analyze the rule against the material facts of your case and to compare the material facts of your case with the material facts of other cases with the same rule. In short, this is the analysis portion of the IRAC process.

   For every material fact, you need to ask whether the fact helps to prove or to disprove the rule of law on which you are relying. For example, if a rule requires that a certain circumstance or fact be present in order for the rule to apply, then the absence of that circumstance or fact helps you reach the conclusion that the rule does not apply. Alternatively, the presence of the required fact or circumstance demonstrates that the rule should apply. In short, you must apply the rule you have synthesized as above to the material facts in your case.

   To do this, as previously mentioned in Section B, you must interweave the material facts of your case with the corresponding section of the rule in order to come to a well-reasoned conclusion. You should point out the similarities (analogies) and differences (distinctions) between the material facts of your case and the material facts in past cases, which make the law relevant (or irrelevant, as the case may be).

   For example, recall the rule proof of cases that might be applicable in Mr. Whitkin’s case. In the *Gregory* case, the prisoners were allowed to organize their union, because there was no compelling reason for the prison to limit inmates’ freedom of speech.

   In *Ross*, however, the prisoners’ union was not allowed to solicit funds or conduct direct mailings to other inmates because the dues infringed on the equality of the prison atmosphere and the mailings might be considered unwanted by many inmates. Thus, the court set out a clear guideline for the exercise of free speech in the prison atmosphere.

   Finally, in *Daley*, the court found a compelling interest in limiting the exercise of freedom of religion by disallowing the construction of a sweat tent in favor of the rational prison policy on safety.

   Now, you should evaluate the facts in the Whitkin fact pattern. You know that Mr. Whitkin is seeking to exercise his right to freedom of religious expression through his long hair. Thus, Mr. Whitkin’s case looks like a good fit to *Daley*’s facts, as both are American Indians, both are attempting to exercise their freedom of religion, and both cases include arguments that constitutional rights have been curtailed by prison guidelines.

   In addition, you may wish to make policy arguments in favor of the public good, or further those policy arguments already stated in previous cases. Determine whether those policy issues previously discussed in the *Gregory*, *Ross*, and *Daley* cases would be of likely concern to your jurisdiction. However, make sure to use such arguments only sparingly, because upholding the established law is always your first and primary
concern. Policy arguments, while at times persuasive, are not a substitute for solid and dependable legal reasoning.

Finally, you should consider all counter-arguments suggested by the law. To successfully address and to refute a counter-argument, you should think about the flip side to the conclusion you have reached. Ask about and examine alternate legal outcomes to the one you have selected, and then show why your ultimate choice was the best and the most logical one to make.

For example, you might analyze Mr. Whitkin’s case in the following manner:

The facts of the Whitkin case illustrate that Mr. Whitkin’s desire to grow his hair to below collar-length, while perhaps a sincere religious belief, is not justified. Just as the prisoner in Daley was denied access to a sweat tent because of compelling interests in running an orderly and safe prison, Mr. Whitkin’s desire to grow his hair below collar-length is harmful to the safety of both himself and other prisoners.

Just as in Daley, there are compelling reasons in this case for New Hampshire Prison Rule 101 (a). For example, Mr. Whitkin could conceivably conceal dangerous items or other contraband in his braided hair. Further, as in Daley, other prisoners might become violent towards Mr. Whitkin or each other or to prison officials and officers because of the perceived preferential treatment by prison staff of Mr. Whitkin and his religious beliefs. Moreover, as the court concluded in Ross, cutting Mr. Whitkin’s long hair is a rational curtailing of free speech and religious practice, because allowing Mr. Whitkin to maintain his hair length would lead to alienation and conflict amongst the other prisoners.

Therefore, just as in Daley, Mr. Whitkin has not been denied the right to practice his religion in the company of other Native American inmates, and no other alternative exists to New Hampshire Prison Rule 101(a). Thus, because of the government’s legitimate interest of safety, Mr. Whitkin’s 42 U.S. C. § 1983 claim must fail.

Mr. Whitkin’s counsel argues passionately that Mr. Whitkin will be denied his religious practice because of this decision, and the Court is sympathetic to Mr. Whitkin’s arguments. According to Mr. Whitkin, he may not practice his religion without long hair. However, beyond this emotional and subjective argument, there is no concrete basis to determine that Mr. Whitkin may not effectively practice his religion. The Court is never allowed to determine the validity of a religious practice pursuant to the U.S. Constitution on the separation of the Church and the State, and therefore, it cannot consider this issue any further. The Ross court explained that religious rights may be limited when they infringe on the prison’s orderly operation and interfere with the lives and safety of other prisoners. While practicing his religion in private is allowed and even encouraged by prison staff, Mr. Whitkin’s visible long hair would be analogous to the mailings and dues collections in Ross or the sweat lodge in Daley. Other inmates might construe Mr. Whitkin’s long hair as a sign of favoritism, or, much worse, prisoners might decide to disobey the prison rule against long hair altogether, which would invalidate its rational aims of safety.
In the hypothetical analysis above, you can see how the material facts of Mr. Whitkin’s case are compared to the material facts in the other cases. You also see how the courts’ analyses in those binding cases are analyzed again in the hypothetical adding to the critical explanation of how and why the conclusion that Mr. Whitkin’s claim must fail. In analysis, you are constantly looking at every angle of comparison—identifying the similarities and differences to justify the outcome you are seeking.

4. Conclusion

After the analysis, you should state your conclusion on the issue. This lets the reader know that you have come to the end of this particular line of reasoning, and it summarizes your ruling. Remember to draw a conclusion only in reference to the particular issue at hand and make sure that the conclusion or ruling that you reach has a firm basis in the analysis you have conducted.

For example, in Mr. Whitkin’s case, you are only addressing whether Mr. Whitkin’s claim of a civil rights violation under 42 U.S.C. Section 1983 is valid. You would want to address any constitutional argument of freedom of religion separately. Your conclusion on the civil rights issue, therefore, might read as follows:

Because the New Hampshire Prison Rule 101(a) regarding the length of prisoners’ hair is reasonable and rationally related to an asserted compelling government interest, namely the safety of prisoners and prison officials and officers and the orderly operation of a state prison, and because no alternative exists to this regulation, this court finds that John Whitkin’s 42 U.S.C. § 1983 claim against the State of New Hampshire fails as a matter of law and is dismissed.

IRAC is a system of legal reasoning, which stands for Issue Rule Analysis Conclusion. Spotting key issues is integral to resolving the matter through the proper application of the law. Rules can come from case law, Constitutional, legislative or treaty provisions. Rules that come from case law should be extracted from prior cases and synthesized into one condensed rule that is applicable to the current fact pattern. The extracted rules should be proofed, or explained in the context of the prior cases from which they were obtained in order to determine parameters. The analysis of the identified issue will be the most in-depth portion of the IRAC process, because it builds upon effective issue spotting, fact application, and rule proofing.

In short, the material facts of a case suggest an issue. The issue must be justiciable. All justiciable issues are governed by the rule of law. The analysis of the rule of law to the material facts of the case before you and the material facts of other cases sharing the same rule forms the analysis, and this line of reasoning should be briefly recapitulated to form a conclusion.

The next section provides tips for good legal writing when using IRAC.

Other Resources:
CHAPTER III  Legal Reasoning and Legal Writing in the US


C. LEGAL WRITING

Language is the most important tool of a lawyer, and lawyers must learn to express themselves clearly and concisely. As we mentioned in the previous section of the manual, a well-reasoned opinion will be a well-written opinion, because legal reasoning is only good when it follows the fundamentals of good legal writing. The fundamentals of good legal writing include the following: (1) organization; (2) simplicity; (3) transitions; and (4) audience. We will briefly discuss each of these fundamentals below.

1. Organization

The key to persuasive and effective legal writing and legal reasoning is organization. Even the most persuasive legal argument can be lost in a poorly organized legal document. The following are tips for organizing your legal writing:

- Before you put pen to paper, think through your argument.
- Plan your writing using outlines.
- Order your material in a logical sequence. Use chronology when presenting facts. Keep related material together.
- Divide the document into sections and divide the sections into smaller parts as needed. Use informative headings for the sections and subsections.
- Plan all three parts: the beginning, the middle, and the end.
- Use a strong introduction and a strong conclusion.

2. Simplicity

Another fundamental skill for good legal writing is simplicity. There are some lawyers and judges who believe their intelligence is judged by the complexity of their sentences or the words they use. There are two major problems with this line of thinking. First, as a general rule, if you write complex sentences, more often than not, the reader will misunderstand the meaning of the sentence, and thus regard the writer as anything but intelligent. Second, anyone can look up a complicated word in a dictionary and use it correctly but not everyone can make a sound legal argument that needs no decoration. The following are tips for simplifying your legal writing:

- Omit needless words.
- Keep your average sentence length to about 20 words.
- Prefer the active voice over the passive.
- Use parallel phrasing for parallel ideas.
- Avoid multiple negatives.
- End sentences emphatically.
- Learn to detest simplifiable jargon.
- Use strong, precise verbs.
- Simplify wordy phrases.
- Avoid redundancies.
- Refer to people and companies by name.
- Do not habitually use parenthetical shorthand names. Use them only when you really need them.
m. Make everything you write speakable.

n. If you have to read the sentence two times, you should rewrite it.

3. Transitions

Like organization and simplicity, using transitions in legal writing keeps the reader focused, enhances your material by making it more readable, and maintains order in what could easily become a confused and complicated mess. Transition tools come in different forms including grammar, sentence structure, writing style, and word choice. The following are tips for using transitions in legal writing:

a. Begin with the “deep issue” or the most important information.

b. Summarize—do not over-particularize.

c. Introduce each paragraph with a topic sentence.

d. Bridge between paragraphs using transition words such as: next, second, in contrast, therefore, here, alternatively, etc.

e. Vary the length of your paragraphs, but generally keep them short.

f. Provide signposts along the way. Guide your reader along and do not be afraid to remind them where they have been, where they are, and where they are going.

g. When comparing material (i.e. facts in two different cases, or conclusions from two different cases) be sure to separate the different material into different paragraphs, preferably juxtaposed for effect.

h. When you introduce a new thought or concept, be sure to separate the material into different paragraphs.

4. Audience

Good legal writers are mindful of their audience. If you are responsible for drafting a controversial opinion, you likely will adopt a legal writing style that is different than the legal writing style used by a judge drafting a straight forward order. For example, you would want to include every possible consideration to protect the integrity of your decision. Similarly, lawyers use different legal writing styles and strategies depending on the legal matter, the client, the court, the strengths and weaknesses of the arguments and the entire case. In other words, the legal writing style can change depending on the audience. The following are tips for addressing different audiences in legal writing:

a. Legal writing should always be more formal.

b. Legal writing should comply with all local rules, procedural rules, and ethical rules.

c. Legal writing is about persuasion.

d. Be forthright when dealing with counterarguments.

e. It is never wise to write something you might regret.

f. Draft your document for an ordinary reader not for a mythical person who might someday review the document.

g. Organize provisions in order of descending importance.

h. Minimize definitions, but also never assume that your reader is omniscient.

i. Delete every shall—it sounds pretentious.
j. If you do not understand something included in your material or do not understand why it should be included, try diligently to gain that understanding, and if you still cannot understand it, cut it.

k. Use a readable typeface with a large enough font.

l. Create ample white space and use it meaningfully.

m. Highlight ideas with bullets and other attention-getters.

n. For a long document, make a table contents.

o. Embrace constructive criticism especially from yourself.

p. Edit yourself systematically.

q. Habitually gauge your own readerly likes and dislikes as well as those of other readers—if you do not like how someone else writes, make sure you do not repeat the same mistakes.

r. Remember that good writing makes the reader’s job easy; bad writing makes it hard.

s. If the reader’s job is hard, the reader is less likely to pay attention to what you have to say.

In sum, be mindful of your writing. The purpose of the common law system is to create a system of binding judicial decisions. If your judicial decision is unreadable or certain parts are mangled together, the import of your decision will be lost.

Resource:

Excerpt 3.2

1. The anatomy of an English judgment

1.1 Here we will look at the anatomy of an English judgment by examining the case of Re B (adult refusal of medical treatment) [2002] EWHC 429 (Fam). The case concerns a woman, identified only as Ms B, who after suffering a cervical spine cavernoma became a tetraplegic. She was paralysed from the neck down and entirely dependent on artificial ventilation. Ms B told the hospital through her lawyer that she wanted the ventilator switched off making it clear that she recognised this act would lead to her death. Ms B was judged competent to make the decision by two psychiatrists and plans were made to switch off the ventilator. Shortly before the machine was to be switched off the psychiatrists changed their minds about Ms B’s ability to make decisions. Ms B challenged this and a third psychiatrist was consulted who said she was competent to make the decision to stop all medical treatment. The hospital then accepted that Ms B was competent but the medical team treating her would not switch off the ventilator. In her action against the hospital Ms B sought a declaration that she had been treated unlawfully by way of artificial ventilation by the hospital trust and damages for unlawful trespass.

1.2 In an English law report, the law reporter will summarize the facts of the case in the ‘Headnote’ and after the word ‘Held’ state the decision of the court and the reasons why the court reached this decision. The reporter will indicate where the reasoning can be found in the report enabling lawyers and judges to go directly to the main points. Numbered paragraphs have been used in judgments since 2000 to enable consistent referencing between reports published on the Internet and those published in paper form.

2. The Facts

2.1 The first thing that a judge will do is to provide a summary of the facts as accepted by the court. In multi-judge appellate courts the facts will usually only be summarized in the first judgment and the other judges will simply note that they adopt the facts as recited by the first judge to deliver judgment. In English law appeals are rarely allowed on the facts of a case and so the facts as found by the judge (or jury) at first instance are usually restated insofar as they affect the appeal.

2.2 Re B is a first instance case before the President of the Family Division of the High Court. Paragraphs 4-11 of the judgment deal in detail with the fact situation that the
judge accepts as the facts of this case and from which she will identify the legal issues in the case. Although UK judges are not so tied to the IRAC (see Chapter III of the US materials) method of legal writing as their US counterparts the pattern is recognized as a useful analytical tool and increasingly used in UK law schools to teach students how to answer fictitious legal problems. It is from the facts that the ‘I’ of IRAC, namely the legal issues, must be identified.

Here you can see from paragraphs 4 and 11 of the judgement some of the detailed facts of the case.

**Medical history**

[4] On 26 August 1999, Ms B suffered a haemorrhage of the spinal column in her neck. She was admitted to the hospital and a cavernoma was diagnosed, a condition caused by a malformation of blood vessels in the spinal cord. She was transferred to another hospital where she stayed for five weeks. She was informed by doctors that there was a possibility of a further bleed, or surgical intervention, which would result in severe disability. On the basis of this advice she executed a living will (dated 4 September 1999). The terms of the will stated that should the time come when Ms B was unable to give instructions, she wished for treatment to be withdrawn if she was suffering from a life-threatening condition, permanent mental impairment or permanent unconsciousness. She was, however, also told that the risk of re-haemorrhage was not particularly great, and so she felt very optimistic about the future. Her condition gradually improved and after leaving hospital and a period of recuperation, she returned to work. Thereafter Ms B was in generally good health although she had some continued weakness in her left arm.

...  

[11] On 12 November Ms B was offered referral to a weaning centre which she rejected. In the alternative she was offered the programme in the ICU. This she also rejected for two reasons, being the length of the process (about three weeks), and the omission of pain-killers as part of the treatment. Ms B made it clear from September 2001 that she did not want to go to a spinal rehabilitation unit. She refused the possibility of a referral to one clinic when her name was near the top of the waiting list in October. She also refused the possibility of a bed in a hospice in December since the hospice would not accept her wish to have her ventilator withdrawn.
CHAPTER III Analysis of a UK Judgment

3. Identifying the Issues

3.1 Having established the facts the judge will then identify the issues that the court must address in the present case. Usefully in Re B these are noted with the introductory words ‘The issues are...’ in paragraph 13 of the judgment, unfortunately not all judges identify the issues quite so clearly. The issues are organized in a logical fashion, here issue (b) is dependent on the answer to issue (a) and so clearly (a) must be addressed first.

[13] The issues are therefore: (a) does the claimant, Ms B, have the mental capacity to choose whether to accept or refuse medical treatment, in circumstances in which her refusal will, almost inevitably, lead to her death? If the answer is Yes, (b) did she have the capacity to choose from August 2001? Ms B seeks declarations from the court in respect of both questions. (c) If the answer to (b) is Yes, then Ms B seeks a declaration from the court that the hospital has been treating her unlawfully from 8 August 2001. (d) If the answer to (b) is Yes, then Ms B also seeks nominal damages to recognise the tort of trespass to the person. (e) It will be necessary to continue injunctions in relation to publicity.

4. Selecting the relevant legal rules

4.1 Once the issues are put in order the judge must then select the relevant law. This is the ‘R’ of the IRAC system; the rule. The rule, or as is more often the case rules, will be either statutory or common law. Statutory rules are usually readily identified and are deceptively simple in appearance, in practice however the application of a legal rule can be a complex matter in a legal system like that of the UK where the approach to statutory interpretation today is essentially a purposivist (see Chapter IV of the UK materials) or contextual rather than literal. By contrast common law ‘rules’, or perhaps more accurately common law precedents, have to be found in decided cases by identifying the ratio decidendi (see Chapter I of the UK materials) of the relevant cases. The difficulty here is that the scope of the application of the ratio decidendi of a previous case is not always easy to determine and for this reason it is often difficult to see where selecting the relevant law (the ‘R’ of IRAC) ends and the application (the ‘A’ of IRAC) this law to the facts begins. Some overlap is perhaps inevitable as paragraphs 14-18 of Re B demonstrate.
CHAPTER III

Analysis of a UK Judgment

The law on mental capacity

[14] The general law on mental capacity is, in my judgment, clear and easily to be understood by lawyers. Its application to individual cases in the context of a general practitioner’s surgery, a hospital ward and especially in an intensive care unit is infinitely more difficult to achieve.

[15] In a series of cases during the 1990s the House of Lords and the Court of Appeal restated the long-established principles which govern the law on mental capacity of adults and provided some guidelines in complex medical situations.


‘English law goes to great lengths to protect a person of full age and capacity from interference with his personal liberty. We have too often seen freedom disappear in other countries not only by coups d’etat but by gradual erosion; and often it is the first step that counts. So it would be unwise to make even minor concessions.’

[17] In F v West Berkshire Health Authority (Mental Health Act Commission intervening) [1989] 2 All ER 545 at 563…Lord Goff of Chieveley said: ‘I start with the fundamental principle, now long established, that every person’s body is inviolate.’

[18] Lord Donaldson MR said in Re T (adult: refusal of medical treatment) [1992] 4 All ER 649 at 662: ‘: the patient’s right of choice exists whether the reasons for making that choice are rational, irrational, unknown or even non-existent.’

4.2 In these paragraphs the President is addressing issue (a) and while it might be said that she is simply selecting the relevant legal rules from the common law jurisprudence she is at the same time, implicitly at least, applying the law to the facts before her by citing only the law she thinks is relevant to her eventual conclusions. A further issue worth noting here is that the President starts by looking at binding precedents starting with the highest UK court, the House of Lords, before considering a case from the English Court of Appeal, Re T (adult: refusal of medical treatment). Later (in paragraphs 21 and 26) she looks at persuasive precedents from other common law jurisdictions, namely the US and Canada.
5. A note on deductive reasoning

5.1 It is generally accepted that common law reasoning is primarily analogical, that is, reasoning by example and reasoning from case to case. In her examination of the law on mental capacity in *Re B* the President does not need to proceed by analogy but is able to take a deductive approach to the established law on mental capacity. Reasoning by deduction requires the statement of a general rule which can be applied to present case. The general rule here is that where persons possess the mental capacity to make decisions for themselves it follows that they have autonomy (autonomy here means the freedom to make rational or irrational choices about medical treatment). This general rule cannot be extracted from a single case but has been developed through a number of cases as the discussion in paragraphs 14-18 shows. Thus the common law rule on mental capacity is a rule created by synthesizing a number of decided cases which can then be deductively applied to the present case. It can be represented as follows using the logical form of a syllogism.

<table>
<thead>
<tr>
<th>The deductive form</th>
<th>Application to Re B</th>
</tr>
</thead>
<tbody>
<tr>
<td>Major premise</td>
<td>Where persons have mental capacity they have autonomy</td>
</tr>
<tr>
<td>Minor premise</td>
<td>Ms B is a person who has mental capacity</td>
</tr>
<tr>
<td>Conclusion</td>
<td>Ms B has autonomy</td>
</tr>
</tbody>
</table>

5.2 Deductive reasoning is a powerfully simple tool in legal argument but it in order for the conclusion to be valid the premises themselves must be valid. In order to establish the major premise judges (and lawyers) have to first find the legal rule that governs the case before them. The rules, however, merely identify the legal issues; they do not resolve the extent of their own application. In paragraph 14 of *Re B* that the judge echoes this difficulty, ‘the general law on mental capacity is, in my judgment, clear’ she states but ‘its application to individual cases in the context of a… hospital ward is infinitely more difficult to achieve.’

5.3 The minor premise is established from the facts of the case. Inevitably, in an adversarial legal system, each side will present the facts in a somewhat different light. Only after hearing the evidence can the judge decide whether the facts of formulation as a minor premise that will lead to a valid conclusion. There is a
temptation to see deductive reasoning as a simple and mechanical form of legal reasoning but it must be remembered that even here there is room for judicial discretion since the facts require interpretation and only if the facts (a) can be interpreted in such a way so as to bear a meaning that allows the construction of a valid minor premise and (b) only if they are thus formulated will the syllogism be complete.

6. Applying the relevant legal rules and conclusions

6.1 We have already noted (at 4.1) that there is some overlap between selecting and applying the relevant legal rules since in most cases the judge will have planned what he or she intends to say before actually writing the opinion. Similarly the judge will be aware of the conclusions he or she intends to reach when applying the relevant law and the conclusion will usually be obvious from the application of the law. The followings extracts from paragraphs 89 – 95 of Re B demonstrate application of the law on mental capacity and the judge’s conclusions. Notice that it is the facts, as established by the evidence (to which she has given over most of the judgment), on which the decision turns. The finding of similarity or difference of the facts is a key judicial function and a vital step in legal reasoning regardless of whether deductive or analogical reasoning is employed.

[89] As I have already said Ms B was a most impressive witness. I therefore considered with especial care the evidence of the two psychiatrists and the submissions of Mr Francis for the trust. I start with the presumption that Ms B has mental capacity… Mr Francis has argued that it is legal capacity which I must consider not the assessment of the mental capacity provided by the doctors. That may be so, but, unless it is an exceptional case, the judicial approach to mental capacity must be largely dependent upon the assessments of the medical profession whose task it is on a regular basis to assess the competence of the patient to consent or refuse the medical/surgical treatment recommended to the patient. If, as in the present case, two experienced and distinguished consultant psychiatrists give evidence that Ms B has the mental capacity to make decisions, even grave decisions about her future medical treatment, that is cogent evidence upon which I can and should rely. That evidence supports and reinforces the assessment of Ms B’s competence in August 2001.

[90] Mr Francis has pointed to a number of temporary factors which might affect Ms B’s competence or erode her capacity: possible evidence of psychological regression; the effect
of her grave physical disability; the absence of her experience of rehabilitation which was thought likely to be a positive experience; and the effect of her environment …

[91] It is important to note from the outset, as Dr Sensky properly emphasised in his evidence to the court, the importance of avoiding generalisations about the possibilities for patients in Ms B’s position for capacity to be diminished by one or a number of temporary factors. Rather, the court’s task in the instant case is to determine whether in fact Ms B’s capacity is affected by any of the factors identified by the trust.

[92] I reject any suggestion that Ms B’s capacity has been impaired by the advent of psychological regression. There is no evidence to support it. I do not consider that Ms B has been ambivalent in her determination to choose her medical treatment and in her wish to cease to have artificial ventilation…

[94] One must allow for those as severely disabled as Ms B, for some of whom life in that condition may be worse than death… Unless the gravity of the illness has affected the patient’s capacity, a seriously disabled patient has the same rights as the fit person to respect for personal autonomy. There is a serious danger, exemplified in this case, of a benevolent paternalism which does not embrace recognition of the personal autonomy of the severely disabled patient…

[95] I am therefore entirely satisfied that Ms B is competent to make all relevant decisions about her medical treatment including the decision whether to seek to withdraw from artificial ventilation. Her mental competence is commensurate with the gravity of the decision she may wish to make. I find that she has had the mental capacity to make such decisions since 8 August 2001 and that she will remain competent to make such decisions for the foreseeable future.

7. Directions and Remedies

7.1 Once the court has reached a conclusion as to the outcome of a civil case it will give directions granting the appropriate declarations or remedies. Clearly from the claimant’s viewpoint this will be the most important part of the judgment. It is usually brief and unambiguous, though as can be seen here in paragraphs 96 and 99 from Re B the court may invite the lawyers to make further submissions on the particulars of the declarations or remedies.
[96] In the light of my decision that the claimant has mental capacity and has had such capacity since August 2001 I shall be prepared to grant the appropriate declarations after discussions with counsel. I also find that the claimant has been treated unlawfully by the trust since August.

[99] It is important to draw a careful distinction between the duties of the dedicated team in the ICU of the hospital caring for Ms B and the trust responsible for the working of the hospital. In my view, the latter should have taken steps to deal with the issue. The failure to do so has led me to the conclusion that I should mark my finding that the claimant has been treated unlawfully by the NHS hospital trust by a small award of damages. I shall not decide the amount until Mr Francis has had an opportunity to make representations if he wishes to do so.
4.1 Statutory Interpretation in the United Kingdom

1.1 Since the nineteenth century, social and economic changes have occurred at such a rate that the common law, whose development is dependent on the random process of suitable cases coming before the courts, has been unable to keep pace with the needs of the society it serves. As a result, statute law has become the major source of law.

1.2 Statutory interpretation the process by which a meaning is assigned to words in a statute. Every statute must be ‘interpreted’ since the words of the statute must be applied to the particular fact situation that judges are dealing with in the case before them. In most cases this is straightforward, but occasionally the meaning of words in a statute is unclear.

2. Precedent in relation to decisions on statutory interpretation

2.1 Although decisions on the construction of statutes, being matters of law, may constitute binding precedents, they do not necessarily do so in every case. This stems from the most elementary principle of statutory interpretation, namely that the essential task is to find the meaning of the words for the purposes of the Act in which those words are used – see, for example: Carter v Bradbeer [1975] 3 All ER 158

‘A question of statutory construction is one in which the strict doctrine of precedent can only be of narrow application. The ratio decidendi of a judgment as to the meaning of particular words or combinations of words used in a particular statutory provision can have no more than a persuasive influence on a court which is called upon to interpret the same word or combination of words appearing in some other statutory provision’. (Lord Diplock.)

3. The ‘rules’ of interpretation

The literal rule

3.1 The traditional view of statutory interpretation was that the courts, being constitutionally subordinate to Parliament, should restrict themselves to identifying and applying the plain meaning of a statute (the so-called literal rule). The literal rule requires that the intention of Parliament should be found by applying the ordinary or natural meaning of the words used by Parliament even where this produced an absurd result.

3.2 On the face of it, identifying the literal or natural meaning of statutory words appears straightforward but it is not always possible to identify the plain meaning of a word. Even judges disagree as to the plain meaning of words and sometimes what is plain to one judge is far from plain to another as Ellerman Lines Ltd. v Murray [1930] All ER Rep 503 demonstrates. The cases concerned s.1 of the Merchant Shipping (International Labour Conventions) Act 1925, Lord Tomlin said that the relevant words were ‘free from ambiguity’, whereas in the same case Lord Blanesburgh said, ‘I do not suggest that this Act ... is clear’.

4. The golden rule

4.1 The literal rule was modified by many judges where it produced an unjust result (or indeed no result) or where the result was absurd using the so-called golden rule. The golden rule states that words must be given their natural and ordinary meaning unless this would produce an absurd result. An explanation of the golden rule given in Becke v Smith (1836) 2 M&W 195 by Baron Parke:

‘It is a very useful rule in the construction of a statute to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature to be collected from the statute
itself, or leads to any manifest absurdity or repugnance, in which case the
language may be varied or modified so as to avoid inconvenience but no
further.’

4.2 An example of the use of the golden rule is found in R v Allen (1872) LR ICCR 367.
Here, a man was charged with bigamy. The statutory offence was ‘...to marry any
other person during the life of the former husband or wife’. Using the golden rule the
court interpreted the words ‘to marry’ as ‘to go through a wedding ceremony of
marriage ‘pretending’ to marry someone’. If the court had interpreted the words in
the statute literally no one could ever be convicted of bigamy, since no one can
validly ‘marry’ another person while they are already legally married.

4.3 The golden rule appears to offer a common sense answer to statutory absurdity, but it
might be criticized on the grounds that it relies on the subjective opinion of the judge
as to whether a statute is absurd or not. Further, the issue arises, given the legislative
supremacy of Parliament, as to how absurd an outcome must be to justify the courts
in departing from the statutory language? For example, the case of Whiteley v
Chappell (1868-69) LR 4 QB 147, dealt with a statute under which it was an offence
to impersonate ‘any person entitled to vote’ at an election. The defendant
impersonated someone who had been entitled to vote, but who had died before the
election took place. The court held that the defendant had not committed the offence,
because dead men are not ‘entitled to vote’. Was this conclusion ‘absurd’? Most
commentators seem to think it was, yet clearly the court did not do so. The
flexibility which inevitably results from the highly subjective nature of the notion of
absurdity obviously gives the courts very considerable power.

5. The mischief rule

5.1 The mischief rule, or the rule in Heydon’s case (1584) 76 ER 367, says that a statute
should be interpreted by looking at four points:
• What was the common law before the statute?
• What was the problem (mischief) which the common law failed to deal with?
• What remedy did Parliament prescribe to deal with the problem?
• What is the true reason for the remedy?

5.2 Thus, the judge applying the mischief rule looks at what Parliament was trying to
achieve and interprets the statute accordingly. In Smith v Hughes [1960] 1 WLR
830, a woman was charged with ‘soliciting in a street…for the purposes of
prostitution’. She was convicted despite the fact that she was not physically in
the street, but standing in the window of a house overlooking the street. Parker CJ said:
‘Everybody knows that this was an Act intended to clean up the streets, to
enable people to walk along the streets without being molested or solicited by
common prostitutes…For my part, I am content to base my decision on that
ground and that ground alone.’

5.3 A difficulty with the mischief rule is the issues of how the courts actually identify the
mischief at which the statute was aimed, other than by having regard to the words of
the Act itself? Are they, for example, to consult Hansard, the official report of
proceedings in Parliament, to try to find out what the people who passed the Act
thought it meant? If so, the lawyers who advise clients must do the same. But is it
realistic to require a solicitor who is advising a client on, say, the Offences Against
the Person Act 1861, to consult not only the Act itself and the cases decided under it,
but also the relevant volumes of Hansard? Even if Hansard is used, will it help?
Which of the many viewpoints expressed in debate can be identified as the one which
represented Parliament’s collective view of the mischief at which the Act was aimed?
To address such question a detailed body of case-law has emerged on the question of
which extrinsic sources can be consulted and the conclusions which can be drawn from them.

6. The modern approach: purposivism

6.1 The difficulties which result from the traditional approaches to statutory interpretation have led to the adoption of the *purposive approach*. This approach emphasizes the importance of identifying the context in which words occur before seeking to identify their meanings, and it acknowledges that the purpose which underlies the statute is an important part of that context. The problem of identifying the purpose remains, but in many cases this does not prevent the attainment of results which coincide with commonsense. Not all judges are whole-hearted purposivists, but the fact that purposivism is the dominant method of interpretation in European legal systems may give added impetus to its increasing acceptance in England. In any event, the approach is already sufficiently widely accepted for two examples of the way it works to be given.

6.2 First, in *Kammins Ballrooms Co Ltd v Zenith Investments Ltd* [1970] 2 All ER 871, the House of Lords had to interpret the Landlord and Tenant Act 1954. Part of the scheme of the Act is that where a tenancy of business premises is about to expire, the tenant may request the grant of a new tenancy from his landlord. If the landlord opposes this request, the tenant then has the right to challenge him by applying to the county court, but s. 29(3) of the Act provides:

> ‘No application ... shall be entertained unless it is made not less than two nor more than four months after ... the making of the tenant's request for a new tenancy.’

In the present case the request was made before the minimum period of two months had elapsed. The point appears to have gone unnoticed for some time during the litigation, but eventually the landlords raised the matter and contended that, as a result, the court had no jurisdiction.

The House of Lords held that although the landlords' argument would succeed if the time limit was substantive, the argument would fail if the time limit was only procedural. Commenting on the statutory words, Lord Diplock said:

> ‘Semantics and the rules of syntax alone could never justify the conclusion that the words “No application ... shall be entertained unless ...” meant that some applications should be entertained notwithstanding that neither of the conditions which followed the word 'unless' was fulfilled.’

However, his Lordship went on to say that a *purposive* approach could be used to achieve this result, because the underlying policy of the Act was to encourage landlords and tenants to agree between themselves. Furthermore, the time limit in question was clearly intended to benefit the landlords, who would be at risk of an application to the court for only a precisely fixed period. Therefore the court could promote the purpose of the Act by interpreting the time limit as being merely procedural, with the result that the landlords could agree to dispense with compliance if they so wished. The issue of fact therefore shifted from the simple question of when the application had been made, to the more complicated one of whether the landlords’ conduct implied that they had waived compliance with the time limit.

6.3 Judges who rely on the purposive approach do not always use this phrase to indicate what they are doing, as can be seen from the case of *R v Pigg* [1983] 1 All ER 56. The point at issue was whether the defendant's conviction for rape should be upheld or quashed. His conviction had been by a majority verdict. The key statutory provision was s. 17(2) of the Juries Act 1974:
CHAPTER IV  Statutory Interpretation in the UK

‘A court shall not accept a majority verdict of guilty unless the foreman of the jury has stated in open court the number of jurors who respectively agreed to and dissented from the verdict.’

What actually happened in Pigg was that the foreman merely said that ten jurors had agreed to convict the defendant, without stating that two had dissented.

Lord Brandon, with whom the other Law Lords all agreed, accepted that the statutory requirement had to be complied with, but he also said: ‘The precise form of words by which such compliance is achieved, so long as the effect is clear, is not material.’

The conviction was, therefore, upheld. Lord Brandon appears not to have been concerned that his departure from literal interpretation resulted in the upholding of the conviction, although there is ample authority to the effect that the subject whose liberty is at stake, is entitled to the benefit of any doubt there may be as to the correct interpretation of a statute. Perhaps Lord Brandon's abhorrence of the offence weighed more heavily with him than did any traditional ideas of fair play for the defendant.

6.4 Although purposivism appears to give the judges considerable power its limits must be recognized. In particular, the purpose of any particular provision will be the same in all cases to which the provision is applied. Thus there is no real conflict between purposivism and the apparently uncompromising words of Lord Diplock, who said, with the express agreement of the other Law Lords sitting with him:

‘Your Lordships should, however, in my view take this opportunity of stating once again the important constitutional principle that questions of construction of all legislation, primary or secondary, are questions of law to be determined authoritatively by courts of law; that errors in construing primary or secondary legislation made by inferior tribunals that are not courts of law, however specialized and prestigious they may be, are subject to correction by judicial review; no tribunal and no court of law has any discretion to vary the meaning of the words of primary or secondary legislation from case to case in order to meet what the tribunal or court happens to think is the justice of the particular case. Tempting though it might sound, to do so is the negation of the rule of law. If there are cases in which the application of the Patents Rules lead to injustice, the cure is for the Secretary of State to amend the Rules. If what is thought to be the injustice results from the terms of the Act itself, the remedy is for Parliament to amend the Act.’ (In Re Energy Conversion Devices Inc [1982] FSR 544.)

7. The tools of purposivism

7.1 In using the purposivist approach to statutory interpretation the courts have developed numerous ‘rules’ or guidelines. There is no definitive list of these guidelines since essentially they must be gathered from decided cases. It is generally agreed that Parliament expects the courts to interpret statutes using these numerous guidelines as Bennion puts it:

‘It is taken to be the legislator’s intention that an enactment shall be construed according to the numerous general guidelines laid down for that purpose by law; and that where these conflict (as they often do) the problem shall be resolved by weighing and balancing the interpretative factors concerned’.

A number of interpretative guidelines will now be considered.

7.2 Not surprisingly, given that purposivism is concerned with context, the most basic rule is that words must read in their immediate textual context. Although this might be thought to be so obvious as to not require comment it is often overlooked. A simple example is worth considering, in Foster v Diphwys Casson Slate Co (1887)
18 QBD 428 the issue arose as to whether a cloth bag which was used to carry explosives down a mine complied with the statutory requirement that explosives be carried in a ‘case or canister’. Relying on the immediate textual context the court held that only containers of similar strength and rigidity as ‘canisters’ were covered by the legislation and this not include cloth bags.

7.3 When drafting a statute the drafter cannot possibly list all the fact situations to which the statute will eventually apply, but often gives examples of such situations. The *eiusdem generis* (meaning of the same class) ‘rule’ is used by the courts to interpret such examples in a statute in the light of the examples given. More particularly, the courts use the ‘rule’ to interpret general words in the light of specific words in a statute. A useful illustration of the ‘rule’ can be found in the discussion of Lord Millet in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.

‘Thus, while it may be possible to read “cats” as meaning “cats or dogs” (on the footing that the essential concept is that of domestic pets generally rather than felines particularly), it would obviously not be possible to read “Siamese cats” as meaning “Siamese cats or dogs”. The particularity of the expression “Siamese cats” would preclude its extension to other species of cat, let alone dogs. But suppose the statute merely said “cats”, and that this was the result of successive amendments to the statute as originally enacted. If this had said “Siamese cats”, and had twice been amended, first to read “Siamese or Persian cats” and then to read simply “cats”; it would not, in my opinion, be possible to read the word "cats" as including “dogs”; the legislative history would demonstrate that, while Parliament had successively widened the scope of the statute, it had consistently legislated in relation to felines, and had left its possible extension to other domestic pets for future consideration. Reading the word “cats” as meaning “cats or dogs” in these circumstances would be to usurp the function of Parliament.’

7.4 Another fundamental rule of interpretation is that the statute should be *read as a whole* and that the same words should be given the same meaning throughout the Act. This can involve considering various parts of an Act of Parliament, including the preamble, the long title, the short title, headings, marginal notes, definition sections and schedules. Case law offers considerable, though not always unambiguous, guidance as to the weight each part of an Act should be given in interpretation. For example, schedules are considered an integral part of the Act and it is merely a drafting convention that they are placed as schedules rather than in the main body of the Act whereas short titles are by their nature ‘short’ and of little practical help interpreting other words in a statute.

7.5 In addition to looking at the Act itself the courts nowadays are permitted to look at extrinsic materials. This includes pre-Parliamentary materials, most notably Law Commission Reports, Parliamentary materials and post-Parliamentary materials such as guidelines issued by government departments. The courts have only relatively recently been permitted to consult Parliamentary materials following the House of Lords decision in *Pepper v Hart* [1993] 1 All ER 42. This allows the courts, in very limited circumstances, to consult *Hansard* (the official reports of Parliamentary proceedings) to assist it in discovering the meaning of words in a statute. Before *Pepper v Hart* consulting *Hansard* was prohibited on the grounds that it breached the constitutional principle that Parliamentary proceedings cannot be called into question by the courts.

8. Presumptions
8.1 Statutory presumptions are simply assumptions or starting points that a judge can make when interpreting a statute. The most basic presumption is the presumption against injustice and all other presumptions stem from this, they include:

- the presumption against absurdity;
- the presumption that Parliament did not intend to oust the jurisdiction of the courts;
- the presumption against retrospection;
- the presumption that penal (criminal) statutes will be interpreted so as to give the accused the benefit of any doubt which may arise;
- the presumption that statutes are intended to comply with international law and European Community law;
- the presumption against benefiting from wrongdoing;
- the presumption against binding the Crown.

A full discussion of the presumptions can be found in *Maxwell on the Interpretation of Statutes* (12th edn. 1969).
These extracts from the case of Pepper v Hart [1993] AC 593 explain the arguments for and against consideration of the records of parliamentary debate by the court when interpreting legislation.

The case concerned the interpretation of tax legislation. Applying ordinary principles of statutory interpretation, the legislation appeared to require payment of tax. However, the record of the parliamentary debate that proceeded the passing of the legislation contained an express statement by the relevant minister that the Government did not intend tax to be payable in such circumstances.

The speeches by Lord Bridge, Lord Griffiths and Lord Oliver indicate the problem and their reasons for supporting a new rule allowing the courts to consider ‘Hansard’, the official record of parliamentary debates, when interpreting legislation.

Lord Browne-Wilkinson provides a detailed legal analysis of the rule excluding reference to ‘Hansard’ by the Courts and concludes that the rule should be relaxed.

Lord Mackay, the Lord Chancellor, is the only judge who would have liked to have kept the rule excluding reference to ‘Hansard’. He explains that his support for the rule is a practical one, based on the fear that lawyers will feel compelled to research the relevant parliamentary debates in ‘Hansard’ in all cases and that the cost of court cases will rise significantly as a result.

LORD BRIDGE OF HARWICH:

My Lords, I was one of those who were in the majority at the conclusion of the first hearing of this appeal in holding the opinion that section 63 of the Finance Act 1976, construed by conventional criteria, supported the assessments to income tax made by the revenue on the appellants which had been upheld by Vinelott J. and the Court of Appeal. If it were not permissible to take account of the Parliamentary history of the relevant legislation and of ministerial statements of its intended effect, I should remain of that opinion. But once the Parliamentary material was brought to our attention, it seemed to me, as, I believe, to others of your Lordships who had heard the appeal first argued, to raise an acute question as to whether it could possibly be right to give effect to taxing legislation in such a way as to impose a tax which the Financial Secretary to the Treasury, during the passage of the Bill containing the relevant provision, had, in effect, assured the House of Commons it was not intended to impose. It was this which led to the appeal being re-argued before the Appellate Committee of seven which now reports to the House.

Following the further arguments of which we have had the benefit, I should find it very difficult, in conscience, to reach a conclusion adverse to the appellants on the basis of a technical rule of construction requiring me to ignore the very material which in this case indicates unequivocally which of the two possible interpretations of section 63(2) of the Act of 1976 was intended by Parliament. But, for all the reasons given by my noble and learned friend, Lord Browne-Wilkinson, with whose speech I entirely agree, I am not placed in that invidious situation.
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It should, in my opinion, only be in the rare cases where the very issue of interpretation which the courts are called on to resolve has been addressed in Parliamentary debate and where the promoter of the legislation has made a clear statement directed to that very issue, that reference to Hansard should be permitted. Indeed, it is only in such cases that reference to Hansard is likely to be of any assistance to the courts. Provided the relaxation of the previous exclusionary rule is so limited, I find it difficult to suppose that the additional cost of litigation or any other ground of objection can justify the court continuing to wear blinkers which, in such a case as this, conceal the vital clue to the intended meaning of an enactment. I recognise that practitioners will in some cases incur fruitless costs in the search for such a vital clue where none exists. But, on the other hand, where Hansard does provide the answer, it should be so clear to both parties that they will avoid the cost of litigation.

LORD GRIFFITHS:

My Lords, I have long thought that the time had come to change the self-imposed judicial rule that forbade any reference to the legislative history of an enactment as an aid to its interpretation. The ever increasing volume of legislation must inevitably result in ambiguities of statutory language which are not perceived at the time the legislation is enacted. The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted. Why then cut ourselves off from the one source in which may be found an authoritative statement of the intention with which the legislation is placed before Parliament? I have had the advantage of reading the speech of Lord Browne-Wilkinson and save on the construction of the Act, without recourse to Hansard, I agree with all he has to say. In summary, I agree that the courts should have recourse to Hansard in the circumstances and to the extent he proposes. I agree that the use of Hansard as an aid to assist the court to give effect to the true intention of Parliament is not "questioning" within the meaning of article 9 of the Bill of Rights. I agree that the House is not inhibited by any Parliamentary privilege in deciding this appeal.

I cannot agree with the view that consulting Hansard will add so greatly to the cost of litigation, that on this ground alone we should refuse to do so. Modern technology greatly facilitates the recall and display of material held centrally. I have to confess that on many occasions I have had recourse to Hansard, of course only to check if my interpretation had conflicted with an express Parliamentary intention, but I can say that it does not take long to recall and assemble the relevant passages in which the particular section was dealt with in Parliament, nor does it take long to see if anything relevant was said. Furthermore if the search resolves the ambiguity it will in future save all the expense that would otherwise be incurred in fighting the rival interpretations through the courts. We have heard no suggestion that recourse to Parliamentary history has significantly increased the cost of litigation in Australia or New Zealand and I do not believe that it will do so in this country.
LORD OLIVER OF AYLMERTON:

My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Browne-Wilkinson. I agree with it in its entirety and would, in the ordinary way, be content to do no more than express my concurrence both in the reasoning and in the result. I venture to add a few observations of my own only because I have to confess to having been a somewhat reluctant convert to the notion that the words which Parliament has chosen to use in a statute for the expression of its will may fall to be construed or modified by reference to what individual members of Parliament may have said in the course of debate or discussion preceding the passage of the Bill into law. A statute is, after all, the formal and complete intimation to the citizen of a particular rule of the law which he is enjoined, sometimes under penalty, to obey and by which he is both expected and entitled to regulate his conduct. We must, therefore, I believe, be very cautious in opening the door to the reception of material not readily or ordinarily accessible to the citizen whose rights and duties are to be affected by the words in which the legislature has elected to express its will.

But experience shows that language - and, particularly, language adopted or concurred in under the pressure of a tight Parliamentary timetable - is not always a reliable vehicle for the complete or accurate translation of legislative intention; and I have been persuaded, for the reasons so cogently deployed in the speech of my noble and learned friend, that the circumstances of this case demonstrate that there is both the room and the necessity for a limited relaxation of the previously well-settled rule which excludes reference to Parliamentary history as an aid to statutory construction.

It is, however, important to stress the limits within which such a relaxation is permissible and which are set out in the speech of my noble and learned friend. It can apply only where the expression of the legislative intention is genuinely ambiguous or obscure or where a literal or prima facie construction leads to a manifest absurdity and where the difficulty can be resolved by a clear statement directed to the matter in issue. Ingenuity can sometimes suggest ambiguity or obscurity where none exists in fact, and if the instant case were to be thought to justify the exercise of combing through reports of Parliamentary proceedings in the hope of unearthing some perhaps incautious expression of opinion in support of an improbable secondary meaning, the relaxation of the rule might indeed lead to the fruitless expense and labour which has been prayed in aid in the past as one of the reasons justifying its maintenance. But so long as the three conditions expressed in the speech of my noble and learned friend are understood and observed, I do not, for my part, consider that the relaxation of the rule which he has proposed will lead to any significant increase in the cost of litigation or in the burden of research required to be undertaken by legal advisers.

LORD BROWNE-WILKINSON:

My Lords, the underlying subject matter of these tax appeals is the correct basis for valuing benefits in kind received by the taxpayers who are schoolmasters. However in the circumstances which I will relate, the appeals have also raised two questions of much wider importance. The first is whether in construing ambiguous or obscure statutory provisions your Lordships should relax the historic rule that the courts must not look at the Parliamentary history of legislation or Hansard for the purpose of construing such legislation. The second is whether, if reference to such materials would otherwise be appropriate, it would contravene article 9 of the Bill of Rights 1689 or Parliamentary privilege so to do ...

... 1. Should the rule prohibiting references to Parliamentary material be relaxed?

Under present law, there is a general rule that references to Parliamentary material as an aid to statutory construction is not permissible ("the exclusionary rule"): Davis v.
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Johnson [1979] A.C. 264 and Hadmor Productions Ltd v. Hamilton [1983] 1 A.C. 191. This rule did not always apply but was judge made. Thus, in Ash v. Abdy (1678) 3 Swans. 664 Lord Nottingham took judicial notice of his own experience when introducing the Bill in the House of Lords. The exclusionary rule was probably first stated by Willes J. in Millar v. Taylor (1769) 4 Burr. 2303, 2332. However, the case of In re Mew and Thorne (1862) 31 L.J.Bank. 87 shows that even in the middle of the last century the rule was not absolute: in that case Lord Westbury L.C. in construing an Act had regard to its Parliamentary history and drew an inference as to Parliament's intention in passing the legislation from the making of an amendment striking out certain words.

The exclusionary rule was later extended so as to prohibit the court from looking even at reports made by commissioners on which legislation was based: Salkeld v. Johnson (1848) 2 Exch. 256, 273. This rule has now been relaxed so as to permit reports of commissioners, including law commissioners, and white papers to be looked at for the purpose solely of ascertaining the mischief which the statute is intended to cure but not for the purpose of discovering the meaning of the words used by Parliament to effect such cure: Eastman Photographic Materials Co. Ltd. v. Comptroller-General of Patents, Designs and Trademarks [1898] A.C. 571 and Assam Railways and Trading Co. Ltd. v. Commissioners of Inland Revenue [1935] A.C. 445, 457-458. Indeed, in Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd. [1990] 2 A.C. 85 your Lordships' House went further than this and had regard to a Law Commission report not only for the purpose of ascertaining the mischief but also for the purpose of drawing an inference as to Parliamentary intention from the fact that Parliament had not expressly implemented one of the Law Commission's recommendations.

Although the courts' attitude to reports leading to legislation has varied, until recently there was no modern case in which the court had looked at parliamentary debates as an aid to construction. However, in Pickstone v. Freemans Plc. [1989] A.C. 66 this House, in construing a statutory instrument, did have regard to what was said by the Minister who initiated the debate on the regulations. My noble and learned friend, Lord Keith of Kinkel, at p. 112b, after pointing out that the draft Regulations were not capable of being amended when presented to Parliament, said that it was "entirely legitimate for the purpose of ascertaining the intention of Parliament to take into account the terms in which the draft was presented by the responsible Minister and which formed the basis of its acceptance." My noble and learned friend, Lord Templeman, at pp. 121-122, also referred to the Minister's speech, although possibly only by way of support for a conclusion he had reached on other grounds. My noble and learned friends, Lord Brandon of Oakbrook and Lord Jauncey of Tullichettle, agreed with both those speeches. This case therefore represents a major inroad on the exclusionary rule: see also Owens Bank Ltd. v. Bracco [1992] 2 A.C. 443.

Mr. Lester, for the taxpayers, did not urge us to abandon the exclusionary rule completely. His submission was that where the words of a statute were ambiguous or obscure or were capable of giving rise to an absurd conclusion it should be legitimate to look at the Parliamentary history, including the debates in Parliament, for the purpose of identifying the intention of Parliament in using the words it did use. He accepted that the function of the court was to construe the actual words enacted by Parliament so that in no circumstances could the court attach to words a meaning that they were incapable of bearing. He further accepted that the court should only attach importance to clear statements showing the intention of the promoter of the Bill, whether a Minister or private member: there could be no dredging through conflicting statements of intention with a view to discovering the true intention of Parliament in using the statutory words.

In Beswick v. Beswick [1968] A.C. 58, 74 Lord Reid said:

"For purely practical reasons we do not permit debates in either House to be cited: it would add greatly to the time and expense involved in preparing cases involving the
construction of a statute if counsel were expected to read all the debates in Hansard, and it would often be impracticable for counsel to get access to at least the older reports of debates in Select Committees of the House of Commons; moreover, in a very large proportion of cases such a search, even if practicable, would throw no light on the question before the court.

In Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G. [1975] A.C. 591 Lord Reid said, at pp. 613-615:

"We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used. We are seeking not what Parliament meant but the true meaning of what they said. . . . I have more than once drawn attention to the practical difficulties . . . but the difficulty goes deeper. The questions which give rise to debate are rarely those which later have to be decided by the courts. One might take the views of the promoters of a Bill as an indication of the intention of Parliament but any view the promoters may have about the questions which later come before the court will not often appear in Hansard and often those questions have never occurred to the promoters. At best we might get material from which a more or less dubious inference might be drawn as to what the promoters intended or would have intended if they had thought about the matter, and it would, I think, generally be dangerous to attach weight to what some other members of either House may have said. . . . in my view, our best course is to adhere to present practice."

In the same case Lord Wilberforce said, at p. 629:

"The second [reason] is one of constitutional principle. Legislation in England is passed by Parliament, and put in the form of written words. This legislation is given legal effect upon subjects by virtue of judicial decision, and it is the function of the courts to say what the application of the words used to particular cases or individuals is to be. . . . it would be a degradation of that process if the courts were to be merely a reflecting mirror of what some other interpretation agency might say."

In Fothergill v. Monarch Airlines Ltd. [1981] A.C. 251, 279, Lord Diplock said:

"The constitutional function performed by courts of justice as interpreters of the written law laid down in Acts of Parliament is often described as ascertaining 'the intention of Parliament;' but what this metaphor, though convenient, omits to take into account is that the court, when acting in its interpretative role, as well as when it is engaged in reviewing the legality of administrative action, is doing so as mediator between the state in the exercise of its legislative power and the private citizen for whom the law made by Parliament constitutes a rule binding upon him and enforceable by the executive power of the state. Elementary justice or . . . the need for legal certainty demands that the rules by which the citizen is to be bound should be ascertainable by him (or, more realistically, by a competent lawyer advising him) by reference to identifiable sources that are publicly accessible."

In Davis v. Johnson [1979] A.C. 264, 350, Lord Scarman said:

"such material is an unreliable guide to the meaning of what is enacted. It promotes confusion, not clarity. The cut and thrust of debate and the pressures of executive responsibility, the essential features of open and responsible government, are not always conducive to a clear and unbiased explanation of the meaning of statutory language. And the volume of Parliamentary and ministerial utterances can confuse by its very size."

Thus the reasons put forward for the present rule are first, that it preserves the constitutional proprieties leaving Parliament to legislate in words and the courts (not Parliamentary speakers), to construe the meaning of the words finally enacted; second,
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the practical difficulty of the expense of researching Parliamentary material which would arise if the material could be looked at; third, the need for the citizen to have access to a known defined text which regulates his legal rights; fourth, the improbability of finding helpful guidance from Hansard.

The Law Commissions of England and Scotland in their joint Report on the Interpretation of Statutes in 1969 and the Renton Committee on the Preparation of Legislation both recognised that there was much to be said in principle for relaxing the rule but advised against a relaxation at present on the same practical grounds as are reflected in the authorities. However, both bodies recommended changes in the form of legislation which would, if implemented, have assisted the court in its search for the true Parliamentary intention in using the statutory words.

Mr. Lester submitted that the time has come to relax the rule to the extent which I have mentioned. He points out that the courts have departed from the old literal approach of statutory construction and now adopt a purposive approach, seeking to discover the Parliamentary intention lying behind the words used and construing the legislation so as to give effect to, rather than thwart, the intentions of Parliament. Where the words used by Parliament are obscure or ambiguous, the Parliamentary material may throw considerable light not only on the mischief which the Act was designed to remedy but also on the purpose of the legislation and its anticipated effect. If there are statements by the Minister or other promoter of the Bill, these may throw as much light on the "mischief" which the Bill seeks to remedy as do the white papers, reports of official committees and Law Commission reports to which the courts already have regard for that purpose. If a Minister clearly states the effect of a provision and there is no subsequent relevant amendment to the Bill or withdrawal of the statement it is reasonable to assume that Parliament passed the Bill on the basis that the provision would have the effect stated. There is no logical distinction between the use of ministerial statements introducing subordinate legislation (to which recourse was had in the Pickstone case [1989] A.C. 66) and such statements made in relation to other statutory provisions which are not in fact subsequently amended. Other common law jurisdictions have abandoned the rule without adverse consequences. Although the practical reasons for the rule (difficulty in getting access to Parliamentary materials and the cost and delay in researching it) are not without substance, they can be greatly exaggerated: experience in Commonwealth countries which have abandoned the rule does not suggest that the drawbacks are substantial, provided that the court keeps a tight control on the circumstances in which references to Parliamentary material are allowed.

On the other side, the Attorney-General submitted that the existing rule had a sound constitutional and practical basis. If statements by Ministers as to the intent or effect of an Act were allowed to prevail, this would contravene the constitutional rule that Parliament is "sovereign only in respect of what it expresses by the words used in the legislation it has passed:" per Lord Diplock in Black-Clawson [1975] A.C. 591, 638e. It is for the courts alone to construe such legislation. It may be unwise to attach importance to ministerial explanations which are made to satisfy the political requirements of persuasion and debate, often under pressure of time and business. Moreover, in order to establish the significance to be attached to any particular statement, it is necessary both to consider and to understand the context in which it was made. For the courts to have regard to Parliamentary material might necessitate changes in Parliamentary procedures to ensure that ministerial statements are sufficiently detailed to be taken into account. In addition, there are all the practical difficulties as to the accessibility of Parliamentary material, the cost of researching it and the use of court time in analysing it, which are good reasons for maintaining the rule. Finally, to use what is said in Parliament for the purpose of construing legislation would be a breach of article 9 of the Bill of Rights as being an impeachment or questioning of the freedom of speech in debates in proceedings in Parliament.
My Lords, I have come to the conclusion that, as a matter of law, there are sound reasons for making a limited modification to the existing rule (subject to strict safeguards) unless there are constitutional or practical reasons which outweigh them. In my judgment, subject to the questions of the privileges of the House of Commons, reference to Parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases references in court to Parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words. In the case of statements made in Parliament, as at present advised I cannot foresee that any statement other than the statement of the Minister or other promoter of the Bill is likely to meet these criteria.

I accept Mr. Lester's submissions, but my main reason for reaching this conclusion is based on principle. Statute law consists of the words that Parliament has enacted. It is for the courts to construe those words and it is the court's duty in so doing to give effect to the intention of Parliament in using those words. It is an inescapable fact that, despite all the care taken in passing legislation, some statutory provisions when applied to the circumstances under consideration in any specific case are found to be ambiguous. One of the reasons for such ambiguity is that the members of the legislature in enacting the statutory provision may have been told what result those words are intended to achieve. Faced with a given set of words which are capable of conveying that meaning it is not surprising if the words are accepted as having that meaning. Parliament never intends to enact an ambiguity. Contrast with that the position of the courts. The courts are faced simply with a set of words which are in fact capable of bearing two meanings. The courts are ignorant of the underlying Parliamentary purpose. Unless something in other parts of the legislation discloses such purpose, the courts are forced to adopt one of the two possible meanings using highly technical rules of construction. In many, I suspect most, cases references to Parliamentary materials will not throw any light on the matter. But in a few cases it may emerge that the very question was considered by Parliament in passing the legislation. Why in such a case should the courts blind themselves to a clear indication of what Parliament intended in using those words? The court cannot attach a meaning to words which they cannot bear, but if the words are capable of bearing more than one meaning why should not Parliament's true intention be enforced rather than thwarted?

A number of other factors support this view. As I have said, the courts can now look at white papers and official reports for the purpose of finding the "mischief" sought to be corrected, although not at draft clauses or proposals for the remedying of such mischief. A ministerial statement made in Parliament is an equally authoritative source of such information: why should the courts be cut off from this source of information as to the mischief aimed at? In any event, the distinction between looking at reports to identify the mischief aimed at but not to find the intention of Parliament in enacting the legislation is highly artificial. Take the normal Law Commission Report which analyses the problem and then annexes a draft Bill to remedy it. It is now permissible to look at the report to find the mischief and at the draft Bill to see that a provision in the draft was not included in the legislation enacted: see the Factortame case [1990] 2 A.C. 85. There can be no logical distinction between that case and looking at the draft Bill to see that the statute as enacted reproduced, often in the same words, the provision in the Law Commission's draft. Given the purposive approach to construction now adopted by the courts in order to give effect to the true intentions of the legislature, the fine distinctions between looking for the mischief and looking for the intention in using words to provide the remedy are technical and inappropriate. Clear and unambiguous statements made by Ministers in Parliament are as much the background to the enactment of legislation as white papers and Parliamentary reports.
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The decision in Pickstone v. Freemans Plc. [1989] A.C. 66 which authorises the court to look at ministerial statements made in introducing regulations which could not be amended by Parliament is logically indistinguishable from such statements made in introducing a statutory provision which, though capable of amendment, was not in fact amended.

The judicial antipathy to relaxing the rule has been far from uniform. Lord Reid, who in the passage I have quoted from the Black-Clawson case [1975] A.C. 591, 613-615, supported the maintenance of the rule, in his dissenting speech in Reg. v. Warner [1969] 2 A.C. 256, 279 said:

"the layman may well wonder why we do not consult the Parliamentary Debates, for we are much more likely to find the intention of Parliament there than anywhere else. The rule is firmly established that we may not look at Hansard and in general I agree with it, for reasons which I gave last year in Beswick v. Beswick. This is not a suitable case in which to reopen the matter but I am bound to say that this case seems to show that there is room for an exception where examining the proceedings in Parliament would almost certainly settle the matter immediately one way or the other."

Lord Wilberforce (whose words I have also quoted) had second thoughts in an extra-judicial capacity at a seminar in Canberra (Symposium on Statutory Interpretation, Canberra, 1983, p. 13) where he referred to a case in which the Minister on two occasions during the passage of a Finance Bill stated expressly that the provision was not intended to tax a particular class of beneficiary. Yet subsequently beneficiaries of that class were sought to be taxed under the statutory provision. Lord Wilberforce suggested that there should be a relaxation of the exclusionary rule so that where a Minister promoting a Bill makes an explicit and official statement as to the meaning or scope of the provision, reference should be allowed to that statement.

Text books often include reference to explanations of legislation given by a Minister in Parliament, as a result of which lawyers advise their clients taking account of such statements and judges when construing the legislation come to know of them. In addition, a number of distinguished judges have admitted to breaching the exclusionary rule and looking at Hansard in order to seek the intention of Parliament. When this happens, the parties do not know and have no opportunity to address the judge on the matter. A vivid example of this occurred in the Hadmor case [1983] 1 A.C. 191 where Lord Denning M.R. in the Court of Appeal relied on his own researches into Hansard in reaching his conclusions: in the House of Lords, counsel protested that there were other passages to which he would have wished to draw the court’s attention had he known that Lord Denning M.R. was looking at Hansard: see the Hadmor case at p. 233. It cannot be right for such information to be available, by a sideward, for the court but the parties be prevented from presenting their arguments on such material.

Against these considerations, there have to be weighed the practical and constitutional matters urged by the Attorney-General many of which have been relied on in the past in the courts in upholding the exclusionary rule. I will first consider the practical difficulties.

It is said that Parliamentary materials are not readily available to, and understandable by, the citizen and his lawyers who should be entitled to rely on the words of Parliament alone to discover his position. It is undoubtedly true that Hansard and particularly records of Committee debates are not widely held by libraries outside London and that the lack of satisfactory indexing of Committee stages makes it difficult to trace the passage of a clause after it is redrafted or renumbered. But such practical difficulties can easily be overstated. It is possible to obtain Parliamentary materials and it is possible to trace the history. The problem is one of expense and effort in doing so, not the availability of the material. In considering the right of the individual to know the law by simply looking at legislation, it is a fallacy to start from the position that all legislation is
available in a readily understandable form in any event: the very large number of statutory instruments made every year are not available in an indexed form for well over a year after they have been passed. Yet, the practitioner manages to deal with the problem albeit at considerable expense. Moreover, experience in New Zealand and Australia (where the strict rule has been relaxed for some years) has not shown that the non-availability of materials has raised these practical problems.

Next, it is said that lawyers and judges are not familiar with Parliamentary procedures and will therefore have difficulty in giving proper weight to the Parliamentary materials. Although, of course, lawyers do not have the same experience of these matters as members of the legislature, they are not wholly ignorant of them. If, as I think, significance should only be attached to the clear statements made by a Minister or other promoter of the Bill, the difficulty of knowing what weight to attach to such statements is not overwhelming. In the present case, there were numerous statements of view by members in the course of the debate which plainly do not throw any light on the true construction of section 63. What is persuasive in this case is a consistent series of answers given by the Minister, after opportunities for taking advice from his officials, all of which point the same way and which were not withdrawn or varied prior to the enactment of the Bill.

Then it is said that court time will be taken up by considering a mass of Parliamentary material and long arguments about its significance, thereby increasing the expense of litigation. In my judgment, though the introduction of further admissible material will inevitably involve some increase in the use of time, this will not be significant as long as courts insist that Parliamentary material should only be introduced in the limited cases I have mentioned and where such material contains a clear indication from the Minister of the mischief aimed at, or the nature of the cure intended, by the legislation. Attempts to introduce material which does not satisfy those tests should be met by orders for costs made against those who have improperly introduced the material. Experience in the United States of America, where legislative history has for many years been much more generally admissible than I am now suggesting, shows how important it is to maintain strict control over the use of such material. That position is to be contrasted with what has happened in New Zealand and Australia (which have relaxed the rule to approximately the extent that I favour): there is no evidence of any complaints of this nature coming from those countries.

There is one further practical objection which, in my view, has real substance. If the rule is relaxed legal advisers faced with an ambiguous statutory provision may feel that they have to research the materials to see whether they yield the crom of gold, i.e., a clear indication of Parliament's intentions. In very many cases the crock of gold will not be discovered and the expenditure on the research wasted. This is a real objection to changing the rule. However again it is easy to overestimate the cost of such research: if a reading of Hansard shows that there is nothing of significance said by the Minister in relation to the clause in question, further research will become pointless.

In sum, I do not think that the practical difficulties arising from a limited relaxation of the rule are sufficient to outweigh the basic need for the courts to give effect to the words enacted by Parliament in the sense that they were intended by Parliament to bear. Courts are frequently criticised for their failure to do that. This failure is due not to cussedness but to ignorance of what Parliament intended by the obscure words of the legislation. The courts should not deny themselves the light which Parliamentary materials may shed on the meaning of the words Parliament has used and thereby risk subjecting the individual to a law which Parliament never intended to enact.
But much wider issues than the construction of the Finance Act 1976 have been raised in these appeals and for the first time this House has been asked to consider a detailed argument upon the extent to which reference can properly be made before a court of law in the United Kingdom to proceedings in Parliament recorded in Hansard.

For the appellant Mr. Lester submits that it should now be appropriate for the courts to look at Hansard in order to ascertain the intention of the legislators as expressed in the proceedings on the Bill which has then been enacted in the statutory words requiring to be construed. This submission appears to me to suggest a way of making more effective proceedings in Parliament by allowing the court to consider what has been said in Parliament as an aid to resolving an ambiguity which may well have become apparent only as a result of the attempt to apply the enacted words to a particular case. It does not seem to me that this can involve any impeachment, or questioning of the freedom of speech and debates or proceedings in Parliament, accordingly I do not see how such a use of Hansard can possibly be thought to infringe article 9 of the Bill of Rights 1689 and I agree with my noble and learned friend's more detailed consideration of that matter.

The principal difficulty I have on this aspect of the case is that in Mr. Lester's submission reference to Parliamentary material as an aid to interpretation of a statutory provision should be allowed only with leave of the court and where the court is satisfied that such a reference is justifiable: (a) to confirm the meaning of a provision as conveyed by the text, its object and purpose; (b) to determine a meaning where the provision is ambiguous or obscure; or (c) to determine the meaning where the ordinary meaning is manifestly absurd or unreasonable.

I believe that practically every question of statutory construction that comes before the courts will involve an argument that the case falls under one or more of these three heads. It follows that the parties' legal advisors will require to study Hansard in practically every such case to see whether or not there is any help to be gained from it. I believe this is an objection of real substance. It is a practical objection not one of principle, and I believe that it was the fundamental reason that Lord Reid, for example, considered the general rule to be a good one as he said in the passage my noble and learned friend has cited from Beswick v. Beswick [1968] A.C. 58, 74A. Lord Reid's statement is, I think, worthy of particular weight since he was a parliamentarian of great experience as well as a very distinguished judicial member of your Lordships' House. It is significant that in the following year, in his dissenting speech in Reg. v. Warner [1969] 2 A.C. 256, 279, he, while agreeing with the general rule, was prepared to consider an exception from it although not that the time was right to do so. But the exception he contemplated was in respect of a particular type of statute, namely, a statute creating criminal liability in which the question was whether or not a guilty intention was required to create liability. Now that type of exception would mean that the practical difficulties to which he referred would not arise except in the comparatively few cases that arise of the particular type. The submission which Mr. Lester makes on the other hand is not restricted by reference to the type of statute and indeed the only way in which it could be discovered whether help was to be given is by considering Hansard itself. Such an approach appears to me to involve the possibility at least of an immense increase in the cost of litigation in which statutory construction is involved. It is of course easy to overestimate such cost but it is I fear equally easy to underestimate it. Your Lordships have no machinery from which any estimate of such cost could be derived. Two inquiries with such machinery available to them, namely, that of the Law Commission and the Scottish Law Commission, in their Joint Report on the Interpretation of Statutes (1969) (Law Com. No. 21) (Scot. Law Com. No. 11) and the Renton Committee Report on the Preparation of Legislation (1975) (Cmnd. 6053), advised against a relaxation on the practical grounds to which I have referred. I consider that nothing has been laid before
your Lordships to justify the view that their advice based on this objection was incorrect.

In his very helpful and full submissions Mr. Lester has pointed out that there is no evidence of practical difficulties in the jurisdictions where relaxations of this kind have already been allowed, but I do not consider that, full as these researches have been, they justify the view that no substantial increase resulted in the cost of litigation as a result of these relaxations, and, in any event, the Parliamentary processes in these jurisdictions are different in quite material respects from those in the United Kingdom.

Your Lordships are well aware that the costs of litigation are a subject of general public concern and I personally would not wish to be a party to changing a well established rule which could have a substantial effect in increasing these costs against the advice of the Law Commissions and the Renton Committee unless and until a new inquiry demonstrated that that advice was no longer valid.

I do not for my part find the objections in principle to be strong and I would certainly be prepared to agree the rule should no longer be adhered to were it not for the practical consideration to which I have referred and which my noble and learned friend agrees to be of real substance. Reference to proceedings in
3 STATUTORY Review in the US

This section of the manual summarizes the recent trend by the United States (and other common law countries) towards a civil law system and statutory sources of law. The purpose of this section is to introduce different approaches to statutory interpretation used in the United States. The different approaches included and described in this section are not exclusive. Similarly, there is no firm rule in the United States on when to use one approach over the other. In most cases, the choice depends on personal preference.

The starting point in statutory construction is to determine the legislative intent from the language of the statute itself, and the statutory words should be given the meaning intended by the lawmakers. Where the statutory language is plain and the meaning is clear, the courts do not search for legislative intent beyond the express terms of the statute and must give effect to the language as written, rather than determining what the law should be.

Although a word ordinarily will be given the same meaning throughout the statute, in statutory construction the same words do not always have the same effect. On the other hand, if possible, the same meaning should not be given to distinct words in a statute, rather, the appropriate meaning should be given each word with the objective of giving full effect to the legislative intent.

The title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute.

*Meaning as of time of enactment.*

The language of a statute must be construed in accordance with its meaning at the time of its enactment, rather than according to a meaning subsequently acquired.

*Dictionary definitions.*

If the statute does not sufficiently define a word used therein, the court may consider all known definitions of the word, including dictionary definitions. However, dictionary definitions are not necessarily controlling, and recourse to such definitions is unnecessary where the legislative intent may be gathered readily from a reading of the statute.

*Plain Meaning Rule*

As a general rule, words used in a statute must be given their usual, natural, plain, ordinary, and commonly understood meaning, unless it is clear from the statute that a different meaning is intended.
Words generally do not acquire a peculiar and different meaning when used in a statute. Thus, words used in a statute normally must be given their usual, natural, plain, ordinary, and commonly understood meaning, in the absence of any indication to the contrary. Strict grammatical usage will not necessarily control over the general and popular usage of the words.

The natural and commonly understood meaning will be given to words used in a statute, unless it is plain or clear from the statute, or from the context of the words within the statute, that a different meaning was intended. Words of a statute can be taken in other than their plain and ordinary sense only when it would defeat the manifest intention of the legislature, or if it would produce an absurd or unreasonable result if the words were given their plain and ordinary meaning. A court normally will not depart from the plain wording of a statute, unless it is necessary to do so in order to correct a mistake or an absurdity that the legislature could not have intended or to deal with an irreconcilable conflict among statutory provisions.

**Legislative Intent**

In extraordinary cases, the courts may extend or restrict the ordinary and usual meaning of the words employed in the statute in order to give effect to the legislative intent.

The legislative intent may not be defeated by a narrow construction based on small distinctions in the meaning of words. The courts therefore may disregard the usual or exact and literal meaning of words contained in a statute where some imperative reason exists for so doing, as when it is evident that the words were incorrectly used or were used in another sense. The literal meaning of statutory language also may be disregarded where it is necessary to do so in order to effectuate the legislative intent and accomplish the evident object of a provision, or to avoid absurdity. Thus, it may be necessary, in order to give effect to the legislative intent, to extend or restrict the ordinary and usual meaning of words. The meaning of doubtful words must be determined by the sense in which they were used by the legislature without regard to their primary meaning.

In varying the ordinary meaning of the language of a statute, care must be used; the power should be exercised with reluctance and only in extraordinary cases. The words of a statute are not to be given a forced, strained, subtle, or unusual meaning. A plainly worded statute therefore must be construed without forced or subtle interpretations designed to extend or limit its scope. Thus, the courts ordinarily will not enlarge or restrict the meaning of statutory language, particularly where the words are plain and have a definite and precise meaning.

The words and phrases employed in a statute should be given a reasonable and sensible construction so as to make the statute workable and effective.

The words and phrases employed in a statute should be given a reasonable and sensible construction to carry out, if possible, the intention of the legislature. The statutory words should be construed so as to give them some meaning and the statute some force and effect. Uncertain or ambiguous words will be construed so as to produce a reasonable result in harmony with the purpose of the act, to the extent possible. On the other hand, where the language of a statute has a distinct meaning, the fact that the legislature might have expressed itself more appropriately will not authorize a court to disregard the natural sense of the words actually used.
In those rare cases in which literal application of a statute will produce a result that is demonstrably at odds with the intentions of its drafters, it is the intention of the drafters, rather than the strict statutory language, which controls.

82 C.J.S. Statutes § 321

**The Social Purpose Rule**

Within the context of law, *social purpose* is a scheme of *statutory construction* declaring that a statute should not be construed in a way that would violate normal societal values or good. An example of a case in which this *rule of construction* was used is *Holy Trinity Church v. United States*.

http://en.wikipedia.org/wiki/Social_purpose

**Criminal Statutes Generally**

Certain principles of criminal law are basic human rights. Specifically, there are standards, in U.S. law and in international law that prohibit the substantive retroactive application of criminal laws and require all laws to be precise as to avoid vagueness and overbreadth. This fundamental rule—that the defendant cannot be punished for a crime unless the government has given him specific notice of the crime at the time of its offense—is manifested in the criminal rules of statutory interpretation.

We discussed retroactive application in Chapter I and referred to the oft-cited U.S. Supreme Court case *Calder v. Bull*. There are prohibitions against retroactive applications found in Article 11 of the Universal Declaration of Human Rights (1948); Article 15 of the International Covenant on Civil and Political Rights (1966); Article 7 of the European Convention on Human Rights (1950); Article 9 of the American Convention on Human Rights (1969); Article 7 (2) of the African Charter on Human and Peoples’ Rights (1981); and Article 54 of the Russian Constitution.

Another fundamental requirement is that statutory provisions and judicial decision must be so defined that the defendant is reasonably expected to know their meaning. Therefore, laws must be neither too vague nor too broad.

Vagueness means that the terms are so unclear that the defendant is not sufficiently on notice of what is prohibited. There are three (3) criteria in U.S. case law that define whether a law is too vague:

1. whether it is so imprecisely drawn or so overbroad that it discourages the exercise of such constitutional rights as free speech;
2. whether it gives adequate notice of the conduct prohibited; and
3. whether imprecise language encourages arbitrary enforcement by allowing prosecuting authorities undue discretion to determine the scope of the statute’s prohibitions.

As a result, for example, a criminal law that prohibits a “group” of people protesting without a permit would be vague for all of the above reasons if the term “group” were not defined by statute.

A law must not be so overly broad that its prohibition is unsupported by any legitimate goal of the lawmaker. For example, a law that prohibits the inter-marriage between residents of Los Angeles and San Francisco could not be supported by any legitimate legislative goal. It is therefore overly broad. Further, a law prohibiting adults from drinking alcohol would probably be overly broad since there would not be a legitimate goal supporting the law. However, a law prohibiting children and pregnant women from consuming alcohol may be sufficiently supported by a legitimate goal.

Defference to administrative interpretations

In Chapter I, we introduced the administrative law in the United States. As you know, administrative bodies are created to regulate certain activities and are given the power to administer the related legislation. Therefore, the interpretation of a statute by an administrative agency charged with administering that statute is entitled to deference by the courts.
These case excerpts deal with the doctrine of binding precedent in English law in relation to the European Convention for the Protection of Human Rights and Fundamental Freedoms (usually abbreviated to the European Convention of Human Rights or ECHR).

The first excerpt is from the Court of Appeal, which incidentally is a composite judgement “of the court” (see Excerpt 1.1), delivered by the Master of the Rolls (MR), the head of the Civil Division of the Court of Appeal. English law, by s. 2 (1) of the Human Rights Act 1998, requires the courts (as public bodies) to “take into account” decisions of the European Court of Human Rights (ECtHR) when considering “convention rights” raised in domestic law. In Leeds City Council v Price the appellants raise the convention right in Article 8 ECHR claiming that where there is a conflict between decisions of the House of Lords and the ECtHR inferior domestic courts should follow the ECtHR in preference to the House of Lords. The Court of Appeal rejected this argument and their decision was affirmed by the House of Lords. Both courts agree that modifying the principle of stare decisis would create legal uncertainty. Lord Bingham, in the House of Lords, is particularly concerned that inferior courts should not be free to deviate from the doctrine of binding precedent even where a decision of the ECtHR is considered “clearly inconsistent” with a domestic binding precedent. As his Lordship notes what is “clearly inconsistent” to one court may be “clearly consistent” in the eyes of another court. The solution adopted by both courts is that the inferior court should grant an appellant in Price’s position leave to appeal to the relevant superior court rather than allow the inferior court to deviate from binding precedent. It may come as something of a surprise then that both courts accept as correct the decision of the Court of Appeal in D v East Berkshire Community NHS Trust (see paragraphs 33 and 45) where it departed from stare decisis in the light of a ECtHR decision that was inconsistent with a biding precedent of the House of Lords. The “extreme character” of this exception may be explained by the fact that the domestic precedent (from the House of Lords) was decided before the Human Rights Act 1998 came into force and because the domestic precedent had been expressly criticised by the ECtHR.

Note, that in the House of Lords seven Law Lords heard the appeal. It is usual practice for five Law Lords hear an appeal but where the court is invited to depart from one of its own previous decisions or the case raises a highly significant issue then seven, or sometimes nine, Law Lords hear the appeal.
inconsistent with subsequent decision of European Court of Human Rights - Whether courts of inferior jurisdiction to follow decision of House of Lords or European Court of Human Rights

Where a House of Lords decision conflicts with a subsequent decision of the European Court of Human Rights in relation to the Convention for the Protection of Human Rights and Fundamental Freedoms, inferior courts are bound by stare decisis to follow the decision of the House of Lords (post, para 33).

Where, therefore, a local authority as the freehold owner of land brought an action for possession against the defendants who had occupied the land without licence or consent, the defendants sought to rely as their sole defence on the right to respect for private and family life in article 8 of the Convention, the judge held that he was bound by a decision of the House of Lords to hold that the exercise of an absolute proprietary right to possession could not infringe article 8 and the defendants appealed-

Held, dismissing the appeal, that the decision of the House of Lords was incompatible with a subsequent decision of the European Court of Human Rights that the eviction of an occupier from a local authority site in particular circumstances could violate article 8 of the Convention; that since the court was bound to follow the decision of the House of Lords, the defendants had no defence to the claim for possession could not infringe article 8 and the defendants appealed-

Harrow London Borough Council v Qazi [2004] 1 AC 983, HL(E) applied.
Decision of Judge Bush sitting as a judge of the Queen’s Bench Division affirmed.

16 March. LORD PHILLIPS OF WORTH MATRAVERS MR handed down the following judgment of the court.

Introduction

Where a public authority demonstrates that it has an absolute right to possession of land, whether under relevant statutory provisions or, if there is none, at common law, can a defendant raise by way of defence an action for an order for possession of that land a plea that the obtaining of possession will infringe his rights under article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms as scheduled to the Human Rights Act 1998? That is the important preliminary issue raised before Judge Bush, sitting as a deputy judge of the High Court in proceedings transferred from Leeds County Court. In a judgment delivered on 25 October 2004, Judge Bush answered that question in the negative, holding that he was bound so to do by the decision of the House of Lords in Harrow London Borough Council v Qazi [2004] 1 AC 983. He granted leave to appeal.

2 The defendants had submitted that Qazi was incompatible with a subsequent decision of the European Court of Human Rights, Connors v United Kingdom (2004) 40 EHRR 189 and that the court was bound to follow Connors’s case rather than Qazi’s case. Those submissions have been repeated by Mr Alex Offer in this court. Judge Bush rejected them, holding that Qazi’s case was not incompatible with Connors’s case and that he was bound to follow Qazi’s case. We have to consider two questions. Is Qazi’s case incompatible with Connors’s case? If so, which decision should we follow?

Should this court follow Qazi’s case or Connors’s case?

31 Mr Offer submitted that, should we conclude that Qazi’s case [2004] 1 AC 983 could not stand with Connors’s case 40 EHRR 189, we should follow the latter decision. Only in this way could we satisfy our obligation under section 2 of the Human Rights Act 1998 to “take into account” the decisions of the Strasbourg court. His primary submission was that this would not offend the principle of stare decisis. Strasbourg law is capable of development and, so he
substituted, the decision in Connors’s case could properly be considered as a development in the law which had occurred since the decision in Qazi’s case. It seems to us that to accept this submission would be to subvert the principle of legal certainty. Less than a year elapsed between the decision in Qazi’s case and the decision in Connors’s case. In the latter case the Strasbourg court did not purport to be making new law. The jurisprudence on which it based its decision predated Qazi’s case. The issue is a stark one. If a decision of the House of Lords in relation to the Convention is followed by a decision of the Strasbourg court that is incompatible with it, which decision should an inferior court follow?

32 Mr Underwood submitted that we were bound to follow the House of Lords. He drew our attention to the statement of Lord Hoffmann in R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] 2 AC 295, para 76 to the effect that section 2(1) of the Human Rights Act 1998 did not make it mandatory to follow the Strasbourg jurisprudence. He also drew our attention to the following statement of Judge LJ, sitting in the Divisional Court in R (Bright) v Central Criminal Court [2001] 1 WLR 662, 682 in a judgment which pre-dated the entry into force of the Convention:

“...We are not permitted to re-examine decisions of the European court in order to ascertain whether the conclusion of the House of Lords or Court of Appeal may be inconsistent with those decisions, or susceptible to a continuing gloss. The principle of stare decisis cannot be circumvented or disapplied in this way, and if it were the result would be chaos.”

These observations were made in a very different context, but the warning of the risk that chaos will follow if inferior courts are to be permitted to rely on decisions of the Strasbourg court to justify departing from decisions of the House of Lords is timely. None the less, we have to decide upon the appropriate course without the benefit of any precedent that is directly applicable.

33 In D v East Berkshire Community NHS Trust [2004] QB 558 this court held that the decision of the House of Lords in X (Minors) v Bedfordshire County Council [1995] 2 AC 633 could not survive the introduction of the Human Rights Act 1998. This was, however, because the effect of the Human Rights Act 1998 had undermined the policy consideration that had largely dictated the House of Lords decision. Departing from the House of Lords decision in those circumstances has attracted some academic criticism. It remains to see whether this will be echoed by the House itself. What Mr Offer invites us to do in this case, however, is iconoclasm of a different dimension. There has been no change of circumstances, but simply a decision of the Strasbourg court that conflicts with a previous decision of the House of Lords. It seems to us that in these circumstances, the only permissible course is to follow the decision of the House of Lords, but to give permission, if sought and not successfully opposed, to appeal to the House of Lords, thereby and to that extent taking the decision in Connors’s case 40 EHRR 189 into account. If in due course the House considers that we have not followed the appropriate course, it will no doubt make this plain.

... Appeal dismissed. Permission to appeal granted.
In the second case the defendants, who were gipsies, moved their caravans onto a recreation ground owned by the local authority without its consent and remained there as trespassers. They resisted the local authority’s claim for possession in reliance on article 8 of the Convention and they further asserted that the local authority was in breach of its statutory duty to provide suitable sites for gipsies. The judge concluded that, despite a decision of the European Court of Human Rights to the contrary, he was obliged to follow decisions of the House of Lords and Court of Appeal that contractual and proprietary rights to possession could not be defeated by reliance on article 8. He accordingly made the order for possession. On appeal the Court of Appeal concluded that the decision of the European Court of Human Rights was inconsistent with the House of Lords decision but that courts were bound by the House of Lords decision and that, accordingly, the defendants had no defence to the local authority’s claim.

On appeal by the defendants in both cases-

Held, dismissing the appeals, (1) that although domestic courts were not strictly required to follow the rulings of the European Court of Human Rights they were obliged to give practical recognition to the principles it expounded; that effective implementation of the Convention depended on constructive collaboration between the Strasbourg court and national authorities and, while it was for that court as the highest judicial authority to interpret Convention rights as they were uniformly to be understood by all member states, it was for domestic courts to determine initially how the principles it laid down were to be applied in the domestic context; that adherence to precedent was a cornerstone of the domestic legal system by which a degree of certainty in legal matters was best achieved; that judges could give leave to appeal where they considered a binding precedent was inconsistent with Strasbourg authority and that they should follow the ordinary rules of precedent, save in an extreme case where the decision of a superior court could not survive the introduction of the 1998 Act; and that, accordingly, the Court of Appeal in the second case had adopted the correct course (post, paras 28, 40, 42-45, 50, 62, 121, 177, 178, 213).

...
Precedent

40 Reference has already been made to the duty imposed on United Kingdom courts to take Strasbourg judgments and opinions into account and to the unlawfulness of courts, as public authorities, acting incompatibly with Convention rights. The questions accordingly arise whether our domestic rules of precedent are, or should be modified; whether a court which would ordinarily be bound to follow the decision of another court higher in the domestic curial hierarchy is, or should be, no longer bound to follow that decision if it appears to be inconsistent with a later ruling of the court in Strasbourg. The Court of Appeal concluded, in para 33 of its judgment on the Leeds appeal, that the only permissible course was to follow the decision of the House in Qazi, despite finding that it was incompatible with Connors, but to give permission, if sought and not successfully opposed, to appeal to the House, and in that way to take the decision in Connors into account.

41 The House has had the benefit of carefully considered submissions on this issue. In a written case submitted on behalf of JUSTICE and LIBERTY as interveners it is contended that the lower court is free to follow, and barring some special circumstances should follow, the later Strasbourg ruling where four conditions are met, namely (1) the Strasbourg ruling has been given since the domestic ruling on the point at issue, (2) the Strasbourg ruling has established a clear and authoritative interpretation of Convention rights based (where applicable) on an accurate understanding of United Kingdom law, (3) the Strasbourg ruling is necessarily inconsistent with the earlier domestic judicial decision, and (4) the inconsistent domestic decision was or is not dictated by the terms of primary legislation, so as to fall within section 6(2) of the 1998 Act. The appellants’ formulation was to very much the same effect, although they did not suggest that the domestic court should follow the Strasbourg ruling, only that it might; they emphasised that the inconsistency between the otherwise binding domestic decision and the later Strasbourg ruling should be very clear; and they elaborated somewhat the conditions pertaining to primary domestic legislation. The First Secretary of State, after a judicious review of the arguments for and against the Court of Appeal’s approach, favoured a (strictly circumscribed) relaxation of the doctrine of precedent in the circumstances of the Leeds appeal. He proposed that a lower court should be entitled to depart from an otherwise binding domestic decision where there is a clearly inconsistent subsequent decision of the Strasbourg court on the same point. But the inconsistency must be clear. A mere tension or possible inconsistency would not entitle a lower court to depart from binding domestic precedent. The respondent gave a guarded answer. A lower court may decline to follow binding domestic authority in the limited circumstances where it decides that the higher courts are bound to resile from that authority in the light of subsequent Strasbourg jurisprudence.

[2006]
2 WLR Kay v Lambeth LBC (HL(E)) Lord Bingham of Cornhill

42 While adherence to precedent has been derided by some, at any rate since the time of Bentham, as a recipe for the perpetuation of error, it has been a cornerstone of our legal system. Even when, in 1966, the House modified, in relation to its own practice, the rule laid down in London Street Tramways Co Ltd v London County Council [1898] AC 375, it described the use of precedent as:

“an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.”

Practice Statement (Judicial Precedent) [1966] 1 WLR 1234.

The House made plain that this modification was not intended to affect the use of precedent elsewhere than in the House, and the infrequency with which the House has exercised its freedom to depart from its own decisions testifies to the importance its attaches to the principle. The strictures of Lord Hailsham of St Marylebone LC in *Broome v Cassell & Co Ltd* [1972] AC 1027, 1053-1055, are too well known to call for repetition. They remain highly pertinent.

43 The present appeals illustrate the potential pitfalls of a rule based on a finding of clear inconsistency. The appellants, the First Secretary of State and the Court of Appeal in the *Leeds* case find a clear inconsistency between *Qazi* and *Connors*. The respondents and the Court of Appeal in the *Lambeth* case find no inconsistency. Some members of the House take one view, some the other. The prospect arises of different county court and High Court judges, and even different divisions of the Court of Appeal, taking differing views of the same issue. As Lord Hailsham observed ([1972] AC 1027, 1054), “in legal matters, some degree of certainty is at least as valuable a part of justice as perfection”. That degree of certainty is best achieved by adhering, even in the Convention context, to our rules of precedent. It will of course be the duty of judges to review Convention arguments addressed to them, and if they consider a binding precedent to be, or possibly to be, inconsistent with Strasbourg authority, they may express their views and give leave to appeal, as the Court of Appeal did here. Leap-frog appeals may be appropriate. In this way, in my opinion, they discharge their duty under the 1998 Act. But they should follow the binding precedent, as again the Court of Appeal did here.

44 There is a more fundamental reason for adhering to our domestic rule. The effective implementation of the Convention depends on constructive collaboration between the Strasbourg court and the national courts of member states. The Strasbourg court authoritatively expounds the interpretation of the rights embodied in the Convention and its protocols, as it must if the Convention is to be uniformly understood by all member states. But in its decisions on particular cases the Strasbourg court accords a margin of appreciation, often generous, to the decisions of national authorities and attaches much importance to the peculiar facts of the case. Thus it is for national authorities, including national courts particularly, to decide in the first instance how the principles expounded in Strasbourg should be applied in the special context of national legislation, law, practice and social and other conditions. It is by the decisions of national courts that the domestic

standard must be initially set, and to those decisions the ordinary rules of precedent should apply.

45 To this rule I would make one partial exception. In its judgment on the *Leeds* appeal, para 33, the Court of Appeal said:

“In *D v East Berkshire Community NHS Trust* [2004] QB 558 this court held that the decision of the House of Lords in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 could not survive the introduction of the Human Rights Act 1998. This was, however, because the effect of the Human Rights Act 1998 had undermined the policy consideration that had largely dictated the House of Lords decision. Departing from the House of Lords decision in those circumstances has attracted some academic criticism. It remains to see whether this will be echoed by the House itself.”

When that case reached the House, no criticism of the Court of Appeal’s bold course was expressed, the House agreed that the policy considerations which had founded its decision in *X v Bedfordshire* had been very largely eroded and it was accepted that that decision was no longer good law: [2005] 2 AC 373 paras 21, 30-36, 82, 119, 124-125. The contrary was not suggested. But there were other considerations which made *X v Bedfordshire* a very exceptional case. Judgment was given in 1995, well before the 1998 Act. No reference was made to the European Convention in any of the opinions. And, importantly, the very children whose claim in
negligence the House had rejected as unarguable succeeded at Strasbourg in establishing a breach of article 3 of the Convention and recovering what was, by Strasbourg standards, very substantial reparation: *Z v United Kingdom* (2001) 34 EHRR 97. On these extreme facts the Court of Appeal was entitled to hold, as it did in para 83 of its judgment in *D*, that the decision of the House in *X v Bedfordshire*, in relation to children, could not survive the 1998 Act. But such a course is not permissible save where the facts are of that extreme character.
In the following sequence of extracts from cases, we can follow the development and refinement of the modern law of negligence in the UK. In the UK, the law of negligence, the law of civil responsibility for accidental injury caused to others, is drawn mainly from the Common law.

The cases provide a useful illustration of the techniques of legal argument relating to case law and the doctrine of precedent.

The cases also illustrates the ability of the Common law to adapt existing legal rules to changing social and economic conditions on an incremental basis, without the need for fresh legislation.

Finally, the cases illustrate the issues of judicial policy making that arise in relation to judicial activism and judge-made law.

In the first extract, from Donoghue v. Stevenson [1932], we can see how the judge giving the majority opinion, Lord Atkin, analyses the pre-existing case law to find a generalised rule that justifies the extension of liability in negligence to a new situation. The case extends liability in negligence to protect consumers from physical injury caused by the careless manufacture of products, in this case a bottled soft drink.


*562 [original page number]

M’Alister (or Donoghue) (Pauper) Appellant; v. Stevenson Respondent.

House of Lords

HL

Lord Buckmaster, Lord Atkin, Lord Tomlin, Lord Thankerton, and Lord Macmillan.

1932 May 26.

Negligence--Liability of Manufacturer to ultimate Consumer--Article of Food--Defect likely to cause Injury to Health.

By Scots and English law alike the manufacturer of an article of food, medicine or the like, sold by him to a distributor in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect, is under a legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health:

So held, by Lord Atkin, Lord Thankerton and Lord Macmillan; Lord Buckmaster and Lord Tomlin dissenting.

George v. Skivington (1869) L. R. 5 Ex. 1 approved.


CHAPTER V Donoghue v. Stevenson (1932)

APPEAL against an interlocutor of the Second Division of the Court of Session in Scotland recalling an interlocutor of the Lord Ordinary (Lord Moncrieff).

By an action brought in the Court of Session the appellant, who was a shop assistant, sought to recover damages from the respondent, who was a manufacturer of aerated waters, for injuries she suffered as a result of consuming part of the contents of a bottle of ginger-beer which had been manufactured by the respondent, and which contained the decomposed remains of a snail. The appellant by her condescendence averred that the bottle of ginger-beer was purchased for the appellant by a friend in a café at Paisley, which was occupied by one Minchella; that the bottle was made of dark opaque glass and that the appellant had no reason to suspect that it contained anything but pure ginger-beer; that the said Minchella poured some of the ginger-beer out into a tumbler, and that the appellant drank some of the contents of the tumbler; that her friend was then proceeding to pour the remainder of the contents of the bottle into the tumbler when a snail, which was in a state of decomposition, floated out of the bottle; that as a result of the nauseating sight of the snail in such circumstances, and in consequence of the impurities in the ginger-beer which she had already consumed, the appellant suffered from shock and severe gastro-enteritis. The appellant further averred that the ginger-beer was manufactured by the respondent to be sold as a drink to the public (including the appellant); that it was bottled by the respondent and labelled by him with a label bearing his name; and that the bottles were thereafter sealed with a metal cap by the respondent. She further averred that it was the duty of the respondent to provide a system of working his business which would not allow snails to get into his ginger-beer bottles, and that it was also his duty to provide an efficient system of inspection of the bottles before the ginger-beer was filled into them, and that he had failed in both these duties and had so caused the accident ...

... LORD ATKIN.

It is remarkable how difficult it is to find in the English authorities statements of general application defining the relations between parties that give rise to the duty. The Courts are concerned with the particular relations which come before them in actual litigation, and it is sufficient to say whether the duty exists in those circumstances. The result is that the Courts have been engaged upon an elaborate classification of duties as they exist in respect of property, whether real or personal, with further divisions as to ownership, occupation or control, and distinctions based on the particular relations of the one side or the other, whether manufacturer, salesman or landlord, customer, tenant, stranger, and so on. *

In this way it can be ascertained at any time whether the law recognizes a duty, but only where the case can be referred to some particular species which has been examined and classified. And yet the duty which is common to all the cases where liability is established must logically be based upon some element common to the cases where it is found to exist.

To seek a complete logical definition of the general principle is probably to go beyond the function of the judge, for the more general the definition the more likely it is to omit essentials or to introduce non-essentials. The attempt was made by Brett M.R. in Heaven v. Pender [11 Q. B. D. 503, 509], in a definition to which I will later refer. As framed, it was demonstrably too wide, though it appears to me, if properly limited, to be capable of affording a valuable practical guide.

At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances.
The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa," is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy.

The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.

Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question ...
In formulating this new, generalised rule, Lord Atkin concludes that there are no previous cases that contradict it and several that support it.

He identifies good social policy reasons to justify the imposition of liability in negligence on manufacturers to ensure that consumers injured by the carelessness of manufacturers have an effective remedy.

He also considers several cases that were said to exclude liability between manufacturers and consumers and ‘distinguishes’ them as not being relevant to the facts and law in issue and therefore not binding the House of Lords to any particular conclusion on the issues.

... This appears to me to be the doctrine of Heaven v. Pender [11 Q. B. D. 503, 509], *581 as laid down by Lord Esher (then Brett M.R.) when it is limited by the notion of proximity introduced by Lord Esher himself and A. L. Smith L.J. in Le Lievre v. Gould. [1893] 1 Q. B. 491, 497, 504 ...  

... A manufacturer puts up an article of food in a container which he knows will be opened by the actual consumer. There can be no inspection by any purchaser and no reasonable preliminary inspection by the consumer. Negligently, in the course of preparation, he allows the contents to be mixed with poison. It is said that the law of England and Scotland is that the poisoned consumer has no remedy against the negligent manufacturer. If this were the result of the authorities, I should consider the result a grave defect in the law, and so contrary to principle that I should hesitate long before following any decision to that effect which had not the authority of this House. I would point out that, in the assumed state of the authorities, not only would the consumer have no remedy against the manufacturer, he would have none against any one else, for in the circumstances alleged there would be no evidence of negligence against any one other than the manufacturer; and, except in the case of a consumer who was also a purchaser, no contract and no warranty of fitness, and in the case of the purchase of a specific article under its patent or trade name, which might well be the case in the purchase of some articles of food or drink, no warranty protecting even the purchaser-consumer. There are other instances than of articles of food and drink where goods are sold intended to be used immediately by the consumer, such as many forms of goods sold for cleaning purposes, where the same liability must exist. The doctrine supported by the decision below would not only deny a remedy to the consumer who was injured by consuming bottled beer or chocolates poisoned by the negligence of the manufacturer, but also to the user of what should be a harmless proprietary medicine, an ointment, a soap, a cleaning fluid or cleaning powder. I confine myself to articles of common household use, where every one, including the manufacturer, knows that the articles will be used by other persons than the actual ultimate purchaser - namely, by members of his family and his servants, and in some cases his guests. I do not think so ill of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilized society and the ordinary claims it makes upon its members as to deny a legal remedy where there is so obviously a social wrong.

It will be found, I think, on examination that there is no case in which the circumstances have been such as I have just suggested where the liability has been negatived. There are numerous cases, where the relations were much more remote, where the duty has been held not to exist. There are also dicta in such cases which go further than was necessary for the determination of the particular issues, which have caused the difficulty experienced by the Courts below.
I venture to say that in the branch of the law which deals with civil wrongs, dependent in England at any rate entirely upon the application by judges of general principles also *584 formulated by judges, it is of particular importance to guard against the danger of stating propositions of law in wider terms than is necessary, lest essential factors be omitted in the wider survey and the inherent adaptability of English law be unduly restricted. For this reason it is very necessary in considering reported cases in the law of torts that the actual decision alone should carry authority, proper weight, of course, being given to the dicta of the judges.

In my opinion several decided cases support the view that in such a case as the present the manufacturer owes a duty to the consumer to be careful. A direct authority is George v. Skivington. [FN86] That was a decision on a demurrer to a declaration which averred that the defendant professed to sell a hairwash made by himself, and that the plaintiff Joseph George bought a bottle, to be used by his wife, the plaintiff Emma George, as the defendant then knew, and that the defendant had so negligently conducted himself in preparing and selling the hairwash that it was unfit for use, whereby the female plaintiff was injured. Kelly C.B. said that there was no question of warranty, but whether the chemist was liable in an action on the case for unskilfulness and negligence in the manufacture of it. "Unquestionably there was such a duty towards the purchaser, and it extends, in my judgment, to the person for whose use the vendor knew the compound was purchased." Pigott and Cleasby BB. put their judgments on the same ground. I venture to think that Cotton L.J., in Heaven v. Pender [FN87], misinterprets Cleasby B.'s judgment in the reference to Langridge v. Levy. [FN88] Cleasby B. appears to me to make it plain that in his opinion the duty to take reasonable care can be substituted for the duty which existed in Langridge v. Levy [FN89] not to defraud. It is worth noticing that George v. Skivington [FN90] was referred to by Cleasby B. himself, sitting as a member of the Court of Exchequer Chamber in Francis v. Cockrell [FN91], and was recognized by him as based on an ordinary duty to take care. It was also affirmed by Brett M.R. *585 in Cunnington v. Great Northern Ry. Co. [FN92], decided on July 2 at a date between the argument and the judgment in Heaven v. Pender [FN93], though, as in that case the Court negatived any breach of duty, the expression of opinion is not authoritative ...

... It now becomes necessary to consider the cases which have been referred to in the Courts below as laying down the proposition that no duty to take care is owed to the consumer in such a case as this ...

... In Langridge v. Levy [FN100] the ... the declaration alleged that the defendant, by falsely and fraudulently warranting a gun to have been made by Nock and to be a good, safe, and secure gun, sold the gun to the plaintiff's father for the use of himself and his son, and that one of his sons, confiding in the warranty, used the gun, which burst and injured him ... It is sufficient to say that the case was based, as I think, in the pleading, and certainly in the judgment, on the ground of fraud, and it appears to add nothing of value positively or negatively to the present discussion.

Winterbottom v. Wright [10 M. & W. 109] The declaration and alleged that the defendant had contracted with the Postmaster-General to provide the mail-coach to convey *589 mails from Hartford to Holyhead and to keep the mails in safe condition; that Atkinson and others, with notice of the said contract, had contracted with the Postmaster-General to convey the road mail-coach from Hartford to Holyhead; and that the plaintiff, relying on the said first contract, hired himself to Atkinson to drive the mail-coach; but that the defendant so negligently conducted himself and so utterly disregarded his aforesaid contract that the defendant, having the means of knowing, and well knowing, all the aforesaid premises, the mail-coach, being in a dangerous condition, owing to certain latent defects and to no other cause, gave way, whereby the plaintiff was thrown from his seat and injured. It is to be observed that no negligence apart from breach of contract was alleged - in other words, no duty was alleged other than the duty arising out of the contract; it is not stated that the defendant knew, or ought to have known, of the latent defect ... The actual decision appears to have been manifestly right; no duty to the plaintiff arose out of the contract.
Lord Atkin, when wishing to rely on a case as an authority supporting his opinion, tends to analyse the case at a high level of generality – emphasising similarities in the underlying facts and legal issues.

He is also happy to accept persuasive authority, such as the obiter dictum of Lord Esher (then Brett M.R.) in *Heaven v. Pender*.

By contrast, when analysing cases said to contradict his opinion, he is careful to analyse the cases at a high level of particularity, emphasising differences between the the facts and legal issues in the cases.

Anything that is not a binding precedent can be ignored. This includes cases where the material facts or the legal issues are different, decisions of lower courts and cases decided ‘per incuriam’, that is to say cases decided without reference to relevant case law and statutes.

The subtlety and flexibility of legal argument based on case law and the doctrine of precedent can be seen by comparing the opinion of Lord Atkin with that of Lord Buckmaster in the same case. Lord Buckmaster gave a minority judgement strongly opposed to the creation of a new general rule of liability in negligence imposing liability on manufacturers.

He refers to the same cases as Lord Atkin and relies upon them to reach the opposite conclusion. He then articulates social policy reasons why liability in negligence should not be imposed on manufacturers because the principle can not be limited and it would undermine commercial contracts.

It would be wrong to take this as evidence of a lack of certainty in the common law. The vast majority of the cases that come before the courts, concern the application of well established law to familiar facts. Most cases are settled without resort to trial because the outcome of a court case can be predicted by reference to previous cases.

But in a case such as *Donoghue v Stevenson*, involving novel questions of law, the doctrine of precedent and the techniques of legal argument give the courts considerable flexibility in developing the law incrementally and by analogy with previous cases.
LORD BUCKMASTER

... The law applicable is the common law, and, though its principles are capable of application to meet new conditions not contemplated when the law was laid down, these principles cannot be changed nor can additions be made to them because any particular meritorious case seems outside their ambit.

Now the common law must be sought in law books by writers of authority and in judgments of the judges entrusted with its administration. The law books give no assistance, because the work of living authors, however deservedly eminent, cannot be used as authority, though the opinions they express may demand attention; and the ancient books do not assist. I turn, therefore, to the decided cases to see if they can be construed so as to support the appellant's case. One of the earliest is the case of Langridge v. Levy. [2 M. & W. 519; 4 M. & W. 337] It is a case often quoted and variously explained. There a man sold a gun which he knew was dangerous for the use of the purchaser's son. The gun exploded in the son's hands, and he was held to have a right of action in tort against the gunmaker. How far it is from the present case can be seen from the judgment of Parke B., who, in delivering the judgment of the Court, used these words: "We should pause before we made a precedent by our decision which would be an authority for an action against the vendors, even of such instruments and articles as are dangerous in themselves, at the suit of any person whomsoever into whose hands they might happen to pass, and who should be injured thereby"; and in Longmeid v. Holliday [6 Ex. 761]the same eminent judge points out that the earlier case was based on a fraudulent misstatement, and he expressly repudiates the view that it has any wider application. The case of Langridge v. Levy [2 M. & W. 519; 4 M. & W. 337], therefore, can be dismissed from consideration with the comment that it is rather surprising it has so often been cited for a proposition it cannot support.

*568 The case of Winterbottom v. Wright [10 M. & W. 109] is, on the other hand, an authority that is closely applicable. Owing to negligence in the construction of a carriage it broke down, and a stranger to the manufacture and sale sought to recover damages for injuries which he alleged were due to negligence in the work, and it was held that he had no cause of action either in tort or arising out of contract. This case seems to me to show that the manufacturer of any article is not liable to a third party injured by negligent construction, for there can be nothing in the character of a coach to place it in a special category.

It may be noted, also, that in this case Alderson B. said [10 M. & W. 115]: "The only safe rule is to confine the right to recover to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty." ...

... Of the remaining cases, George v. Skivington [L. R. 5 Ex. 1] is the one nearest to the present, and without that case, and the statement of Cleasby B. in Francis v. Cockrell [(1870) L. R. 5 Q. B. 501, 515] and the dicta *570 of Brett M.R. in Heaven v. Pender [11 Q. B. D. 503, 509 et seq], the appellant would be destitute of authority.

George v. Skivington [L. R. 5 Ex. 1] related to the sale of a noxious hairwash, and a claim made by a person who had not bought it but who had suffered from its use, based on its having been negligently compounded, was allowed. It is remarkable that Langridge v. Levy [2 M. & W. 519] was used in support of the claim and influenced the judgment of all the parties to the decision. Both Kelly C.B. and Pigott B. stressed the fact that the article had been purchased to the knowledge of the defendant for the use of the plaintiff, as in Langridge v. Levy [2 M. & W. 519], and Cleasby B., who, realizing that Langridge v. Levy [2 M. & W. 519] was decided on the ground of fraud, said: "Substitute the word 'negligence' for 'fraud,' and the analogy between Langridge v. Levy [2 M. & W. 519] and this case is complete." It is unnecessary to point out too emphatically that such a substitution cannot possibly be made. No action based on fraud can be supported by mere proof of negligence.

I do not propose to follow the fortunes of George v. Skivington [L. R. 5 Ex. 1]; few cases can have lived so dangerously and lived so long. Lord Sumner, in the case of Blacker v. Lake & Elliot, Ld. [106 L. T. 533, 536], closely examines its history, and I agree with his analysis. He
said that he could not presume to say that it was wrong, but he declined to follow it on the ground which is, I think, firm, that it was in conflict with Winterbottom v. Wright. [10 M. & W. 109] ...

... In my view, therefore, the authorities are against the appellant's contention, and, apart from authority, it is difficult to see how any common law proposition can be formulated to support her claim.

The principle contended for must be this: that the manufacturer, or indeed the repairer, of any article, apart entirely from contract, owes a duty to any person by whom the article is lawfully used to see that it has been carefully constructed.

All rights in contract must be excluded from consideration of this principle; such contractual rights as may exist in successive steps from the original manufacturer down to the ultimate purchaser are ex hypothesi immaterial.

Nor can the doctrine be confined to cases where inspection is difficult or impossible to introduce. This conception is simply to misapply to tort doctrine applicable to sale and purchase.

The principle of tort lies completely outside the region where such considerations apply, and the duty, if it exists, must extend to every person who, in lawful circumstances, uses the article made.

There can be no special duty attaching to the manufacture of food apart from that implied by contract or imposed by statute. If such a duty exists, it seems to me it must cover the construction of every article, and I cannot see any reason why it should not apply to the construction of a house. If one step, why not fifty?

Yet if a house be, as it sometimes is, negligently built, and in consequence of that negligence the ceiling falls and injures the occupier or any one else, no action against the builder exists according to the English law, although I believe such a right did exist according to the laws of Babylon.

Were such a principle known and recognized, it seems to me impossible, having regard to the numerous cases that must have arisen to persons injured by its disregard, that, with the exception of George v. Skivington [L. R. 5 Ex. 1], no case directly involving the principle has ever succeeded in the Courts, and, were it well known and accepted, much of the discussion of the earlier cases would have been waste of time, and the distinction as to articles dangerous in themselves or known to be dangerous to the vendor would be meaningless.
The English Courts were slow to take advantage of the generalised principle of a duty of court formulated in Donogue v Stevenson to apply a duty of care in negligence to new situations.

However, in the case of Hedley Byrne & Co v Heller & Partners [1964] the House of Lords extended the duty of care to impose liability, in limited situations, for careless words as well as careless acts.

In Dorset Yacht Co Ltd v Home Office [1970], liability was imposed on the Government for the negligence of prison officers in allowing young prisoners to escape from a prison on an island, causing damage to a yacht belonging to the claimant in the process.

In Anns v Merton Borough Council [1978], the House of Lords allowed a claim for the cost of repairing a building after cracks appeared due to inadequate foundations but before any damage was done to any person or property other than the building itself.

In so doing, the House of Lords reformulated the test for a claim in negligence to one of reasonable foresight of harm, subject to

‘...considerations that ought to negative, or to reduce or limit the scope of the duty or the class of persons to whom it is owed or the damages to which a breach of it may give rise.’

The claim was made by a subsequent purchaser of the flats, not the original purchaser from the builder. The claim was not made against the builder, who was insolvent, but against a local government building inspector who certified the foundations to be adequate.

This was exactly that sort of claim that Lord Buckmaster was opposed to allowing when he said in Donoghue v Stevenson

“There can be no special duty attaching to the manufacture of food apart from that implied by contract or imposed by statute. If such a duty exists, it seems to me it must cover the construction of every article, and I cannot see any reason why it should not apply to the construction of a house. If one step, why not fifty?”
McLoughlin v O’Brian [1982], provides an illustration of this new approach.

The House of Lords extended liability in negligence to include liability for ‘Nervous Shock’ (psychiatric injury) as well as for physical injury.

In the following extract from the case, Lord Wilberforce analyses the previous case law and extends and restates the law. He formulates the principles that he extracts from the previous cases into a specific test for ‘Nervous Shock’ cases. His new test extends the law but sets limits on who can claim for psychiatric injury.

He then considers whether there are any ‘considerations’ (policy arguments) for not extending liability in negligence to include liability for psychiatric injury and concludes that there are not, provided that the categories of potential claimants are limited.

According to Lord Wilberforce, for a claim to be allowed:

The claim must be for a ‘recognisable psychiatric illnesses’ not mere ‘grief and sorrow’.

If the claimant was not someone involved in the accident, they must be someone fearing for their own safety or that of a close relative. He concludes that mere bystanders are not foreseeable victims and so cannot claim but leaves open the question of whether rescuers can claim.

The claimant must have been sufficiently close in space and time to the accident or its immediate aftermath.

The claimant must have had direct perception of the accident by sight or sound. Being told about the accident from someone else is insufficient.
LORD WILBERFORCE.

My Lords, this appeal arises from a very serious and tragic road accident which occurred on October 19, 1973, near Withersfield, Suffolk. The appellant's husband, Thomas McLoughlin, and three of her children, George, aged 17, Kathleen, aged 7, and Gillian, nearly 3, were in a Ford motor car: George was driving. A fourth child, Michael, then aged 11, was a passenger in a following motor car driven by Mr. Pilgrim: this car did not become involved in the accident. The Ford car was in collision with a lorry driven by the first respondent and owned by the second respondent. That lorry had been in collision with another lorry driven by the third respondent and owned by the fourth respondent. It is admitted that the accident to the Ford car was caused by the respondents' negligence. It is necessary to state what followed in full detail.

As a result of the accident, the appellant's husband suffered bruising and shock; George suffered injuries to his head and face, cerebral concussion, fractures of both scapullae and bruising and abrasions; Kathleen suffered concussion, fracture of the right clavicle, bruising, abrasions and shock; Gillian was so seriously injured that she died almost immediately.

At the time, the appellant was at her home about two miles away; an hour or so afterwards the accident was reported to her by Mr. Pilgrim, who told her that he thought George was dying, and that he did not know the whereabouts of her husband or the condition of her daughter. He then drove her to Addenbrooke's Hospital, Cambridge. There she saw Michael, who told her that Gillian was dead. She was taken down a corridor and through a window she saw Kathleen, crying, with her face cut and begrimed with dirt and oil. She could hear George shouting and screaming. She was taken to her husband who was sitting with his head in his hands. His shirt was hanging off him and he was covered in mud and oil. He saw the appellant and started sobbing. The appellant was then taken to see George. The whole of his left face and left side was covered. He appeared to recognise the appellant and then lapsed into unconsciousness. Finally, the appellant was taken to Kathleen who by now had been cleaned up. The child was too upset to speak and simply clung to her mother. There can be no doubt that these circumstances, witnessed by the appellant, were distressing in the extreme and were capable of producing an effect going well beyond that of grief and sorrow …

... The appellant now appeals to this House. The critical question to be decided is whether a person in the position of the appellant, i.e. one who was not present at the scene of grievous injuries to her family but who comes upon those injuries at an interval of time and space, can recover damages for nervous shock.

Although we continue to use the hallowed expression "nervous shock," English law, and common understanding, have moved some distance since recognition was given to this symptom as a basis for liability. Whatever is unknown about the mind-body relationship (and the area of ignorance seems to expand with that of knowledge), it is now accepted by medical science that recognisable and severe physical damage to the human body and system may be caused by the impact, through the senses, of external events on the mind. There may thus be produced what is as identifiable an illness as any that may be caused by direct physical impact. It is safe to say that this, in general terms, is understood by the ordinary man or woman who is hypothesised by the courts in situations where claims for negligence are made. Although in the only case which has reached this House (Bourhill v. Young [1943] A.C. 92) a claim for damages in respect of "nervous shock" was rejected on its facts, the House gave clear recognition to the legitimacy, in principle, of claims of that character; As the result of that and other cases, assuming that they are accepted as correct, the following position has been reached:

1. While damages cannot, at common law, be awarded for grief and sorrow, a claim for
damages for "nervous shock" caused by negligence can be made without the necessity of showing direct impact or fear of immediate personal injuries for oneself. The reservation made by Kennedy J. in Dulieu v. White & Sons [1901] 2 K.B. 669, though taken up by Sargant L.J. in Hambrook v. Stokes Brothers [1925] 1 K.B. 141, has not gained acceptance, and although the respondents, in the courts below, reserved their right to revive it, they did not do so in argument. I think that it is now too late to do so. The arguments on this issue were fully and admirably stated by the Supreme Court of California in Dillon v. Legg (1968) 29 A.L.R. 3d 1316.

2. A Claimant may recover damages for "nervous shock" brought on by injury caused not to him- or herself but to a near relative, or by the fear of such injury. So far (subject to 5 below), the cases do not extend beyond the spouse or children of the Claimant (Hambrook v. Stokes Brothers [1925] 1 K.B. 141, Boardman v. Sanderson [1964] 1 W.L.R. 1317, Hinz v. Berry [1970] 2 Q.B. 40 - including foster children - (where liability was assumed) and see King v. Phillips [1953] 1 Q.B. 429).

3. Subject to the next paragraph, there is no English case in which a Claimant has been able to recover nervous shock damages where the injury to the near relative occurred out of sight and earshot of the Claimant. In Hambrook v. Stokes Brothers an express distinction was made between shock caused by what the mother saw with her own eyes and what she might have been told by bystanders, liability being excluded in the latter case.

4. An exception from, or I would prefer to call it an extension of, the latter case, has been made where the Claimant does not see or hear the incident but comes upon its immediate aftermath. In Boardman v. Sanderson the father was within earshot of the accident to his child and likely to come upon the scene: he did so and suffered damage from what he then saw. In Marshall v. Lionel Enterprises Inc. [1972] 2 O.R. 177, the wife came immediately upon the badly injured body of her husband. and in Benson v. Lee [1972] V.R. 879, a situation existed with some similarity to the present case. The mother was in her home 100 yards away, and, on communication by a third party, ran out to the scene of the accident and there suffered shock. Your Lordships have to decide whether or not to validate these extensions.

5. A remedy on account of nervous shock has been given to a man who came upon a serious accident involving numerous people immediately thereafter and acted as a rescuer of those involved (Chadwick v. British Railways Board [1967] 1 W.L.R. 912). "Shock" was caused neither by fear for himself nor by fear or horror on account of a near relative. The principle of "rescuer" cases was not challenged by the respondents and ought, in my opinion, to be accepted. But we have to consider whether, and how far, it can be applied to such cases as the present. Throughout these developments, as can be seen, the courts have proceeded in the traditional manner of the common law from case to case upon a basis of logical necessity. If a mother, with or without accompanying children, could recover on account of fear for herself, how can she be denied recovery on account of fear for her accompanying children? If a father could recover had he seen his child run over by a backing car, how can he be denied recovery if he is in the immediate vicinity and runs to the child’s assistance? If a wife and mother could recover if she had witnessed a serious accident to her husband and children, does she fail because she was a short distance away and immediately rushes to the scene (cf. Benson v. Lee)? I think that unless the law is to draw an arbitrary line at the point of direct sight and sound, these arguments require acceptance of the extension mentioned above under 4 in the interests of justice. If one continues to follow the process of logical progression, it is hard to see why the present Claimant also should not succeed. She was not present at the accident, but she came very soon after upon its aftermath. If, from a distance of some 100 yards (cf. Benson v. Lee), she had found her family by the roadside, she would have come within principle 4 above. Can it make any difference that she comes upon them in an
ambulance. or, as here, in a nearby hospital, when, as the evidence shows, they were in the same condition, covered with oil and mud, and distraught with pain? If Mr. Chadwick can recover when, acting in accordance with normal and irresistible human instinct, and indeed moral compulsion, he goes to the scene of an accident, may not a mother recover if, acting under the same motives, she goes to where her family can be found?

I could agree that a line can be drawn above her case with less hardship than would have been apparent in Boardman v. Sanderson [1964] 1 W.L.R. 1317 and Hinz v. Berry [1970] 2 Q.B.40, but so to draw it would not appeal to most people's sense of justice. To allow her claim may be, I think it is, upon the margin of what the process of logical progression would allow. But where the facts are strong and exceptional, and, as I think, fairly analogous, her case ought, prima facie, to be assimilated to those which have passed the test. To argue from one factual situation to another and to decide by analogy is a natural tendency of the human and the legal mind. But the lawyer still has to inquire whether, in so doing, he has crossed some critical line behind which he ought to stop. That is said to be the present case.

The reasoning by which the Court of Appeal decided not to grant relief to the Claimant is instructive. Both Stephenson L.J. and Griffiths L.J. accepted that the "shock" to the Claimant was foreseeable; but from this, at least in presentation, they diverge. Stephenson L.J. considered that the defendants owed a duty of care to the Claimant, but that for reasons of policy the law should stop short of giving her damages: it should limit relief to those on or near the highway at or near the time of the accident caused by the defendants' negligence. He was influenced by the fact that the courts of this country, and of other common law jurisdictions, had stopped at this point: it was indicated by the barrier of commercial sense and practical convenience. Griffiths L.J. took the view that although the injury to the Claimant was foreseeable, there was no duty of care. The duty of care of drivers of motor vehicles was, according to decided cases, limited to persons and owners of property on the road or near to it who might be directly affected. The line should be drawn at this point. It was not even in the interest of those suffering from shock as a class to extend the scope of the defendants' liability: to do so would quite likely delay their recovery by immersing them in the anxiety of litigation.

I am impressed by both of these arguments, which I have only briefly summarised. Though differing in expression, in the end, in my opinion, the two presentations rest upon a common principle, namely that, at the margin, the boundaries of a man's responsibility for acts of negligence have to be fixed as a matter of policy. Whatever is the correct jurisprudential analysis, it does not make any essential difference whether one says, with Stephenson L.J., that there is a duty but, as a matter of policy, the consequences of breach of it ought to be limited at a certain point, or whether, with Griffiths L.J., one says that the fact that consequences may be foreseeable does not automatically impose a duty of care, does not do so in fact where policy indicates the contrary.

This is an approach which one can see very clearly from the way in which Lord Atkin stated the neighbour principle in Donoghue v. Stevenson [1932] A.C. 562, 580: "persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected. ..."

This is saying that foreseeability must be accompanied and limited by the law's judgment as to persons who ought, according to its standards of value or justice, to have been in contemplation. Foreseeability, which involves a hypothetical person, looking with hindsight at an event which has occurred, is a formula adopted by English law, not merely for defining, but also for limiting, the persons to whom duty may be owed, and the consequences for which an actor may be held responsible. It is not merely an issue of fact to be left to be found as such. When it is said to result in a duty of care being
owed to a person or a class, the statement that there is a "duty of care " denotes a conclusion into the forming of which considerations of policy have entered.

That foreseeability does not of itself, and automatically, lead to a duty of care is, I think, clear. I gave some examples in Anns v. Merton London Borough Council [1978] A.C. 728, 752, Anns itself being one. I may add what Lord Reid said in McKew v. Holland & Hannen & Cubitts (Scotland) Ltd. [1969] 3 All E.R. 1621, 1623:

"A defender is not liable for a consequence of a kind which is not foreseeable. But it does not follow that he is liable for every consequence which a reasonable man could foresee."

We must then consider the policy arguments. In doing so we must bear in mind that cases of "nervous shock," and the possibility of claiming damages for it, are not necessarily confined to those arising out of accidents on public roads. To state, therefore, a rule that recoverable damages must be confined to persons on or near the highway is to state not a principle in itself, but only an example of a more general rule that recoverable damages must be confined to those within sight and sound of an event caused by negligence or, at least, to those in close, or very close, proximity to such a situation.

The policy arguments against a wider extension can be stated under four heads.

First, it may be said that such extension may lead to a proliferation of claims, and possibly fraudulent claims, to the establishment of an industry of lawyers and psychiatrists who will formulate a claim for nervous shock damages, including what in America is called the customary miscarriage, for all, or many, road accidents and industrial accidents.

Secondly, it may be claimed that an extension of liability would be unfair to defendants, as imposing damages out of proportion to the negligent conduct complained of. In so far as such defendants are insured, a large additional burden will be placed on insurers, and ultimately upon the class of persons insured - road users or employers.

Thirdly, to extend liability beyond the most direct and plain cases would greatly increase evidentiary difficulties and tend to lengthen litigation.

Fourthly, it may be said - and the Court of Appeal agreed with this - that an extension of the scope of liability ought only to be made by the legislature, after careful research.

But, these discounts accepted, there remains, in my opinion, just because "shock" in its nature is capable of affecting so wide a range of people, a real need for the law to place some limitation upon the extent of admissible claims.

It is necessary to consider three elements inherent in any claim: the class of persons whose claims should be recognised; the proximity of such persons to the accident; and the means by which the shock is caused. As regards the class of persons, the possible range is between the closest of family ties - of parent and child, or husband and wife - and the ordinary bystander.

Existing law recognises the claims of the first: it denies that of the second, either on the basis that such persons must be assumed to be possessed of fortitude sufficient to enable them to endure the calamities of modern life, or that defendants cannot be expected to compensate the world at large.

In my opinion, these positions are justifiable, and since the present case falls within the first class, it is strictly unnecessary to say more.
I think, however, that it should follow that other cases involving less close relationships must be very carefully scrutinised. I cannot say that they should never be admitted. The closer the tie (not merely in relationship, but in care) the greater the claim for consideration. The claim, in any case, has to be judged in the light of the other factors, such as proximity to the scene in time and place, and the nature of the accident.

As regards proximity to the accident, it is obvious that this must be close in both time and space. It is, after all, the fact and consequence of the defendant's negligence that must be proved to have caused the "nervous shock." Experience has shown that to insist on direct and immediate sight or hearing would be impractical and unjust and that under what may be called the "aftermath" doctrine one who, from close proximity, comes very soon upon the scene should not be excluded …

… Subject only to these qualifications, I think that a strict test of proximity by sight or hearing should be applied by the courts.

Lastly, as regards communication, there is no case in which the law has compensated shock brought about by communication by a third party. In Hambrook v. Stokes Brothers [1925] 1 K.B. 141, indeed, it was said that liability would not arise in such a case and this is surely right. It was so decided in Abramzik v. Brenner (1967) 65 D.L.R. (2d) 651. The shock must come through sight or hearing of the event or of its immediate aftermath. Whether some equivalent of sight or hearing, e.g. through simultaneous television, would suffice may have to be considered.

My Lords, I believe that these indications, imperfectly sketched, and certainly to be applied with common sense to individual situations in their entirety, represent either the existing law, or the existing law with only such circumstantial extension as the common law process may legitimately make. They do not introduce a new principle. Nor do I see any reason why the law should retreat behind the lines already drawn. I find on this appeal that the appellant's case falls within the boundaries of the law so drawn. I would allow her appeal.
Whilst the extensions of liability for negligence flowing from Donoghue v Stevenson have generally been accepted and become settled law, two aspects of these development have been overruled or revised in subsequent cases by the House of Lords.

In Murphy v Brentwood District Council [1990], the House of Lords overruled Anns v Merton Borough Council [1978].

Both Anns and Murphy were cases concerned with claims for the cost of repairing buildings discovered to be defective by subsequent purchasers.

Anns was overruled because it was considered to be:

Wrong in principle

A Principle that can not logically be restricted and which would lead to ‘transmissible warranties of quality’

Judicial legislation in the field of consumer protection - a matter best left to parliament (cf DPA 1972)

A ‘fertile breeding ground for litigation’

In the following extract, Lord Keith, giving the leading judgment, explains why.

Lord Keith

... The jump which is made here from liability under the Donoghue v Stevenson principle for damage to person or property caused by a latent defect in a carelessly manufactured article to liability for the cost of rectifying a defect in such an article which is ex hypothesi no longer latent is difficult to accept...

...there is no liability in tort on a manufacturer towards the purchaser from a retailer of an article which turns out to be useless or valueless through defects due to careless manufacture. The loss is economic. It is difficult to draw a distinction in principle between an article which is useless or valueless and one which suffers from a defect which would render it dangerous in use but which is discovered by the purchaser in time to avert any possibility of injury. The purchaser may incur expense in putting right the defect, or, more probably, discard the article. In either case the loss is purely economic...

... Anns did not proceed on any basis of established principle, but introduced a new species of liability governed by a principle indeterminate in character but having the potentiality of covering a wide range of situations, involving chattels as well as real property, in which it had never hitherto been thought that the law of negligence had any proper place...a remarkable example of judicial legislation.'
Not only was the decision in Anns relating to liability for defective buildings overruled, but subsequently the entire approach of Lord Wilberforce to the duty of care was rejected by the House of Lords in Caparo Industries v Dickman [1990].

In the following extract, Lord Bridge explains why a tradition approach to developing novel categories of negligence is preferable to the modern approach applied by Lord Wilberforce in Anns.

The modern approach seeks a single general principle (the test of reasonable foresight of harm and ‘proximity’) applied subject to social policy considerations.

The traditional approach develops novel categories of negligence incrementally and by analogy with established categories of claims established by previous cases,

“rather than by a massive extension of a prima facie duty of care restrained only by indefinable ‘considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed.’”

Lord Bridge

... In determining the existence and scope of the duty of care which one person may owe to another in the infinitely varied circumstances of human relationships there has for long been a tension between two different approaches. Traditionally the law finds the existence of the duty in different specific situations each exhibiting its own particular characteristics. In this way the law has identified a wide variety of duty situations, all falling within the ambit of the tort of negligence, but sufficiently distinct to require separate definition of the essential ingredients by which the existence of the duty is to be recognised. Commenting upon the outcome of this traditional approach, Lord Atkin, in his seminal speech in Donoghue v. Stevenson [1932] A.C. 562, 579-580, observed:

"The result is that the courts have been engaged upon an elaborate classification of duties as they exist in respect of property, whether real or personal, with further divisions as to ownership, occupation or control, and distinctions based on the particular relations of the one side or the other, whether manufacturer, salesman or landlord, customer, tenant, stranger, and so on. In this way it can be ascertained at any time whether the law recognises a duty, but only where the case can be referred to some particular species which has been examined and classified. And yet the duty which is common to all the cases where liability is established must logically be based upon some element common to the cases where it is found to exist."

It is this last sentence which signifies the introduction of the more modern approach of seeking a single general principle which may be applied in all circumstances to determine the existence of a duty of care. Yet Lord Atkin himself sounds the appropriate note of caution by adding, at p. 580:

"To seek a complete logical definition of the general principle is probably to go beyond the function of the judge, for the more general the definition the more likely it is to omit
essentials or to introduce non-essentials."

Lord Reid gave a large impetus to the modern approach in Dorset Yacht Co. Ltd. v. Home Office [1970] A.C. 1004, 1026-1027, where he said:

"In later years there has been a steady trend towards regarding the law of negligence as depending on principle so that, when a new point emerges, one should ask not whether it is covered by authority but whether recognised principles apply to it. Donoghue v. Stevenson [1932] A.C. 562 may be regarded as a milestone, and the well known passage in Lord Atkin's speech should I think be regarded as a statement of principle. It is not to be treated as if it were a statutory definition. It will require qualification in new circumstances. But I think that the time has come when we can and should say that it ought to apply unless there is some justification or valid explanation for its exclusion."

The most comprehensive attempt to articulate a single general principle is reached in the well known passage from the speech of Lord Wilberforce in Anns v. Merton London Borough Council [1978] A.C. 728, 751-752:

"Through the trilogy of cases in this House - Donoghue v. Stevenson[1932] A.C. 562, Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.[1964] A.C. 465, and Dorset Yacht Co. Ltd. v. Home Office [1970] A.C. 1004, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter - in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise: see Dorset Yacht case [1970] A.C. 1004 per Lord Reid at p. 1027."

But since the Anns case a series of decisions of the Privy Council and of your Lordships' House, notably in judgments and speeches delivered by Lord Keith, have emphasised the inability of any single general principle to provide a practical test which can be applied to every situation to determine whether a duty of care is owed and, if so, what is its scope: see Governors of Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd. [1985] A.C. 210, 239f-241c; Yuen Kun Yeu v. Attorney-General of Hong Kong [1988] A.C. 175, 190e-194f; Rowling v. Takaro Properties Ltd. [1988] A.C. 473, 501d-g; Hill v. Chief Constable of West Yorkshire[1989] A.C. 53, 60b-d.

What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of "proximity" or "neighbourhood" and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other.

But it is implicit in the passages referred to that the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope.

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Whilst recognising, of course, the importance of the underlying general principles common to the whole field of negligence, I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes. We must now, I think, recognise the wisdom of the words of Brennan J. in the High Court of Australia in Sutherland Shire Council v. Heyman (1985) 60 A.L.R. 1, 43-44, where he said:

"It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable 'considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed.'"
This case shows how the Court of Appeal in the UK recently interpreted criminal legislation having regard to the European Convention of Human Rights and two previous decisions of the Court of Appeal R v Kelly (Edward) [2000] and R v Buckland [2000].

The Appeals concerned Section 2 of the Crime (Sentences) Act 1997 Act, which is in the following terms:

(1) This section applies where

(a) a person is convicted of a serious offence committed after the commencement of this section; and

(b) at the time when that offence was committed, he was 18 or over and had been convicted in any part of the United Kingdom of another serious offence.

(2) The court shall impose a life sentence, that is to say

(a) where the person is 21 or over, a sentence of imprisonment for life;

(b) where he is under 21, a sentence of custody for life under section 8(2) of the Criminal Justice Act 1982 ('the 1982 Act'),

unless the court is of the opinion that there are exceptional circumstances relating to either of the offences or to the offender which justify its not doing so.

(3) Where the court does not impose a life sentence, it shall state in open court that it is of that opinion and what the exceptional circumstances are.

(4) An offence the sentence for which is imposed under subsection (2) above shall not be regarded as an offence the sentence for which is fixed by law.

(5) An offence committed in England and Wales is a serious offence for the purposes of this section if it is any of the following, namely

(a) an attempt to commit murder, a conspiracy to commit murder or an incitement to murder;

(b) an offence under section 4 of the Offences against the Person Act 1861 (soliciting murder);

(c) manslaughter;

(d) an offence under section 18 of the Offences against the Person Act 1861 (wounding, or causing grievous bodily harm, with intent); (e) rape or an attempt to commit rape;

(f) an offence under section 5 of the Sexual Offences Act 1956 (intercourse with a girl under 13);

(g) an offence under section 16 (possession of a firearm with intent to injure), section 17 (use of a firearm to resist arrest) or section 18 (carrying a firearm with criminal intent) of the Firearms Act 1968; and

(h) robbery where, at some time during the commission of the offence, the offender had in his possession a firearm or imitation firearm within the meaning of that Act."


It had generally been considered that the narrow interpretation of section 2 given by the Court of Appeal in *R v Kelly (Edward)*, although unpopular with the courts, had been a correct interpretation of the Government's intention to impose life sentences in almost all cases where a person was convicted of a second serious offence.

In *R v Offen*, a subsequent Court of Appeal took the opportunity to widen the interpretation of section 2 to allow the courts greater scope to make a finding of 'exceptional circumstances' that could justify the imposition of a lesser sentence than an automatic life sentence.

The Court of Appeal justified the wider interpretation of section 2 by reference to the intention of parliament and to the European Convention on Human Rights.

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*253 [original page number]*

Regina v. Offen
Regina v. McGilliard
Regina v. McKeown
Regina v. Okwuegbunam
Regina v. S

Court of Appeal

CA (Crim Div)

Lord Woolf CJ, Steel and Richards JJ

2000 Oct 17; Nov 9

Crime--Sentence--Life imprisonment--Defendants convicted of second "serious offence"--Life sentence to be imposed in absence of exceptional circumstances--First offence committed before enactment of automatic life sentence provisions--Whether automatic life sentence retrospectively aggravating sentence for first offence--Whether inhuman or degrading punishment or arbitrary and disproportionate--Whether lack of risk to public constituting exceptional circumstance--Crime (Sentences) Act 1997 (c43), s. 2--Human Rights Act 1998 (c42), s. 3, Sch 1, arts 3, 5, 7

The defendants all pleaded guilty to or were convicted of a second "serious offence" within section 2(5) or (6) of the Crime (Sentences) Act 1997 [FN1]. In each case the first serious offence was committed prior to 1997. In the first four cases, the defendants were sentenced to life imprisonment pursuant to section 2(2) after the judge concluded that there were no exceptional circumstances which justified him not imposing such a sentence. In the fifth case, the defendant was sentenced to 12 year's imprisonment for serious sexual offences after the judge concluded that there was an exceptional circumstance justifying him not imposing a life sentence in that the offences fell into a totally different category from the defendant's first serious offence, causing grievous bodily harm with intent.
FN1 Crime (Sentences) Act 1997, s. 2: see post, p 259C-H.

On the defendant's appeals or applications for leave to appeal against sentence, which were heard following the coming into force of the Human Rights Act 1998 [FN2], and on an application by the Attorney General for leave to refer the sentence in the fifth case to the court under section 36 of the Criminal Justice Act 1988--

FN2 Crime (Sentences) Act 1997, s. 2: see post, p 259C-H. Human Rights Act 1998, s. 3: see post, p 259B-C Sch 1, art 3: see post, p 274H Art 5: see post, p 275A-B Art 7: see post, p 273B-C.

Held, (1) that under section 2 of the 1997 Act an automatic life sentence was imposed on a defendant for a second serious offence and, whilst a condition of its imposition was that the defendant had previously been convicted of another serious offence, the defendant was not being sentenced, or having his sentence increased, for that first offence; and that, accordingly, section 2 did not contravene article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms, as scheduled to the Human Rights Act 1998, by retrospectively aggravating the penalty for a first serious offence committed before the 1997 Act came into force (post, pp 273H-274A, F-G). R v Taylor (Ronald) [1996] 2 CrAppR 64, CA considered.

(2) Granting leave to appeal as appropriate and allowing the appeals in the first and third cases, dismissing the other appeals and substituting a life sentence in the *254* fifth case, that the policy and intention of Parliament in enacting the automatic life sentence provisions in section 2 of the 1997 Act was that the public should be protected; that section 2 established that those who had committed two serious offences were a danger or risk to the public; that if, taking into account all the circumstances, a particular defendant did not pose an unacceptable risk to the public, the position was exceptional; that such an approach to the construction of "exceptional circumstances" did not contravene the prohibition on inhuman or degrading treatment or arbitrary and disproportionate punishment in articles 3 and 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms, whereas a more restrictive approach might do so; that the age of the defendant, the differing nature of the two offences or the fact that there had been a long period between them during which a defendant had not committed other offences might be relevant in considering the degree of risk a defendant posed to the public; and that, accordingly, if a defendant was a significant risk to the public a life sentence would be mandatory under section 2 since either there would be no exceptional circumstances or, despite the exceptional circumstances, the facts would justify the court imposing such a sentence (post, pp 276C-277B, 278A-B, C, E, 279B, E). R v Kelly (Edward) [2000] QB 198, CA and R v Buckland [2000] 1 WLR 1262, CA considered.

The following cases are referred to in the judgment of the court:

McIntosh v HM Advocate The Times, 31 October 2000
Quinn v France (1995) 21 EHRR 529
R v Buckland [2000] 1 WLR 1262; [2000] 1 All ER 907, CA
R v Governor of Brockhill Prison, Ex p Evans (No 2) [2000] 3 WLR 843; [2000] 4 All ER 15, HL(E)
R v Kelly (Edward) [2000] QB 198; [1999] 2 WLR 1100; [1999] 2 All ER 13, CA
R v Offen [2000] CrimLR 306, CA
R v Taylor (Ronald) [1996] 2 CrAppR 64, CA
R v Turner (Ian) The Times, 4 April 2000, CA
R v Williams [2000] CrimLR 597, CA
Taylor v United Kingdom [1998] EHRLR 90
Weeks v United Kingdom (1987) 10 EHRR 293
Welch v United Kingdom (1995) 20 EHRR 247

The following additional cases were cited in argument:
CHAPTER V

Regina v. Offen

Attorney General’s Reference (No 23 of 1997) [1998] 1 CrAppR (S) 378, CA
Attorney General’s Reference (No 4 of 1998) [1998] 2 CrAppR (S) 388, CA
Attorney General’s Reference (No 27 of 1999) [2000] 1 CrAppR (S) 237, CA

CC v United Kingdom [1999] CrimLR 228
Costello-Roberts v United Kingdom (1993) 19 EHRR 112
Hussain v United Kingdom (1996) 22 EHRR 1
Ireland v United Kingdom (1978) 2 EHRR 25
Kokkinakis v Greece (1993) 17 EHRR 397
Osman v United Kingdom (1998) 29 EHRR 245

Porter Harris v United Kingdom (Application No 18828/91) 1 July 1992, European Commission of Human Rights
R v Chapman [2000] 1 CrAppR (S) 377, CA
R v Crow (1994) 16 CrAppR (S) 409, CA
R v Director of Public Prosecutions, Ex p Keblene [2000] 2 AC 326; [1999] 3 WLR 972; [1999] 4 All ER 801, HL(E)
R v Gabbidon [1997] 2 CrAppR (S) 19, CA
R v Hercules (1980) 2 CrAppR (S) 156, CA
R v Hodgson (1967) 52 CrAppR 113, CA
R v King (1973) 57 CrAppR 696, CA
R v Mansell (1994) 15 CrAppR (S) 771, CA

*255 R v Parole Board, Ex p Bradley [1991] 1 WLR 134; [1990] 3 All ER 828, DC
R v Parole Board, Ex p Lodomez (1994) 26 BMLR 162, DC
R v Queen [1981] 3 CrAppR (S) 245, CA
R v Thomas [1996] 1 CrAppR (S) 208, CA

SP v United Kingdom(Application No 43478/98) 18 January 2000, European Commission of Human Rights

SW v United Kingdom (1995) 21 EHR 363
Smith v The Queen (1987) 40 DLR (4th) 435
State v Vries (1996) 12 BCLR 1666
Thynne v United Kingdom (1990) 13 EHRR 666
Tyrer v United Kingdom (1978) 2 EHRR 1
V v United Kingdom (1999) 30 EHR 121
Van Droogenbroeck v Belgium (1982) 4 EHRR 443
Veen v The Queen (No 2) (1988) 164 CLR 465
Wynne v United Kingdom (1994) 19 EHR 333

The following additional cases, although not cited, were referred to in the skeleton arguments:

Adamson v United Kingdom (Application No 42293/98) 26 January 1999, European Commission of Human Rights
Albert and Le Compte v Belgium (1983) 5 EHR 533
Attorney General’s Reference (No 53 of 1998) [1999] 2 CrAppR (S) 185, CA
Attorney General’s Reference (No 71 of 1999) [1999] 2 CrAppR (S) 369, CA
Belgium Linguistic Case (No 2) (1968) 1 EHR 252
Botta v Italy (1998) 26 EHR 241
Brown v Procurator Fiscal (unreported) 4 February 2000, Ct of Sess
C v Federal Republic of Germany (1986) 46 DR 176
Caballero v United Kingdom [2000] CrimLR 587
Darmalingum v The State [2000] 1 WLR 2303, PC
de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69; [1998] 3 WLR 675, PC
Herczegfalvy v Austria (1992) 15 EHRR 437
Ibbotson v United Kingdom [1999] EHRLR 218
Marleasing SA v La Comercial Internacional de Alimentación SA (Case C-106/89) [1990] ECR I-4135, ECJ
Niemietz v Germany (1992) 16 EHRR 97
Nottingham City Council v Amin [2000] 1 WLR 1071; [2000] 2 All ER 946, DC
R v Broadcasting Standards Commission, Ex p British Broadcasting Corp [2000] 3 WLR 1327; [2000] 3 All ER 989, CA
R v McKeown
R v Oakes (1986) 26 DLR (4th) 200
*R256 R v Secretary of State for the Home Department, Ex p Doody [1994] 1 AC 531; [1993] 3 WLR 154; [1993] 3 All ER 92, HL(E)
R v Wood (Stephen) [2000] 1 WLR 1687; [2000] 3 All ER 561, CA
Selmanin v France (1999) 29 EHRR 403
Soering v United Kingdom (1989) 11 EHRR 439
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Vasquez v The Queen [1994] 1 WLR 1304; [1994] 3 All ER 674, PC
Webb v Emo Air Cargo (UK) Ltd (No 2) [1995] 1 WLR 1454; [1995] 4 All ER 577, HL(E)
X v Federal Republic of Germany (1976) 6 DR 127
X v United Kingdom (1981) 4 EHRR 188

**APPEALS** against sentence

**R v Offen**

On 28 May 1999 in the Crown Court at Lewes before Judge Hayward the defendant, Matthew Offen, following his plea of guilty to robbery, was sentenced to life imprisonment on the ground that it was a second serious offence for the purposes of section 2 of the Crime (Sentences) Act 1997, the defendant having been convicted of robbery in January 1990, and that there were no exceptional circumstances which justified the judge not imposing such a sentence. On 28 October 1999, the Court of Appeal (Criminal Division) dismissed the defendant’s appeal against sentence. On 13 October 2000 the Criminal Cases Review Commission referred the sentence back to the Court of Appeal pursuant to section 9(1) of the Criminal Appeal Act 1995.

The facts are stated in the judgment of the court.

**R v McKeown**

On 11 May 2000 in the Crown Court at Durham before Judge Spittle and a jury the defendant, Darren McKeown, was convicted of causing grievous bodily harm with intent and sentenced to life imprisonment on the ground that it was a second serious offence for the purposes of section 2 of the Crime (Sentences) Act 1997, the defendant having been convicted of wounding with intent in May 1990, and that there were no exceptional circumstances which justified the judge not imposing such a sentence. He appealed against sentence with the leave of the single judge on the grounds that, since the judge had concluded that the offence merited a sentence of three year’s imprisonment, the life sentence imposed was inhuman punishment contrary to article 3 of the Convention for the Protection
The facts are stated in the judgment of the court.

*257 APPLICATIONS for leave to appeal against sentence

R v McGilliard

On 28 May 1999 in the Crown Court at Derby before Judge Appleby QC the defendant, Peter Wilson McGilliard, following his plea of guilty to wounding with intent to do grievous bodily harm, was sentenced to life imprisonment on the ground that it was a second serious offence for the purposes of section 2 of the Crime (Sentences) Act 1997, the defendant having been convicted in Scotland of culpable homicide in July 1984, and that there were no exceptional circumstances which justified the judge not imposing such a sentence. He was refused permission to appeal against sentence by the single judge and he renewed his application before the full court on the grounds, inter alia, that section 2 of the 1997 Act was incompatible with the Convention for the Protection of Human Rights and Fundamental Freedoms in that (i) the required imposition of a life sentence without regard to the individual circumstances of the offence or the offender was contrary to article 5(1)(a); and (ii) the effect of the Act was to punish defendants both for the instant offence and the earlier "serious" offence, even where that earlier offence preceded the Act, contrary to article 7(1) of the Convention.

The facts are stated in the judgment of the court.

R v Okwuegbunam

On 25 July 2000 at the Central Criminal Court before Judge Stokes QC the defendant, Kristova Okwuegbunam, following his plea of guilty to manslaughter, was sentenced to life imprisonment on the ground that it was a second serious offence for the purposes of section 2 of the Crime (Sentences) Act 1997, the defendant having been convicted of rape in 1990, and that there were no exceptional circumstances which justified the judge not imposing such a sentence. His application for leave to appeal against sentence was referred to the full court by the Registrar of Criminal Appeals.

The facts are stated in the judgment of the court.

APPLICATIONS for leave to appeal against conviction and sentence and to refer sentence pursuant to section 36 of the Criminal Justice Act 1988

R v S

On 2 March 2000 at the Central Criminal Court before Judge Capstick QC and a jury the defendant, Stephen S, was convicted of five counts of indecent assault, five counts of attempted rape, five counts of rape, one count of buggery and one count of assault occasioning actual bodily harm and was sentenced to 12 year's imprisonment. The single judge refused to grant the defendant leave to appeal against conviction and referred his application for leave to appeal against sentence to the full court, where the defendant renewed his application in respect of conviction. The Attorney General sought leave under section 36 of the Criminal Justice Act 1988 to refer the sentence to the court as an unduly lenient sentence on the ground that the judge should have imposed a sentence of life imprisonment under section 2 of the Crime (Sentences) Act 1997, the defendant having been convicted of causing grievous bodily harm with intent in November 1993, and that there were no exceptional circumstances which justified the judge not imposing such a sentence.

The facts are stated in the judgment of the court.

Representation
Edward Fitzgerald QC with Phillipa Kaufmann for Offen and with Daniel Friedman for Okwuegbunam.
Joel Bennathan (assigned by the Registrar of Criminal Appeals) for McGilliard.
Christopher Knox (assigned by the Registrar of Criminal Appeals) for McKeown.
Alastair Edie for S.
David Perry for the Crown.

Cur adv vult

LORD WOOLF CJ

9 November. handed down the following judgment of the court.

1 This judgment relates to five appeals. In each case where leave is required to appeal against sentence, we give leave. The five appeals all involve section 2 of the Crime (Sentences) Act 1997. (This is now section 109 of the Powers of Criminal Courts (Sentencing) Act 2000. In this judgment we will refer to section 2 in the 1997 Act.) The application of section 2 has already given rise to a number of decisions by this court. They illustrate the problems which can arise in practice in applying statutory provisions which require the courts to impose an automatic life sentence on certain offenders.

"Too often in the past, those who have shown a propensity to commit serious violent or sex offences have served their sentences and been released only to offend again. In many such cases, the danger of releasing the offender has been plain for all to see--but nothing could be done, because once the offender has completed the sentence imposed, he or she has to be released. Too often, victims have paid the price when the offender has repeated the same offences. The Government is determined that the public should receive proper protection from persistent violent or sex offenders. That means requiring the courts to impose an automatic indeterminate sentence, and releasing the offender if and only if it is safe to do so."

3 In R v Buckland [2000] 1 WLR 1262, 1268 Lord Bingham of Cornhill CJ described the rationale of section 2 in these terms:
"The section is founded on an assumption that those who have been convicted of two qualifying serious offences present such a serious and continuing danger to the safety of the public that they should be liable to indefinite incarceration and, if released, should be liable indefinitely to recall to prison. In any case where, on all the evidence, it appears that such a danger does or may exist, it is hard to see how the court can consider itself justified in not imposing the statutory penalty, even if exceptional circumstances are found to exist. But if exceptional circumstances are found, and the evidence suggests that an offender does not present a serious and continuing danger to the safety of the public, the court may be justified in imposing a lesser penalty"

4 The reason why we have heard these appeals together is because in each case it is contended that either the interpretation of section 2 of the 1997 Act is affected by section 3 of the Human Rights Act 1998, or that section 2 is incompatible with a Convention right so that the defendants are entitled to a declaration of incompatibility. The impact of the 1998 Act on the interpretation of legislation arises under section 3 of the Act, which provides: "(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights"

The legislation

5 Section 2 of the 1997 Act, so far as relevant, is in the following terms:
(1) This section applies where
(a) a person is convicted of a serious offence committed after the commencement of this section; and
(b) at the time when that offence was committed, he was 18 or over and had been convicted in any part of the United Kingdom of another serious offence.

(2) The court shall impose a life sentence, that is to say
(a) where the person is 21 or over, a sentence of imprisonment for life;
(b) where he is under 21, a sentence of custody for life under section 8(2) of the Criminal Justice Act 1982 ('the 1982 Act'),

unless the court is of the opinion that there are exceptional circumstances relating to either of the offences or to the offender which justify its not doing so.

(3) Where the court does not impose a life sentence, it shall state in open court that it is of that opinion and what the exceptional circumstances are.

(4) An offence the sentence for which is imposed under subsection (2) above shall not be regarded as an offence the sentence for which is fixed by law.

(5) An offence committed in England and Wales is a serious offence for the purposes of this section if it is any of the following, namely
(a) an attempt to commit murder, a conspiracy to commit murder or an incitement to murder;
(b) an offence under section 4 of the Offences against the Person Act 1861 (soliciting murder);
(c) manslaughter;
(d) an offence under section 18 of the Offences against the Person Act 1861 (wounding, or causing grievous bodily harm, with intent);
(e) rape or an attempt to commit rape;
(f) an offence under section 5 of the Sexual Offences Act 1956 (intercourse with a girl under 13);
(g) an offence under section 16 (possession of a firearm with intent to injure), section 17 (use of a firearm to resist arrest) or section 18 (carrying a firearm with criminal intent) of the Firearms Act 1968; and
(h) robbery where, at some time during the commission of the offence, the offender had in his possession a firearm or imitation firearm within the meaning of that Act.

6 *260 The following features of the section will be noted. (i) It refers to two offences having been committed by the offender. (ii) It is only the second offence ("the trigger offence") which has to have been committed after the commencement of the section. The earlier offence may have been committed at any time. (iii) When the second offence is committed the offender is required to be over 18 but there is no age requirement in relation to the first offence. (iv) The proviso of "exceptional circumstances" applies to both offences. The "exceptional circumstances" can relate either to the offences or to the offender but what constitutes exceptional circumstances is not otherwise defined by the section. (v) All offences
identified as serious offences are offences for which life imprisonment could be imposed quite apart from section 2.

The facts of the different appeals

[Paragraphs 7 to 68, outlining the detailed facts of the cases on appeal, have been omitted for the sake of brevity]

The law

69 The leading authority as to the interpretation of section 2 prior to the coming into force of the 1998 Act is the decision of this court in R v Kelly (Edward) [2000] QB 198. In that case Lord Bingham of Cornhill CJ gave a construction of "exceptional" which has been followed in later cases. He said, at p 208:

"We must construe 'exceptional' as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered"

70 No criticism of "exceptional" was made by any of the counsel appearing in the appeals, and we consider that the issues which arise on the appeals do not cast any reflection upon its appropriateness now that the European Convention on Human Rights is part of our law. We therefore gratefully adopt it.

71 Lord Bingham CJ then went on, at p 208, to explain that:

"To relieve the court of its duty to impose a life sentence under section 2(2), however, circumstances must not only be exceptional but such as, in the opinion of the court, justify it in not imposing a life sentence, and in forming that opinion the court must have regard to the purpose of Parliament in enacting the section as derived from the Act itself and the White Paper..."

72 Lord Bingham CJ did not apply his reasoning, that it is necessary to have regard to the purposes of Parliament when considering whether there are exceptional circumstances. He applied it to the subsequent question of whether, assuming there are exceptional circumstances, they justify not imposing a life sentence. This has in some of the cases where section 2 has been applied accentuated the difficulties created by the section. We draw attention to this since, when deciding whether a situation is exceptional, we regard it as being of the greatest importance to have in mind the policy already identified which reflects the intention of Parliament. That is the rationale spelt out by Lord Bingham CJ in Buckland [2000] 1 WLR 1262.

73 In Kelly [2000] QB 198, Lord Bingham CJ, having identified the approach to section 2, went on to consider features contended in that case to establish exceptional circumstances. The first was the youth of the defendant when committing the first "serious offence". That was not regarded as being unusual in that case, because the offender was then already very experienced and, as Lord Bingham CJ said, at p 209,

"the unhappy fact is that many very serious crimes are committed by very youthful defendants".

It was also stated that the time which intervened between the offences could also not be regarded as exceptional. Attention was drawn to the fact that Parliament had not required the two qualifying offences to be committed within a specified period. Again, it was suggested, at p 209, that the fact that the "serious offences" were of different kinds was not exceptional because:
"the section lumps all these offences together and there is nothing to suggest that the imposition of a life sentence should depend on whether the offender has repeated the same 'serious offence' or committed another. It is scarcely unusual for a defendant convicted of robbery involving the use of firearms on one occasion to be convicted of causing grievous bodily harm with intent on another."

Finally, Lord Bingham CJ stated, at p 209, that the court could not "regard the defendant as a man who, on the evidence available when he was sentenced, presented no continuing threat or danger to the public".

This last statement of Lord Bingham CJ is important because it seems to us, for reasons we will explain later, to go to the heart of the issue with which the court in that case was faced.

Later in his judgment, Lord Bingham CJ made two further points to which we should draw attention. First of all, he made it clear that that was a case which apart from section 2 would not have resulted in a life sentence. The other point was in relation to the argument which was advanced relying on articles 3 and 5 of the European Convention. Lord Bingham CJ declined to address that argument because at that time the Convention could only be used as an aid to construction when an ambiguity existed and the court thought there was no ambiguity as to the interpretation of section 2. However, Lord Bingham CJ added, at p 210:

"In any event, as already pointed out, we do not find it possible to regard the defendant as a man who is shown not to represent a continuing danger to the public"

The approach adopted as to the application of section 2 in Kelly has naturally been followed in the subsequent cases. It has however, been subject to academic criticism as an unduly narrow approach to "exceptional circumstances". In view of that criticism, it is convenient to refer next to the decision of Buckland [2000] 1 WLR 1262, from which we have already made a citation. The facts of Buckland were very similar to the facts in the appeal of Offen which is before us. Lord Bingham CJ described it, at p 1265, as "an almost farcical caricature of a professional bank hold-up. Although obviously distressing to the staff of the bank..."

In deciding whether or not the court was required to impose a life sentence, the court, as Lord Bingham CJ made clear, had looked at various reports and then come to a judgment that: (i) these were exceptional circumstances and (ii) these circumstances justified not imposing a life sentence.

Lord Bingham CJ stated, at p 1269, that:

"on all the evidence, it is safe to conclude that the defendant does not present a serious and continuing danger to the public such as could justify the imposition of a life sentence..."

Buckland was regarded by Mr Perry, who appeared on behalf of the Crown and for whose help we are most grateful, as representing a more flexible approach than had been adopted in the earlier authorities, and he accepted that it reflected the approach that should be adopted in the future if his submissions were accepted by this court. He also conceded that if the decision in Buckland had been available when Offen came before the Court of Appeal on the original appeal against sentence [2000] CrimLR 306, the Court of Appeal would probably have taken a different view from that which they did.

Before leaving Buckland, and turning to the decision in Offen, we should point out that we regard it as a striking feature of the reasoning in Buckland, as in Kelly [2000] QB 198, that the court regarded the rationale of the section as being relevant when the court had already come to its conclusion that there are exceptional circumstances and not as to whether the exceptional circumstances exist. We would suggest that quite apart from the impact of the Human Rights Act 1998, the rationale of the section should be highly relevant
in deciding whether or not exceptional circumstances exist. The question of whether circumstances are appropriately regarded as exceptional must surely be influenced by the context in which the question is being asked. The policy and intention of *Parliament was to protect the public against a person who had committed two serious offences. It therefore can be assumed the section was not intended to apply to someone in relation to whom it was established there would be no need for protection in the future. In other words, if the facts showed the statutory assumption was misplaced, then this, in the statutory context, was not the normal situation and in consequence, for the purposes of the section, the position was exceptional. The time that elapsed between the two serious offences could, but would not necessarily, reflect on whether, after the second serious offence was committed, there was any danger against which the public would need protection. The same is true of two differing offences, and the age of the offender. These are all circumstances which could give rise to the conclusion that what could be normal and not exceptional in a different context was exceptional in this context. If this approach is not adopted, then in the case of the serious offences listed in the section, the gravity of which can vary very greatly, the approach to exceptional circumstances could be unduly restrictive. This is illustrated by the extensive range of situations which can constitute the offence of manslaughter.

80 Turning to the decision of this court on the initial appeal by Offen, we find this very point being made by the court as a justification for saying that there are no exceptional circumstances. Jowitt J, when giving the judgment of the court, indicated that robberies vary greatly in their seriousness. He then went on to say that it is clear that a robbery cannot be regarded as exceptional merely because it is at the lower end of the scale of gravity. He then turned to Offen himself and considered his characteristics without considering whether Offen would give rise to any danger in the future. We suggest that, if the policy behind the section had been taken into account, the approach would have been different.

81 In a case which again has a resemblance to Offen, R v Williams [2000] CrimLR 597, the court were prepared in the light of Buckland [2000] 1 WLR 1262 to regard the circumstances of the offence as being exceptional, however, having considered the presentence report and the 47 previous convictions of the defendant, the court decided that the defendant did represent a serious danger to the safety of the public and in those circumstances a life sentence under section 2 was justified.

82 The other case to which it is necessary to refer before turning to the 1998 Act, is R v Turner (Ian) The Times, 4 April 2000. That was a case where the defendant was convicted of an offence under section 18 of the Offences against the Person Act 1861 as a consequence of his being involved in a brawl during the course of which he lost his temper and continued to strike the victim after he was on the ground. This was a serious offence for the purposes of section 2 of the 1997 Act. Unfortunately, 22 years before, the offender had also been convicted of manslaughter and sentenced to three year’s imprisonment. During the intervening period, he had only been convicted of one motoring offence. This court came to the conclusion that section 2 has the consequence that a judge can be compelled to pass a sentence of life imprisonment notwithstanding the fact that it offends his sense of justice. The court therefore loyalty gave effect to the earlier authorities and decided that they had no alternative but to uphold the sentence of life imprisonment under section 2. This decision underlines why, notwithstanding the more flexible approach of this court in *Buckland [2000] 1 WLR 1262 *endorsed by Mr Perry, each of the defendants strongly relies upon the 1998 Act.

*The Human Rights Act 1998*

83 The defendants contend that, as previously applied, section 2 of the 1997 Act is incompatible with articles 3, 5, 7 and 8 of the Convention.

*Article 7*

84 As the argument as to article 7 is discrete, it is convenient to start with that article. It is article 7(1) which is relevant. It provides:
"No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

85 The arguments advanced by Mr Fitzgerald on behalf of Offen and Okwuegbunam and advanced by Mr Bennathan on behalf of McGilliard differed. The difference, however, is as to whether it is possible to remedy the breach of article 7 which they allege section 2 of the 1997 Act involves by a process of interpretation relying on section 3 of the 1998 Act, or whether it is necessary for the court to make a declaration of incompatibility under section 4 of the 1998 Act. Fortunately, it is not necessary to resolve this issue, because we do not consider that section 2 of the 1997 Act involves a contravention of article 7.

86 Mr Fitzgerald advances the argument, which is adopted by all defendants, that there is a contravention. He submits that the argument has two aspects. Both involve changing the consequences of a conviction of the first serious offence after the date of the offence and after the sentence for which it was imposed. It is submitted that after a punishment for the first serious offence had been imposed, the subsequent coming into force of section 2 increased the penalty for the initial offence since the offender then became liable, if he committed a further serious offence, to be automatically sentenced to life imprisonment. It is also submitted that section 2 itself increased the penalty for the first serious offence since on conviction of the second serious offence a life sentence would be imposed, in reality, in respect of both offences.

87 Mr Fitzgerald’s argument was well illustrated by the practice in Association Football of sending off a player who is shown two yellow cards. If the rule which brings this about was to be imposed after one yellow card had been shown this would give greater significance to the first yellow card than was the case when it was shown. It could adversely affect a player since if a player knew he would be sent off if he had two yellow cards, he would make greater efforts to avoid being shown even the first yellow card.

88 This attractive argument depends upon treating the life sentence as being imposed at least in part for both offences. This is not, however, the manner in which, in our judgment, section 2 works. Section 2 imposes the penalty of the automatic life sentence for the second offence alone. The imposition of the automatic life sentence is, however, subject to certain *274 conditions. Those are that the offender was 18 or over and that he had been previously convicted of another serious offence. The language of section 2(1) makes this clear. The sentence is not being imposed in relation to the earlier offence. The position is similar to that considered by this court in R v Taylor (Ronald) [1996] 2 CrAppR 64 and by the European Commission of Human Rights in Taylor v United Kingdom [1998] EHRLR 90 which arose out of the changes in making confiscation orders introduced by the Drug Trafficking Offences Act 1986.

89 Although the 1986 Act allowed the court to make a confiscation order in respect of “benefits” which accrued before the 1986 Act came into force, the offence which triggered the confiscation order was committed after the 1986 Act came into force. That decision is not inconsistent with Welch v United Kingdom (1995) 20 EHRR 247, 262, para 28. The distinction between Taylor and Welch is that in Welch the confiscation order had been made in relation to a criminal offence committed before the relevant legislation, the Drug Trafficking Offences Act 1986, came into force. In Taylor the triggering offence was committed after the Act came into force. Accordingly in Taylor it was in order, as a matter of domestic law, to make a confiscation order to recover benefits from drug trafficking which accrued to Taylor before the Act came into force. It was the date of the offence which was critical. It was when and because he committed the trigger offence that he became liable to have his earlier benefits from drug trafficking confiscated. Although Taylor was decided by this court under domestic law, article 7 was examined and the reasoning was endorsed by the European Commission, which found Taylor's application manifestly ill-founded. Mr Bennathan, on behalf of Mr McGilliard, and Mr Edie, in his submissions on behalf of S, contend that Taylor is distinguishable from the position here. Clearly, the statutory provisions differ but the
reasoning is the same. Mr Edie also refers to the recent decision of the Inner House of the Court of Session in Scotland in McIntosh v HM Advocate The Times, 31 October 2000. However, the issue in that case turned on article 6(2) and not article 7 and we do not find it assists here.

90 The serious offences are, as we have already pointed out, all sentences in relation to which the court can pass a life sentence quite apart from section 2 of the 1997 Act. Before imposing a discretionary life sentence, the court would pay the greatest regard to the previous record of the offender. The fact that the previous record influenced the court into imposing a life sentence would not mean that the offender was being sentenced or having his sentence increased for the earlier offences. Here, the first offence and the penalty imposed for it remain the same after the coming into force of section 2 of the 1997 Act; it is the penalty for the trigger offence which section 2 changes.

Articles 3 and 5

91 The relevant provisions of article 3 and article 5 are as follows:

"Article 3
Prohibition of torture

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

"Article 5
Right to liberty and security

1. "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court...

4. "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

92 In approaching these articles, it is important to recognise that the 1998 Act is a constitutional instrument introducing into domestic law the relevant articles of the Convention. The consequence of section 3 is that legislation which affects human rights is required to be construed in a manner which conforms with the Convention wherever this is possible. In support of his contention that there is no need for a change in the construction of section 2 of the 1997 Act, Mr Perry relies upon the more flexible approach adopted to section 2 in the more recent authorities, and in Buckland [2000] 1 WLR 1262 in particular. In addition, he refers to the consequences of the imposition of an automatic life sentence. He reminds the court of the present practice as to the setting of a tariff and the independent review by the Parole Board which follows the expiry of the tariff. If the Parole Board are of the view that a prisoner should be released, the Home Secretary must release him. Although this may not have been the position in the past, the present arrangements for the review of those subject to an automatic or discretionary life sentence, he submits, are now Convention compliant. The aim of section 2 is not to increase the time offenders spend in prison as a punishment for the offence they have committed, but to provide for an assessment to be made to see whether the offender poses a real risk to the public, in which event his release is deferred. He argues that this regime is not one which contravenes either article 3 or article 5. He submits that there is no question of the automatic life sentence amounting to torture or inhuman or degrading treatment or punishment which would contravene article 3.

93 As to article 5, Mr Perry accepts that the overall purpose of the article is to ensure that no one is deprived of his liberty in an "arbitrary fashion": Quinn v France (1995) 21 EHRR 529, 548-549, para 42. He relies in particular on Weeks v United Kingdom (1987) 10 EHRR 293. The significance of that decision was that the court considered the defendant’s renewed detention after being released on licence was lawful and that the rehabilitation of
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offenders was a legitimate aim. (This country fell foul of article 5(4) because of the absence at that time of any procedure by which the lawfulness of the offender's detention could be determined by a properly constituted independent board. That defect has since been remedied.)

94 Not surprisingly, Mr Fitzgerald takes a very different view of the relationship between section 2 of the 1997 Act and articles 3 and 5. He stresses that life imprisonment is the most serious punishment that the courts in this jurisdiction can impose. It means that although a prisoner may be released, he still remains liable to be recalled. That liability is a permanent *276 one. In addition, he contrasts the position of a life sentence prisoner with that of a prisoner sentenced to a determinate sentence. When a determinate sentence has been served, release is automatic. In the case of a life sentence prisoner, he will not be released after the end of the tariff period unless the Parole Board can be satisfied that he does not constitute a risk to the public for the future. This is the very object section 2 was designed to achieve in relation to those who would not be sentenced to life imprisonment before that section came into force. It is clear that as a result of section 2, offenders are now being sentenced to life imprisonment when there is no objective justification for that sentence. Such a result can be categorised as being arbitrary and not proportionate.

95 In his speech in R v Governor of Brockhill Prison, Ex p Evans (No 2) [2000] 3 WLR 843, 858, Lord Hope of Craighead considered the relationship between article 5 of the Convention and our domestic law. In the course of doing so, he recognised that the question would arise as to whether, "assuming that the detention is lawful under domestic law, it is nevertheless open to criticism on the ground that it is arbitrary because, for example, it was resorted to in bad faith or was not proportionate". Here no question of bad faith arises. In addition, we recognise that there have been, and will be, cases where section 2 of the 1997 Act has, and will, operate in a proportionate manner. However, as the section has hitherto been interpreted, it can clearly operate in a disproportionate manner. It is easy to find examples of situations where two offences could be committed which were categorised as serious by the section but where it would be wholly disproportionate to impose a life sentence to protect the public. Whenever a person is convicted of an offence, there is always some risk that he or she may offend again. Equally, there are a significant number of cases in which two serious offences will have been committed where the risk is not of a degree which can justify a life sentence. We refer again to the very wide span of manslaughter, which is a serious offence within the Act. An unjustified push can result in someone falling, hitting his head and suffering fatal injuries. The offence is manslaughter. The offender may have committed another serious offence when a young man. A life sentence in such circumstances may well be arbitrary and disproportionate and contravene article 5. It could also be a punishment which contravenes article 3.

96 The problem arises because of the restrictive approach which has so far been adopted to the interpretation of exceptional circumstances in section 2. If exceptional circumstances are construed in a manner which accords with the policy of Parliament in passing section 2, the problem disappears.

97 Section 2 establishes a norm. The norm is that those who commit two serious offences are a danger or risk to the public. If in fact, taking into account all the circumstances relating to a particular offender, he does not create an unacceptable risk to the public, he is an exception to this norm. If the offences are of a different kind, or if there is a long period which elapses between the offences during which the offender has not committed other offences, that may be a very relevant indicator as to the degree of risk to the public that he constitutes. Construing section 2 in accordance with the duty imposed upon us by section 3 of the 1998 Act, and taking into account the rationale of the section as identified by Lord Bingham CJ gives content to *277 exceptional circumstances. In our judgment, section 2 of the 1997 Act will not contravene Convention rights if courts apply the section so that it does not result in offenders being sentenced to life imprisonment when they do not constitute a significant risk to the public. Whether there is significant risk will depend on the evidence which is before the court. If the offender is a significant risk, the court can impose a life sentence under section 2 without contravening the Convention. Either there will be no
exceptional circumstances, or despite the exceptional circumstances the facts will justify imposing a life sentence.

98 Under section 2 it will be part of the responsibility of judges to assess the risk to the public that offenders constitute. In many cases the degree of risk that an offender constitutes will be established by his record, with or without the assistance of assessments made in reports which are available to the court. If a court needs further assistance, they can call for it. The courts have traditionally had to make a similar assessment when deciding whether a discretionary life sentence should be imposed. There should be no undue difficulty in making a similar assessment when considering whether the court is required to impose an automatic life sentence, although the task will not be straightforward, because of the lack of information as to the first serious offence which will sometimes exist because of the passage of time.

99 This does not mean that we are approaching the passing of an automatic life sentence as though it is no different from the imposition of a discretionary life sentence. Notwithstanding the interpretation resulting from the application of section 3(1) of the 1998 Act suggested, section 2 of the 1997 Act will still give effect to the intention of Parliament. It will do so, however, in a more just, less arbitrary and more proportionate manner. Section 2 will still mean that a judge is obliged to pass a life sentence in accordance with its terms unless, in all the circumstances, the offender poses no significant risk to the public. There is no such obligation in cases where section 2 does not apply. In addition, if the judge decides not to impose a life sentence under section 2, he will have to give reasons as required by section 2(3). Furthermore, the issue of dangerousness will have to be addressed in every case and a decision made as to whether or not to impose a life sentence.

100 The objective of the legislature, identified by Lord Bingham CJ, will be achieved, because it will be mandatory to impose a life sentence in situations where the offender constitutes a significant risk to the public. Section 2 of the 1997 Act therefore provides a good example of how the 1998 Act can have a beneficial effect on the administration of justice, without defeating the policy which Parliament was seeking to implement.

101 In view of our conclusions as to the impact of articles 3 and 5, it is not necessary to consider article 8.

Conclusions

Offen

103 In order to decide whether this is a case where exceptional circumstances apply for the purpose of section 2, we have considered whether the material supports the existence of a finding of significant risk to the public. Apart from the two relevant convictions, the defendant has two convictions of theft recorded against him in 1990. The pre-sentence report and the medical reports do not support such a finding. We conclude that the defendant is not to be regarded as presenting a significant risk to the public. This is a case where, in our judgement, exceptional circumstances do exist and a life sentence is inappropriate. We therefore allow this appeal, set aside the life sentence and substitute for it a determinate sentence of three year's imprisonment.

McKeown

104 In our judgment and, taking into account the findings of the judge, the circumstances of this offence, although a serious offence, are not such as to warrant a substantial prison sentence. The determinate sentence fixed by the judge was appropriate. Further there is here no material from which it could be concluded that the defendant presents a significant risk to the public. In this case, therefore, we conclude that exceptional circumstances exist and that the case does not fall within the rationale of section 2. We allow the appeal, set aside the life sentence and substitute a sentence of three year's imprisonment.
In our judgment, the matters set out properly lead us to conclude: (i) that on 4 December 1998 the defendant committed a grave offence sufficient to warrant a substantial prison sentence; (ii) that the defendant presents a serious and continuing danger to the public.

The defendant's antecedent record for unlawful violence and the circumstances of the present offence, the pre-sentence reports and the medical reports clearly indicate that there are here no exceptional circumstances which would permit a court not to pass a life sentence under section 2. We confirm the notional determinate sentence of seven years as entirely appropriate for the offence which the defendant admitted and dismiss the appeal.

No finding as to dangerousness was made by the sentencing judge. We have considered the question for ourselves, in order to decide whether exceptional circumstances exist in this case. Our assessment has been made on the basis of the antecedents and the circumstances of the offences themselves, to the extent that they are known. There is no pre-sentence or medical report to assist us.

As regards the trigger offence of manslaughter, we take account of the fact that death resulted unexpectedly from two blows inflicted without an intention to cause serious harm. On the other hand, for the reasons given by the judge in his sentencing remarks, this was an offence of some gravity. In our view, the notional determinate sentence of six years was generous to the defendant and the figure could have been higher. The defendant had received a substantial custodial sentence in 1990 for an offence of violence on the same victim, though account must of course be taken of the lapse of time and the absence of any further offences of violence during the intervening period. As to the offence of rape for which he received a *279 sentence of five year's imprisonment in 1990, we bear in mind what the defendant says about the circumstances of the offence, as communicated to us in oral and written submissions on his behalf. We give him the benefit of the doubt on those matters, since the material now available does not disclose whether his account was accepted at the time or not. The fact remains that it was a very serious offence committed against a young girl.

We have not found this an easy case to decide. It is close to the borderline. Taking everything into account, however, we have come to the conclusion that the defendant constitutes a significant risk to the public. The case therefore falls within the rationale of section 2, exceptional circumstances do not exist, and a life sentence was rightly imposed. Accordingly, we dismiss the appeal itself.

The judge was, in our view, wrong to treat the difference in type between the earlier section 18 of the 1861 Act offence and the new sexual offences as amounting to exceptional circumstances. That difference is a relevant consideration but is not sufficient to justify such a conclusion. We have considered whether exceptional circumstances exist in this case in the light of the principles laid down in this judgment. There was no finding by the judge on the question of dangerousness. The matter was not covered by any reports before the court. In our judgment, however, the long history of offending, including numerous offences of violence, together with the detailed circumstances of the sexual offences and violence towards the offender's own daughters (in relation to whom he showed no remorse in his stance at trial), warrants the conclusion that he does pose a significant risk to the public. This case falls within the rationale of section 2 of the 1997 Act. We hold that there are no exceptional circumstances. The Attorney General's reference succeeds and a life sentence under section 2 will be substituted for the determinate sentence of 12 years.

It follows that the renewed application to appeal against sentence fails, though the points of substance raised in it are considered below in the context of tariff.
We must also specify a period for the purposes of section 28 of the 1997 Act. We take as our starting point a notional determinate sentence of 12 years, corresponding to the sentence passed by the judge below. Mr Edie submitted that 12 years was manifestly excessive and drew our attention to a number of authorities in support of that submission. We are satisfied, however, that 12 years was an entirely appropriate sentence for these terrible offences against the offender's own daughters. In specifying the period under section 28, we make an appropriate deduction from that notional determinate sentence and a further reduction to take account of the fact that the offender spent 11 months and 11 days on remand in custody before sentence was passed. Taking everything into account, we specify a period of 5 1/2 years to commence from the date the judge passed sentence.

Representation

Solicitors: Moss & Co; Bindman & Partners; Tyndallwoods, Birmingham; Crown Prosecution Service,

Orders accordingly. Certificate under section 33(2) of the Criminal Appeal Act 1968 in the cases of Okwuegbunam, McGilliard and S that a point of law of general public importance was involved in the decision, namely: "Whether in accordance with article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms and section 3 of the Human Rights Act 1998, section 2(1)(b) of the Crime (Sentences)Act 1997 must be read to mean 'at the time when that offence was committed, he was 18 or over and had been convicted after the date on which this section came into force, in any part of the United Kingdom of another serious offence'. In other words, whether it is necessary to read into the section the phrase 'after the date on which this section came into force' in order to prevent a retrospective aggravation of the penalty that was applicable for the original offence at the time it was committed."

Permission to appeal refused.

J B S
(c) Incorporated Council of Law Reporting For England & Wales [2001] 1 W.L.R. 253
DEVELOPMENT OF CASE LAW IN THE UNITED STATES

The purpose of this section of the manual is to demonstrate how areas of substantive law in the United States have developed through case law. We have selected five (5) areas of U.S. jurisprudence to evaluate including: (1) civil procedure and specifically jurisdiction in U.S. courts; (2) criminal procedure and specifically the Fifth Amendment of the U.S. Constitution and a person’s freedom against self-incrimination; (3) criminal procedure and specifically the limits to warrantless search and seizure; (4) First Amendment of the U.S. Constitution and freedom of speech and specifically defamation; and (5) First Amendment of the U.S. Constitution and freedom of assembly.

To demonstrate the development of law through these cases, you will read a summary of the leading case in the particular area of law. Then, through summaries of subsequent cases, you will see how courts followed the leading case, and either narrowed or broadened the law depending on the facts presented, changes in the law, and external considerations such as public policy and societal change.

1. Civil Procedure and Jurisdiction in U.S. Courts: International Shoe

The purpose of this section is to demonstrate the evolution of case law on civil procedure jurisprudence in the United States and specifically personal jurisdiction beginning with International Shoe and ending with Zippo. International Shoe was the principal case by the U.S. Supreme Court on personal jurisdiction where the Court was forced to consider a court’s power to compel a litigant to answer a complaint in a foreign jurisdiction. In International Shoe and in subsequent decisions, the Court considered non-legal factors such as the changes in society, technology, and considerations of fairness.

According to the common jurisdictional notions of the day set by the 19th century U.S. precedent of Pennoyer v. Neff, the jurisdiction a court could exercise over a person was based entirely on notions of territoriality. Under these jurisdictional restraints, for example, a New Jersey plaintiff could never successfully bring suit against a South Dakota corporation unless that corporation had a designated agent to receive service of process in the U.S. State of New Jersey.

In a break with this outdated standard, the International Shoe case established that as the nature of commerce and transportation changes, so too must the nature of civil procedure and jurisdiction in the United States. For example, jurisdiction could no longer be tied down to territorial restraints. Following U.S. Constitution 14th Amendment Due Process requirements, the U.S. Supreme Court adopted a new standard based on proving minimum contacts with the forum state.

In World-Wide Volkswagen, the next principal case to address personal jurisdiction, the U.S. Supreme Court noted that limits imposed on State jurisdiction by the 14th Amendment Due Process Clause in its role as a guarantor against inconvenient litigation, had
been substantially relaxed over the years as the volume of interstate commerce continued to increase and technology continued to make out-of-state litigation more convenient for defendants. Therefore, the Court stretched the minimum contacts standard of *International Shoe* to consider whether a defendant should reasonably expect to be haled into that particular court.

Notably, Justice Brennan, in his dissent, considered less the contacts between the forum and defendant, and more the strength of the forum State’s interest in the case, as well as whether there would actually be any inconvenience to the defendant.

Relying on this very reasoning, the U.S. Supreme Court in *Burger King*, the next principal case to follow *World-Wide Volkswagen* devised a test to measure whether contacts established were sufficient for the so-called purposeful availment of a forum State’s laws and protection.

Following *Burger King*, *Burnham* reemphasized the role physical presence by the defendant within the jurisdiction plays in determining the proper exercise of jurisdiction.

Finally, *Zippo* explored the possibility of the Internet for establishing the contacts required for a court’s expanding exercise of jurisdiction over a defendant. This decision, especially when considered with *International Shoe* and the others, demonstrates the non-legal considerations that often factor into the Court’s decisions.
INTERNATIONAL SHOE CO. v. STATE OF WASHINGTON
326 U.S. 310
December 3, 1945

Facts: International Shoe Co. was a Delaware corporation, with its principal place of business in St. Louis, Missouri. It was engaged in the manufacture and sale of shoes. It maintained offices in several States but not in Washington. International Shoe made no contracts for sale or purchase of merchandise in Washington. It did, however, employ salesmen directly under the control of the St. Louis main office, who lived in and conducted their business primarily in Washington. Orders generated by the salesmen were filled outside of Washington but these orders were shipped directly to Washington purchasers.

Issue: The question before the U.S. Supreme Court was whether, within the limitation of the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution, International Shoe had by its activities in the State of Washington, rendered itself amenable to proceedings in the courts of that State to recover unpaid contributions to the state unemployment compensation fund exacted by Washington State statutes.

Analysis: This case and the Court’s analysis rested on how the Court defined the term “present” within a court’s jurisdiction. International Shoe Co. argued that even though it employed salesmen in the State of Washington, the company itself was not present within the State. The company further argued that under the old precedent of Pennoyer v. Neff, jurisdiction of courts to render judgment on a person was grounded in territorial jurisdiction, the Washington court should not find jurisdiction over International Shoe Co., because it was not located in the State of Washington. The State argued that the company’s decision to hire employees in Washington and to sell shoes to Washington citizens was sufficient contact with the State to justify jurisdiction.

The court rejected the company’s line of reasoning based on Pennoyer v. Neff, a 19th century U.S. case, and in so doing modernized its case law. In particular, the Court recognized that as means of transportation between States became cheaper due to the automobile and airplane and thus expanded, so must the concept of “presence” within a jurisdiction.

Accordingly, the court stated that a defendant must have certain “minimum contacts” with the jurisdiction such that the exercise of jurisdiction does not offend “traditional notions of fair play and substantial justice.”
The court further stated that the quality and the nature of the defendant’s activities within the forum State, paired with orderly administration of the laws, which was the purpose of the Due Process Clause, determined whether due process concerns were adequately addressed. In other words, the analysis of activities cannot be simply mechanical or quantitative. As the Court stated:

The test is not merely … whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less.

Due process does not contemplate that a state may make a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations. If, however, a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits of the laws of that state. According to the Court:

Exercise of such privileges may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.

The court concluded that the activities of International Shoe Co. within the State of Washington were “systematic and continuous” during the years in question, which resulted in a large volume of interstate business. The defendant received benefits and protections of Washington State laws. These operations established sufficient contacts with the forum State to make exercising of jurisdiction reasonable and just according to “traditional notions of fair play and substantial justice.”
WORLD-WIDE VOLKSWAGEN CORPORATION v. WOODSON
444 U.S. 286
January 21, 1980

Facts: World-Wide Volkswagen (WWVW) is a company incorporated in the U.S. State of New York, whose principal place of business is New York, and from whom Harry and Kay Robinson purchased a new Audi automobile. Subsequently, the Robinsons decided to move to the U.S. State of Arizona, and on the way were involved in an automotive accident in the U.S. State of Oklahoma while driving their new Audi. The Robinsons were severely burned and brought a products-liability action in Oklahoma district court against WWVW. WWVW did not conduct business in Oklahoma, did not ship or sell any products to or in that State, had no agent to receive service of process there, and did not purchase any advertisements in any media calculated to reach the State of Oklahoma.

Issue: The issue before the U.S. Supreme Court was whether, consistent with the Due Process Clause of the 14th Amendment of the U.S. Constitution, an Oklahoma court may exercise personal jurisdiction over a nonresident automobile retailer and its wholesale distributor in a products-liability action, when the company’s only connection with Oklahoma is the fact that an automobile sold in New York to New York residents became involved in an accident in Oklahoma.

Analysis: The U.S. Supreme Court began its discussion from International Shoe, where the Court held that a state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist “minimum contacts” between the defendant and the forum State. The Court revisited the International Shoe holding to ensure that it was still lawful and valid. The Court concluded that the “minimum contacts” test established in International Shoe still comported with due process concerns, not only by protecting the defendant against the burdens of litigating in a distant or inconvenient forum, but also by ensuring that States, via their courts, do not reach out beyond the limits imposed on them by a federal system.

Next, the court reviewed how this standard from International Shoe had evolved in the years since International Shoe. Implicit in International Shoe’s emphasis on reasonableness is the understanding that the burden on the defendant, while a primary concern, will also be considered in light of other factors, including the forum State’s interest in adjudicating the dispute (see McGee v. International Life Ins. Co., 355 U.S. 220 (1957)); the plaintiff’s interest in obtaining convenient and effective relief; the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and the shared interest of several States in furthering fundamental substantive social policies (see Kulko v. California Superior Court, 436 U.S. 84 (1978)).
The court also noted that limits imposed on State jurisdiction by the 14th Amendment Due Process Clause, in its role as a guarantor against inconvenient litigation, have been substantially relaxed over the years. The court attributed this trend to a fundamental transformation in the U.S. economy. The Court stated:

As technological progress has increased the flow of commerce between the States, and the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome.
In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of Pennoyer to the flexible standard of International Shoe. But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective states.

Thus, the Court stated, even if the defendant would not suffer adversely from being forced to litigate in another state, and the forum State maintains a strong interest and is the most convenient locale for such litigation, the Due Process Common law use may still act to divest the State of its jurisdictional power as an instrument of interstate federalism.

Despite all of this dictum, the court held that the Oklahoma court could not exercise jurisdiction over WWVW. WWVW concluded no sales and performed no business in Oklahoma. It availed itself of none of the privileges or benefits of Oklahoma law. It solicited no business through salespersons or advertising calculated to reach the State. Although it was foreseeable that the Robinsons might purchase an automobile in New York and take that automobile across State lines to Oklahoma, foreseeability has never been an adequate measure of jurisdictional exercise over an out-of-state defendant.

**Note:** In his well-known dissenting opinion, Justice Brennan stated his belief that the court had read International Shoe and its succeeding cases too narrowly. Justice Brennan’s dissent relied less on the contacts between the forum and defendant and more on the strength of the forum State’s interest in the case, as well as whether there would actually be any inconvenience to the defendant.

Justice Brennan stated that an automobile was not a stationary item or one designed to be used in only one place. WWVW not only foresaw the likelihood that an automobile would leave the forum State; it actually intended that the automobile should travel outside of the forum State. In other words, the sale of the automobile purposefully injects the vehicle into the stream of interstate commerce so that it may travel to other states. To illustrate the increasingly broad reach of interstate commerce, Justice Brennan relied on statistics demonstrating a massive

Finally, Justice Brennan contended that “when an action in fact causes injury in another State, the actor should be prepared to answer for it there unless defending in that State would be unfair for some reason other than that a state boundary must be crossed.” As you will see next, Justice Brennan’s viewpoint became the foundation for the majority opinion in *Burger King*, which he drafted.
BURGER KING CORPORATION v. RUDZEWICZ
471 U.S. 462
May 20, 1985

Facts: Burger King Corporation (BK) is a Florida corporation with principal offices in Miami, Florida. At the time of the opinion, BK had over 3,000 stores in the United States, and operated in 8 foreign countries. BK makes most of its profits through franchising.

Mr. Rudzewicz is a BK franchisor and citizen of Michigan who failed to remit his franchise fees to BK. Mr. Rudzewicz’s BK franchise operated in Drayton Plains, Michigan. After the BK franchise began to fall behind in its payments, Mr. Rudzewicz engaged in lengthy negotiations with the BK headquarters in Miami, Florida, who ultimately ordered him to close the BK franchise. After Mr. Rudzewicz refused to comply with these orders, BK initiated a federal lawsuit against him in the State of Florida. Mr. Rudzewicz appealed to the U.S. Court of Appeals solely on jurisdictional grounds and whether he could face a lawsuit in the State of Florida.

Issue: The question before the U.S. Supreme Court is whether the Florida court’s exercise of jurisdiction over Mr. Rudzewicz offended “traditional notions of fair play and substantial justice” embodied in the Due Process Clause of the 14th Amendment of the U.S. Constitution.

Analysis: Justice Brennan, who wrote the dissenting opinion in World-Wide Volkswagen Corp. and now authored the majority opinion in this case, ruled in favor of BK. Focusing once again on the forum State’s interest in litigating the current case, Justice Brennan stated that the 14th Amendment Due Process Clause of the U.S. Constitution “may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed.” Citing once again the expansion of modern transportation and communication in the United States, the Court stated that the burden of conducting litigation in another State has been substantially reduced in the years since International Shoe and its progeny.

Accordingly, the Court focused on the “quality and nature of the defendant’s activity … by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.” By requiring that individuals have “fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign,” Shaffer v. Heitner, 433 U.S. 186 (1977), the Due Process Clause “gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.” World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).
Relying on Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984), the Court stated that for a forum seeking to assert jurisdiction over an out-of-state defendant, the requirement of “fair-warning” is satisfied if the defendant has “purposefully directed” his activities at residents of the forum, and the litigation results from alleged injuries that arise out of or relate to those activities.

In reaching this conclusion based on Keeton, the Court ensured that a defendant would not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party. Instead, the Court concluded that jurisdiction is proper where the contacts proximately result from the actions of the defendant himself that create a substantial connection with the forum State. Thus, where a defendant has engaged in significant activities within a State, or has created continuing obligations between him and residents of the forum, he has availed himself of the privilege of conducting business there. Because these activities were shielded by the benefits and protections of the Florida’s laws, it would not be unreasonable to require Mr. Rudzewicz to submit to the burdens of litigation in that forum as well.

According to Justice Brennan’s analysis, once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts must be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice as required by the U.S. Constitution.

Relying on the legal reasoning set forth in World-Wide Volkswagen Corp., Justice Brennan enunciated five guidelines for determining the appropriateness of exercising jurisdiction:

1. the burden on the defendant;
2. the State’s interest in adjudicating the dispute;
3. the plaintiff’s interest in obtaining convenient and effective relief;
4. the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and
5. the shared interest of the several States in furthering fundamental substantive social policies.

In the Court’s analysis of these factors, the Court found that Mr. Rudzewicz had never been to Florida, and he did not maintain an office there. The case, however, grew out of Mr. Rudzewicz’s substantial connection to Florida via his business with BK. Mr. Rudzewicz voluntarily entered into 20-year contract with BK, which he knew or should have known had principal offices in Florida. His contacts with Florida, then, could in no way be considered random or fortuitous. Mr. Rudzewicz caused foreseeable injuries to BK, and it was presumptively reasonable for him to be called to account for these actions in Florida.
Facts: Mr. Burnham, a resident of the State of New Jersey, visited the State of California on business, after which he visited his children who were living with his estranged wife in the San Francisco Bay area. Mr. Burnham took his oldest child to San Francisco for the weekend. Upon returning the child to Mrs. Burnham’s home, Mr. Burnham was served with a California court summons and a copy of Mrs. Burnham’s divorce petition. Mr. Burnham then returned to the State of New Jersey.

Issue: The question before the U.S. Supreme Court was whether the Due Process Clause of the 14th Amendment of the U.S. Constitution denies California courts jurisdiction over a nonresident, who was personally served with service of process while temporarily visiting in that State, in a lawsuit unrelated to that individual’s activities in the State.

Analysis: Justice Scalia wrote the opinion for the majority of the Court. He focused his analysis of this question on the concept of “traditional notions of fair play and substantial justice” enshrined in the Due Process Clause of the 14th Amendment of the U.S. Constitution and placed into practice in International Shoe.

In particular, Justice Scalia explored the question of whether due process requires minimum contacts between the litigation and the defendant’s contacts with the State in cases where the defendant is physically present in the State at the time service of process is served upon him. Reviewing numerous decisions from the early 20th and 19th centuries in the United States, Justice Scalia explained that courts have long held that service of process upon a physically present defendant was sufficient to confer jurisdiction, without regard to whether the defendant was only briefly in the State or whether the cause of action was related to the defendant’s activities in the State.

To emphasize this point, Justice Scalia pointed out that “due process does not necessarily require the states to adhere to the unbending territorial limits on jurisdiction set forth in Pennoyer.” But, he found it most striking that not one U.S. case from the period in question (until 1978) held, or even suggested, that in-state personal service on an individual was insufficient to confer personal jurisdiction.

In short, the Court held that although the requirements of establishing minimum contacts has undergone numerous changes since the days of International Shoe and its progeny, jurisdiction based on physical presence alone satisfies due process requirements, because “presence” is one of the continuing traditions of the Anglo-American legal system. Traditional notions of fair play and substantial justice function in lieu of physical presence but should not supplant it entirely. Thus, the Court held that the fact that defendant’s contacts do not satisfy 14th Amendment.
Amendment requirements is irrelevant. Mr. Burnham’s physical presence in the State of California was cause enough to exercise jurisdiction.
ZIPPO MANUFACTURING COMPANY v. ZIPPO DOT COM, INC.
952 F. Supp. 1119
Jan. 16, 1997

Facts: Plaintiff Zippo Manufacturing Corporation (“Zippo”) filed a complaint against Zippo Dot Com, Inc. (“Dot Com”) alleging trademark infringement based on Dot Com’s use of the “Zippo” trademark in its websites. Zippo is a Pennsylvania corporation with its principal place of business in Bradford, PA. Zippo makes well known “Zippo” tobacco lighters. Dot Com, a California company, operates an Internet Web site and an Internet news service that has obtained the exclusive right to use the domain names “zippo.com”, “zippo.net” and “zipponews.com” on the Internet. Dot Com’s Web site contains, inter alia, an application for membership to Dot Com’s subscription-based Internet news service. Payment for subscription is made by credit card over the Internet or telephone. The paying subscriber views and/or downloads Internet newsgroup messages that are stored on Dot Com’s server in California. Dot Com’s offices, employees, and servers are all located in California, and Dot Com maintains no offices, employees or agents in the State of Pennsylvania. Of Dot Com’s 140,000 subscribers, approximately 3% (3,000) of those subscribers are Pennsylvania residents. Additionally, Dot Com has entered into agreements with seven Internet access providers in Pennsylvania to permit their subscribers to access Dot Com’s Internet news service.

Issue: The question before this U.S. Federal District Court is whether a Federal District Court in Pennsylvania can exercise jurisdiction over a California corporation that maintains no physical contacts with Pennsylvania.

Analysis: For its analysis, the Court relied on a three-pronged test for determining whether it was appropriate to exercise jurisdiction over Dot Com:

1. Did the defendant have sufficient “minimum contacts” with the forum State;
2. Did the claim asserted against the defendant arise out of these contacts; and
3. Was the exercise of jurisdiction reasonable.

The Court, in keeping with the tradition first enunciated in Hanson v. Denckla, 357 U.S. 235 (1958) (another U.S. Supreme Court in the International Shoe progeny), noted that “as technological progress [in the United States] has increased the flow of commerce between States, the need for jurisdiction has undergone a similar increase.” Relying on Burger King, the Court stated that modern commercial business is transacted increasingly across state lines often by telephone or wire communication alone, thus obviating the need for physical presence within a State in which business is conducted.

The Court further noted that as the Internet has exponentially expanded the amount of business conducted not only across State lines, but also internationally,
so must the notion of States’ jurisdiction expand. Personal jurisdiction can be constitutionally exercised in proportion to the nature and quality of commercial activity that an entity conducts over the Internet. If a defendant enters into contracts with residents of a foreign jurisdiction that involve knowing and repeated transmission of computer files over the Internet, for example, then personal jurisdiction is proper.

Because Dot Com created an interactive Web site by which it conducted monetary and commercial transactions with Pennsylvania residents and Pennsylvania Internet Service Providers, Dot Com purposefully availed itself of doing business in Pennsylvania. Thus, the Court held that the exercise of jurisdiction by a U.S. District Court in Pennsylvania over a California corporation was appropriate.
CHAPTER V  Miranda v Arizona

2. Criminal Procedure and the Right Against Self-Incrimination: Miranda

This section focuses on the development of U.S. criminal procedure law and specifically the Fifth Amendment of the United States Constitution, which states that no defendant “shall be compelled in any criminal case to be a witness against himself.”

In other words, every defendant who appears in a U.S. court retains the so-called “right to remain silent.” Until about 50 years ago, the standard for admissibility of a Defendant’s statement was whether the statement was “voluntary” – whether it resulted from some actual coercion, promise, or threat. This seemingly simple standard was in practice very difficult to apply, because custodial questioning of the defendant by the police had become inherently coercive. Police routinely engaged in coercive verbal techniques to trick the defendant into confessing. As a result, both the police and the courts had difficulty applying the “voluntariness” test.

In order to create a more definite rule on determining what constitutes a voluntary admission, the U.S. Supreme Court in Miranda ruled that an adequate protective device must be employed to avoid police coercion. As a result of this decision, the police incorporated what is known as the “Miranda” statement into their interrogation to make the defendant aware that his or her words may be used as a potential admission in a court of law. You are probably aware of the Miranda statement from U.S. movies and television programs that have popularized it:

You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to consult an attorney and have an attorney with you during questioning. If you cannot afford an attorney, one will be appointed for you.

What is most interesting about the Court’s decision in Miranda is that it is a perfect example of how the U.S. Supreme Court often legislates in extreme cases.

Miranda was not, however, the end of the legal analysis surrounding the right to remain silent. As U.S. societal circumstances changed, including an increased population, more guns and crimes committed, better technology, etc., the Court’s subsequent decisions to Miranda adjusted to both deter police misconduct and to ensure that evidence collected by law enforcement agencies is trustworthy.

For example, in Nix, the U.S. Supreme Court determined what kind of “inevitable discovery” should be allowed as evidence in courts. In other words, even if the defendant provides coerced statements, can the evidence be admitted if it would have been found inevitably by the police. For this decision, the Court relied on the spirit of Miranda to determine whether the conduct in question was really related to the probative nature of the evidence.

Likewise in Connelly, the U.S. Supreme Court concluded that a confession obtained from a mentally ill person was competent and admissible, because there was no police misconduct to deter.
Thus, over the years, the Court has upheld the standard first promulgated by *Miranda* successfully while allowing exceptions within a changing societal context. In reviewing this line of cases, we will see how the Court seeks to harmonize the goals of *Miranda* with the changing and often competing needs of society and the police who protect it. Where an exception would promote both of the goals of *Miranda*, the Court usually adopts the exception.
MIRANDA v. ARIZONA
384 U.S. 436
June 13, 1966

Facts: A confession was obtained from Mr. Miranda by the police without Mr. Miranda being previously warned of his rights to counsel or of his right to remain silent. Directly after his arrest, Mr. Miranda was taken into an interrogation room. He signed a typed-up confession, which included a paragraph stating that he made the confession voluntarily and with full understanding of his rights. Based on this confession, Mr. Miranda was convicted in an Arizona State Court of kidnapping and rape. The Supreme Court of Arizona affirmed.

Issue: The question before the U.S. Supreme Court was whether statements obtained from a defendant questioned while in police custody, or otherwise deprived of his freedom of action in any significant way, and without effective warning of his rights at the outset of the interrogation process, admissible at trial.

Analysis: The Court concluded that the prosecution may not use statements, whether exculpatory or inculpatory, stemming from questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way, unless it demonstrates the use of procedural safeguards effective to secure the Fifth Amendment’s privilege against self-incrimination.

In the Court’s analysis of this question, it concluded the following: The inherently coercive nature of police custodial interrogation requires that confessions elicited under such circumstances be inadmissible unless it can be shown that there were adequate devices to protect the arrestee’s privilege against self-incrimination and to warn him of his right to counsel. Unless specifically refused, there is a right to counsel. Police’s supposed need for a compelling custodial interrogation has not been shown, and even if it were, the U.S. Constitution requires that a balance be struck on the side of the essential rights guaranteed by the Fifth Amendment.

The Court further stated that the privilege against self-incrimination, which has had a long and expansive historical development in the United States, is the essential mainstay of the U.S. adversary system and guarantees to the individual the “right to remain silent unless he chooses to speak in the unfettered exercise of his own will,” during a period of custodial interrogation as well as in the courts or during the course of other official investigations.

The Court further found that in the absence of other effective measures the following procedures to safeguard the Fifth Amendment privilege must be observed:
CHAPTER V  Miranda v Arizona

1. The person in custody must, prior to interrogation, be clearly informed that he has the right to remain silent, and that nothing he says will be used against him in court;
2. He must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation, and that, if he is indigent, a lawyer will be appointed to represent him;
3. If the individual indicates, prior to or during questioning, that he wishes to remain silent, the interrogation must cease;
4. If he states that he wants an attorney, the questioning must cease until an attorney is present;
5. Where an interrogation is conducted without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his right to counsel;
6. Where the individual answers some questions during in-custody interrogation, he has not waived his privilege and may invoke his right to remain silent thereafter;
7. The warnings required and the waivers needed are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement, inculpatory or exculpatory, made by a defendant.

The Court then recognized the importance of the self-incrimination clause of the 5th Amendment of the U.S. constitution, tracing its history from the “Star Chamber” in 1637 through the U.S. Supreme Court decisions beginning in 1964. In doing so, the Court recognized the importance of the presence of a defense attorney as a safeguard to the defendant’s voluntary statement.

Finally, the Court noted another important fact that had been received as evidence—that in order to ensure voluntary statements the FBI had a practice of advising the defendant of his right to remain silent and his right to have an attorney present before the FBI questioned the defendant. Evaluating the present facts before it, the Court found that although Mr. Miranda had not been questioned by the FBI in this case, this standard of practice had been admitted into evidence to show the Court the practice of other law enforcement agencies.

Finding that “in each of these cases the statements were obtained under circumstances that did not meet constitutional standards for protection of the privilege against self-incrimination,” the Supreme Court reversed the judgments of the Supreme Court of Arizona.

10 The Star Chamber was an English court having broad civil and criminal jurisdiction at the king’s discretion and noted for its secretive, arbitrary, and oppressive procedures, including compulsory self-incrimination, inquisitorial investigation, and the absence of juries. The Star chamber was abolished in 1641 because of its abuses of power. Black’s Law Dictionary 7th Ed. 1414 (1999).
Facts: Defendant was lawfully arrested and taken into custody by the police for the murder of a ten-year old girl. The police assured the defendant’s attorney that they would not question the defendant while driving him to the jail. Despite their promise, while transporting the defendant a police officer told the defendant in the car the following:

I want to give you something to think about while we're traveling down the road. . . . They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is . . . and if you get a snow on top of it you yourself may be unable to find it. And since we will be going right past the area where the body is on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas Eve and murdered. . . . After a snow storm we may not be able to find it at all…. I do not want you to answer me. . . . Just think about it.

The defendant in response told the officer where he buried the little girl’s corpse. The police drove to the location, where a search was already being conducted by 200 people, including police. The child's body was found next to a culvert in a ditch beside a gravel road in Polk County, about two miles south of Interstate 80, and essentially within the area to be searched.

Issue: The question before the U.S. Supreme Court was whether evidence obtained by police questioning should be admissible in court, where no proper warning was given to the defendant before he spoke, no defense lawyer was present, and where the evidence obtained as a result of the questioning would ultimately or inevitably have been discovered even if no violation of any constitutional or statutory provision taken place.

Analysis: This case has become known as the “Christian Burial” case, and it has become almost as infamous as Miranda.

It its analysis, the Court stated the following: In this case the body would certainly have been discovered by the searchers if the defendant had not confessed. The discovery of the body is the result of the improper confession and thus “the fruit of the poisonous tree.”
As one Supreme Court Judge noted: “This litigation is exceptional for at least three reasons. The facts are unusually tragic; it involves an unusually clear violation of constitutional rights; and it graphically illustrates the societal costs that may be incurred when police officers decide to dispense with the requirements of the law.” Despite the clear violation of Miranda by the police, the Court nonetheless concluded that while the defendant’s statement should be inadmissible, the discovery of the body should be admissible because the prosecutor proved that the body would have been discovered without the defendant’s confession.

For its decision, the Court relied upon the two goals of the Miranda rule: 1) to deter police misconduct and 2) to ensure truthful statements. Because the police misconduct in this case was unrelated to the truthfulness of the evidence, and because the evidence would have been discovered anyway, the Court did not need to exclude the evidence to deter police misconduct. The Court found the police misconduct in this case entirely irrelevant, stating “the deterrence rationale has so little basis that the evidence should be received.” Therefore, the Court held that the independently discovered evidence should be admitted if the prosecutor can prove that the evidence would have inevitably been discovered.
COLORADO v. CONNELLY
479 U.S. 157
December 10, 1986

Facts: A person approached a police officer and said that he wanted to confess to a murder. After the police officer took the individual to the police station and fully advised the defendant of his Miranda rights, the defendant confessed. Only later did the police learn that the defendant was so mentally ill that he could not have understood the Miranda warnings.

Issue: The question before the U.S. Supreme Court was whether the respondent's mental state vitiated his attempted waiver of the right to counsel and the privilege against self-incrimination guaranteed by the 5th Amendment of the U.S. Constitution, where the defendant’s confession was obtained under a mental state that interfered with his "rational intellect" and his "free will," and where his mental condition precluded his ability to make a valid waiver of his Miranda rights.

Analysis: For the Court’s analysis, it was forced to again reconsider the purpose of Miranda and the societal interests it serves. The Court summarized that the purpose of the Miranda rule is to deter improper police conduct. According to the Court, suppressing the defendant’s statements would serve absolutely no purpose in enforcing constitutional guarantees. The purpose of excluding evidence seized in violation of the Constitution is to substantially deter future violations of the Constitution. Because exclusion of accurate evidence in this case would be harmful and because there was no police misconduct to deter, the Court concluded that the statement was properly admitted into evidence.
3. Criminal Procedure and the Prohibition Against Unreasonable Search and Seizure

This section also analyzes the development of U.S. Criminal Procedure law and specifically the 4th Amendment to the U.S. Constitution’s prohibition of unreasonable warrantless search and seizure. As we noticed from the previous section on the 5th Amendment right against self-incrimination, the 4th Amendment guarantees are fundamental, rarely expanded, and often in conflict with society changes. This is especially true in post-September 11, 2001 United States, and legal experts predict that much of this law could see further expansions.

Under the “exclusionary rule,” of the 4th Amendment of the U.S. Constitution, any evidence obtained through an improper search must be excluded from trial. The U.S. Supreme Court addressed this constitutional limitation by creating a few narrow exceptions in which the police may search a defendant without a warrant, including, but not limited to, the following circumstances:

(1) “search incident to arrest”—when a lawful arrest is made, the arresting officer does not need a warrant to search the arrestee's person and the area within his immediate control;

(2) "plain view"—when the police are legally on a person's premises, and they see obviously incriminating evidence, in plain view they can seize the evidence without a warrant;

(3) consent search—when a person's lack of knowledge that he has a right to refuse to consent to the search is but one factor in determining the validity of that consent;

(4) “stop and frisk” searches —when police officers observe unusual conduct that would lead a reasonable officer to believe that criminal conduct is afoot and the suspect may be armed and dangerous, no warrant is needed for them to conduct a brief stop and "pat down" search to discover weapons.

(5) "exigent circumstances"—when police officers believe that evidence will be destroyed, the can seize the evidence without a warrant.
Facts: Officer McFadden observed two men on the street and suspected them of "casing" a store to rob it. He confronted the two men and asked their names. The men mumbled a response, at which time the officer spun one of the men, Mr. Terry, around and patted his breast. Officer McFadden found and removed a pistol from Mr. Terry’s person. Mr. Terry was charged with carrying a concealed weapon. Mr. Terry moved to suppress this weapon from evidence. The trial judge denied the motion. Mr. Terry contended that the weapon seized from his person and introduced into evidence was obtained through an illegal search, under the Fourth Amendment of the U.S. Constitution and that the trial court improperly denied his motion to suppress. The Ohio Court of Appeals affirmed the trial court decision, and the Ohio Supreme Court dismissed Mr. Terry’s appeal.

Issue: The question before the U.S. Supreme Court was whether the police officer’s limited search of Mr. Terry and subsequent seizure of evidence violated the Fourth Amendment of the U.S. Constitution, which states that persons are to be secure against unreasonable searches and seizures in a confrontation between a private citizen and police investigating suspicious circumstances, where there was no probable cause for arrest.

Analysis: The Court concluded that it was not unreasonable. According to the Court, an officer is justified in conducting a carefully limited search of persons whom he reasonably suspects to be dangerous in order to discover any weapons which might be used to assault him or others nearby, even in the absence of probable cause for arrest, and any weapons seized may be introduced in evidence. The policeman should use an objective test and be able to point to specific and articulable facts which reasonably justify the intrusion.

The Court’s evaluation of the proper balance that had to be struck in this type of case lead it to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. According to the Court, the officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man under the circumstances would be warranted in the belief that his safety or that of others was in danger.

The Court’s analysis began with a statement that an individual may harbor a reasonable "expectation of privacy," to be free from unreasonable governmental intrusion, and the Court also recognized that excluding evidence seized in
violation of the Fourth Amendment of the U.S. Constitution was the principal method of discouraging lawless police conduct. Thus, the Court stated that the major purpose of the “exclusionary rule” is to deter police misconduct and that without it the constitutional guarantee against unreasonable searches and seizures is a mere "form of words."

On the motion to suppress the gun, the prosecution argued that the police seized the gun following a search incident to a lawful arrest. The trial court rejected this theory, stating that it "would be stretching the facts beyond reasonable comprehension" to find that Officer McFadden had had probable cause to arrest Mr. Terry before he patted him down for weapons.

However, the court denied Mr. Terry’s motion on the ground that Officer McFadden, on the basis of his experience, "had reasonable cause to believe . . . that the [suspects] were conducting themselves suspiciously, and some interrogation should be made of their action." Purely for his own protection, the Court held, the officer had the right to pat down the outer clothing of these men, who he had reasonable cause to believe might be armed.

In its analysis, the Court noted the distinction between an investigatory "stop" and an arrest, a "frisk" of the outer clothing for weapons, and a full-blown search for evidence of crime.

The Court then turned its attention to the narrow question posed by the facts: whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for an arrest.

In the Court’s view, the sounder course was to recognize that the Fourth Amendment of the U.S. Constitution governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of “reasonableness.” In other words, the Court’s task was to establish at what point in the encounter the Fourth Amendment became relevant. The Court had to decide whether and when Officer McFadden "seized" Mr. Terry and whether and when the officer conducted a "search."

There can be no question that Officer McFadden "seized" Mr. Terry and subjected him to a "search" when he took hold of him and patted down the outer surfaces of his clothing. The Court decided whether at that point it was reasonable for Officer McFadden to have interfered with petitioner's personal security as he did. The crux of this case, however, was not the propriety of Officer McFadden's taking steps to investigate petitioner's suspicious behavior, but rather, whether there was justification for Officer McFadden's invasion of Mr. Terry's personal security by searching him for weapons in the course of that investigation.

The Court held that the gun seized from Mr. Terry was properly admitted into evidence against him. At the time Officer McFadden seized Mr. Terry and
searched him for weapons, Officer McFadden had reasonable grounds to believe that Mr. Terry was armed and dangerous, and it was necessary for the protection of himself and others to take swift measures to discover the true facts and neutralize the threat of harm if it materialized. The policeman carefully restricted his search to what was appropriate to the discovery of the particular items which he sought.
Facts: Two policemen observed Mr. Mimms driving a car, which had an expired license plate on it. The officers stopped the vehicle so that they could ticket the driver for a moving violation. One of the officers, pursuant to safety concerns, asked Mr. Mimms to exit the vehicle; when he did, the officer saw a bulge in the sport jacket Mr. Mimms was wearing. A frisk of Mr. Mimms uncovered a loaded .38-caliber handgun in the waistband of his pants and his passenger had a loaded .32-caliber on him as well. Both were arrested for carrying concealed firearms without a license and carrying firearms in general on their person without a permit.

Mr. Mimms was convicted in the Court of Common Pleas in Philadelphia of carrying a concealed firearm and carrying a firearm without a license. The Pennsylvania Supreme Court reversed finding that the gun was seized as a result of an unlawful search and seizure by police.

Issue: The question before the U.S. Supreme Court was whether the order by the police for Mr. Mimms to get out of the car, issued after the driver was lawfully detained, was reasonable and thus permissible under the 4th Amendment of the U.S. Constitution.

Analysis: The Court began its analysis by commenting on the general practice by police for vehicle stops. According to the Court, it is a common practice for police to ask motorists who are being cited for motor vehicle violations to step out of their car. Establishing the face-to-face contact between the police and the driver being detained on violation diminishes the possibility that a person will make unobserved movements in the car and assault the officer. Also, if the stop is executed in a high traffic area, having the driver step around to the back of his vehicle removes the officer from the danger of standing in the road near traffic. This amounts to a mere inconvenience for a driver, but is reasonable given a police officer’s concern for his or her safety.

In this case, by stepping out of the car, Mr. Mimms only revealed little more than was already visible when he was seated in the vehicle. The bulge in the jacket permitted the officer to conclude that Mr. Mimms was armed and thus posed a serious and present danger to the safety of the officer.

As this Court decided in Terry v. Ohio, the touchstone of analysis under the Fourth Amendment is always "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security."

The Court in Mimms revisited the Terry decision and its decision that an officer is justified in conducting a limited search for weapons once he had reasonably concluded that the person whom he had legitimately stopped might be armed and presently dangerous. Under the standard enunciated in Terry--whether "the facts
available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate" there is little question the officer in the instant case was justified in his actions. The bulge in Mr. Mimms’s jacket permitted the officer to conclude that Mr. Mimms was armed and thus posed a serious and present danger to the safety of the officer. In these circumstances, any man of "reasonable caution" would likely have conducted the "pat-down."

Unlike Terry, however, here there was no question about the propriety of the initial restrictions on Mr. Mimms’s freedom of movement. Mr. Mimms was driving an automobile with expired license tags in violation of the Pennsylvania Motor Vehicle Code. In this case, the Court dealt only with the narrow question of whether the order to get out of the car, issued after the driver was lawfully detained, was reasonable and thus permissible under the Fourth Amendment of the U.S. Constitution. The inquiry, therefore, focused not on the intrusion resulting from the request to stop the vehicle or from the later "pat-down," but on the incremental intrusion resulting from the request to get out of the car once the vehicle was lawfully stopped.

Also, there remained the second question of the propriety of the search once the bulge in the jacket was observed. The Court had as little doubt on this point as on the first; the answer was controlled by Terry where the Court concluded that "certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties." And the Court had specifically recognized the inordinate risk confronting an officer as he approaches a person seated in an automobile. According to one study that the Court considered, approximately 30% of police shootings occurred when a police officer approached a suspect seated in an automobile.

In his dissenting opinion, Justice Marshall wrote that Terry involved the observations of a thirty-year police veteran, who had been patrolling the downtown area of Cleveland and knew what type of suspicious activity would lead a police officer to have reasonable suspicion that an armed robbery was about to take place or had taken place. According to Justice Marshall, the “stop and frisk” under Terry was reasonable, because one who was suspected of attempting a robbery is likely to be armed and a danger to the officer as well as other citizens. In this case, however, the officers did not have the slightest hint that the respondent might have a gun in the car or was up to no good. The officer’s response must bear a direct correlation to circumstances, which first justified the interference. Justice Marshall concluded that this decision broadens Terry beyond what its original scope was intended to be.
CHAPTER V

Florida v. Royer

Florida v. Royer
460 U.S. 491
March 23, 1983

Facts: Police who were observing Mr. Royer from a distance in the airport terminal believed that he fit the drug courier profile. Upon request by the police, but without oral consent, Mr. Royer produced his airline ticket (which was under an assumed name) and driver's license (under his real name) to the police. The police informed Mr. Royer that they were narcotics investigators and that they suspected him of transporting narcotics. Without returning either Mr. Royer's ticket or his driver's license, the police asked him to accompany them to a small police room adjacent to the airport terminal. One of the police detectives retrieved Mr. Royer's luggage and brought it into the room. Mr. Royer did not respond to the detectives' request for consent to search his luggage. However, Mr. Royer produced a key and unlocked one suitcase, in which marijuana was found. Mr. Royer claimed he did not know the combination to the other suitcase, but he did not object to it being opened. The officers opened the other suitcase and found more marijuana. Mr. Royer was convicted of felony possession of marijuana.

During his trial, Mr. Royer moved to suppress the evidence and the trial court denied the motion. Mr. Royer appealed. The appellate court reversed Mr. Royer’s conviction, holding that because Mr. Royer had been involuntarily confined without probable cause, the detention exceeded the limited restraint permitted by Terry v. Ohio, and the consent was therefore invalid. The State of Florida appealed.

Issue: The question before the U.S. Supreme Court is whether the defendant’s consent to a warrantless search is invalid if tainted by unlawful confinement by police without probable cause?

Analysis: The U.S. Supreme Court held that the search was invalid and the evidence obtained as a result of the search, therefore, must be excluded. For its analysis, the Court began with the Fourth Amendment of the U.S. Constitution and stated that it is not violated by officers approaching an individual in a public place and identifying themselves. But, according to the Court, an investigative stop must be temporary and last no longer than necessary to effectuate its purpose. Removal of Mr. Royer without his consent, involuntarily, from a public area to a police room in the airport converted what was otherwise a legal Terry v. Ohio stop into an arrest, where probable cause is necessary. Probable cause did not exist when the police removed Mr. Royer and when Mr. Royer consented to the search of his luggage. Therefore, Mr. Royer’s statements made during the illegal detention were inadmissible even if voluntary.

In its analysis, the Court relied on Dunaway v. New York, 442 U.S. 200 (1979). In Dunaway, the Court found that a police confinement which “. . . goes beyond the
limited restraint of a Terry investigatory stop may be constitutionally justified only by probable cause.” In the instant case, the Court found that Detective Johnson, who conducted the search of Mr. Royer’s luggage, had specifically stated at the suppression hearing that he did not have probable cause to arrest Mr. Royer until the suitcases were opened and their contents revealed. In the absence of probable cause, the Court concluded, Mr. Royer's consent to search, given only after he had been unlawfully confined, was ineffective to justify the search. Because there was no proof at all that a "break in the chain of illegality" had occurred, the court found that Mr. Royer's consent was invalid as a matter of law.

In making its decision, the Court made the following observations: First, it was unquestionable that without a warrant to search Mr. Royer's luggage and in the absence of probable cause and exigent circumstances, the validity of the search depended on Mr. Royer's purported consent. Further, it is undisputed that where the validity of a search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority.

Second, the police officers did not violate the Fourth Amendment by merely approaching Mr. Royer in the airport (or in another public place), by asking him if he is willing to answer some questions, by putting questions to him after he agrees to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. The person approached—in this case Mr. Royer, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or to answer does not, without more, furnish those grounds. If there is no detention—no seizure within the meaning of the Fourth Amendment—then no constitutional rights have been infringed.

The Court found that Terry created a limited exception to this general rule: certain seizures are justifiable under the Fourth Amendment if there is articulable suspicion that a person has committed or is about to commit a crime. The Court also concluded that Terry was unequivocal in saying that reasonable suspicion of criminal activity warrants a temporary seizure for the purpose of questioning limited to the purpose of the stop. The search is limited to the person of the arrestee and the area immediately within his control. According to Terry: "The scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible.”

Based on the holding in Terry, the Court concluded that the reasonableness requirement of the Fourth Amendment of the U.S. Constitution requires no less when the police action is a seizure permitted on less than probable cause because of legitimate law enforcement interests. The scope of the detention must be carefully tailored to its underlying justification.
The Court emphasized that *Terry* was a very limited decision that expressly declined to address the "constitutional propriety of an investigative 'seizure' upon less than probable cause for purposes of 'detention' and/or interrogation." According to the Court, *Terry* simply held that under certain carefully defined circumstances a police officer "is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing . . . in an attempt to discover weapons which might be used to assault him." The scope of a *Terry*-type "investigative" stop and any attendant search must be extremely limited or the *Terry* exception would "swallow the general rule that Fourth Amendment seizures [and searches] are 'reasonable' only if based on probable cause." In the court’s view, any suggestion that the *Terry* reasonable-suspicion standard justifies anything but the briefest of detentions or the most limited of searches finds no support.

Justice Brennan dissented from the plurality opinion only on the point of whether the initial stop of Mr. Royer in the airport terminal was legal. Justice Brennan concluded that the initial stop of Mr. Royer was illegal. In his opinion, Mr. Royer was "seized" for purposes of the Fourth Amendment when the officers asked him to produce his driver's license and airline ticket. According to Justice Brennan, *Terry* stated that "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." Although Justice Brennan agreed that "not all personal intercourse between policemen and citizens involves 'seizures' of persons," and that policemen may approach citizens on the street and ask them questions without "seizing" them for purposes of the Fourth Amendment, once an officer has identified himself and asked a traveler for identification and his airline ticket, the traveler has been "seized" within the meaning of the Fourth Amendment. By identifying themselves and asking for Mr. Royer's airline ticket and driver's license the officers, as a practical matter, engaged in a "show of authority" and "restrained Mr. Royer’s liberty."

According to Justice Brennan, *Terry* "established that in appropriate circumstances the Fourth Amendment allows a properly limited 'search' or 'seizure' on facts that do not constitute probable cause to arrest or to search for contraband or evidence of crime." But to justify such a seizure an officer must have a reasonable suspicion of criminal activity based on "specific and articulable facts . . . [and] rational inferences from those facts . . . ." In Justice Brennan’s view, those facts did not exist here.
CHAPTER V


4. First Amendment: Freedom of Expression and Defamation

This section evaluates the development of First Amendment case law on defamation. First Amendment law, more than civil and criminal procedure law, is considered to be more political, and certainly areas of First Amendment law reflect the political makeup of the court. This is probably because speech and expression, which are protected by the First Amendment of the U.S. Constitution, reflect societal mores and norms. For example, protest speech and television and radio programming are governed by First Amendment law, and these subcategories of law include very controversial decisions by the courts.

Defamation law, another subcategory of First Amendment law, protects an individual’s reputation from being falsely impugned. The interest in protecting one’s reputation has been recognized “since time immemorial.” Defamation law has developed to protect the name and reputation of individuals and public figures, while at the same time preserving the core of the First Amendment—namely the freedom of speech and expression.

In the celebrated case of New York Times v. Sullivan, the U.S. Supreme Court ruled that a government official—in this case an Alabama Police Commissioner—could not recover against the New York Times newspaper for damaging statements made against him, because Mr. Sullivan, the Alabama Police Commissioner, could not make out a convincing argument that the New York Times had printed such statements with “actual malice.” The U.S. Supreme Court held that in order to prove actual malice, the plaintiff must show that the statements were made with reckless disregard for truth. Adopting this standard reaffirmed the Court’s commitment to uninhibited, robust, and wide-open [public discourse],” even when it includes “… vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”

Similarly, the later U.S. Supreme Court case of Gertz concerns the Court’s equal interest in protecting private citizens (in that case a lawyer) from potentially false and damaging statements. Thus, the Court allowed states to impose their own guidelines for protecting citizens from pernicious attacks, so long as a strict-liability guideline was avoided “…in order to protect speech that matters.”

In Hustler v. Falwell, the Court once again restricted the ability of the States to curtail speech that may be harmful—this time to public figures. The Court ruled against Mr. Falwell, a famous public commentator, in his lawsuit against the adult magazine Hustler stating that satire and satirical images of public figures are essential to the free flow of ideas and opinions on matters of public concern.

Finally, in Bartnicki, the Court allowed third-party publication of information obtained via an illegal wire-tap. Because the information intercepted discussed public concerns and was obtained by the third-party in a lawful manner, the Court allowed publication of the information, finding publishing matters of public importance to outweigh privacy concerns, and stating that one of the high costs associated with participating in public affairs is the accompanying loss of privacy.

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Facts: The New York Times newspaper sought review of a trial court decision awarding respondent damages in a civil libel action brought by Mr. Sullivan against the newspaper. Mr. Sullivan, a Commissioner of the Montgomery, Alabama Police Department, alleged he was damaged by a full-page advertisement that was carried in the newspaper. The advertisement was about racial tensions in Montgomery, Alabama and elsewhere in the south of the United States between white and black citizens, and it specifically included allegations of racial violence and racially-motivated actions by public figures, including Mr. Sullivan. None of the statements in the advertisement mentioned Mr. Sullivan by name, but he alleged that the word “police” referred to him. A jury awarded Mr. Sullivan damages of $500,000 although he made no effort to prove that he suffered actual pecuniary loss as a result of the alleged libel.

Issue: The question before the U.S. Supreme Court was whether and to what extent the protections for speech and free press embodied in the First Amendment of the U.S. Constitution limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct?

Analysis: The U.S. Supreme Court held “that the rule of law applied by the Alabama courts is constitutionally deficient for failure to provide petitioner the safeguards for freedom of speech and of the press that were guaranteed by the First and Fourteenth Amendments [of the U.S. Constitution] in a libel action brought by a public official against critics of his official conduct.” The Court further held that “under the proper safeguards the evidence presented in this case is constitutionally insufficient to support the judgment for [Mr. Sullivan].”

In the beginning of its analysis, the court disposed of the two arguments asserted by the New York Times regarding the constitutionality of the judgment of the Alabama courts. The U.S. Supreme Court avoids unnecessary scrutiny of the U.S. Constitution when possible. The second of the disposed of arguments by the New York Times is the most interesting. Specifically, the New York Times argued that “the constitutional guarantees of freedom of speech and of the press are inapplicable here, at least so far as the Times is concerned, because the allegedly libelous statements were published as part of a paid, ‘commercial’ advertisement.” In rejecting this argument, the Court found, however, that the publication was not a “commercial advertisement,” but rather one that “communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern.” The Court chose to focus on the content of the allegedly libelous material over its form, reasoning that any other conclusion would discourage newspapers from carrying editorial
advertisements of this type, stopping an important outlet for the dissemination of information and ideas of persons lacking access to publishing facilities.

On a policy-guided level, the Court considered the case to be a reaffirmation of “the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” Citing to the historical debates on the U.S. Constitution, the Court eschewed exceptions based on tests of truth that place the burden of proving truth on the speaker. Citing case law from appellate courts, the Court stated, “that erroneous statement is inevitable in free debate, and that it must be protected if the freedom of expression are to have the ‘breathing space’ that they ‘need … to survive.’”

Following this guiding democratic principles embodied in the First Amendment of the U.S. Constitution, the Court struck down the Alabama libel law, relying on reasoning similar to Smith v. California, 361 U.S. 147. In Smith, the court regarded as essential a requirement of proof of guilty knowledge to a valid conviction of a bookseller for possessing obscene writings for sale, reasoning the following:

[I]f the bookseller is criminally liable without knowledge of the contents, … he will tend to restrict the books he sells to those he has inspected; and thus this State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. … [The bookseller’s] timidity in the face of his absolute criminal liability, thus would tend to restrict the public’s access to forms of the printed word which the State could not constitutionally suppress directly. . . .

Based on its reading of its decision in Smith, the Court held: “A rule compelling the critic of official conduct to guarantee the truth of all of his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable ‘self-censorship.’”

The Court went on: “Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true … because of doubt whether it can be proved in a court or fear of the expense of having to do so. … “ According to the Court, the “rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.”

Accordingly, the Court recommended a federal rule to prohibit a public official from recovering damages for a defamatory falsehood related to official conduct unless he proves that the statement was made with actual malice, with knowledge that it was false or with reckless disregard for whether it was false or not.
Further, the Court held that under the proper safeguards, the evidence presented against the New York Times newspaper was constitutionally insufficient to support the judgment for Mr. Sullivan. Mr. Sullivan presented no evidence to show that the New York Times was aware of erroneous statements or was in any way reckless in that regard. On application of this standard, the Court concluded that no actual malice was present, and hence Mr. Sullivan’s case was not constitutionally sustainable.

The Court found evidence that the New York Times published its advertisement without checking its accuracy against the news stories in its own files. The mere presence of the stories in the Times’ files, however, did not establish that the Times “knew” the advertisement was false, as the state of mind required for actual malice. Thus, the Court concluded that the evidence presented fell short of the standard for recklessness that is required for a finding of actual malice. It was also defective in that it was incapable of supporting the jury’s finding that the allegedly libelous statements were made “of and concerning” Mr. Sullivan. Mr. Sullivan was forced to rely on the words of the advertisement in conjunction with the testimony of six witnesses in order to establish a connection between himself and the advertisement. Mr. Sullivan was never mentioned, either by name or official position, and several of the allegedly libelous statements did not actually refer to the police, except by ingenious inference.
CHAPTER V
Elmer Gertz v. Robert Welch, Inc

ELMER GERTZ v. ROBERT WELCH, INC.
418 U.S. 323
June 25, 1974

Facts: After a Chicago policeman named Nuccio killed a young person named Nelson, the victim’s family retained Mr. Gertz to represent them in a civil action against Mr. Nuccio. During the civil trial, respondent’s magazine “American Opinion” published an article that alleged that Nuccio’s murder trial was part of a Communist conspiracy to discredit the local police, and it falsely stated that Mr. Gertz had arranged Nuccio’s “frame-up,” implied that Mr. Gertz had a criminal record, and labeled him a “Communist.” Because the statements contained serious inaccuracies, Mr. Gertz filed a libel action against respondent claiming the falsehoods invented by respondent injured Mr. Gertz’s reputation as a lawyer and citizen. The district court held that the New York Times standard applied, which meant that respondent escaped liability unless petitioner proved that the defamatory falsehood was published with actual malice. The district court entered judgment for respondent and the court of appeals affirmed. According to the decision, the state’s interest in compensating injury to the reputation of a private individual required a different rule. The Court held that the states could define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injuries to a private individual. The states could not permit recovery of presumed or punitive damages absent a showing of knowledge of falsity or reckless disregard for the truth.

Issue: The question before the U.S. Supreme Court is whether a newspaper or broadcaster that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional privilege against liability for the injury inflicted by those statements.

Analysis: For its analysis, the U.S. Supreme Court stated the following:

This Court has struggled for nearly a decade to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment. With this decision we return to that effort. We granted certiorari to reconsider the extent of a publisher’s constitutional privilege against liability for defamation of a private citizen.

Because the lower court in this case relied on Rosenbloom v. Metromedia, Inc. for its decision, the Court revisited Rosenbloom. In Rosenbloom, a distributor of nudist magazines, was arrested for selling allegedly obscene material while making a delivery to a retail dealer. Mr. Rosenbloom sued a radio station for failing to note that the 3,000 items confiscated during the arrest were only “reportedly” or “allegedly” obscene and for other libelous offenses. The U.S. Supreme Court was unable to agree on a controlling rationale for the Rosenbloom
decision. The eight U.S. Supreme Court Justices who participated in Rosenbloom could not agree on a controlling rationale for their decision, and, as a result, they announced their views in five separate opinions, none of which commanded more than three votes.

The lower court in this case relied on the conclusion in Rosenbloom that “all discussion and communication involving matters of public or general concern warrant the protection from liability for defamation accorded by the rule originally enunciated in New York Times Co. v. Sullivan.”

Three years after New York Times, a majority of the Court agreed to extend the constitutional privilege to defamatory criticism of “public figures.” This extension was announced in Curtis Publishing Co. v. Butts and its companion, Associated Press v. Walker.

Rosenbloom demonstrated that the New York Times standard becomes less clear when applied to non-public persons.

For this decision, the Court began with common ground. It held: “Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.”

The Court went on: “Although the erroneous statement of facts is not worthy of constitutional protection, it is nevertheless inevitable in free debate.” In other words, according to the Court: “The First Amendment requires that we protect some falsehood in order to protect speech that matters.”

In this case, the Court concluded that the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them. The Court held that it should lay broad rules of general application. For this, the Court compared the vulnerability of private individuals against public officials/public persons. Public officials and public figures have greater access to channels of effective communications and have a better opportunity to counteract false statements, whereas private individuals do not and are therefore more vulnerable to injury. As such, the state has a greater interest in protecting private individuals from this harm. The Court acknowledges that while these are generalities, and while they might not apply in every situation, the Court concluded that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehoods concerning them. No such assumption can be made about private individuals.

For all of these reasons, the Court concluded that the “States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual.” Therefore, “so long as they do not impose liability without fault, the States may define for themselves
the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.” The Court was satisfied with this holding, stating: “It recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation.”
Jerry Falwell, a nationally known Christian minister and commentator on U.S. politics and public affairs, filed a lawsuit against Hustler Magazine and its owner, Larry Flint, both well-known for adult entertainment, for libel, slander, and intentional infliction of emotional distress arising from the publication in Hustler of a caricature of Mr. Falwell in an advertisement parody. Specifically, the “parody” showed Mr. Falwell in a Campari Liqueur advertisement that contained the name and picture of Mr. Falwell and was entitled “Jerry Falwell talks about his first time.” After that, there is a fake interview with Mr. Falwell in which he states that his “first time” was during a drunken incestuous rendezvous with his mother in an outhouse. The Hustler parody portrays respondent and his mother as drunk and immoral, and suggests that respondent is a hypocrite who preaches only when he is drunk. In small print at the bottom of the page, the ad contains the disclaimer, “ad parody—not to be taken seriously.” The magazine’s table of contents also lists the ad as “Fiction; Ad and Personality Parody.”

The question before the U.S. Supreme Court is whether a public figure can recover damages for intentional infliction of emotional distress based on a satire?

The Court found that under the First Amendment of the United States, an obvious satire or parody of a public figure remains protected speech, even if it causes emotional distress to that person.

The Court began its analysis acknowledging that this case presents “a novel question involving First Amendment limitations upon a State’s authority to protect its citizens from the intentional infliction of emotional distress.” The U.S. Supreme Court agreed with Hustler and Mr. Flynt's arguments and held that a public figure couldn't recover damages for "intentional infliction of emotional distress" without showing not only that the publication contained a "false statement of fact" (that is, a statement that a reasonable reader would believe to be true), but also that the satirist acted with "actual malice" test from New York Times v. Sullivan (that is, "with knowledge that the statement was false or with reckless disregard as to whether or not it was true").

The U.S. Supreme Court stated that satire (even outrageous satire) has a long and important history in the United States, and the Founding Fathers had specifically intended for the First Amendment of the U.S. Constitution to protect these types of parodies. The court cited many examples of famous, if bitingly satirical, political cartoons, "from the early cartoon portraying George Washington as an ass down to the present day."
The creators of parodies of public figures are protected by the First Amendment against civil liability, unless the parody includes false statements of fact made in knowing or reckless disregard of the truth.

**BARTNICKI ET AL. v. VOPPER, AKA WILLIAMS, ET AL.**

532 U.S. 514
May 21, 2001

**Facts:** Petitioners alleged that an unknown person intercepted their telephone conversation regarding a matter of public concern and that respondent media representatives published the contents of the conversation knowing that the recording had been obtained illegally, in violation of federal and state wiretapping statutes. In petitioners' lawsuit against respondents for damages, the appellate court determined that the federal and state wiretapping statutes were invalid. On certiorari, the U.S. Supreme Court affirmed the judgment, determining that the application of the statutes under the circumstances violated the First Amendment. Petitioners and the Government identified two interests served by the federal and state statutes: 1) the interest in removing an incentive for parties to intercept private conversations and 2) the interest in minimizing the harm to persons whose conversations have been illegally intercepted. However, the U.S. Supreme Court determined that the interests could not justify the statutes' restrictions on speech.

**Issue:** The question before the U.S. Supreme Court is where the punished publisher of information has obtained the information in question in a manner lawful in itself but from a source who has obtained it unlawfully, may the government punish the ensuing publication of that information based on the defect in the chain.

**Analysis:** In New York Times Co. v. United States, 403 U.S. 713, the U.S. Supreme Court upheld the right to publish information of great public concern obtained from documents stolen by a third party. However, New York Times v. United States raised, but did not resolve the question "whether, in cases where information has been acquired unlawfully by a newspaper or by a source, [the] government may ever punish not only the unlawful acquisition, but the ensuing publication as well." Here, the Court focused on the stolen documents' character and the consequences of public disclosure, not on the fact that the documents were stolen.

For its analysis, the Court considered that privacy of communication is an important interest. However, in this suit, privacy concerns give way when balanced against the interest in publishing matters of public importance. One of the costs associated with participation in public affairs is an attendant loss of privacy. The profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open supported the Court's holding.
in *New York Times Co. v. Sullivan*, that neither factual error nor defamatory content, nor a combination of the two, sufficed to remove the First Amendment shield from criticism of official conduct. Parallel reasoning requires the conclusion that a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern.

Based on the same reasoning from *New York Times Co. v. Sullivan*, the Court concluded that the disclosures made by respondents were protected by the First Amendment of the U.S. Constitution.

5. **First Amendment: Freedom of Assembly**

This line of cases is unique from the previous line of cases we evaluated, because the U.S. Supreme Court, though never expressly overruling the founding case *Cruikshank*, managed nonetheless to invalidate aspects of the decision that failed to comport with the evolving U.S. cultural and jurisprudential standards of the day. The venerable case *Cruikshank* from 1875 limited the powers of the federal government severely by stating that the freedom to assemble peaceably was a right never granted by the U.S. Constitution. Instead, the right to assemble was left to the States alone to defend, because such a right actually existed before the drafting of the U.S. Constitution.

According to *Cruikshank*, the right of assembly only concerned the government insofar as it limited Congress from drafting laws that would curtail it. Sixty-two years after that decision, the U.S. Supreme Court established its role as a protector of the freedom to assemble in the *DeJonge* case, citing the Fourteenth Amendment of the U.S. Constitution as a guarantor against State intrusion on the right to assemble. Thus, while *Cruikshank* demurred from federal governmental interference in a so-called State sphere, the *DeJonge* Court circumvented this line of reasoning by evoking the Fourteenth Amendment’s protection of the individual from the State.

*Thomas* furthers the line of reasoning first voiced in *DeJonge* to the right of individuals to assemble peaceably by adopting a “clear and present danger” standard to limitation of the freedom of assembly. Because the rights to freedom of speech, press, and assembly are all cognates, no one of these rights may be curtailed without restricting by implication the other two. Thus, in *Thomas*, the petitioner was allowed to hold his meeting in public without a license in the absence of any danger to public safety.

This same protection was extended to organizations in *NAACP v. Alabama* absent some showing by the State that the organization is in some tangible way harming some valid interest of the State. The trend that has emerged through this progeny of cases is one that allows the federal government to curtail the States’ actions where they threaten the valid and constitutional exercise of the freedom to assemble via the Fourteenth Amendment of the U.S. Constitution. This is also another excellent example of the Court’s legislative initiatives.
UNITED STATES v. CRUIKSHANK
92 U.S. 542
October Term, 1875

Facts: Respondents, citizens of the State of Louisiana, were indicted for conspiring to deprive some African-American citizens, also of Louisiana, of rights secured by the U.S. Constitution to peacefully assemble for lawful purposes, bear arms, maintain protection of life and liberty of person under due process of law, and vote at an election. The indictment of these individuals was supported by the sixth section of a statute known as the “Enforcement Act of May 30, 1870,” which punished any group of persons who “injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States.”

Issue: The question before the U.S. Supreme Court is whether the right of Freedom of Assembly was granted or secured by the Constitution or laws of the United States.

Analysis: As Chief Justice Waite pointed out in his opinion, the government of the United States is one of “delegated powers.” Therefore, all powers that are not granted to the federal government are reserved to the States or the people. The only rights that the federal government may grant the people are those first secured by the Constitution. Accordingly, Chief Justice Waite considered whether the rights that Respondents allegedly abridged (the right to assemble) are indeed granted by the U.S. Constitution.

Turning the analysis towards Freedom of Assembly, the Court stated, “[t]he right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government. It ‘derives its source,’ … from those laws whose authority is acknowledged by civilized man throughout the world. … It was not, therefore, a right granted to the people by the Constitution. The government of the United States when established found it in existence, with the obligation on the part of the States to afford it protection.”

The First Amendment of the U.S. Constitution prohibits Congress from abridging the right of people to assemble and petition the government for a redress of grievances. The right was not created by the amendment, and its continuance was not guaranteed, except as against congressional interference. Therefore, for protection of the right to assemble, the people must look to the States. Only the right of the people to petition Congress as national citizens is protected by the U.S. Constitution.
On July 27, 1934, a meeting of the Communist Party was held in Portland, Oregon, at which approximately 300 members were in attendance free of charge. The purpose of the meeting was to protest against illegal raids on workers’ halls and homes and against the shooting of striking longshoremen by Portland police. Mr. DeJonge was a speaker at this meeting, and in his speech he protested against conditions in the county jail and the actions of local police against the longshoremen strike. Mr. DeJonge asked those present to redouble their efforts in recruiting for the Communist party, as well as purchase Communist literature. The meeting, which was conducted in an orderly manner, was raided by police, and Mr. DeJonge was arrested. He was subsequently convicted under a criminal syndicate statute for presiding over a group that was unlawfully teaching and advocating criminal activities.

The question before the U.S. Supreme Court is whether an indictment and conviction on charges of criminal activities should stand, where the only proof of Mr. Dejonge’s involvement in such behavior was organizing a meeting of an organization at which no such criminal behavior was proven.

For its analysis, the U.S. Supreme Court first pointed out that Mr. DeJonge had not been properly charged with criminal behavior, because his only “crime” was facilitating a meeting of “known syndicalists,” without any proof that he or the organization was promoting a criminal syndicate. The Court cautioned against such reasoning, as it would guarantee a similar fate to any speaker at any meeting, “however innocuous the object of the meeting, however lawful the subjects and tenor of the addresses, however reasonable and timely the discussion.” While the States are entitled to protect themselves from the abuse of the privileges of citizenship, “none of our decisions go [sic] to the length of sustaining such a curtailment of the right of free speech and assembly as the Oregon statute demands in its present application.”

Relying on the Fourteenth Amendment of the U.S. Constitution’s Due Process Clause, the Court reexamined its reasoning in Cruikshank. In that opinion, the Court clearly found that a government of republican form automatically implies a right on the part of its citizens to meet peaceably for consultation in respect of public affairs. Cruikshank only extended this First Amendment right to citizens petitioning Congress.

The Court, by contrast, argued that explicit mention of First Amendment guarantees against the federal government does not exclude all other spheres. The Fourteenth Amendment of the U.S. Constitution protects “fundamental principles of liberty and justice which lie at the base of all civil and political institutions,” of which the Freedom to Assemble is one. According to the Court, a greater
importance in safeguarding the community from incitements to overthrow our institutions by force and violence necessitates a greater need to preserve and to hold inviolate the constitutional rights of free speech and assembly, so that the government may be responsive to the will of its citizens, and that changes, if desired, may be engendered by peaceful means.

The Court concluded that peaceable assembly cannot be made a crime, and those who facilitated such meetings may not be cast as criminals. The question that must be asked is not under what auspices the meeting is held, but rather its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech the Constitution protects. The State may not “seize upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge.”
CHAPTER V

THOMAS v. COLLINS
323 U.S. 516
January 29, 1945

Facts: Mr. Thomas, is the president of the International Union U.A.W. (United Automobile, Aircraft, and Agricultural Implements Workers) and a vice president of the C.I.O. The Oil Workers’ Union (O.W.I.U.), a C.I.O. affiliate, organized a large gathering in Texas, at which Mr. Thomas was scheduled to speak. Six hours before speaking, Mr. Thomas was served with a restraining order not to speak, because his organization had not applied for nor received an organizer’s card from the local government.

Nonetheless, Mr. Thomas held the meeting in an orderly and peaceable fashion, at which he addressed 300 members. At the meeting, Mr. Thomas made general pleas for those present to join the union, and made a specific solicitation of one audience member. After the meeting, Mr. Thomas was arrested and subjected to contempt proceedings for violating the restraining order. The Texas statute under which Mr. Thomas was arrested and held in contempt was passed to “secure general public welfare, and to safeguard laborers from imposture when approached by an alleged organizer.” It affects “only the right of one to engage in the business as a paid organizer, and not the mere right of an individual to express his views on the merits of the union.” It makes mandatory the issuance of a card to all paid organizers.

Issue: The question before the U.S. Supreme Court is whether the Court should adopt a test of “rational basis” or “clear and present danger” for limitation of the First Amendment freedom of assembly?

Analysis: Mr. Thomas argued that the Texas statute by which he was arrested and charged is an invalid restraint upon free expression guaranteed by the First Amendment of the U.S. Constitution by penalizing the mere asking of a worker to join a union, without having procured the card, whether the asking takes place in a public assembly or privately. The State of Texas, conversely, asserted that no issue of free speech or assembly was presented. Instead, the State argued the matter was a commercial one, and that the statute in question was directed at business practices, like selling insurance, dealing in securities, etc. In accordance with their differing views on the issues, Mr. Thomas argued for the rule which requires a showing of “clear and present danger” to sustain a restriction on speech or assembly, while the State argued that the appropriate standard was a “rational basis” test to determine whether any compelling state interest is advanced by the statute.

The Court, in agreement with Mr. Thomas, stated that freedom of assembly “[is] susceptible of restriction only to prevent grave and immediate danger to interests
which the State may lawfully protect.” The duty of the Court is to determine where the individual’s freedom ends and the State’s power begins. Because First Amendment freedoms are extended an overwhelming priority, any attempt to restrict these freedoms “must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger.” Although not identical, the rights of free speech, press, and assembly are inseparable cognate rights.

The rights of assembly and discussion are protected by the First Amendment of the U.S. Constitution. Whatever would restrict them, without sufficient occasion, would infringe its safeguards. The O.W.I.U. meeting was clearly protected, as the speech in question was an essential part of the occasion, unless all purpose was to be taken from it. The solicitations were parts of the speech, and the occasion that can not be separated. As such, a requirement of registration in order to make a public speech would be incompatible with an exercise of the rights of free speech and assembly. Lawful public assemblies that involve no element of grave and immediate danger to an interest of the State are not instruments of harm requiring previous identification of the speakers.

Relying on DeJonge and its progeny, the Court stated that “consistently with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime. And those who assist in the conduct of such meetings cannot be branded as criminals on that score.” The question to be determined if freedom of speech and assembly is to be preserved is not under which auspices is the meeting to be held, but rather for what purpose. The right of free assembly is a national right, federally guaranteed. According to the Court:

There is some modicum of freedom of thought, speech and assembly which all citizens of the Republic may exercise throughout its length and breadth, which no State, nor all together, nor the Nation itself, can prohibit, restrain, or impede. If the restraint were smaller than it is, it is from petty tyrannies that large ones take root and grow. This fact can be no more plain than when they are imposed on the most basic rights of all. Seedlings planted in that soil grow great and, growing, break down the foundations of liberty.
Facts: The National Association for the Advancement of Colored People (“NAACP”), which operates an office in the State of Alabama, refused to comply with a State qualification statute, requiring an out-of-state corporation to file its corporate charter with the Secretary of State and designate a place of business and an agent to receive service of process. The Attorney General of Alabama brought an equity suit in the State Circuit Court to enjoin the NAACP from conducting further activities within, and to oust it from, the State. The charge recited that the NAACP, by continuing to do business in Alabama without complying with the qualification statute, was “causing irreparable injury to the property and civil rights of the residents and citizens of the State of Alabama.” During proceedings, Alabama required that the NAACP submit its membership roles or face contempt of court charges. The NAACP refused.

Issue: The question before the U.S. Supreme Court is whether an Alabama court order for the NAACP to produce records including names and addresses of all members and agents is a denial of due process guaranteed by the Fourteenth Amendment of the U.S. Constitution as entailing likelihood of a substantial restraint upon members’ exercise of their right to freedom of association.

Analysis: The NAACP argued that Alabama may not constitutionally compel disclosure of its membership lists, because doing so would abridge the rights of its rank and file members to engage in lawful association in support of their common beliefs. It contended that governmental action, which, although not directly suppressing association, nevertheless carries this consequence, can be justified only upon some overriding valid interest of the State.

Relying on both DeJonge and Thomas, the U.S. Supreme Court stated:

[E]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the “liberty” assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.

State action curtailing the freedom to associate, then, is subject to the closest scrutiny. The nexus between freedom to associate and privacy in one’s associations should be clear. Governmental requirements compelling disclosure of membership in an organization engaged in advocacy of particular beliefs is
tantamount to compelling adherents to a particular religious faith or political party to wear arm-bands or similar badges. Privacy in group association in many circumstances is indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs. Immunity from state scrutiny of membership lists is so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment. Alabama’s production order entails the likelihood of a substantial restraint upon the exercise of the NAACP’s members of their right to association.

For these reasons, the U.S. Supreme Court rejected Alabama’s arguments and granted relief to the NAACP consistent with the opinion.
Comparative Analysis of Armenian Judicial Acts

1. Introduction

Unlike the United States of America, where the structure of a court judgment (ruling, judicial opinion) have evolved historically—based on precedent, the law defines it in the Republic of Armenia. The structure of a court judgment (ruling, judicial opinion) in Armenia is defined in the Criminal and Civil Procedure Codes, which provide that a judgment (ruling) must have an introductory part, a narrative part, a reasoning part, and a final part.

The introductory part of a judgment (ruling) specifies that it is being taken in the name of the Republic of Armenia, as well as the time and place of taking it, the name and bench of the court, the case number, the names of parties to the case, the dispute object (in civil cases), and the criminal law under which the defendant is charged (in criminal cases).

The narrative part of a judgment (ruling) shall contain a brief narration of the contents of the charges (claim), the response, and the motions and requests made by the parties.

The reasoning part of a judgment (ruling) shall specify the case circumstances, as established by the court, the evidence on which the court’s inferences are based, the court’s conclusion on whether the charges are proven and whether the defendant is guilty, the reasoning for rejecting certain evidence, and the rules of legislation by which the court was guided in reaching its decision.

The final part of a judgment (ruling) shall specify the decision taken by the court in the case and the way in which it can be appealed.

Though Cassation Court judgments are formally not divided into parts, they effectively contain provisions characteristic of such parts. An Armenian Cassation Court judgment will contain the case number, the time of taking the decision, the bench of the Cassation Court, the name of the person (entity) that lodged the cassation appeal, the name of the court that tried the case, the case number, the time the judgment (ruling, judicial opinion) was made, the bench of the court, brief narration of the substance of the judgment (ruling, judicial opinion), the names of parties to the case, the grounds on which lawfulness of the judgment (ruling, judicial opinion) was challenged, the laws guiding the Cassation Court in its decision-making, the reasons for the Cassation Court disagreeing with the inferences of the lower court in case of quashing the judgment (ruling, judicial opinion), and the conclusions reached as a result of reviewing the cassation appeal. Thus, an Armenian Cassation Court judgment, too, could be conditionally divided into introductory, narrative, reasoning, and final parts.

In the USA, the court acts as a single body, while each judge may act with a separate opinion. The same is possible under the Armenian procedure legislation, provided that the court is acting through a bench of several judges. It is possible in the appellate and cassation courts; in such cases, a judge that disagrees with the majority opinion may act with a special opinion, which, too, will be attached to the published decision. However, a special opinion cannot have any legal consequences.

Based on the foregoing, a comparison would show that Armenian and US judgments are quite similar in terms of the structure, although the source of law affecting the evolution of such structure has been different in the two countries: in one, it was case law, whereas in the other, it was legislative (statutory) law.

Let us now address the possible use of precedent in judgments, rulings, and judicial opinions of Armenian courts: though the Armenian legislation in effect does not rule out such use, it must be said that before amending the Constitution, it was only possible under Article
52(2) of the Civil Procedure Code, which provides: “Facts related to a previously tried civil case and established by court ruling that came into legal force are not proved repeatedly.” Besides, a similar provision could be found in the Republic of Armenia Law on Legal Acts, which defines the procedure of adopting, promulgating, and bringing into force legal acts in the Republic of Armenia, as well as the hierarchy of legal acts and the procedure of repealing and challenging them. This Law provides that in the legislative framework of Armenia, the Constitution has supreme legal force, followed by laws of Armenia (which shall not contradict the Armenian Constitution, other laws, and Constitutional Court judgments), Constitutional Court judgments, National Assembly decisions, Presidential decrees and instructions, Government decrees, Prime Minister decrees, and other legal acts adopted by competent bodies acting within their law-making mandate.

Determining the constitutionality of legal acts is reserved for the Constitutional Court of Armenia. Decisions of the Constitutional Court on constitutionality of legal acts may be deemed rules of precedent, because they must be applied by all other bodies, including courts.

Under the civil legislation of Armenia, universal courts may examine acts adopted by other bodies for conformity with Armenian laws, and decisions on these matters, too, may be a source of precedent.

After the Constitution of Armenia was amended, the Armenian Cassation Court has been given the responsibility to ensure that courts apply laws in a uniform (consistent) manner. The reason is that, even though courts must follow the law and take decisions that do not contradict the law, there are cases when different courts come up with different reasoning on similar issues, which causes violation of the principle of uniform application of laws. Under the Amended Constitution, this responsibility was placed with the Armenian Cassation Court and, from now on, Cassation Court judgments shall have the nature of precedent.

Precedent principles are also contained in the jurisprudence of the European Court of Human Rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms, because the ECHR’s judgments contain elaborate construal of the Convention provisions, which in turn become a source of law for similar circumstances. However, the judgments of the European Court of Human Rights are so far applied as case law only by the Cassation Court, as other courts often refrain from applying the ECHR's case law, although, by following Cassation Court judgments, they would in effect be obliged to follow ECHR case law, as well.

2. Republic of Armenia Cassation Court Judgment 180/05 of July 22, 2005

The July 22, 2005 judgment of the Armenian Cassation Court can serve as an example of how case law was applied: in this judgment, the Cassation Court interpreted the notion of administrative detention on the basis of the relevant case law of the European Court of Human Rights on the issue of administrative detention as an administrative punishment, concluding that, in the given circumstances, it amounted to a criminal punishment.
The “introductory” part of the judgment:

Appellate Court bench that took the judgment
2005
Presiding judge: T. Sahakyan

Criminal case VKB - 180/05

JUDGMENT

IN THE NAME OF THE REPUBLIC OF ARMENIA

The Criminal and Military Case Chamber of the Cassation Court,
Sitting in Yerevan on July 22, 2005

Presiding: D.Avetissyan
Judges: H.Asatryan, M.Simonyan
H.Ghukasyan, and S.Ohanyan

With participation of:
Prosecutor: N.Baghdasaryan
Defense counsel: N.Baghdasaryan

In an open session of the court, heard the cassation appeal of N.Baghdasaryan—defense
counsel for Vanik (son of Vagharshak) Salartzortzyan against the April 18, 2005 decision of
the President of the Republic of Armenia Appellate Court for Criminal and Military Cases.

It becomes clear from the introductory part of the judgment that the case number is “VKB
– 180/05,” that the case is examined by the Cassation Court, that the case arrived at the Cassation
Court from the Republic of Armenia Appellate Court for Criminal and Military Cases (as N.
Baghdasaryan, the defense counsel (attorney) for Vanik (son of Vagharshak) Salartzortzyan (the
offender), filed the cassation appeal against the April 18, 2005 decision of the Appellate Court
for Criminal and Military Cases), that the Cassation Court heard the case on June 22, 2005 with a
bench of D. Avetissyan, H. Asatryan, M. Simonyan, H. Ghukasyan, and S. Ohanyan. Thus, we
can say that the introductory part of court judgments in Armenia is, in effect, similar to the
“introduction” and “pleadings of parties” parts of US judgments.

In the “narrative” part of its judgment, the Court provides a brief material statement of the
appellate court’s decision and the grounds invoked by the appellant to support the need for
reviewing the appellate court’s judgment.

By decision dated April 9, 2005 of the First Instance Court of the Kentron and Nork-Marash
districts of Yerevan under Article 182 of the Administrative Infringements Code, Vanik (son
of Vagharshak) Salartzortzyan was subjected to 5-day administrative detention for making loud noise, breaching the public order, and disobeying the lawful demands of the police on stopping such behavior in front of building number 7, Agatangeghos street, at around 9:30 pm on April 8, 2005.

Counsel N. Baghdasaryan lodged an appeal against the April 9, 2005 decision of the First Instance Court of the Kentron and Nork-Marash districts of Yerevan, in which he asked to quash the first instance court decision on subjecting Vanik Salartzortzyan to administrative liability and to terminate the case proceedings.

The President of the Republic of Armenia Appellate Court for Criminal and Military Cases decided on April 18, 2005 to reject N. Baghdasaryan’s appeal.

In the cassation appeal, counsel for V. Salartzortzyan N. Baghdasaryan asked to quash the April 18, 2005 decision of the Republic of Armenia Appellate Court for Criminal and Military Cases, and to send the case to the Appellate Court for new review by a different bench.

The cassation appeal was lodged on the ground of an alleged violation of V. Salartzortzyan’s rights under Articles 6 and 42 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, “the ECHR”). The appellant invoked the following arguments to support the alleged breaches of substantive rights:

1) The Appellate Court has not ensured publicity of the hearing, i.e. neither his client nor he were informed of the day and time of appellate court review of the case;
2) His client was deprived of the right to be presence in the hearing of his case, which deprived him of the right to defense;
3) V. Salartzortzyan was not told by the Police of his constitutional right to refuse to testify against himself, and therefore, the appellate court’s decision was based on evidence obtained by breach of law;
4) By not ensuring V. Salartzortzyan’s participation in his trial, the appellate court did not enable him to tell the court of the circumstances in which he confessed, to adduce new evidence, and to summon and question new witnesses.

As proof of the alleged violation of his client’s right to public hearing under Article 6 of the ECHR, the appellant claims that the imprisonment sentence prescribed for the act attributed to V. Salartzortzyan is a criminal sentence, which is proven by the nature of the offence and the nature and severity of the punishment.

This part of the judgment contains a brief statement of the facts, the procedural history of the case, and the appeal justifications. It, therefore, clarifies the scope of questions that must be
answered by the Cassation Court. As opposed to the first instance and appellate courts, the scope of issues for the cassation court is limited to the cassation appeal grounds in accordance with the Armenian procedural legislation. This part can, in a sense, be compared to the “Overview on the Case and Procedural History” and the “Overview of Facts” parts of US judgments.

The Cassation Court itself will not check the truthfulness of the case facts—in effect accepting the facts established by the first instance or appellate courts. From the part above, it becomes clear that citizen Vanik (son of Vagharshak) Salartzortzyan was making loud noise, breaching the public order, and disobeying the lawful demands of the police on stopping such behavior in front of building number 7, Agatangeghos street, at around 9:30 pm on April 8, 2005, for which he was subjected to 5-day administrative detention by decision dated April 9, 2005 of the First Instance Court of the Kentron and Nork-Marash districts of Yerevan under Article 182 of the Administrative Infringements Code. Counsel N. Baghdasaryan lodged an appeal against the April 9, 2005 decision of the First Instance Court of the Kentron and Nork-Marash districts of Yerevan, in which he asked to quash the first instance court decision on subjecting Vanik Salartzortzyan to administrative liability and to terminate the case proceedings.

The President of the Republic of Armenia Appellate Court for Criminal and Military Cases decided on April 18, 2005 to reject N. Baghdasaryan’s appeal, and the latter lodged a cassation appeal. In his opinion, there have been violations of both procedural and substantive law in the instant case. He alleges violations of his client’s rights under Articles 6 and 42 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The next part—“reasoning”:

Having reviewed the appeal arguments, and having analyzed the presented materials in the frameworks of the grounds specified in the cassation appeal, the Chamber finds it necessary to quash April 18, 2005 decision of the Republic of Armenia Appellate Court for Criminal and Military Cases, and to send the case to the same Court for new review, due to the following reasons:

Article 6 of the Republic of Armenia Constitution provides:
“…ratified international treaties are a component of the legal system of the Republic. If they establish provisions that differ from those of the domestic laws, the treaty provisions shall apply…”

On March 20, 2002, the Republic of Armenia ratified the European Convention—thus giving prevalence to its provisions over the domestic laws of Armenia and, at the same time, undertaking not only to safeguard the rights and freedoms enshrined in the Convention, but also to recognize the jurisdiction of the European Court of Human Rights (hereinafter, “the European Court”).

Article 6(1) of the Convention provides: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by
law.”

The European Court, in construing the notion of “criminal charges”, found that regardless of whether an offence is qualified by the domestic laws as criminal, civil, administrative, or disciplinary, the court may, by applying criteria that it developed, define that an offence is characterized as a criminal one from the standpoint of the Convention.

The European Court notes that the Convention is not opposed to the moves towards “decriminalization” … Nevertheless, if the Contracting States were able at their discretion, by classifying an offence as “regulatory” instead of criminal, to exclude the operation of the fundamental clauses of Articles 6 and 7, the application of these provisions would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the object and purpose of the Convention. (See Öztürk v. Germany, 21/02/84, para. 49).

The first matter to be ascertained is whether or not the text defining the offence in issue belongs, according to the legal system of the respondent State, to criminal law; next, the nature of the offence and, finally, the nature and degree of severity of the penalty that the person concerned risked incurring must be examined, having regard to the object and purpose of Article 6 (art. 6), to the ordinary meaning of the terms of that Article (art. 6) … (See Öztürk v. Germany, 21/02/84, para. 50).

These are the criteria employed by the European Court. In fact, they appear separately, rather than jointly, i.e. the existence of any one of them is sufficient for an act to qualify for “criminal charges.”

By rightfully applying the aforementioned criteria towards the instant case, the Chamber finds that convicting Վանիկ Սալարթորջյան to 5 days’ imprisonment, though done in the ambit of administrative legislation, must be classified as a criminal charge in view of the nature of his offence and the nature and severity of the penalty ordered against him.

Article 182 of the Republic of Armenia Administrative Code provides: “Failure to obey the lawful instruction or demand of a police officer, a police helper, and a military serviceman during the latter’s performance of duties linked with maintenance of the public order—

shall give rise to a fine in the amount from 50% of to double the established minimum salary, or correctional labor from one to two months (with 20% of earnings withheld), and in the case if the application of such means is deemed insufficient under the circumstances of the case, in view of the offender’s person, then to administrative detention for a term of up to 15 days.”
When taking into consideration the nature of the offence, the Chamber bears in mind that Article 182 of the Republic of Armenia Administrative Code has universal application and is intended for all citizens, rather than a certain group of individuals with a special status; this legal provision prescribes a certain type of behavior for everyone, and compliance with its requirements is achieved by means of a punitive sanction.

In the case of Weber and Demikol, the European Court differentiated disciplinary sanctions from criminal sanctions using these very criteria. The Court noted that “disciplinary sanctions are generally designed to ensure that the members of particular groups comply with the specific rules governing their conduct.” If a law concerns all members of the public or the whole population, then the offence proscribed by such law and the punishment for such offence is considered a “criminal” offence. (See the judgment of the European Court in the case of Weber, 22.05.1990, Series A, N 177, p. 18, para. 33; in the case of Weber and Demikol, 1991, Series A, N 210, p. 17, para. 33).

As concerns the severity of the punishment, even in cases when the punishment at stake is a fine, rather than imprisonment or the threat thereof, the European Court will consider whether the penalty is applied as purely monetary compensation for damages inflicted, or as a punishment that plays a preventive role. In the latter case, as well, the penalty may be examined in the context of criminal law.

In the case of Bendenoun v. France (February 24, 1994), the Court assessed the penalty prescribed for the offending behavior and, in such assessment, took into account the fact that such penalty had not only punitive, but also deterrent nature. (See the Court’s judgment in the case of Bendenoun v. France, 24.02.1994, para. 47).

This case is related to an imprisonment sentence, which is much more severe than any monetary penalty, and, in effect, has not only punitive connotation—being the most severe punishment prescribed for the offence in question.

In the case of Benham v. the UK, the European Court noted: “…where deprivation of liberty is at stake, the interests of justice in principle call for legal representation. (See the Court’s judgment in the case of Benham v. the UK, 10.06.1996, para. 61.) In another case, the European Court noted: “In a society subscribing to the rule of law, there belong to the "criminal" sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental.” (See the Court’s judgment in the case of Engel and Others v. the Netherlands, para. 82.)

In the Engel case, the European Court considered two-day detention too short to pertain to criminal law, whereas the other instances of detention were considered criminal, because the persons convicted to this sentence were not separated from persons detained for criminal acts and did not have the right to be absent from the punishment site for longer than one hour.
The conditions of holding persons subjected to administrative detention in Armenia are
defined by the Internal By-Laws of Places for Holding Arrested Persons in the Police System
of the Republic of Armenia (approved by the Head of the Armenian Police). Paragraph 1.2
of the Internal By-Laws provide: “Persons subjected to administrative detention for
administrative infringements, which are covered by the terms and requirements of these By-
Laws, shall be held in special separated sections of places for holding the arrested for a
duration prescribed by the Armenian Code.”

Thus, persons detained for administrative infringements are detained in the same conditions
as those arrested in criminal cases.

Based on the foregoing, and in agreement with the European Court’s construal of Article 6(1)
of the Convention in certain cases, the Chamber finds that the 5-day detention ordered by
court against V. Salartzortzyan for an administrative infringement, by its nature and degree
of severity, reaches the level of a criminal charge; therefore, the Chamber finds a violation of
V. Salartzortzyan’s Article 6(1) right to a “public hearing” has been violated. Therefore, the
April 18, 2005 decision of the President of the Republic of Armenia Appellate Court for
Criminal and Military Cases is not in conformity with the provision of Article 6(1) of the
European Convention.

The Court further accepts the cassation appeal argument and finds a breach of V.
Salartzortzyan’s right under Article 6(3d) of the European Convention, which provides:

“Everyone charged with a criminal offence has the following minimum rights: … (d) to
examine or have examined witnesses against him and to obtain the attendance and
examination of witnesses on his behalf under the same conditions as witnesses against
him…”

In the instant case, in addition to suffering a violation of his right to a public hearing, V.
Salartzortzyan did not have the possibility either to examine witnesses against him in court or
to obtain the attendance and examination of witnesses on his behalf, which could testify in
his favor. Guided by the interpretation of the Convention by the European Court, the
Chamber finds the aforementioned circumstances to be in breach of V. Salartzortzyan’s right
safeguarded by Article 6(3d) of the European Convention.

The Court finds that during the review of the case in the Appellate Court, Article 278 of the
Republic of Armenia Code of Administrative Infringements was violated, which provides:
“…the presiding judge shall … explain to the parties to the case their rights and
responsibilities…”

In the instant case, the Appellate Court President did not explain to V. Salartzortzyan his
rights and responsibilities, including his right under Article 42 of the Armenian Constitution
to refuse to testify against himself.

Thus, the April 18, 2005 decision of the President of the Republic of Armenia Appellate
Court for Criminal and Military Cases must be quashed, and the materials returned to the
same court in order for the materials against Vanik Salartzortzyan to be heard as criminal
charges and for his constitutional rights and his right to a “fair trial” under Article 6 of the
Convention to be safeguarded.
In this part of the judgment, the Court analyzes the merits of the case within the ambit of the cassation appeal and, based on the relevant provisions of material law, applying rules of precedent contained in the relevant case law of the European Court of Human Rights, lays down its reasons and justification for quashing the Appellate Court’s decision. This part of the judgment could be compared to the “discussion, legal reasoning, analysis” part of US judgments.

In the instant case, the Court had to answer several questions. First of all, the Court had to answer whether the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms, invoked in the appeal, are applicable to the instant case. The Court’s answer was affirmative—based on Article 6 of the Republic of Armenia Constitution, which provides: “…ratified international treaties are a component of the legal system of the Republic. If they establish provisions that differ from those of the domestic laws, the treaty provisions shall apply…” Since the Republic of Armenia ratified the European Convention on March 20, 2002, the European Court’s judgments prevail over the domestic laws of Armenia.

The next question for the Court was whether Article 6 of the Convention, which contains the notion of “criminal charges,” is applicable to the instant case, considering that the punishment ordered against Vanik Salartzortzyan was “administrative”, rather than criminal. To answer this question, the Court applied the rules of precedent and cited the European Court’s judgment in the case of Öztürk v. Germany (21/02/84, para. 49). Based on an analysis of the criteria established by the European Court in this judgment, the Armenian Cassation court concluded that the punishment carried out in respect of Vanik Salartzortzyan was criminal, rather than administrative by its nature.

To support this inference, the Court cited the judgments of the European Court in the case of Weber (22.05.1990, Series A, N 177, p. 18, para. 33) and in the case of Weber and Demikol (1991, Series A, N 210, p. 17, para. 33), and noted: “When taking into consideration the nature of the offence, the Chamber bears in mind that Article 182 of the Republic of Armenia Administrative Code has universal application and is intended for all citizens, rather than a certain group of individuals with a special status; this legal provision prescribes a certain type of behavior for everyone, and compliance with its requirements is achieved by means of a punitive sanction.

Turning to the assessment of the severity of the punishment, the Court once again cited a number of judgments of the European Court (the Court’s judgment in the case of Bendenoun v. France, 24.02.1994, para. 47; the Court’s judgment in the case of Benham v. the UK, 10.06.1996, para. 61), based on which it concluded: “This case is related to an imprisonment sentence, which is much more severe than any monetary penalty, and, in effect, has not only punitive connotation—being the most severe punishment prescribed for the offence in question.”

Then, by analyzing the conditions of those subjected to administrative detention and those arrested in criminal cases, the Court concluded that such conditions are not different. The Cassation Court found that “the 5-day detention ordered by court against V. Salartzortzyan for an administrative infringement, by its nature and degree of severity, reaches the level of a criminal charge; therefore, the Chamber finds a violation of V. Salartzortzyan’s Article 6(1) right to a “public hearing” has been violated. Therefore, the April 18, 2005 decision of the President of the Republic of Armenia Appellate Court for Criminal and Military Cases is not in conformity with the provision of Article 6(1) of the European Convention.”

The Court further concluded that in the instant case, the rights of V. Salartzortzyan—as a person facing criminal charges—had been violated, and that the appeal had to be granted and the case sent back for new trial to ensure V. Salartzortzyan’s right to a “fair trial.”
Thus, having analyzed the practice established around administrative detention as an administrative punishment, the Cassation Court concluded that, whenever an administrative punishment is of a general nature, then, considering the nature of the act and the adequacy of the punishment ordered for the act, provided that the conditions of holding administrative detainees are not different from the conditions of holding persons arrested in criminal cases, administrative detention must be viewed as a criminal punishment and, in such cases, administrative cases must be heard under the rules of criminal procedure. This conclusion, in turn, can serve as precedent for courts hearing similar cases.

The “final” part of the judgment:

Based on the foregoing, and guided by Articles 403-407, 415-419, and 422-424 of the Republic of Armenia Criminal Procedure Code, the Republic of Armenia Cassation Court Criminal and Military Case Chamber

RULES

To quash the April 18, 2005 decision of the President of the Republic of Armenia Appellate Court for Criminal and Military Cases and to send the cases to the Appellate Court for a new hearing with a different bench.

This Judgment shall enter into force on the moment of its promulgation and shall not be subject to an appeal.

Presiding Judge:

Judges:

In this part of the Judgment, the Court specifies the outcome of the case and, if the decision is quashed, the future steps to be taken. If a decision (judgment, ruling) is subject to a further appeal, then the Court will also specify the appeal procedure. This part will contain the signatures of judges.

This judgment stands out in the practice of Armenian courts, because it applies to all cases in which a person is facing possible administrative detention as an administrative punishment; later, courts of all instances, which try administrative cases for an uncertain group of persons facing administrative detention will essentially cite this judgment as precedent, based on which they will be obliged to try such cases under the rules laid down for criminal proceedings.

The trend in Armenia is not like the US, where there is some movement from case law to statutory law. In Armenia, there is some movement from legislatively regulated
(statutory) law to case law. It all shows that neither statutory (legislative), nor case law can be comprehensive taken alone, and that they need to work hand-in-hand.

3. Republic of Armenia Civil Appellate Court Judgment of April 11, 2003 in Civil Case # 03/85

Case law is still not widely used by all the judicial instances of Armenia. It has recently been applied by the Cassation Court. In the past, application of case law was rare and not widespread. However, it is normal for any new phenomenon, and this institution of law will develop as appropriate court practice evolves.

In some cases, the use of case law is not only desirable, but also required by the legislation of Armenia. The judgment of the Republic of Armenia Civil Appellate Court dated April 11, 2003 in civil case # 03-85 can serve as an example.

Case 03-85

JUDGMENT

IN THE NAME OF THE REPUBLIC OF ARMENIA

The Republic of Armenia Civil Appellate Court, acting through the following bench:

Presiding judge: N. Hovsepyan
Judges: K. Hakobyan
D. Khachatryan

Secretary: N. Karapetyan

Plaintiff: Z. Hairyan

Counsel for respondent: R. Rshtuni

On April 11, 2003, in an open hearing, the Appellate Court in Yerevan examined the civil case based on the claim of Zaruhi Hairyan against Margarita Hairyan, Hasmik Ghambaryan, and the Notary Office regarding the revocation of the apartment donation agreement and title certificate, recognition of ownership right, and provision of a share.

The First Instance Court of the Kentron and Nork-Marash Districts of Yerevan had rejected the claim on March 22, 2002.

The Republic of Armenia Civil Appellate Court had rejected the claim on June 3, 2002.

On July 26, 2002, the Republic of Armenia Cassation Court Civil and Economic
Case Chamber quashed the June 3, 2002 judgment of the Civil Appellate Court and sent the case to the same court for a new hearing by a different bench.

In the Appellate Court, the Plaintiff informed that the Yerevan “26 Komisar” District Council had decided on June 14, 1981 (decision 14/14) to allow her grandparents to adopt her, based on which an adoption certificate had been issued.

On August 1, 1984, she became registered in the disputed apartment (apartment 23-24, building 1, Tamanyan street), where her grandparents were registered at that time.

She informed that after privatization on November 12, 1991, the aforementioned apartment had become common shared ownership of three persons—each with an equal share, and that in November 1999, the grandfather had died, while the grandmother, allegedly in violation of the Plaintiff’s ownership rights, donated (under donation contract 5-5013 dated October 2, 2001 approved in Yerevan First State Notary Office) the whole apartment, including the Plaintiff’s 1/3 share, to her sister—respondent Margarita Hairyan.

She also told the Appellate Court that her grandfather—Gevorg Hairyan, had bought the apartment from the state, having paid its price, although she was unable to provide the court any evidence of this assertion.

She found out about Gevorg Hairyan’s death, took part in the funeral; however, though a first-turn heir, did not apply to a notary office to obtain an inheritance certificate due to her lack of legal knowledge.

In 1992, she voluntarily canceled her registration in the disputed apartment in connection with becoming married, and is currently the owner of apartment number 65, building 25 Halabyan Street, Yerevan.

She applied to court in January 2002, when she found out that her sister—Margarita Hairyan, had received the apartment after an act of donation.

She asks the Court to declare as partially null and void donation contract 5-5013 between Hasmik Ghambaryan and Margarita Hairyan dated October 2, 2001, as well as Margarita Hairyan’s title certificate for apartment 23-24, building 1, Tamanyan street, to recognize the Plaintiff’s ownership right over the disputed apartment, and to separate her share from the common ownership.

The Respondent’s counsel objected to the Claim, stating that in July 1991, the Plaintiff’s father—G. Hairyan, had applied to the Arabkir District Council and requested to privatize the apartment to him—as a participant in the Second World War.

By decision #15/14 of the Yerevan “26 Komisar” District Council dated September 26, 1991, G. Hairyan was authorized to privatize the apartment at no cost, in view of his participation in the Second World War.

On November 12, 1991, the Yerevan “26 Komisar” District Council and G. Hairyan concluded a “Contract on Transfer of Apartment as Ownership at No Cost.” On
November 8, 1999, G. Hairyan died. After his death, his wife Hasmik Ghambaryan and his daughter Zaruhi Hairyan were heirs. The latter terminated her registration in the apartment in 1992 and established permanent residence in a different apartment (apartment number 65, building 25 Halabyan Street, Yerevan), and from that moment, her apartment use right over the disputed apartment ceased.

About nine months after her husband’s death, i.e. on August 9, 2001, respondent Hasmik Ghambaryan applied to the notary office and became recognized as the heir of ½ part of the ownership share in the apartment, i.e. her husband’s share, which effectively made her the only owner of the disputed apartment. Based on this, a title certificate was issued to her on August 30, 2001.

On October 2, 2001, respondent Hasmik Ghambaryan donated the apartment to her granddaughter—Margarita Hairyan.

The Plaintiff had not assumed inheritance and had not applied to the notary office, and therefore her claim must be rejected.

The Respondent’s Counsel finally asked to reject the Claim.

A representative of Yerevan First State Notary Office has been duly notified, but failed to come to the court session. He asked to admit as evidence his explanatory note sent earlier to the Appellate Court, which stated that Gevorg Hairyan had received the disputed apartment as a present from the state on the basis of decision #15/14 of the Yerevan “26 Komisar” District Council dated September 26, 1991 and the contract dated November 12, 1991 issued by registry 2-1095 of the notary office for the same district, which was registered as inheritance to be the ownership of his wife—Hasmik Ghambaryan, after he died.

Hasmik Ghambaryan, having become the sole owner of the disputed apartment, donated it to her granddaughter Margarita Hairyan on October 2, 2001. The transaction was executed in accordance with the requirements of the Republic of Armenia Civil Code, and the Claim should therefore be rejected for being unfounded.

The Appellate Court, having analyzed the court proceedings, finds the Claim unfounded and rejects it on the following grounds.

The court proceedings revealed that the Yerevan “26 Komisar” District Council had decided on June 14, 1981 to authorize Gevorg Hairyan and Hasmik Ghambaryan to adopt their granddaughter Zaruhi Hairyan (letter number 5.10).

After this decision, Zaruhi Hairyan became registered in apartment 23-24, building 1, Tamanyan street, of which Gevorg Hairyan was the tenant (letter number 7).

On September 20, 1991, the Yerevan “26 Komisar” District Council Executive Committee had decided to privatize the apartment to Gevorg Hairyan at no cost—for his participation in the Second World War, in accordance with the March 4, 1991 decision of the Armenian Republican Council of the Trade Unions of the Republic of Armenia Council of Ministers and the May 24, 1991 decision of the Yerevan City Council Executive Committee on Transferring Apartments to Participants of the Second World War
and Certain Other Categories of Citizens as Ownership (letter number 48).

After the aforementioned decisions were taken, Gevorg Hairyan and the Yerevan “26 Komisar” District Council Executive Committee concluded a donation contract in November 1991, which was endorsed in the state notary office on November 12, 1991, and registered in the District Council Executive Committee.

In the Contract, the District Council Executive Committee representative had acted as the donor, which donated, and Gevorg Hairyan—as the owners, which received, apartment 23-24, building 1, Tamanyan street.

Though the Contract had allocated space for specifying the names and surnames of all other persons receiving the donation, if any, no others were mentioned in the Contract besides Gevorg Hairyan (document 58).

The Plaintiff’s assertion that she, being the daughter of the apartment tenant, agreed to the then state-owned apartment to be privatized, by which she had become a co-owner of the apartment, is groundless, because Gevorg Hairyan had received the apartment as a gift for his services to his homeland, which was explicitly stated in the decision of the executive committee (document 11).

Finally, the basis for the late Gevorg Hairyan obtaining ownership right was the donation contract (under Article 172 of the Republic of Armenia Civil Code), which means that the Court must resolve this dispute on the basis of laws concerning donation.

The court proceedings revealed that after Gevorg Hairyan’s death, the Plaintiff had not resided in the disputed apartment: as a result of her marriage, she quit registration from this apartment in 1992, by which her use rights over the disputed apartment ceased.

As a first-turn heir, she failed to apply to the notary office for exercise of her rights under Articles 121(6) and 122 of the Republic of Armenia Civil Code.

The Plaintiff’s claim to nullify the October 2, 2001 contract between Hasmik Ghambarayan and Margarita Hairyan is groundless, because Hasmik Ghambarayan, being the sole owner of the disputed apartment, whose “ownership right was registered on October 30, 2001, and has not been nullified” (letters # 41 and 42), exercised her discretion in determining the fate of assets owned by her (Article 163 of the Civil Code of the Republic of Armenia).

Based on the foregoing, and guided by Article 218 of the Republic of Armenia Civil Procedure Code, the Appellate Court hereby

RULES

To reject the claim of Zaruhi Hairyan against Margarita Hairyan, Hasmik Ghambarayan, and the Notary Office regarding the revocation of the apartment donation agreement and title certificate, recognition of ownership right, and provision of a share.

The judgment may be appealed to the Republic of Armenia Cassation Court Civil
With this judgment, the Civil Appellate Court, though it had to base its judgment on the judgment of the higher court (i.e. the Cassation Court), ignored the Cassation Court judgment and took a decision that was substantively the same as the earlier decision of the Appellate Court (acting through a different bench), which had been quashed by the Cassation Court.

This was clearly stated by the Cassation Court in its judgment of May 23, 2003, whereby it again quashed the Appellate Court judgment and noted that “the Appellate Court has committed a grave violation of law, and it would be redundant to comment on these issues again” (see the Chamber judgment of July 26, 2002, document # 74-76). Thus, had the Appellate Court followed the doctrine of precedent and based its judgment on a judgment already taken by the higher court (i.e. the Cassation Court), it could have avoided this “violation” and would have, probably, reached a lawful judgment.

However, the Appellate Court took a decision that had been taken earlier, and the Cassation Court quashed it on May 3, 2003.
Judges: H. GEVORGYAN  
S. SARGSYAN  
S. GIURJYAN  
V. ABELYAN

On May 23, 2003

In an open session of the Court, examined Z. Hairyan’s cassation appeal against the April 11, 2003 judgment of the Civil Appellate Court in the civil case based on the claim of Zaruh Hairyan against Margarita Hairyan, Hasmik Ghambaryan, and the Notary Office regarding the revocation of the apartment donation agreement and title certificate, recognition of ownership right, and provision of a share.

By appealing to the Court, the Plaintiff informed the Court that the Yerevan “26 Komisar” District Council had decided on June 14, 1981 (decision 14/14) to allow her grandparents (Gevorg Hairyan and Hasmik Ghambaryan) to adopt her, after which she became registered in apartments 23 and 24, building 1, Tamanyan Street, Yerevan, where her grandparents were already registered. On November 12, 1991, the apartment was privatized in the name of G. Hairyan. In 1999, G. Hairyan died. Claiming that H. Ghambaryan, allegedly in violation of the Plaintiff’s ownership rights, donated (under donation contract 5-5013 dated October 2, 2001 approved in Yerevan First State Notary Office) the whole apartment to her sister—Margarita Hairyan, she asked to partially revoke donation contract 5013 dated October 2, 2001 and the apartment title certificate, to recognize her ownership right over 1/3 part of the apartment, and to separate her share.

The claim had been rejected by judgment of the Civil Appellate Court dated April 11, 2003.

The cassation appeal has been lodged on the basis of an alleged breach of substantive law.

It is asserted in the cassation appeal that the Appellate Court misinterpreted the requirements of the Armenian SSR Council of Ministers Decision on Selling State-Owned and Publicly-Owned Housing Stock to Citizens as Personal Ownership, the decision of the Armenian Republican Council of the Trade Unions dated June 13, 1989, Articles 53 and 54 of the Republic of Armenia Housing Code, and Articles 197, 198, 273, 274, 305, 599, 685, and 1216 of the Republic of Armenia Civil Code. The appellant has asked to quash the April 11, 2003 judgment of the Civil Appellate Court and to send it back for a new hearing.

Having reviewed the judgment of the Appellate Court and analyzed the case materials and appeal arguments, the Chamber finds it necessary to grant the cassation appeal on the following grounds.

The case proceedings revealed that according to decision 14/14 of the Yerevan “26 Komisar” District Council Executive Committee dated June 14, 1981, it was “permitted, as a
CHAPTER VI

Examples of Armenian Case Law

matter of exception, to spouses Gevorg Hairyan and Hasmik Ghambaryan to adopt their
granddaughter Zaruhi (daughter of Rafik) Hairyan. After adoption, call the adoptee Zaruhi
(daughter of Gevorg) Hairyan, father—Gevorg Hairyan, mother—Hasmik Ghambaryan.” (Letter
number 5.)

On July 10, 1981, adoption certificate number 1-SL 257928 was issued. (Document
number 10.)

According to an excerpt from session 15/14 of the Yerevan “26 Komisar” District
Council Executive Committee on September 26, 1991, it was permitted to privatize apartments
23 and 24, building 1, Tamanyan Street to tenant G. Hairyan, with 3 persons (document number
11). At the time of the apartment privatization, G. Hairyan, H. Ghambaryan, and Z. Hairyan
were registered and living in the apartment. In the contracts dated August 6, 1991 issued for the
privatization of the apartments, Z. Hairyan and H. Ghambaryan each noted: “I agree for our
apartment (apartment 24, entrance 2, Tamanyan 1) to be privatized” (documents 12, 13, and 14).

On November 12, 1991, G. Hairyan obtained title registration certificate number 3550
(document 55).


On October 2, 2001, H. Ghambaryan donated apartments 23 and 24 to M. Hairyan under
a donation contract (document 57).

The Civil Appellate Court of the Republic of Armenia ruled on June 3, 2002 to reject Z.
Hairyan’s claim, explaining that being registered in the apartment at the time of its privatization
and having “3 persons” specified in the privatization decision was not a basis for declaring the
Plaintiff as an owner (documents 65-67).

Under Paragraph 20 of the Armenian SSR Council of Ministers Decision on Selling
State-Owned and Publicly-Owned Housing Stock to Citizens as Personal Ownership and
decision 272 of the Armenian Republican Council of the Trade Unions dated June 13, 1989,
which were in force at the time of privatizing apartments 23 and 24, building 1, Tamanyan
Street, Yerevan, “state-owned and publicly-owned apartments are sold as private ownership to
the tenant occupying such apartment or to the tenant’s family members specified in Article 54 of
the Armenian SSR Housing Code—subject to the written consent of all the adult members of the
family. If they wish, the apartment may be sold as their common ownership.”

Under Article 53 of the Republic of Armenia Housing Code, members of the tenant’s
family that reside jointly with the tenant shall enjoy the same rights as the tenant in terms of
rights provided under the living space lease contract and shall have the same responsibilities.
Under Article 54, the tenant’s family members include the tenant’s spouse, children, and parents.

On July 26, 2002, the Republic of Armenia Cassation Court Civil and Economic Case
Chamber quashed the June 3, 2002 judgment of the Republic of Armenia Civil Appellate Court
on the ground that the Appellate Court had misinterpreted the requirements of the
aforementioned decision and Articles 53 and 54 of the Republic of Armenia Housing Code, and
ignored the fact that Z. Hairyan, too, had acquired ownership rights over the apartment on the
basis of the grounds for the apartment privatization (including the decision that specified “3
persons” (document 11) and the August 6, 1991 privatization contracts issued with such contents
(documents 12 and 14)).

In the new trial of the case, the Appellate Court reasoned that the Plaintiff’s argument
whereby “she, as the daughter of the apartment tenant, agreed to the privatization of the state-
owned apartment, and thereby became an owner of the apartment, is groundless, because Gevorg
Hairyan received the apartment as a gift for his services to his homeland, which was explicitly
stated in the decision of the executive committee (document 11).” It was also stated in the
judgment of the Appellate Court: “Finally, the basis for the late Gevorg Hairyan obtaining ownership right was the donation contract (under Article 172 of the Republic of Armenia Civil Code), which means that the Court must resolve this dispute on the basis of laws concerning donation.”

Under such conditions, the cassation appeal assertions of breach of substantive law are justified and provide basis for quashing the Appellate Court’s judgment under Article 226 of the Republic of Armenia Civil Procedure Code. The Chamber “finds that the Appellate Court has committed a grave violation of law, and it would be redundant to comment on these issues again” (see the Chamber judgment of July 26, 2002, document # 74-76).

Moreover, this dispute is subject to the laws on privatization of state-owned assets (to citizens), rather than the laws of donation, regardless of whether there was compensation for the transfer of ownership or not (to participants of the Second World War and certain other categories of citizens). Moreover, the fact that apartment 24 of building 1 on Tamanyan Street in Yerevan is under common ownership is confirmed by the title certificate dated August 9, 2001 (document 47), and under Articles 273 and 274 of the Civil Code of the Republic of Armenia, an owner has the right to demand that his ownership right be recognized and to claim his assets back from unlawful possession of another.

At the same time, the Chamber notes that Plaintiff Z. Hairyan motioned the Chamber to postpone the hearing of the case by a session in view of the parties being sisters and there being genuine options for peaceful settlement, but the counsel for the Respondent (R. Rshtuni—an advocate with a special license, registered with the Cassation Court of the Republic of Armenia), refused categorically.

Based on the foregoing, and guided by Articles 236-239 of the Republic of Armenia Civil Procedure Code, the Chamber

R U L E S

To grant the claim, i.e. to quash the Civil Appellate Court judgment dated April 11, 2003, and to send the case to the same court for a new trial by a different bench.

This judgment shall enter into force from the moment of promulgation and shall not be subject to appeal.

PRESIDING JUDGE: signature

JUDGES: signatures
CHAPTER VII

Sample Forms

Form 1

FORM 1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

WARREN T. KITCHEN, )
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(3) prejudgment interest (“Third Claim”).

In its answer, WSCO raised nine affirmative defenses.

This court has jurisdiction over Kitchen’s First Claim pursuant to 42 USC § 2000e. Both parties have consented to allow a Magistrate Judge to enter final orders and judgment in this case in accordance with FRCP 73 and 28 USC § 636(c).

WSCO has now filed a Motion for Summary Judgment (docket #40) against all claims on the basis of judicial estoppel. For the reasons that follow, the Motion for Summary Judgment is DENIED.

FACTS

WSCO is an Oregon corporation that does business in the state of Oregon under the assumed name of WSCO Petroleum and Toad’s. Kitchen commenced at-will employment with WSCO on or about September 23, 2002, and was terminated on or about December 31, 2002.

On August 29, 2003, Kitchen filed a complaint with the Oregon Bureau of Labor and Industries (“BOLI”), alleging sexual harassment and retaliation against WSCO. Defendant’s Ex. 1, p. 2. BOLI subsequently transferred the complaint to the Equal Employment Opportunities Commission (“EEOC”) for investigation. Id at 1. On or about March 19, 2004, the EEOC issued its determination, stating that based on its investigation, it was “unable to conclude that the information obtained establishes violations of the statutes.”. Defendant’s Ex. 2, p. 1. Kitchen was provided with a 90-day right to sue notice. Id. His right to sue expired on or about June 14, 2004. Id.

On April 5, 2004, Kitchen filed a Voluntary Petition for a Chapter 13 Bankruptcy in the United States Bankruptcy Court for the District of Oregon, Case No. 04-33230-rlid13, together
with mandatory schedules of assets. Defendant’s Ex. 3. In his schedule of assets, Kitchen did not disclose or list the claims for relief that Kitchen now alleges against WSCO in this action. Id at 6-7. Instead, Kitchen’s claim against WSCO (misspelled as “Westco”) was included on the schedule listing unsecured, non-priority creditor claims. Id at 14. Kitchen also failed to include his claims against WSCO on his Chapter 13 Plan (the “Plan”), which was filed simultaneously with his bankruptcy petition and later modified on or about May 28, 2004. Defendant’s Ex. 4.

On May 11, 2004, at a “341a Meeting of Creditors,” the Trustee asked Kitchen whether all his assets were listed on the schedules, and Kitchen responded “yeah.” Defendant’s Ex. 6, p. 3. No creditors were present at that meeting. Id at 2. The Trustee also asked Kitchen whether he had reviewed the documents signed by him and prepared by his attorney, and Kitchen again responded “yeah.” Id at 4. The Trustee finally asked “Do you find them to be complete, true and accurate to the best of your knowledge?” and Kitchen answered “To the best of my knowledge, yeah.” Id.

On June 10, 2004, Kitchen amended his bankruptcy schedules, but did not add his claims against WSCO. Defendant’s Ex. 5, p. 3; Defendant’s Ex. 7, p. 9. On August 30, 2004, the Bankruptcy Court issued an “Order Confirming Plan and Resolving Motions.” Defendant’s Ex. 8.

On or about July 5, 2005, WSCO’s attorney confronted Kitchen’s attorney with WSCO’s intent to move for summary judgment on the basis of judicial estoppel relating to the bankruptcy filing. Affidavit of Amy S. Campbell, ¶ 2. On or about July 11, 2005, Kitchen amended his bankruptcy schedules to add his claims against WSCO, as well as a contract claim and malpractice claim against others that he had not previously disclosed. Defendant’s Ex. 9, p. 3.
This amendment was filed with the bankruptcy court and served on the Chapter 13 and Trustee. Defendant’s Ex. 12. Kitchen has never informed his creditors of his claims against WSCO. *Id.* Kitchen amended his schedules prior to WSCO’s motion for summary judgment, which was filed on July 22, 2005.

On August 2, 2005, Kitchen and the Trustee entered into a stipulation to modify the plan “so that any non-exempt proceeds will be used to fund the plan and to pay claims. The parties anticipate that any such proceeds will increase payment to creditors.” Plaintiff’s Ex. C, p.2.

**DISCUSSION**

WSCO argues that Kitchen has failed to meet his obligations as a debtor pursuant to the Bankruptcy Code by not listing his pre-petition claims against WSCO in his original bankruptcy filings, his subsequent testimony and amendments to his schedules and Chapter 13 Plan and by amending his schedules after being confronted with the threat of a motion for summary judgment. Therefore, WSCO believes Kitchen’s claims are barred under the doctrine of judicial estoppel.

I. **Legal Standard**

“Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position.” *Hamilton v. State Farm Fire & Cas. Co.*, 270 F3d 778, 782 (9th Cir 2001), citing *Rissetto v. Plumbers & Steamfitters Local*, 343, 94 F3d 597, 600-01 (9th Cir 1996) and *Russell v. Rolfs*, 893 F2d 1033, 1037 (9th Cir 1990), cert denied, 501 US 1260 (1991). It is not only limited to asserting...
inconsistent positions in the same litigation, but also is appropriate to bar litigants from making incompatible statements in two different cases. Id at 782-83. Because it is intended to protect the integrity of the judicial process, judicial estoppel “is an equitable doctrine invoked by a court at its discretion.” Russell, 893 F2d at 1037.

A court “may” consider three factors in determining whether to apply the doctrine of judicial estoppel: (1) “a party’s later position must be clearly inconsistent with its earlier position;” (2) “whether the party has succeeded in persuading a court to accept that party’s earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled;” and (3) “whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.” Hamilton, 270 F3d at 782-83, quoting New Hampshire v. Maine, 532 US 742 (2001) (internal quotations and citations omitted).

II. Analysis

A lawsuit based on events occurring prior to the filing of a bankruptcy petition is a claim existing as of the date the petition is filed; accordingly, the claim is property of the estate under 11 USC § 541(a)(1). United States v. Whiting Pools, 462 US 198, 205 n9 (1983). Kitchen’s
potential employment discrimination claim arose before he filed his bankruptcy petition, and yet he failed to list this claim as an asset on his schedules, although he was expressly required to do so by 11 USC § 521(1).

Judicial estoppel is designed “not only to prevent a party from gaining an advantage by taking inconsistent positions, but also because of ‘general consideration[s] of the orderly administration of justice and regard for the dignity of judicial proceedings,’ and to ‘protect against a litigant playing fast and loose with the courts.’” Hamilton, 270 F3d at 782, citing Russell, 893 F2d at 1037. Application of judicial estoppel is appropriate to “prevent the deliberate manipulation of the courts.” Helfand v. Gerson, 105 F3d 530, 536 (9th Cir 1997) (citation omitted, emphasis added). Accordingly, courts have judicially estopped parties that have taken inconsistent positions calculated to make a mockery of the judicial system. Burnes v. Pemco Aeroplex, Inc., 291 F3d 1282, 1284 (11th Cir 2002) (citations omitted, emphasis added); see also In re Coastal Plains, 179 F3d 197, 206 (5th Cir 1999) (“many courts have imposed the additional requirement that the party to be estopped must have acted intentionally, not inadvertently” (citations omitted, emphasis added)); Johnson Serv. Co. v. Transamerica Ins. Co., 485 F2d 164, 175 (5th Cir 1973) (interpreting Texas law on judicial estoppel as “the rule looks toward cold manipulation”) (emphasis added)).

However, when a party acts in good faith and the creditors have been adequately informed, no threat is posed to the “integrity of the bankruptcy system [which] depends on full and honest disclosure of debtors of all their assets.” Hamilton, 270 F3d at 785, quoting In re Coastal Plains, 179 F3d at 208. Judicial estoppel does not apply “[i]f incompatible positions are based not on chicanery, Johnson v. State, Oregon Dept. of Human Resources, Rehab. Div., 141
F3d 1361, 1369 (9th Cir 1998), or “when a party’s prior position was based on inadvertence or mistake.” *Helfand*, 105 F3d at 136. Mere inconsistency is not enough to permit a conclusion that a party has been playing fast and loose. *General Signal Corp. v. MCI Telecomm. Corp.*, 66 F3d 1500, 1505 (9th Cir 1995), *cert denied*, 516 US 1146 (1996).

The issue is whether Kitchen’s failure to include his claim against WSCO on the original schedule of assets was deliberate, intentional and in bad faith, or was due to inadvertence or mistake. WSCO alleges that Kitchen is guilty of “coy shenanigans” because he had knowledge of his pre-petition claims against WSCO at the time he filed for bankruptcy and yet failed to provide notice to the bankruptcy court, Trustee and creditors until he was confronted by WSCO of its intent to move for summary judgment.

This court finds that Kitchen did not act in bad faith. WSCO relies on an alleged inconsistency between Kitchen’s deposition testimony (stating that he noticed some debts, including the WSCO claim, were missing from the schedules, asked his lawyer about them and was reassured that they could added later by amending the schedules), his oath at the creditors’ meeting (certifying that the schedules are true and accurate to the best of his knowledge), and his declaration filed in opposition to the summary judgment motion. As discussed in this court’s Opinion and Order on WSCO’s Motion to Strike, Kitchen’s deposition testimony is not inconsistent with his oath at the creditors’ meeting or his declaration. When Kitchen noticed that some of his “debts” were not listed on his schedules, including his claim against WSCO, he became concerned and asked his bankruptcy attorney about it, who advised that the schedules could be amended later. *Deposition of Kitchen*, pp. 12, 16, 18, 66-67. Kitchen relied on that representation and believed that the documents complied with bankruptcy rules. *Id* at 9, 12, 27,
41, 58, 61. He found the bankruptcy proceeding totally confusing and did not understand the precise status of his BOLI complaint and how it was connected to the bankruptcy proceeding. Declaration of Kitchen, ¶ 3; Deposition of Kitchen, pp. 22-23, 27, 62-64. As a result, he answered all the questions under oath “truthfully to the best of [his] ability on [his] information, knowledge and belief. Declaration of Kitchen, ¶ 13. In hindsight, he could only assume “the materials . . . were misunderstood to result in the mischaracterization of the ‘claim’ in the manner which found its way to the Schedule F [creditors holding unsecured nonpriority claims, Defendant’s Ex. 3, p. 13]” and that “[a]ny mistakes that I . . . caused my lawyer to make have been the result of confusion surrounding the events and not b[y] any effort of mine to hide.” Id at ¶¶ 4, 16. Kitchen did not realize that WSCO was listed in his original schedules, although on the wrong schedule, until the time of his deposition. In fact, the listing of WSCO on the original Schedule F, even if incorrect, corroborates Kitchen’s assertion that he told his bankruptcy attorney about the claim against WSCO.

Furthermore, Kitchen cured any error promptly by amending his bankruptcy schedules just five days after learning about the error from WSCO’s counsel. Defendant’s Ex. 9, p. 3. Some courts outside this jurisdiction have found that amending is not enough to avoid judicial estoppel. In *Scoggins v. Arrow Trucking Co.*, 92 F Supp 1372 (SD Ga 2000), the court applied judicial estoppel where plaintiff did not inform the trustee or his creditors of the claim until the opposing party filed a summary judgment motion against him. However, plaintiff failed to provide any affidavit or other explanation for his failure to list the claim as an asset on the original schedules and offered no proof that he was in the process of moving to amend his
bankruptcy filings to disclose the claim. *Id* at 1375-76. Kitchen has offered both an explanation of the error and actual proof that he amended his bankruptcy schedules to correct the error.

Other case relied on by WSCO are distinguishable. In *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F2d 414 (3rd Cir 1988), the Third Circuit applied judicial estoppel where a business debtor listed the bank which had driven him into bankruptcy as a creditor owed $7.7 million on the Chapter 11 bankruptcy schedules, failed to list the potential claims against the bank on its assets schedule, and then sued the bank. As later acknowledged by the Third Circuit in *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F3d 355, 362 (3rd Cir 1996), another Chapter 11 case, *Oneida* did not expressly analyze the debtor’s intent, but found “ample evidence in the record” from which to draw an inference of deliberate manipulation. Whereas the creditors might have been entitled to the full amount of any recovery had they known about the claim in advance, the reorganization plan limited their potential recovery to only one-third of the debtor’s potential recovery, and the bank may have voted differently under the plan had it known it would be sued. *Id* at 363. In contrast, Kitchen’s bankruptcy was not caused by WSCO; WSCO did not take any part in the approval of the original plan and was not misled in any way; and unlike *Oneida*, a business engaging in interstate commerce, Kitchen is an unsophisticated party. Moreover, “only the plan proponent or the reorganized debtor may propose a modification of a Chapter 11 plan, leaving creditors vulnerable to late amendments,” while even an unsecured creditor may propose a modification of a Chapter 13 plan. *In re Anthony*, 302 BR 843, 849-50 (Bkrtcy ND Miss 2003).

In *Burnes*, six months after filing for bankruptcy under Chapter 13, the plaintiff filed an employment discrimination suit but failed to amend his schedule to include his lawsuit. Two
years later he requested that his Chapter 13 bankruptcy be converted to a Chapter 7 case, was ordered to file amended schedules and again failed to report the pending lawsuit. After he received a “no asset” complete discharge of his debts, plaintiff was confronted with a motion for summary judgment by his opponent in the employment discrimination case on the basis of judicial estoppel, and only then sought to reopen his bankruptcy to include the undisclosed claim. Unlike Kitchen, the plaintiff in *Burnes* clearly benefitted from the omission of his claim and even implicitly acknowledged that disclosing this information would have likely changed the result of his bankruptcy.

In *De Leon v. Comcar Ind., Inc.*, 321 F3d 1289, 1291 (11th Cir 2003), a Chapter 13 bankruptcy case, the Eleventh Circuit held that “judicial estoppel bars a plaintiff from asserting claims previously undisclosed to the bankruptcy court where the plaintiff both knew about the undisclosed claims and had a motive to conceal them from the bankruptcy court.” The plaintiff had not amended his chapter 13 bankruptcy filing to add his lawsuit as a potential asset until after the defendant relied on this omission to file a motion to dismiss the case. Without discussing the facts, the court “infer[red] from the record [the plaintiff’s] intent to make a mockery of the judicial system.” *Id* at 1292 (internal quotations and citations omitted). The court based its decision on *Burnes*, involving a Chapter 7 bankruptcy, and found find the differences between Chapters 7 and 13 sufficient enough to affect the applicability of judicial estoppel “because the need for complete and honest disclosure exists in all types of bankruptcies.” *De Leon*, 321 F3d at 1291 (emphasis added).

This court agrees that honest disclosure is required in Chapter 13 bankruptcies, but determinating whether a failure to disclose was based on an honest mistake or intentional
manipulation of the court depends on the facts of each case. *De Leon* is not persuasive because it did not thoroughly discuss the facts. Furthermore, *De Leon* offered no authority for its conclusion that “a financial motive to secret assets exists under Chapter 13 as well as under Chapter 7 because the hiding of assets affects the amount to be discounted and repaid.” *Id.* Another court discussing this conclusion in *De Leon* was not convinced that a Chapter 13 debtor-in-possession has a motive to secret assets, given that the creditors are repaid out of the debtor’s income. *EEOC v. Apria Healthcare Group, Inc.*, 222 FRD 608, 613 n3 (ED Mo 2004). This court is similarly unconvinced.
A related question is whether Kitchen has derived an unfair advantage from the inconsistency. Chapter 13 allows a portion of a debtor’s future earnings to be collected by a trustee and paid to creditors.” *Burnes*, 291 F3d at 1284 n1. A Chapter 13 plan (which sets out the payments to creditors) may be modified even after the vast majority of plan payments have been made. 11 USC § 1329(a). The debtor, the trustee or an unsecured creditor could all propose a modification of a Chapter 13 plan. *Id.* Thus, even though the creditors were not aware of the claim against WSCO at the time the creditors’ meeting took place, they can propose a modification of the payment plan. According to the Trustee’s attorney, Kitchen’s failure to list the claim as an asset “does not rise to prejudicial error because the claim is so speculative that the chapter 13 Trustee could not place any accurate value on the claim and so could not fill in the number in paragraph 2(f) [of the debtor’s plan].” *Declaration of Jack Fisher*, p. 3. Pursuant to 11 USC § 1325(a)(4), the number in paragraph 2(f) is “the amount of money which hypothetically would be distributed to unsecured creditors if the debtors had filed a chapter 7 bankruptcy.” *Id.* Since the amount could not have been determined initially, the Trustee in Kitchen’s bankruptcy proceedings would have required the debtors to turn over any non-exempt funds for distribution to creditors and would have modified the Chapter 13 plan to reflect that. *Id.* However, the original plan already mandated Kitchen to “report immediately to the trustee any right of the debtor or debtor’s spouse to a distribution of funds” and not to use these funds without the trustee’s permission. Defendant’s Ex. 8, p. 1. The creditors were therefore not harmed during the time the claim against WSCO was not disclosed because no distribution of funds occurred. Had it had occurred, Kitchen would not have been allowed to use these funds without the Trustee’s permission, and even unsecured creditors could have requested a modification of the plan to reflect the new funds.

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12 There is no evidence that WSCO would suffer an unfair detriment if Kitchen is not estopped. In fact, because WSCO was listed as an unsecured non-priority creditor on the original schedules, it either knew or should have known about Kitchen’s error, yet did nothing for more than a year before notifying Kitchen’s attorney of its intention to move for summary judgment. Surely, WSCO would have acted had it felt Kitchen’s omission was detrimental to it.
Judicial estoppel is an equitable doctrine which should not be applied “where it would work an injustice.” *Matter of Cassidy*, 892 F2d 637, 642 (7th Cir 1990) (citations omitted). Application of judicial estoppel is not appropriate in this case because Kitchen did not act in bad faith, has cured his error and has not derived an unfair advantage from his error. In fact, if Kitchen’s claims against WSCO have any merit, allowing this case to continue may benefit Kitchen’s creditors.

**ORDER**

For the reasons set forth above, defendant’s Motion for Summary Judgment (docket #40) is DENIED.

DATED this 13th day of January, 2006.

Janice M. Stewart
United States Magistrate Judge
NOTE: The footnotes do not follow the numbering in the original article.


Examples of composite Court of Appeal judgments abound in this paper, but other courts occasionally indulge in the practice. Thus, the House of Lords recently delivered a single, collective judgment in Forbes [2001] 2 W.L.R.1, as it once did many years ago in Heaton’s Transport (St Helen’s) Ltd. v. T.G.W.U. [1973] A.C. 15. Brooke L.J., in the Divisional Court, lately handed down a composite judgment in an important decision on the sentencing of young offenders: R. v. Nottingham Magistrates’ Court (2002) 166 J.P. 132.

Similarly, it could be said that where the issue is an appeal against the amount of damages awarded in a personal injuries case, there is some advantage in the appeal court delivering a single unified finding: Hay v. Konig and Motor Insurers Bureau [2002] EWCA Civ 19.

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vi Similarly, it could be said that where the issue is an appeal against the amount of damages awarded in a personal injuries case, there is some advantage in the appeal court delivering a single unified finding: Hay v. Konig and Motor Insurers Bureau [2002] EWCA Civ 19.


ix [1997] EWCA Civ 1524, [1998] 1 W.L.R. 1123. See also English v. EmeryR einbold & Strick Ltd. [2002] EWCA Civ 605, where Lord Phillips of Maltravers M.R. sought to address a ground of appeal that was said to have grown into “a cottage industry” (at para. [2]).

x [2001] EWCA Civ 242 at para. [1], [2001] I.C.R. 1189. Slade L.J.’s composite judgment in Adams v. Cape Industries plc [1990] Ch. 433 arose out of 205 consolidated actions: “The trial in the court below lasted some 35 days and the argument before this court extended over some 17 days. The case raises important points of law...” In similar vein, Clark v. Tull [2002] EWCA Civ 510 was depicted as “the third round of a contest between the motor insurance market and credit hire companies” (per curiam). The operations of the Criminal Division were discussed in the Donovan Report (Interdepartmental Committee on the Court of Criminal Appeal, Cmdn. 2755). Dissents have very occasionally occurred in the past. Thus, in Kerr (1921) 15 Cr.App.R. 165 Salter J. dissented in a case involving a charge of conspiracy to murder laid against an Irish Republican. In Norman (1924) 18 Cr.App.R. 81, too, a full bench of 13 judges heard an appeal on the law governing habitual criminals under the Prevention of Crime Act 1908. Lord Hewart C.J. and seven other judges decided the case one way, Avory J. and three further dissentients openly disagreed. The mystery is, whatever happened to the thirteenth judge, Sankey J., whose vote seems not to have been registered? The only other trace of dissent in criminal cases is to be found in Seaborne Davies’ paper, The Court of Criminal Appeal: The First Forty Years (1951) 1 J.S.P.T.L. (N.S.) 425, 400. The author there claims to have unearthed five instances of cases reported in the Criminal Appeal Reports, up until the year 1948, where the court reveals that its unanimous judgment was in truth a majority decision.


xiii This aspect should not be under-estimated. The streamlined procedures introduced by the CPR typify the new mood. They have fostered an environment that actively favours costcutting, time-saving, and economy of effort. Even as I write, the Chancery Division is fulminating against late submission of skeleton arguments, contrary to the rules set down in para. [7] of the Chancery Guide—rules that are in place to allow pre-reading by the judge which, in turn, enables the court to be more efficient, less costly and more effective: Ansol Ltd. v. Taylor Joynson (a firm) (2002) The Times, 30 January (per Sir Andrew Morritt. V.-C.).

xiv See “The Rhetoric of Results and the Results of Rhetoric: Judicial Writings” (1995) 62 U. Chi. L. Rev. 1371. The paper was written with the assistance of her three law clerks — another development that will need to be watched in this country.

xv Ibid., at p. 1377.