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Paul W. Werner

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# The Straits of Stare Decisis and the Utah Court of Appeals: Navigating the Scylla of Under-Application and the Charybdis of Over-Application\*

## I. INTRODUCTION

When traveling through the narrow Straits of Messina near Sicily, ancient travelers were forced to confront two terrifying creatures. On the one side sat Scylla, an enormous sea monster, while on the other side sat Charybdis, a giant whirlpool wreaking havoc on ships drawing too near. Unwary mariners found themselves scudding back and forth between these two dangers as they attempted to navigate the strait without being seized by either Scylla or Charybdis. Over time, however, charts and experience assisted navigators to hold to a center course, avoiding both Scylla and Charybdis and the dangers they presented.

Courts adventuring through the straits of stare decisis today are confronted with their own version of that ancient deadly duo: the Scylla of Under-Application and the Charybdis of Over-Application. While the Scylla of Under-Application snares in her scaly clutches courts and litigants who carelessly displace or disregard prior decisions, the Charybdis of Over-Application draws into her swirling maelstrom courts and litigants who zealously adhere to moribund precedent and whose last breath as they descend into the abyss is an invocation to Our Lady of the Perpetual Precedent.<sup>1</sup>

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\* B.A., 1991, University of California, Los Angeles; J.D., candidate, J. Reuben Clark Law School. The author would like to thank Professor David A. Thomas, Lisa Joner, Steven Black, and Mary O. Jensen for their thoughtful comments and editorial assistance. The author would also like to express his appreciation for comments made by Chief Justice Michael D. Zimmerman and Veda Travis on an earlier version of this paper. Of course, the author takes full responsibility for the opinions (and errors) herein. Deo gloria fiat.

1. Chief Justice Traynor phrased these two different dangers in slightly less mythic terms. "If hasty displacement of precedents should be discouraged, there should be corresponding discouragement of ritual perpetuation of a moribund precedent." Roger J. Traynor, *Transatlantic Reflections on Leeways and Limits of Appellate Courts*, 1980 UTAH L. REV. 255, 263.

The Utah Supreme Court recently began the process of smoothing transit through these straits for Utah courts.<sup>2</sup> Responding to inconsistent applications of the same legal principle by the court of appeals,<sup>3</sup> the supreme court concluded that stare decisis required that panels of the court of appeals should be mutually bound by the decisions of each other. As the court correctly reasoned, misapplication of stare decisis impacts equally the values underlying the policy of adhering to precedent whether a court consists of a unitary bench or of multiple panels. Although the supreme court determined that stare decisis applied to the court of appeals, it did not analyze the doctrine or its application to a multi-panel appellate court. This Comment proposes to fill that gap by analyzing stare decisis, thereby assisting the court of appeals to avoid the twin evils of its misapplication: under-application and over-application.

Failure to understand stare decisis may lead to two undesirable ends. First, when a court misunderstands stare decisis, it may fail to adhere properly to its prior decisions, producing inconsistency in subsequent decisions. This judicial inconsistency strikes at the considerations that both support and are protected by adherence to precedent: reliance on and stability in the law; judicial economy; expeditious litigation; and judicial legitimacy. Second, failure to apprehend the values and effects of stare decisis may lead a court to refuse to abandon unjust precedents. When a court assumes the straitjacket of precedent, it abdicates its ability to shape the growth of the common law. Moreover, a court declining to overrule erroneous decisions may not be able to fully vindicate the rights of parties coming before it.<sup>4</sup> Thus, a court must be able to steer between these two undesirable results.

This Comment seeks to aid the Utah Court of Appeals in its application of stare decisis. First, the Comment will provide an overview of how stare decisis operates, focusing on its application within the setting of a multi-panel intermediate appel-

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2. See *State v. Thurman*, 846 P.2d 1256 (Utah 1993).

3. See *infra* part II.C.

4. A court is frequently the only means by which a violated right may be vindicated. See *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (overruling *Plessy's* "separate but equal" doctrine); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (noting that legislation impacting the political processes or directed at "discrete and insular minorities" may receive heightened judicial solicitude); *Wade v. Jobe*, 818 P.2d 1006 (Utah 1991) (adopting the implied warranty of habitability).

late court. Second, the Comment will analyze how the court of appeals may limit and overrule its own decisions consistent with stare decisis jurisprudence.<sup>5</sup>

As background for those unacquainted with the Utah Court of Appeals, part II provides an overview of the court of appeals including its history, jurisdiction, and operations, as well as a review of its application of stare decisis prior to *State v. Thurman*.<sup>6</sup> Part III discusses the doctrine of stare decisis, including the policies underlying adherence to precedent. Part IV suggests methods permitting the court of appeals to limit and overrule former decisions. In part V, this Comment concludes that, although one panel of the court of appeals is bound by the decisions of another panel, consistent with stare decisis jurisprudence, one panel may limit or overrule a decision previously rendered by another panel of the court of appeals.

## II. THE UTAH COURT OF APPEALS: AN OVERVIEW OF ITS HISTORY AND TREATMENT OF PRIOR DECISIONS

### A. History

Until 1987, Utah possessed a bipartite judicial system divided between a trial court level, composed of the district and circuit courts, and an appellate level, composed solely of the state supreme court. Although initially a single appellate court had been adequate to meet the state's needs, the supreme court was unable to keep up with the demands placed upon it as the state's population and economy expanded in the 1970s and early 1980s. By the mid 1980s, the supreme court had over one thousand cases pending on its docket; the length of disposition from docketing until issuance of an opinion could be as long as seven years.<sup>7</sup> Responding to this crisis in the appellate system, the state legislature passed a joint resolution proposing an amendment to the Judicial Article of the Utah Constitution that would permit the creation of an intermediate appellate

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5. Of course, much of the discussion will be relevant to any court seeking to correctly satisfy the demands of stare decisis. However, some of the discussion is uniquely addressed to the court of appeals. See, e.g., *infra* part IV.B.1.

6. 846 P.2d 1256 (Utah 1993).

7. See Judith M. Billings, *Recent Developments in Utah Law*, 1988 UTAH L. REV. 149, 150; Norman H. Jackson, *The Fifth Anniversary of the Utah Court of Appeals*, 1992 UTAH BAR J. 18, 19. Today, the average time for disposition is only fourteen months. Jackson, *supra* at 19. Supreme court personnel declined the author's request for information on how many cases are currently pending before the court.

court.<sup>8</sup> The joint resolution was submitted to and approved by the citizens in 1984. During the next two years, a judicial task force appointed by the governor examined possible methods of resolving the appellate backlog.<sup>9</sup> In 1987, the legislature adopted the task force's final proposal and created the Utah Court of Appeals.<sup>10</sup>

### B. Appellate Operations and Jurisdiction

The court of appeals, consisting of seven judges, hears all cases as three-judge panels.<sup>11</sup> Under the enabling legislation, the court lacks authority to hear cases en banc.<sup>12</sup>

8. In relevant part the amendment provided that "[t]he judicial power of the state shall be vested in a supreme court . . . and in such other courts as the Legislature by statute may establish." UTAH CONST. art. VIII, § 1. The system established in Utah is similar to the federal system in that some courts exist by constitutional mandate, while other courts exist by mandate of the legislature. See U.S. CONST. art. III.

9. The task force submitted three possible proposals: (i) expansion of the supreme court; (ii) expansion of the supreme court and authorization for it to sit in panels; and (iii) creation of a court of appeals. Jackson, *supra* note 7, at 18.

10. UTAH CODE ANN. § 78-2a-1 (1994). With the creation of the court of appeals, Utah became one of 37 other states to have an intermediate appellate court. In order to provide a flexible court that would be responsive to changes in the appellate system, the legislature created a hybrid appellate court that was neither wholly a "pour over" court nor a "specified jurisdiction" court. A pure pour over court is one whose docket consists solely of cases sent to it by the supreme court; a specified jurisdiction court is one whose docket consists solely of cases that arise under one of its statutory heads of jurisdiction. Jackson, *supra* note 7, at 18.

The initial members of the court of appeals considered their role in the judicial system as encompassing three central goals: elimination of the appellate backlog; development of case law in the area of its own original jurisdiction; and assisting the supreme court by focussing and narrowing the legal issues presented to it. See Billings, *supra* note 7, at 153; Jackson, *supra* note 7, at 19.

11. UTAH CODE ANN. § 78-2a-2(1), (2) (1994). Judges are randomly assigned to sit on panels for three months. Because the panels shift every three months, each judge has the opportunity to work on a panel with every other appellate judge during the year.

12. UTAH CODE ANN. § 78-2a-2(2) (1994). When creating the court of appeals, the legislature adopted the task force's recommendation that a hearing en banc was unnecessary. The task force's reasoning was as follows:

The court of appeals should be prohibited by legislation from sitting en banc . . . . Such rehearings typically are used to conform inconsistent decisions . . . or to reverse a decision . . . that does not have the support of the whole court. It is the conclusion of the task force that rehearings en banc do not accomplish these goals. Rather, if the issue is so complicated or controversial, or the principle of law so unsettled as to generate inconsistent panel decisions or a sizable minority opinion, a rehearing will tend to further complicate the issue, not resolve it. Moreover, such a case will likely be appealed to the supreme court in any event. Since the supreme court is available to resolve such matters, it is far better to use

The court's appellate jurisdiction embraces several subject matter categories, including:

1. Final orders and decrees of state agencies;<sup>13</sup>
2. Juvenile court appeals;<sup>14</sup>
3. Circuit court appeals, except for small claims court decisions;<sup>15</sup>
4. Criminal cases, unless the charge is a first degree or capital felony;<sup>16</sup>
5. Domestic relations determinations;<sup>17</sup>
6. Utah Military Court appeals;<sup>18</sup> and
7. Cases "poured over" from the supreme court.<sup>19</sup>

In addition, the court of appeals may certify to the supreme court for review any case falling within its jurisdiction.<sup>20</sup>

### C. *Treatment of Precedent*

Although the court of appeals recognized that stare decisis required it to follow the precedents of the supreme court,<sup>21</sup> it seems to have initially concluded that these same principles of stare decisis did not require one panel of the court to adhere to the precedents set by another panel. This position finds implicit support in the legislative decision to prohibit en banc rehear-

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that resource in the first instance and save the time and expense of a rehearing by the court of appeals en banc.

Governor's Task Force on the Judicial Article, Oct. 9, 1985, at 66-67, *quoted in* State v. Sykes, 840 P.2d 825, 831 (Utah Ct. App. 1992) (Jackson, J., concurring). Judge Norman Jackson used the task force's reasoning as justification for inconsistent precedents. *Id.* at 831 ("I remind the reader that conflicting panel decisions were expected to occur and contemplated by the statute creating this court.").

Although *Thurman* has removed one reason for an en banc procedure, prevention of inconsistent precedent, this Comment will show that stare decisis jurisprudence allows the court of appeals to achieve the other reason for an en banc hearing, overruling precedent, without recourse to a statutory grant of authority. See *infra* part IV.B.2.

13. UTAH CODE ANN. § 78-2a-3(2)(a), (b) (1994).

14. *Id.* § 78-2a-3(2)(c).

15. *Id.* § 78-2a-3(2)(d).

16. *Id.* § 78-2a-3(2)(e), (f).

17. *Id.* § 78-2a-3(2)(i).

18. *Id.* § 78-2a-3(2)(j).

19. *Id.* § 78-2a-3(2)(k).

20. *Id.* § 78-2a-3(3). Although the supreme court has sole discretion over granting or denying certiorari petitions, it may not decline to review a case certified to it from the court of appeals. *Id.* § 78-2-2(5); see also *infra* part IV.B.1.

21. See, e.g., State v. Vincent, 845 P.2d 254 (Utah Ct. App. 1992) (Jackson, J., dissenting) (pointing to supreme court decision that should govern the disposition of the case), *cert. granted*, 857 P.2d 948 (Utah 1993).

ings. As noted above, the legislature adopted the task force's conclusion that the reasons for an en banc rehearing—overruling precedent and conformation of inconsistent decisions—would be more efficiently handled through review at the supreme court level than through a rehearing by the entire court of appeals. This reasoning allowed the court of appeals to conclude that inconsistency among panels was both expected and permitted.<sup>22</sup> Consequently, the court determined that panels would not be bound by each other's precedents and that any inconsistencies would be resolved by supreme court review.

Despite the logic of the court's reasoning, the supreme court subsequently determined that stare decisis does apply to the court of appeals, requiring that one panel be bound by the decision of another.<sup>23</sup> In *State v. Thurman*, the Utah Supreme Court took the opportunity to voice its concern about a continuing division of authority among the panels of the court of appeals.<sup>24</sup> Speaking for the court, Justice Zimmerman noted the fundamental role stare decisis plays in Anglo-American jurisprudence<sup>25</sup> and concluded that considerations of both the fundamental role of stare decisis and the values it affirms requires that each panel of the court of appeals be bound by the decisions of the others.<sup>26</sup> Indeed, as Justice Zimmerman acknowledged, a conclusion that stare decisis does not require panels to be bound by each others' decisions would sanction a legal system in which "the outcome of an appeal . . . would be dependent more on the composition of the panel hearing the case than on whether the issue has been previously addressed and decided . . . ." <sup>27</sup>

Although the *Thurman* decision is legally correct and salutary,<sup>28</sup> it raises as many questions as it settles.<sup>29</sup> Specifically,

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22. The rules governing the grant of a petition for certiorari also support this conclusion. Rule 46 of the Utah Rules of Appellate Procedure lists inconsistent decisions among panels on the same issue of law as a reason justifying a writ of certiorari. UTAH R. APP. P. 46(a)(1) (1994). Presumably this rule should be revised in light of the supreme court's decision in *State v. Thurman*, 846 P.2d 1256 (Utah 1993).

23. *Thurman*, 846 P.2d at 1269.

24. *Id.* (noting the split among the panels on the issue of the proper standard of review for questions of voluntariness of consent under the Fourth Amendment of the United States Constitution).

25. *Id.* (noting that stare decisis was critical to the viability and predictability of the law, as well as to fairness of adjudication).

26. *Id.*

27. *Id.*

28. The effect of the court's decision may be gauged by comparing the num-

*Thurman* failed to address how stare decisis applied to an intermediate, multi-panel appellate court. Further, the supreme court did not discuss whether, or how, a panel of the court of appeals could limit the impact of or overrule a prior decision. These issues will be addressed in the following sections.<sup>30</sup>

### III. UNDERSTANDING THE DOCTRINE OF STARE DECISIS

A fundamental element of Anglo-American jurisprudence is the principle that the law should be stable, fostering both equality and predictability of treatment. Because so much of our law is judge-made common law, the system achieves this stability through adherence to the legal maxim "stare decisis et non quieta movere," or "stand by the decision and do not disturb what is settled."<sup>31</sup> Stare decisis is a fundamental feature of common law jurisprudence and requires that a court adhere to prior decisions rendered either by itself or by a higher court within its system. Although stare decisis requires absolute adherence to decisions rendered by higher courts, it does permit greater flexibility in the treatment of prior decisions rendered by a court itself. This section first presents a discussion of the traditional formulation of the rule of stare decisis, including the public policy considerations that underlie the doctrine, and the determination of what parts of the prior opinion

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ber of cases in which "stare decisis" was mentioned by a panel of the court of appeals and stated as the basis for its holding. In the twelve months prior to *State v. Thurman*, "stare decisis" was mentioned only once. *Salt Lake Citizens Congress v. Mountain States Tel. & Tel. Co.*, 846 P.2d 1245 (Utah 1993). During the twelve months following *Thurman*, the court relied on "stare decisis" a total of seven times.

29. For example, the court's decision did not resolve the question as to what a panel should do when confronted with an issue on which there is more than one precedent that could control the issue. At least one panel has concluded that *Thurman* stands for the proposition that formerly inconsistent precedents are done away with and that a panel should set a new precedent, binding on the rest, when confronted with inconsistent precedents. See *King v. Industrial Comm'n*, 850 P.2d 1284 (Utah Ct. App. 1993) (noting that in the absence of a clear statement from the supreme court it would review the previous court of appeals decision and make its own conclusion).

30. See *infra* part III.B for a discussion of how the application of the doctrine of stare decisis applies to a multi-panel court. See *infra* part IV for a discussion of how one panel may both limit and overrule prior decisions.

31. For an alternative, yet perhaps truthful, translation of stare decisis, see James D. Gordon III, *Humor in Legal Education and Scholarship*, 1992 B.Y.U. L. REV. 313, 314 n.7 (quipping that stare decisis is Latin for "[w]e stand by our past mistakes").

are truly binding under the rule. The discussion then turns to a consideration of how the doctrine impacts the court of appeals in two distinct ways under the rubric of vertical and horizontal stare decisis.

### A. *The Traditional Formulation of the Doctrine*

Stare decisis, unlike some other legal concepts,<sup>32</sup> is reducible to a simple principle. When a court lays down a rule of law attaching a specific legal consequence to a detailed set of facts, the court must adhere to the legal principle it has announced by applying it in all subsequent cases that come before it presenting a similar factual premise.<sup>33</sup> In addition, courts owing obedience to the court that rendered the initial decision must also adhere to the announced legal principle. Thus, stare decisis simply requires that courts adhere to their own decisions and those of a higher hierarchical court.<sup>34</sup> Despite the conceptual simplicity of stare decisis, correct application of the doctrine entails collateral principles that are somewhat more complex and less settled.<sup>35</sup> For example, under stare decisis, only the precedent of a former decision is binding on the court in subsequent cases, requiring a court or litigant to distinguish between precedent and dicta. Further, although stare decisis would seemingly prevent the abandonment of precedent once set, courts have nevertheless determined that stare decisis does not prohibit the overruling of a prior decision.<sup>36</sup>

Although a complete discussion of all issues generated by the application of stare decisis is beyond the scope of a single

32. For example, consider property law's unholy trinity: the Rule Against Perpetuities, Shelley's Rule, and the Doctrine of Worthier Title. These bedevil not only law students but also practitioners and courts. See, e.g., *Jee v. Audley*, 1 Cox 324, 29 Eng. Rep. 1186 (Ct. Ch. 1787).

33. See HENRY C. BLACK, *THE LAW OF JUDICIAL PRECEDENTS*, 2-3, 182 (1912); BLACK'S LAW DICTIONARY 978-79 (6th ed. 1991); 1B JAMES W. MOORE, ET AL. *MOORE'S FEDERAL PRACTICE* ¶ 0.402[1], at 4.

34. Because stare decisis limits the ability of a court to reconsider past decisions, it bears a resemblance to other similar doctrines: law of the case, res judicata, collateral estoppel, and full faith and credit. For a discussion of these doctrines and how they differ from stare decisis, see MOORE, *supra* note 33, ¶ 0.401; see also *Stormont-Vail Regional Medical Ctr. v. Bowen*, 645 F. Supp. 1182 (D.D.C. 1986).

35. Professor Moore notes that the "doctrine of stare decisis has produced a vast literature" and has collected over 25 recent articles discussing the issues it raises. MOORE, *supra* note 33, ¶ 0.402[1], at 4 n.1.

36. *But cf.* *Young v. Bristol Aeroplane Co.*, K.B. 719, 2 All E.R. 293 (1944) (holding that the English Court of Appeal does not have the authority to overrule its prior decisions).

article, this Comment will focus on those areas that will assist the court of appeals—and any court or litigator—in applying precedent consistent with stare decisis jurisprudence. The remainder of this section considers the policies that underlie adherence to prior decisions and notes the distinction between precedent and dicta, including a method for distinguishing between them. The analysis then turns to the dual impact of stare decisis on an intermediate court of appeals, introducing the concepts of vertical and horizontal stare decisis.

### 1. *Public policies served by stare decisis*

Although the practice of adhering to one's prior decisions has been attributed to other, less policy-oriented reasons,<sup>37</sup> there are several important policies underlying the rule that precedents should be adhered to and not lightly overruled.<sup>38</sup> Although these policy considerations have been phrased in a number of ways, they may be classified into three general categories: (i) reliance and stability interests; (ii) judicial expedition and economy; and (iii) the "image of justice."

First, judicial reticence to stray from prior decisions promotes a continuity and cohesion in the law that protects individuals who have ordered their conduct in accordance with and in reliance on current interpretations of the law.<sup>39</sup> Adherence to precedent is at a premium in those areas of law that impact the stability of such social institutions as the family, the government, and the economy.<sup>40</sup> Moreover, courts applying prior decisions in subsequent cases protect litigants from "untoward

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37. Thus, Professor Currier notes that the doctrine may be attributable to "habit, tradition, historical accident, and sheer intellectual inertia." Thomas S. Currier, *Time and Change in Judge-made Law: Prospective Overruling*, 51 VA. L. REV. 201, 235 (1965) (citing BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 21-22 (1921)).

38. See *Moragne v. States Marine Lines*, 398 U.S. 375, 403 (1970); *State v. Thurman*, 846 P.2d 1256, 1269 (Utah 1993); see also BLACK, *supra* note 33, at 184-86 (collecting cases); Currier, *supra* note 37, at 235-38; Lewis F. Powell, *Stare Decisis and Judicial Restraint*, 1991 J. S. CT. HISTORY 13, 15-16.

39. The importance of stability is such that Justice Brandeis suggested that, with certain exceptions, it is more important to settle an issue than to settle it correctly. See *Burnett v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting), *overruled by Helvering v. Mountain Producers Corp.*, 303 U.S. 376, 387 (1938).

40. See Currier, *supra* note 37, at 235-38; Powell, *supra* note 38, at 16.

surprise" and encourage the settlement of disputes without resort to courts of law.<sup>41</sup>

Second, judicial economy and expedition are served by this doctrine. Neither courts nor litigants are required to revisit all relevant issues presented in a case. As Justice Cardozo, in characteristically pithy phrasing, explained, "the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."<sup>42</sup> Instead, only original propositions of fact and law need to be litigated and decided without reference to precedent. As Justices O'Connor, Kennedy, and Souter noted: "[No] judicial system could do society's work if it eyed each issue afresh in every case that raised it."<sup>43</sup>

Lastly, adherence to precedent sustains the belief that courts should not only administer justice, but should also be just.<sup>44</sup> Stare decisis also promotes an equality of treatment for all persons who are similarly situated. The fundamental value of equal treatment, requiring that persons in like circumstances be treated alike unless some relevant factor distinguishes their cases, is central to traditional notions of Anglo-American justice.<sup>45</sup>

In sum, the practice of adhering to prior decisions serves to protect individual interests as well as to promote efficient and just adjudication. These considerations of public policy not only support the doctrine of stare decisis but must also function as countervailing factors when a court decides whether to depart from prior decisions.<sup>46</sup>

## 2. *Precedent and dicta*

Although stare decisis requires that courts adhere to their former decisions, it does not demand that every element of an opinion be followed as binding authority. Rather, only the

41. *Moragne*, 398 U.S. at 403.

42. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149 (1921).

43. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2808 (1992) (opinion of O'Connor, Kennedy, Souter, JJ.) (citing BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149 (1921)).

44. *See State v. Thurman*, 846 P.2d 1256, 1269 (Utah 1993).

45. *Id.*

46. *Moragne*, 398 U.S. at 403. *See infra* part IV.B.2.

precedential rule of law is binding authority in subsequent cases.<sup>47</sup> Thus, all the parts of the opinion not constituting the precedent are non-binding in subsequent cases.<sup>48</sup> The task, then, is to distinguish the rule of law from the other parts of the opinion. Although what constitutes the "precedent" is the object of great debate,<sup>49</sup> this section will attempt to define the concept and suggest a method of finding the precedent and dicta in an opinion.<sup>50</sup>

Orthodox American jurisprudence interprets stare decisis as "keeping to the former *decisions*" (*stare decisis*) and not as "keeping to the *reasoning* of former decisions" (*stare rationibus decidendis*),<sup>51</sup> nor as "keeping to the *dicta* of former decisions" (*stare dictis*).<sup>52</sup> A court reaches a decision when it attaches a specific legal consequence to a definite, detailed set of facts. Thus, the reasoning of the court, as well as its hypothetical

47. For an exception to this general rule, see *infra* part III.B.1.

48. Courts and commentators generally acknowledge that not all parts of an opinion are binding in subsequent cases. Traditionally, the distinction is between the precedent, which must be followed, and "dicta," which are not binding. See *Indiana Harbor Belt R.R. v. American Cyanamid Co.*, 916 F.2d 1174, 1176 (7th Cir. 1990) (noting that "no court is required to follow another court's dicta"); *Shepherd Fleets v. Opryland USA*, 759 S.W.2d 914, 921 (Tenn. Ct. App. 1988) (stating that "obiter dictum is not binding under the doctrine of stare decisis"); *Lester v. First American Bank*, 866 S.W.2d 361, 363 (Tex. Ct. App. 1993) (noting that "[d]ictum' . . . will not create binding precedent under stare decisis"); see also BLACK, *supra* note 33, at 174-77 (noting that although dicta "of all kinds" may be entitled to respect, they do not possess the weight of precedent in either the court that spoke it or any other). See generally Note, *Dictum Revisited*, 4 STAN. L. REV. 509 (1952) (discussing role of dictum in legal analysis).

Various reasons exist for not affording dicta the effect of precedent. Because the statement of dicta is unnecessary to the decision, it is argued that the statement is not as fully considered. Further, dicta on issues not argued or briefed are not exposed to the adversarial process, designed to bring out truth. More fundamentally, most dicta are presumed to be an expression of the author of the opinion, rather than a reasoned consensus of the court.

I shall label as "dicta" all parts of an opinion that are not the precedential rule of law. Thus, dicta would include the court's reasoning, hypothetical situations, and discussions unrelated to the ultimate conclusion.

49. Moore notes that "[w]hat constitutes the [binding part of an opinion] has produced considerable intellectual ferment." MOORE, *supra* note 33, ¶ 0.402[2], at 26 & n.9.

50. Judge Aldisert notes that, in addition to being a misunderstood subject, precedent may be more easily understood than explained. Ruggiero J. Aldisert, *Precedent: What It Is and What It Isn't; When Do We Kiss It and When Do We Kill It?*, 17 PEPP. L. REV. 605, 606 (1990). After my attempt here, I am quite inclined to agree.

51. See RUPERT CROSS, *Different Meanings of Stare Decisis*, in PRECEDENT IN ENGLISH LAW, 104-05 (2d ed. 1968).

52. Aldisert, *supra* note 50, at 607.

statements, are mere dicta and do not constitute binding authority in subsequent situations.<sup>53</sup> Consequently, the precedent of a case resides in the rule of law emerging from the court's decision: a specific legal consequence attaching to a detailed set of facts.<sup>54</sup>

Because the precedent of a case is contained in its decision, the precedential rule of law may be determined by parsing the opinion for the consequences attaching to a set of relevant facts.<sup>55</sup> One method of examining the opinion is to allocate the parts of the opinion into the classic syllogistic framework used in deductive logic: major premise, minor premise, and conclusion.<sup>56</sup>

Within the framework of an opinion, these categories would contain the following elements of the opinion:

Major premise: the reasoning of the court, or the initial reasoning principle from which the analysis is launched.

Minor premise: the material facts of the case, as the court sees them, and as drawn from the court record.<sup>57</sup>

Conclusion: the specific result reached by drawing a conclusion from the major and minor premises.

Precedent: the rule of law that emerges from examining the specific legal consequence (i.e., the conclusion) attaching to a detailed set of facts (i.e., the minor premise).

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53. "We know this because a decision may still be vital although the original reasons for supporting it may have changed drastically or been proved terribly fallacious." Aldisert, *supra* note 50, at 607; see also Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161, 162-64 (1930). Thus, cases retain their vitality for stare decisis purposes even though their underlying reasoning may have been undercut by subsequent events.

54. Aldisert, *supra* note 50, at 606; Goodhart, *supra* note 53, at 182-83.

55. "The principle of the case is found by taking account (a) of the facts treated by the judge as material, and (b) his decision as based on them." Goodhart, *supra* note 53, at 182.

56. Cf. Aldisert, *supra* note 50, at 612. To give content to these categories, I offer the traditional deductive syllogism:

Major premise: All men are mortal.  
 Minor premise: Socrates is a man.  
 Conclusion: Therefore, Socrates is mortal.

57. For a multi-prong test for determining what facts are material see Goodhart, *supra* note 53, at 182-83.

Analysis of a hypothetical case will help clarify this discussion. In this hypothetical case, the court has determined that a driver who drove on surface streets in excess of eighty miles per hour was liable for negligence when his car swerved across the center divider and struck a grandmother walking her German shepherd dog, Brunhilde.<sup>58</sup> A parse of the opinion would be as follows:

Major premise: Driving at excessive speeds is negligent.

Minor premise: The driver was traveling at more than eighty miles per hour on a surface street.

Conclusion: The driver is negligent because he was traveling at excessive speeds and is therefore liable to the grandmother and her German shepherd dog.

Precedent: Driving at eighty miles per hour or more on a surface street is negligent, rendering the driver liable.

The court will be required to adhere to this precedent when subsequent cases arise presenting a similar factual premise.

Once it is determined that the case is only an authoritative precedent for its rule of law—a legal precept emerging from the specific legal consequences attaching to a detailed set of facts—then dicta, the traditional bane of precedential analysis,<sup>59</sup> are more easily distinguished and avoided.<sup>60</sup> Dicta are what remains after the precedent is extracted.

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58. Although the car was totaled, both victims escaped with minor injuries but suffered severe emotional distress, necessitating frequent trips to Carmel, California (shortbread for Brunhilde) and shopping sprees at Laura Ashley in Canterbury, England (emotional healing for grandmother).

This hypothetical is dedicated to Ms. Heidi K. Hubbard who introduced me to both tort law and creative hypotheticals.

59. "Obiter dictum is where the precedential dragon often reposes." Aldisert, *supra* note 50, at 612. "Dictum is one of the commonest yet least discussed of legal concepts. Every lawyer thinks he knows what it means, yet few lawyers think much more about it. Non thinking and overuse combine to make for fuzziness." Note, *Dictum Revisited*, 4 STAN. L. REV. 509, 509 (1952).

60. However, the ability to distinguish dicta from precedent may not be at a premium. One argument states that the ability to label something as dicta confers the right—and correctly so under modern stare decisis jurisprudence—to disregard the statement in subsequent cases; thus, the ability to label a statement as "mere dicta" enables a court to avoid a prior decision. See Note, *Dictum Revisited*, *supra* note 48; see also *infra* part IV.A.

Under the syllogistic framework above, the precedent is the legal precept drawn from a consideration of the minor premise and the conclusion of the court. Thus, dicta would include any statements that do not appear in either the minor premise or the conclusion.<sup>61</sup>

A return to the hypothetical case previously discussed<sup>62</sup> will clarify this discussion. In an opinion of the hypothetical negligence case, any of the following would be properly classified as dicta:

1. A comment that the driver might not be liable if the steering wheel had broken off.<sup>63</sup>
2. A suggestion that the driver would be liable for punitive damages if he were driving without prescription glasses.<sup>64</sup>
3. A discussion of a possible defense to negligence liability if the driver had been rushing his elder sister, Vivian, to the hospital after she had been thrown by a galloping horse.<sup>65</sup>

A court, then, is not bound to follow the dicta of a prior decision, but only the specific consequences that attach to a detailed set of facts. In other words, "a case is important only for what it decides: for 'the what,' not for 'the why' and not for 'the how.'"<sup>66</sup>

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61. Accordingly, in more traditional terms, dicta would comprise the reasoning of the court, statements of fact that do not appear in court record, and any statement that relates to situations not contained in the actual facts giving rise to the litigation. See BLACK, *supra* note 33, at 174 (dicta are anything that are "not within the limits of official decision nor made in the exercise of judicial functions"); Aldisert, *supra* note 50, at 612 (concluding that dicta are either a description of facts not contained in the case record or the statement of facts not contained in the minor premise); Goodhart, *supra* note 53, at 183 (dictum is conclusion premised on hypothetical facts).

62. See *supra* text accompanying notes 56-58.

63. This statement represents a description of a factual scenario contained in neither the minor premise nor the conclusion.

64. In addition to the reason given in the above note, this statement also represents an additional line of reasoning; because the reasoning of the court falls under the major premise, it is not part of the court's decision.

65. The reasoning of the court is not part of the court's decision for purposes of stare decisis.

66. Aldisert, *supra* note 50, at 607.

*B. Stare Decisis' Dual Impact on a Multi-Panel Appellate Court: Vertical and Horizontal Stare Decisis*

The principle of stare decisis may be divided into two complementary concepts. Such a division aids in understanding the impact of stare decisis, especially its effect on an intermediate, multi-panel appellate court such as the court of appeals.<sup>67</sup> Analysis will begin first with vertical stare decisis, involving courts of different rank within a common judicial system, and then proceed with a discussion of horizontal stare decisis, involving a single court or one court composed of several independent benches.

*1. Vertical stare decisis*

Vertical stare decisis requires that courts adhere to precedents set by courts of higher hierarchical rank within the same judicial system.<sup>68</sup> Moreover, lower courts must strictly follow the decisions of superior courts, regardless of whether they agree with the other court's analysis or conclusion.<sup>69</sup> Black summarizes the requirements imposed by vertical stare decisis:

Inferior courts are absolutely bound to follow the decisions of the courts having appellate . . . jurisdiction over them. In this aspect, precedents set by the higher courts are imperative in the strictest sense. They are conclusive on the lower courts,

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67. Note, however, that isolated consideration of the principle of horizontal stare decisis would be helpful for understanding the impact of stare decisis on a multi-panel court regardless of its hierarchical rank.

68. *State v. Thurman*, 846 P.2d 1256, 1269 (Utah 1993); *Barstow v. State*, 742 S.W.2d 495, 501 n.2 (Tex. Ct. App. 1987). Judge Aldisert points out the contrast between the common law and civil law traditions in the area of adherence to precedent. Whereas the common law tradition affords great respect to the precedent, civil law tradition theoretically requires that each court conduct an *ab initio* interpretation of the legislative mandate in question. Aldisert, *supra* note 50, at 608; see also Ruggero J. Aldisert, *Rambling Through Continental Legal Systems*, 43 U. PITT. L. REV. 935 (1982).

69. See *Jaffree v. Board of School Comm'r*, 459 U.S. 1314, 1316 (1983); *In re Marriage of Thorlin*, 746 P.2d 929, 934 (Ariz. Ct. App. 1987) (stating that a lower court may not disregard a clear precedent merely because it disagrees with supporting analysis). Compare *Thorlin* with Aldisert, *supra* note 50, at 607 and Goodhart, *supra* note 53, at 162-64 (both authors noting that a precedent may maintain vitality despite fallacious reasoning).

*Jaffree* presents a vivid example of this principle. In reversing a district court's preliminary injunction against a prohibition on school prayers, the Supreme Court, with Justice Powell speaking as Circuit Justice, stated that a district court must follow established precedent until the Court reverses it, even if the district court thinks that the Supreme Court erred. *Jaffree*, 459 U.S. at 1315.

and leave to the latter no scope for independent judgment or discretion.<sup>70</sup>

Although the policy considerations underlying stare decisis as a whole support this practice, two additional policies justify this requirement of strict adherence. First, failure to follow the precedents set by courts possessing jurisdiction to review such decisions would produce continual appeals. Second, strict adherence to precedent preserves a superior court's role as final arbiter of the law.

Vertical stare decisis' requirement of strict adherence has been interpreted as an exception to the general rule that courts must only follow the decision of an opinion rather than its dicta. According to traditional analysis, vertical stare decisis compels a lower court to follow both the precedent and dicta contained in a higher court's opinion.<sup>71</sup>

This anomaly is justified by the role that such dicta frequently play.<sup>72</sup> Often these extra-precedential statements serve as authoritative notice of how the court will respond to an issue when it is fully presented to the court. Further, the court may use such dicta to announce rules of conduct for members of the bar or lower courts.<sup>73</sup> Lastly, a court may render a decision in a case, remanding it to a lower court with procedural directions. These directions, although technically dicta, are binding on the lower court. Because these statements operate as a guide for future conduct, they serve the overarching stare decisis policy of promoting stability and reliance under the law.

## 2. *Horizontal stare decisis*

While vertical stare decisis requires a lower court to adhere to a higher court's precedents, horizontal stare decisis

70. BLACK, *supra* note 33, at 10.

71. See *Lewis v. Sava*, 602 F. Supp. 571, 573 (S.D.N.Y. 1984) (holding that, in the absence of any authority to the contrary, the court was bound by dicta in Supreme Court opinion); *Kutschinski v. Thompson*, 138 A. 569, 575 (N.J. Ch. 1927) (noting that dictum of a court of last resort is binding in the absence of contrary authority). *But cf.* *La Guire v. Kain*, 460 N.W.2d 598, 602 (Mich. Ct. App. 1990) (holding that court of appeals is free to decline to follow supreme court dicta).

Frequently, such dicta are known as "judicial dicta."

72. See *Fogerty v. State*, 231 Cal. Rptr. 810, 815 (Cal. App. 3d Dist. 1986); *Ex parte Harrison*, 741 S.W.2d 607, 608-09 (Tex. Ct. App. 1987). See generally ROBERT E. KEETON, *VENTURING TO DO JUSTICE: REFORMING PRIVATE LAW* (1969).

73. *Cf.* *State v. Thurman*, 846 P.2d 1256, 1269 (Utah 1993) (statement on stare decisis is binding on lower courts although technically dictum).

requires a court to follow its own prior decisions. This doctrine applies with equal force to courts comprising one bench or several independent panels, requiring each panel to observe the decisions of another.<sup>74</sup> The scope of this principle, however, extends only to panels of a unitary court and not to panels of different, yet co-equal, courts. Thus, district courts, whether state or federal, are usually not bound by the decision rendered by another district court.<sup>75</sup>

Departure from the principle of horizontal stare decisis would frustrate the policies underlying stare decisis as a whole: the promotion of reliance and stability under the law; judicial economy and expedition of litigation; and an image of a just and legitimate legal system rendering equal treatment to all. Moreover, adoption of any other rule would produce a result contrary to notions of fair play and substantial justice inherent in the Anglo-American common law tradition.<sup>76</sup>

Although horizontal stare decisis, then, requires that panels follow a precedent set by another panel, it does not require that a panel adhere to its own or another panel's prior decisions with the same level of absolute inflexibility imposed by

74. See *id.*; *Opsal v. United Servs. Auto Ass'n*, 283 Cal. Rptr. 212, 216 (Cal. Ct. App. 1991); *Commonwealth v. Crowley*, 605 A.2d 1256, 1257 (Pa. Super. Ct. 1992); *Commonwealth v. Burns*, 395 S.E.2d 456, 457 (Va. 1990).

This principle is applied among the panels of the federal circuit courts of appeal in which "the decision of a panel is a decision of the court and carries the weight of stare decisis . . . govern[ing] subsequent cases . . . before the same or a different panel of the court of appeals." MOORE, *supra* note 33, ¶ 0.402[1], at 18.

Because one panel is bound by the decisions of another, the question of which decision will be precedent may present a close call when more than one panel has rendered a conflicting decision on the same day. See *id.* at 18 n.30. When this occurs, resolution of the conflicting decisions may occur either by Supreme Court affirmation of one decision, or by holding a rehearing en banc, e.g., 28 U.S.C. § 46(c) (1988); or by consolidation of the cases prior to rendering a final judgment, e.g., Fed. R. App. P. 3(b).

75. See, e.g., *Williams v. AGK Communications*, 542 N.Y.S.2d 122 (N.Y. Sup. Ct. 1989) (courts of co-equal authority are not bound to follow one another); see also MOORE, *supra* note 33, ¶ 0.402[1], at 20.

76. As Justice Zimmerman pointed out:

If stare decisis had no application to a multi-panel court . . . it would sanction a judicial system under which the outcome of an appeal presenting a particular legal question would be dependent more on the composition of the panel hearing the case than on whether the issue has been previously addressed and decided by that court. It is one thing to admit that differences among judges on a particular legal question can exist; it is quite another to sanction variability in the rule of law depending solely on which of several judges of an appellate court sit on a given case.

*Thurman*, 846 P.2d at 1269.

vertical stare decisis. As a result, although each panel is generally bound by prior decisions of other panels, a panel may be able to adhere to or modify other panels' decisions while complying with the doctrinal demands of stare decisis. The theory that panels may find "leeways" around the decisions of another panel is discussed in the following section.

#### IV. THE LEEWAYS OF STARE DECISIS: AVOIDING THE STRAIT-JACKET OF PRECEDENT

Although weighty considerations of public policy underlie the judicial principle of adherence to precedent, public policy also requires that the law develop in accordance with modern notions of justice, equality, and fairness. As the plurality opinion in *Planned Parenthood v. Casey* acknowledged, "[t]he obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit."<sup>77</sup> Necessity reaches this outer limit when the policy considerations undergirding adherence either weigh in favor of, or are not implicated by, the limiting or overruling of precedent. Reliance interests are least impacted when an old rule is replaced by one that comports with current modes of behavior.<sup>78</sup> Nor is judicial expedition threatened by a new rule that enhances judicial efficiency.<sup>79</sup> Moreover, both the image of judicial legitimacy and the ethic of equal treatment are less affected by adoption of a rule that promotes equality of treatment than they are by adherence to a rule that is unprincipled in its reasoning and application.<sup>80</sup> In order to afford justice for the parties coming before it, a court must stand ready to limit and overrule its own precedents.<sup>81</sup>

Traditional stare decisis jurisprudence permits a court to both limit and overrule prior decisions.<sup>82</sup> This section provides

77. 112 S. Ct. 2791, 2808 (1992) (opinion of O'Connor, Kennedy, Souter, JJ.).

78. See *Moragne v. States Marine Lines*, 398 U.S. 375, 403 (1970).

79. See *id.* at 405.

80. See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)); *Wade v. Jobe*, 818 P.2d 1006 (Utah 1991) (adopting the principle of implied warranty of habitability in Utah).

81. Returning to the conceit adopted in the title and introduction of this article, a prudent court must avoid both the Scylla of hasty displacement of precedent as well as the Charybdis of senseless perpetuation of an unprincipled and unnecessary precedent. See Traynor, *supra* note 1, at 263.

82. Note, however, a court may only legitimately limit or overrule its own precedents. Compare part III.B.1 (vertical stare decisis) with part III.B.2 (horizontal stare decisis).

an overview of how a court, such as the Utah Court of Appeals, may avoid the pitfall of over-application of precedent.<sup>83</sup>

### A. *Indirect Leeways (No Overruling of Precedent)*

Orthodox American stare decisis jurisprudence provides limits on the application of prior decisions, suggesting the possible narrowing of a prior decision when a subsequent case falls within its apparent scope; yet, the decision's effect is sought to be avoided.<sup>84</sup> Application of these techniques will permit a court to evade the scope of a prior precedent without extinguishing the prior decision. Although the precedent has survived and may subsequently reappear,<sup>85</sup> a shift away from the direct impact of the precedent has occurred. This shift not only allows the court to avoid the precedent, but also encourages the growth of the law in a new direction.<sup>86</sup>

#### 1. *Narrow construction*

Stare decisis jurisprudence principally limits the application of a former decision by narrowly construing what aspect of a prior case is binding authority in a subsequent case. Unlike

83. Thus, this section charts the way around the second sea-monster of stare decisis, the Charybdis of Over-Application.

A court's ability to overrule or limit the application of a precedent frequently depends on the vitality, or "bite," of the prior decision. See Aldisert, *supra* note 50, at 613 (noting that not all precedents have the same "bite"). Factors affecting the vitality of a precedent include: (i) whether the decision is contained in a well-written opinion; (ii) whether the precedent is itself based on clear precedent; (iii) whether the precedent represents a single isolated case rather than a decision that has been followed in several subsequent cases, affirming its socio-judicial utility and desirability; and (iv) whether the decision is weakened by either a trenchant dissent or a concurring opinion that casts doubts on the majority's decision. See BLACK, *supra* note 33, at 90-91; EDWARD D. RE, STARE DECISIS 10 (1975).

84. See, e.g., KARL N. LLEWELLYN, *The Leeways of Precedent*, in THE COMMON LAW TRADITION 62-92 (1960). As Llewellyn puts it, each of these various techniques speaks thus to a court:

As you search for the right rule of law to govern the case in hand, I am one of the things which, respectably, honorably, and in full accordance with the common law tradition . . . you are *formally* entitled in and by your office to do to and with any prior relevant judicial language or holding as it comes before you.

*Id.* at 76.

85. Cf. the hockey-masked ghoul in the endless Friday the 13th series of films.

86. See Aldisert, *supra* note 50, at 608-12 (suggesting that the correct use of precedent follows the "common-law tradition of incremental and gradual accretion of an original narrow rule"). See generally Traynor, *supra* note 1.

vertical stare decisis,<sup>87</sup> horizontal stare decisis does not require that one panel<sup>88</sup> follow the dicta (broadly defined to include the reasoning) in a prior decision.<sup>89</sup> Consequently, a panel is bound to follow only the decision of another panel: the legal principle that emerges from the specific consequences attaching to a detailed set of facts.

2. *"The rule (or principle) was there recognized, the only difficulty being in its application."*<sup>90</sup>

A court may avoid a precedent by pointing out that, although the past decision is fundamentally correct, it has been incorrectly applied in subsequent cases. The court may then purport to apply correctly the "true" rule of law in the present case at bar.<sup>91</sup>

3. *"Each case of this kind must be dealt with on its own facts."*<sup>92</sup>

A court may also avoid precedent by stating that either the precedent or the present case must be dealt with, or confined to, its own facts.<sup>93</sup>

87. See *supra* part III.B.1.

88. Although the discussion in this section is focused primarily on a multi-panel court, the discussion is equally applicable to a single bench appellate court.

89. See *supra* part III.B.2.

90. LLEWELLYN, *supra* note 84, at 84. The techniques and titles of this and the following two methods are adopted from Llewellyn's work, which presents more than sixty methods of limiting the application of precedent.

91. *Id.* For recent Supreme Court decisions following this technique see *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) (claiming to adhere to the "core" of *Roe v. Wade* while simultaneously abandoning or re-interpreting parts of the prior decision); *Illinois v. Gates*, 462 U.S. 213, 230 (1983) (abandoning the *Aguilar-Spinelli* test and recognizing a totality of the circumstances test that "is far more consistent with our prior treatment of probable cause"); see also *McPhearson v. Buick*, 111 N.E. 1050 (N.Y. 1916).

92. LLEWELLYN, *supra* note 84, at 84.

93. *Id.* Thus, in *Town of Farmington v. Miller*, 328 P.2d 589 (N.M. 1958), the supreme court of New Mexico determined that an occupational tax should not be imposed on an itinerant salesperson who sold products that would be shipped later from out-of-state, reasoning that the "practical considerations, which presumably motivated the *Robbins* decision and those which followed in its wake, are in large measure absent in this case. And the particular facts of each case must control the decision." *Id.* at 591.

4. "Kill off as dictum, as such and without more."<sup>94</sup>

In addition, a court may decline to follow a holding in a prior case by declaring it to be dicta.<sup>95</sup> Although this lacks the intellectual integrity of other methods, it is as well established in stare decisis tradition as the other methods.<sup>96</sup>

An example of this technique is found in *Hans v. Louisiana*, in which the United States Supreme Court expanded the scope of state immunity from suits in federal courts as grounded in the Eleventh Amendment.<sup>97</sup> After determining that the Eleventh Amendment prohibited federal question suits against a state in federal court, the Court acknowledged that this position was undercut by Chief Justice Marshall's observation in *Cohens v. Virginia* that the amendment did not prohibit federal question suits. Responding to this dilemma, the Court stated: "[T]he observation was unnecessary to the decision, and in that sense *extra judicial*, and though made by one who seldom used words without due reflection, ought not to outweigh the important considerations referred to which lead to a different conclusion."<sup>98</sup>

*Sic semper dictis.*

Thus, a variety of techniques abound which allow the court to limit the application of precedent without expressly needing to overrule it. However, in some circumstances, the proper technique or the only technique may be overruling.

### B. Direct Leeways (Overruling Precedent)

Although stare decisis requires a court to adhere to its prior decisions, the command neither is inexorable, nor does it operate as a dead hand on the law.<sup>99</sup> Stare decisis permits a court to overrule its own decisions when the court determines that the former decision was erroneous.<sup>100</sup> Although a court

94. LLEWELLYN, *supra* note 84, at 86.

95. *Id.*

96. See, e.g., Note, *Dictum Revisited*, *supra* note 48, at 509 (theorizing that the slippery definition of what dictum is allows courts to disregard any prior decision by labeling the "holding" as "dicta"). This technique may be less important today, if the narrow view of what constitutes a precedent is followed. See *supra* part III.A.2.

97. 134 U.S. 1 (1890).

98. *Id.* at 19-20.

99. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2808 (1992).

100. See BLACK, *supra* note 33, at 199-200.

possesses the ability to overrule precedent, the exercise thereof must be in a principled manner.<sup>101</sup>

When a panel of the court of appeals determines that a prior decision should be extinguished because it is erroneous, two traditional and principled methods are available.<sup>102</sup> The first, review by the Utah Supreme Court, is fully authorized and available within current jurisprudence. The second, panel overrule, is only available in theory. Although the Utah Supreme Court has not yet addressed this issue, other jurisdictions permit one appellate division to overturn another.<sup>103</sup>

### 1. Supreme court review

When seeking to limit a prior decision that it cannot otherwise evade or overrule, a panel of the court of appeals may seek to have the decision reviewed by the Utah Supreme Court. This result may be achieved in either of two ways: use of the statutory certification procedure or arguing for review through subtle use of an opinion itself.

Section 78-2a-3(3) of the Utah Code provides the court of appeals with a direct method of seeking supreme court review: "The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court . . . any matter over which the Court of Appeals has original appellate jurisdiction."<sup>104</sup>

101. Cf. Henry M. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1396 (1953) ("But the judges who sit for the time being on the court have no authority to remake by fiat alone the fabric of principle by which future cases are to be decided. They are only the custodians of the law and not the owners of it.").

102. A third possible means of overruling precedent is, of course, through an en banc rehearing. See *Commonwealth v. Crowley*, 605 A.2d 1256, 1257 (Pa. Super. Ct. 1992) (stare decisis requires adherence until decision overturned by state supreme court or an en banc panel); *Commonwealth v. Burns*, 395 S.E.2d 456, 457 (Va. 1990) (en banc proceeding is the means used to overturn a prior erroneous decision); see also MOORE, *supra* note 33, ¶ 0.402[1], at 18-19. Utah state law, however, does not permit the court of appeals to sit en banc, UTAH CODE ANN. § 78-2a-2(2) (1994), and this third method is therefore not available in Utah.

103. See *Opsal v. United Servs. Auto Ass'n*, 283 Cal. Rptr. 212 (Cal. Ct. App. 1991); *Denver Fire Reporter & Protection Co. v. Dutton*, 736 P.2d 1255, 1256 (Colo. Ct. App. 1986).

Whether the court of appeals should be able to overturn clearly erroneous decisions of other panels is an open question although it could be argued that legislative refusal to grant en banc authority, together with the traditional requirements of stare decisis, may have been intended to bar a panel's overruling.

104. UTAH CODE ANN. § 78-2a-3(3) (1994). Further, the supreme court may not decline to review a certified case. *Id.* § 78-2-2(5).

Despite its availability, certification of a case to the supreme court poses several problems, which may explain its lack of use.<sup>105</sup> First, the certification process is a slow and inefficient means of overruling precedent.<sup>106</sup> Second, certification frustrates a primary reason for the court of appeals' existence: lessening the supreme court docket and concomitant backlog. Third, certification requires that four judges of the court—a majority—be willing to vote for certification.<sup>107</sup>

On the other hand, a panel may seek to limit a prior decision by promoting review in the supreme court. A panel encourages and enhances the value of an eventual review when it reaches the result required by rote application of precedent, yet cogently outlines the logical errors in the past decisions. A strong, insightful opinion outlining errors in prior decisions encourages a losing party to seek such review by the supreme court. An example of this method occurred in *Carter v. United States*.<sup>108</sup> After stating briefly in one paragraph the outcome required by precedent, the panel continued the opinion for several more paragraphs, outlining a valid argument as to why that precedent should be overruled. Although indirect, this method does have benefits. For example, it allows a judge to remain intellectually honest both to the principle of stare decisis, which requires her to adhere to a decision that cannot otherwise be limited, and to her own view of the law. Further, a successive series of opinions that follow, yet argue against, a prior decision provide a well-developed record for the supreme

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105. Section 78-2a-3(3) of the Utah Code has only been used once. See *Johanson v. Fischer*, 808 P.2d 1083 (Utah 1991). Of course, a request for certification may have arisen in the past, yet failed to get the requisite four votes.

106. Under this method, the court would need to await a case that was covered by the former precedent. The court would then need to find four judges who would be willing to vote for certification. Further, the method would be unduly burdensome for the litigants, requiring that they conceivably file two sets of briefs: one at the court of appeals level and a second when the case was transferred to the supreme court.

107. Because the reason for certification is to obtain supreme court review of an issue, rather than to find out whether a majority of the court is implicitly in favor of reversing (or upholding) a decision, certification should only require a minority vote of three judges. Such a practice would compare favorably with the certiorari process of the United States Supreme Court, which permits a minority vote of four (the "rule of four") to determine what cases it will hear. Under this system, a minority could seek review of a precedent, leaving the supreme court free to reverse or affirm—even summarily.

108. 168 F.2d 272 (2d Cir. 1948).

court to review and consider when the question is finally presented to them.<sup>109</sup>

Although both of these methods suffer from inefficiencies and frustrate attempts by the court of appeals to fulfill its role of diminishing the supreme court docket, they do provide two methods by which one panel may treat prior decisions which should be overruled.<sup>110</sup>

## 2. *Panel overrule*

When it is convinced that a prior decision is out of keeping with the current trend of the law and that the policies underlying *stare decisis* would not be offended, a panel of the court of appeals has a panoply of techniques at its disposal to limit, evade, or overrule a prior decision. As discussed above, the panel may indirectly limit the prior decision or it may directly attack the decision by seeking to extinguish it. Because these methods are frequently inefficient and tend to increase the supreme court docket, a panel should have the authority to overrule the court of appeals' prior decisions.

Exercise of this power is permissible because a court may overturn its own decisions under traditional *stare decisis* analysis.<sup>111</sup> Historically, the power of a court to overrule its own precedents was linked to principles of natural law. Under these principles, a judge did not "make law" when adjudicating; rather, he applied the law as he "found" or "discovered" it. Consequently, when a judge discovered principles of law that were inconsistent with prior decisions, the former decisions were discarded as being incompatible with the true nature of the law. Currently, more pragmatic reasons underlie the conclusion that a court must be able to overrule its prior decisions. One fundamental reason is the recognition that a court must be

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109. The benefit of this method was noted by the United States Supreme Court: "[A]ny ultimate review of the question that we might undertake will gain the benefit of a well developed record and a reasoned opinion on the merits." *Bankers Life & Casualty v. Crenshaw*, 486 U.S. 71, 80 (1988).

110. Both the inefficiency of these two methods—especially the latter—and the concomitant burden they necessarily impose on the supreme court docket counsel against their use and in favor of the court of appeals' ability to overrule its own decisions. See *infra* part IV.B.2.

111. See BLACK, *supra* note 33, at 199; MOORE, *supra*, note 33, 0.402[1], at 9 ("[P]ower exists in the court that decides a case to overrule it . . ."); see also *United States v. Cocke*, 399 F.2d 433, 448 (5th Cir. 1968) ("Our law is neither moribund nor muscle-bound. There are justifiable escapes and liberations from the rigidities and inflexibilities of *stare decisis*.").

able to overrule a prior decision when necessary to vindicate the rights of parties before it.

Although Utah law has not yet addressed this issue, other jurisdictions permit one appellate panel to overrule the decisions of another when manifest injustice or compelling reasons counsel against adherence to precedent.<sup>112</sup> Adoption of this theoretic position would permit a multi-panel court which functions as a single court to treat prior decisions in the same manner that a single-bench court treats its prior decisions.<sup>113</sup> Consequently, adoption of this position would permit the panels of the court of appeals to avoid unjust decisions resulting from the application of erroneous precedents, without awaiting supreme court review.<sup>114</sup>

Nevertheless, considerations of public policy, orderly administration, and continuity in the law dictate that decisions not be overruled except as justice requires and as prior decisions cannot otherwise be circumscribed. Merely to concede such authority is not to permit its unbridled exercise.<sup>115</sup> Rather, the court must exercise principled discretion when deciding whether or not to overrule a prior decision. This exercise of principled discretion should be informed first by a consideration of factors indicating whether a precedent is really ripe for overruling and secondly by a consideration of the possible impact on the policies underlying the practice of adhering to precedent.

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112. *See supra* note 102.

113. *Cf. BLACK, supra* note 33, at 10-11. Because panels of the court of appeals are considered as one court for the purposes of creating precedent under stare decisis, they should be treated as one court for purposes of overruling precedent.

114. Adoption of this position would produce several benefits for the legal community: (i) diminishment of appellate delay and backlog; (ii) reduction of adjudicatory inefficiencies; (iii) intellectual integrity; and (iv) development of the common law at a pace in keeping with societal needs and developments.

115. As the Court noted in *Casey*, "[t]o overrule prior law for no other reason than [for a present doctrinal disposition to come out differently than an earlier court] would run counter to the view that a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided." *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2813-14 (1992). *Cf. BLACK, supra* note 33, at 203-04 (listing reasons for and against overruling a prior decision).

Instead of overruling, prudential circumscription may be available in some instances. For example, a prior decision may be legitimately limited under one of the techniques previously discussed. *See, e.g., supra* part IV.A.

First, then, the court should determine whether the prior decision is ripe for overruling. In making this determination, a court should consider the following factors:

1. Contemporaneity:<sup>116</sup> The court should consider the extent to which the prior decision is in keeping with or contrary to contemporary notions of justice and equity.<sup>117</sup>
2. Reliance:<sup>118</sup> The court should consider to what extent the public has relied on the precedent, such that its overruling would upset the settled expectations of society.<sup>119</sup>
3. Doctrinal bases:<sup>120</sup> This factor requires the court to determine the extent to which the development of the law since the rendering of the precedent has left the precedent a doctrinal anachronism.<sup>121</sup>
4. Practicality:<sup>122</sup> When considering this factor, the court should examine the precedent in a pragmatic light, questioning whether the rule it embodies has proved to be inconvenient or simply unworkable in real-world application.<sup>123</sup>

116. Cf. MOORE, *supra* note 33, ¶ 0.402[3.—1], at 50.

117. Thus, in *Shaffer v. Heitner*, 433 U.S. 186 (1977), the Court determined that “traditional notions of fair play and substantial justice” required that all exercises of state court jurisdiction be judged according to the standards set forth in *International Shoe* and its progeny. *Id.* at 212.

Similarly, contemporary notions of equal protection informed the Court’s decision to abandon the “separate but equal” doctrine in *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

118. Cf. *Casey*, 112 S. Ct. at 2808-09; MOORE, *supra* note 33, ¶ 0.402[3.—1], at 50.

119. Noting that “for two decades of economic and social developments, people have organized intimate relationships . . . in reliance on the availability of abortion,” the Supreme Court determined that reliance interests counseled against the overruling of *Roe v. Wade*. *Casey*, 112 S. Ct. at 2810-11.

120. Cf. *Casey*, 112 S. Ct. at 2808-11; MOORE, *supra* note 33, ¶ 0.402[3.—1], at 50.

121. Thus, in *Casey*, the Court determined that developments in constitutional law had not bypassed or undercut the doctrinal bases of *Roe v. Wade*. *Casey*, 112 S. Ct. at 2810-11.

On the other hand, in *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477 (1989), the Court determined that “the old judicial hostility to arbitration” that had formed the basis for the rule disallowing arbitration claims under the Securities Act had been surpassed by current federal policy favoring arbitration. *Id.* at 480-81; see also *Wade v. Jobe*, 818 P.2d 1006 (Utah 1991) (adopting implied warranty of habitability).

122. Cf. *Casey*, 112 S. Ct. at 2808-09; MOORE, *supra* note 33, ¶ 0.402[3.—1], at 50.

123. For example, when considering whether the central holding in *Roe v. Wade* had proved to be unworkable, the Court determined that it had not, for al-

After considering these factors, the court should determine whether they suggest upholding or overruling the prior decision.<sup>124</sup> If the court determines that these individual factors point towards overruling, it should weigh the decision to overrule against the policies that underlie stare decisis, measuring the impact of overruling the prior case on those values.

Consequently, the court should consider the decision to overrule against the backdrop of the following values:

1. Reliance: To what extent will overruling interfere with reasonably settled expectations or upset social relationships that have been formed in reliance on the rule? This consideration is especially weighty when commercial or property interests are involved.<sup>125</sup>
2. Judicial economy and expedition: To what extent will a new rule lead to an increase in litigation, require increased expenditure of judicial resources, or otherwise burden the adjudicative process?
3. The image of justice: Does a new rule promote or impair equal treatment? In overruling, will the court be seen to be just as well as doing justice? Is the exercise of power legitimate?<sup>126</sup>

If, after measuring the impact of overruling on the values counseling adherence, the court concludes that those values would not be unduly impaired, the court should overrule the prior decision. This process of weighing the necessity of over-

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though it required judicial involvement in determining whether state action infringed upon constitutional rights, this type of examination was well within the competency of the bench. *Casey*, 112 S. Ct. at 2809.

As an additional overlay of caution, Professor Moore suggests that even if the court determines that the rule has proven unworkable, it should determine whether any rule would be "workable." See MOORE, *supra* note 33, ¶ 0.402[3.—1], at 50.

124. As with most multi-prong tests, this test fails to suggest whether one prong is more determinative than another. In some cases, one factor alone may be determinative of the need to adhere or overrule; in others, all factors may point to the direction to be taken.

125. To a great degree, this factor will have already been evaluated when the court proceeds through factors bearing on the decision to adhere or overrule. See *supra* notes 116-123 and accompanying text.

126. For example, it would be manifestly unjust to overrule merely because the court would have voted differently if the case had come before it initially. *Casey*, 112 S. Ct. at 2813-14. Likewise, frequent overruling undercuts the image of a just court doing justice. *Id.* at 2815 (stating that "frequent overruling would overtax the country's belief in the Court's good faith").

ruling against its impact on values protected by adherence reconciles two possibly conflicting interests: the interest in promoting orderly administration of and continuity in law and the interest in permitting the court of appeals to avoid unjust decisions without awaiting review of those precedents by the supreme court.<sup>127</sup>

Stare decisis jurisprudence thus allows a court to overrule its own precedents. The proposed "principled discretion" test protects both considerations that underlie stare decisis and the need for a court's ability to promote the growth of the common law. Consequently, one panel of the court of appeals should be able to overrule a prior decision of the court of appeals.

## V. CONCLUSION

A fundamental element of Anglo-American jurisprudence is the notion that the law should be stable, fostering equality and predictability of treatment. The judicial system achieves this stability through adherence to the common law doctrine of stare decisis. Put simply, stare decisis requires that a court apply its own precedents, as well as those of courts to which it owes obedience, when confronted with subsequent cases presenting similar issues. Adherence to this doctrine advances several substantial values: reliance on and stability in the law, judicial economy, expeditious litigation, and, most fundamentally, equal treatment under the law.

The doctrine of stare decisis has a double impact on the Utah Court of Appeals. As an intermediate appellate body, the court of appeals is strictly bound by the precedents of the court to which it owes obedience, the Utah Supreme Court. Further, although the court of appeals adjudicates cases as individual panels, the principle of stare decisis, as interpreted in *State v. Thurman*,<sup>128</sup> requires that each panel follow decisions rendered by other panels of the court.

However, stare decisis permits a court greater flexibility in treating its own, rather than a superior court's, past decisions.

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127. This exercise of principled discretion operates as a functional equivalent of the requirement that a court should overrule a prior decision only when (i) there is a compelling reason to do so; and (ii) to do otherwise would work manifest injustice to the parties before the court. See, e.g., *Opsal v. United Serv. Auto Ass'n*, 283 Cal. Rptr. 212, 216 (1992); *Denver Fire & Reporter Protection v. Dutton*, 736 P.2d 1255, 1256 (Colo. Ct. App. 1986); see also BLACK, *supra* note 33, at 199.

128. 846 P.2d 1256 (Utah 1993).

Because the panels of the court of appeals function as one court, one panel may treat more flexibly another panel's decision while retaining a consistency with stare decisis jurisprudence. Consequently, a panel may limit and should be able to overrule a prior decision of the court when it is convinced that the decision is out of keeping with the current trend of the law and that the policies underlying stare decisis would not be offended.

An understanding of these principles enables the court of appeals to avoid the pitfalls of either under- or over-applying its prior decisions. On the one hand, under-application of precedent produces inconsistent results, which frustrate the policies supported by stare decisis: reliance, stability, expedition, and equality of treatment. On the other hand, over-application of prior decisions—the refusal to abandon precedent—will limit the court's ability to develop the common law and deal justly with the parties before it. The analysis presented by this Comment will assist the court of appeals to identify and avoid both Scylla and Charybdis as it passes through the Straits of Stare Decisis.

*Paul W. Werner*