The Exaggerated Importance of Stare Decisis

By Erich Vieth – Aug 1, 2019

Understanding stare decisis ("SD") is important for all lawyers, but it's especially compelling for litigators facing unfavorable precedent. SD requires that outcomes of new cases should mirror the outcomes of similar cases that are older and controlling. Ever since I became an attorney, I've been skeptical about claims that SD determines the outcomes of difficult cases. That remains my position today for the reasons discussed below.

What do I mean by "difficult" cases? I'm referring to well-fought cases with two plausible outcomes. As SCOTUS once said (in a different context), you'll know it when you see it. For contrast, here's an easy case, one where precedent is stable and the facts are clear: Seller agrees to sell a car for $2,000. After Buyer pays the money, Seller refuses to deliver. We know this is a breach of contract because the common law elements fit the facts like a template or checklist.

What kind of animal is Fido? If he's furry, wags his tail, says "woof," he's a dog. Again, that's an easy case. But some cases involve the animal equivalent of a venomous lactating duck-billed egg-laying mammal that has two heads and plays the harp. Regardless of whether legal issues are simple or complicated, however, judges reach into their judicial toolkits and pull out SD. I propose that SD, which is helpful in simple cases, does not scale up well to determine outcomes of difficult cases. In difficult cases, the decision-process, which includes consulting precedent, is far more complicated.

SD seems straight-forward: Courts should follow precedent. If you ask for a ruling in your favor, trial judges often challenge you by saying "Show me a case!" If you can dig up a favorable comparable case, the judge will nod and you will smile. Courts cite to precedent so often on all types of cases that SD seems to be the engine of legal reasoning. I'm not denying that judges consider precedent or cite to precedent on difficult cases. They clearly do these things. My question is whether SD specifies how to decide those difficult cases.

It's not irrational to mimic the decisions of others. This approach has ancient origins. "Our ancestors have always hunted in the big valley—we will hunt there too." Fast forward: "Where is the exit from this concert hall? . . . Let's follow the crowd!" Truly, SD can be seen as longitudinal crowd sourcing—follow the judges from the past! The requirement to "follow precedent" raises many concerns, however.

First, most of us would avoid hiring doctors or engineers who obsessed about doing things the old way. Most of us roll our eyes whenever someone tells us to do something a particular way "because that's the way we've always done it." Stripped to its logical core, SD is bereft of any attempt to do justice. To "follow" precedent is a metaphor that suggests passive obedience, a cold algorithmic perpetuation of whatever came before, for better or worse. SD is path dependence, which can either be either useful or a mere curiosity. The design of the space shuttle apparently relates to the width of a horse's butt, but that's a mere curiosity, not a prerequisite for designing future space craft.[1]

Second, SD often leads to inconsistent results, even when different levels of

[1] http://www.astrodigital.org/space/stshorse.html

appellate courts consider the exact same facts and precedent. SD fails to explain why my 0-3 loser in the Missouri Court of Appeals, became a 7-0 winner in the Missouri Supreme Court.[2] Or why my 7-0 winner in the Missouri Supreme Court became a unanimous loser in the U.S. Supreme Court.[3]

Third, in difficult cases, opposing attorneys both rely on precedent. The judge stands at the fork in the road where both paths are lined with SD. No matter how the judge decides, the decision will be attributed to SD. Merely "following" precedent cannot resolve these difficult cases, however. Instead, the judge faces a much more daunting task: determining whose precedent is *better*. The judge must consider numerous intangibles, and this requires discretion, not following a template. This leads some writers to suggest that judges cite to precedent merely as post-facto rationalization, that precedent appearing in written opinions is essentially window-dressing.[4] That position is too extreme, however. Judges really do ponder SD as they decide difficult cases. Precedent really does affect a judge's thought process.

Being a judge is an honorable and difficult job. Every time judges decide contested issues, at least one of the litigants is unhappy and some of these losing litigants grumble that their judge was unfair. That's a lot of emotional abuse to take on a regular basis, especially when the loser's version of the case gets traction in the news media. Before continuing, then, I'd like to offer kudos to all of those hard-working judges out there! To be clear, this article is not a critique of judges, but an attempt to explore the role of precedent in difficult cases.

Appellate Decisions Considering SD.

Missouri courts have had a lot to say about SD. We must be "mindful of the sanctity of *stare decisis*."[5] "Stare decisis is the cornerstone of our legal system."[6] "If *stare decisis* is no longer a viable part of our legal system, then has the court become merely another legislative branch . . ."[7] Hence, "we are not at liberty to disregard the decided cases"[8] or "depart from precedent."[9] Therefore " . . . s*tare decisis* must prevail,[10] and it *must* prevail "free of reluctance, hesitancy or doubt as to the propriety or fairness of doing so."[11]

SD derives from Latin, "Stand by the thing decided."[12] Where the same issue or an analogous issue was decided in an earlier case, SD provides that prior authority "stands as authoritative precedent unless and until it is overruled."[13] SD does not "extend to reasoning, illustrations, and references in

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[2] *Huch v. Charter Communs.*, 290 S.W.3d 721 (Mo. 2009).
[3] *Coventry Health Care. v. Nevils*, 137 S. Ct. 1190 (2017).
[4] For details on this "indeterminacy contention," see Ken Kress, *Legal Indeterminacy*, 77 Cal.L.Rev 77(2) 283 (1989).
[5] *State v. Grant*, 810 S.W.2d 591, 592 (Mo.App. 1991) (concurrence).
[6] *M & H Enterprises v. Tri-State Delta Chemicals, Inc.*, 984 S.W.2d 175, 183 (Mo.App. S.D. 1998).
[7] *State v. Smith*, 737 S.W.2d 731, 738, (Mo.App. 1987) (Dissent).
[8] *Brookshier v. McIlwrath*, 87 S.W. 607, 608 (Mo.App. 1905)
[9] *Jennifer Mae Jones, Estate of Dorothy Louise*, 1996 WL 523092, *4 (Mo.App. W.D. 1996).
[10] *State v. Wacaser*, 794 S.W.2d 190, 199 (Mo. 1990) (Concurrence).
[11] *Slagle v. Minich*, 523 S.W.2d 160, 165 (Mo.App. 1975).
[12] *Stare decisis et non quieta movere.*
[13] *U.S. Life Title v. Brents*, 676 S.W.2d 839, 841[2] (Mo.App.1984).

opinions."[14] Such material constitutes "obiter dicta."[15]

The requirement that one should follow precedent can take the form of either horizontal SD (the following of precedent over time by any court) or vertical SD (the duty of lower courts to follow precedent set by higher courts).[16] The Missouri Courts of Appeals "are bound by the decisions of our Supreme Court under the firmly established doctrine of *stare decisis*."[17]

Why use the doctrine of SD? Because of "the crowded docket"[18] and the "due administration of justice."[19] After all, these dockets contain so many "things of crying need,"[20] and we need to "close litigation that would otherwise be endless."[21] Another reason for SD is to establish "needed stability and predictability in the law,"[22] and security in the law.[23] We must "keep the scales of justice even and steady, and not be liable to waiver with every new case presented."[24]

Then again . . . even though SD "serves exceedingly well in most instances,"[25] we *should* depart from SD where there are good "reasons" for doing so.[26] After all, "the fact that a rule has long been followed does not require that we continue to follow it, if the reason for the rule has ceased to operate . . ."[27] The law should not be "static" and . . . should not blindly follow the rule of *stare decisis*"[28] or "seek refuge" in it,[29] certainly not in "emergencies."[30]

Therefore, never follow SD where precedent is "clearly erroneous and manifestly wrong."[31] [S]trike, heavy-handed, such antiquated rules . . . as allow outrageous injustice to be perpetrated."[32] SD is "not observed or enforced where the prior

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[14] *Koerner v. St. Louis Car Co.,* 107 S.W. 481, 485 (Mo. 1907); see also, *State ex rel. Bixby v. City of St. Louis,*145 S.W. 801, 803 (Mo. 1912).
[15] See, *State ex rel. Lashly v. Becker,* 235 S.W. 1017, 1023 (Mo. 1921).
[16] The *Missouri Constitution* provides for a form of vertical SD in *Art 5, §2:* "The supreme court shall be the highest court in the state. Its jurisdiction shall be coextensive with the state. Its decisions shall be controlling in all other courts."
[17] *McNearney v. LTF Club Operations,* 486 S.W.3d 396 (Mo. App. E.D. 2016).
[18] *State ex rel. Missouri Public Service v. Fraas,* 627 S.W.2d 882, 886 (Mo.App. 1981)
[19] *In Re Goessling's Estate,* 230 S.W. 613, 619, (Mo. 1921).
[20] *State v. Taylor,* 168 S.W. 1191, 1196 (Mo. 1914).
[21] *Turner v. Anderson,* 168 S.W. 943, 945, (Mo. 1914).
[22] *O'Dell v. School Dist. of Independence, 521* S.W.2d 403, (Mo. 1975) (dissent); *Med. Shoppe Int'l v. Dir. of Revenue,* 156 S.W.3d 333 (Mo. 2005).
[23] *Rothwell v. Dir. of Revenue,* 419 S.W.3d 200, 206-207 (Mo. App. 2013).
[24] *Kennedy v. Watts,* 125 S.W. 211, 212 (Mo.App. SD 1910).
[25] *Savannah R-III School Dist. v. Public School Retirement System,* 950 S.W.2d 854, 862 (Mo. 1997).
[26] *State v. Taylor,* 779 S.W.2d 636, 646 (Mo.App. 1989); *Martin v. Mid-America Farm Lines, Inc.,* 769 S.W.2d 105, 110 (Mo. 1989).
[27] *Bituminous Cas. Corp. v. Aetna Life,* 599 S.W.2d 516, 521 (Mo. App. E.D. 1980).
[28] *State ex rel. Normandy Orthopedics v. Crandall, 581* S.W.2d 829, 581 (Mo. 1979).
[29] *Schulte v. Missionaries of La Salette Corp.,* 352 S.W.2d 636, 643 (Mo. 1961).
[30] *Kansas City v. St. Louis & Kansas City Land Co.,* 169 S.W. 62, 66 (Mo. 1914).
[31] *Novak v. Kansas City Transit, Inc.,* 365 S.W.2d 539, 546 (Mo. Banc 1963).
[32] *Epstein v. Pennsylvania R. Co.,* 156 S.W. 699, 710 (Mo. 1913).

decision is palpably wrong.[33] Always depart from SD "when such departure is necessary to avoid the perpetuation of pernicious error."[34] Courts may violate SD in the case of recurring injustice or absurd results,[35] or when "considerations of public policy demand it."[36] Where it appears that an opinion is clearly erroneous and manifestly wrong, the rule of SD "is never applied."[37] In sum, courts should always follow precedent, because it is "authoritative precedent" "until and unless it is overruled."[38]

These Missouri cases raise important issues such as fairness, efficiency and stability, but they do not provide any reason to believe that SD compels particular outcomes in particular difficult cases. In fact, *apply-SD-unless-you-don't* suggests the opposite. I will now discuss SD from other perspectives.

"Applying" Rules.

Courts speak of SD as identifying rules embedded in prior relevant cases and "applying" them to current cases. Legal rules don't enforce themselves, however. Abstract rules connect to messy real-world facts only after working their way through the complex brains of human judges. Therefore, human interpretation and discretion are unavoidable when "applying" rules, and that's a good thing. That's why we hire judges to decide cases instead of using clerks. Steven Winter has studied rules at length, concluding that "there's a lot more space than we'd think in 'following the rules'"[39]:

> [T]he real world of human action is too varied and complex to be captured by any set of categorical structures. It is not so much that every rule has a few corners that do not quite fit, as it is that life's diversity and complexity cannot be contained within square corners. Indeed, as long as we treat categories as rigid little boxes, any set of boxes we devise will be either too few to do like justice or too many to be workable.[40]

Winter cites to Stanley Fish, who wrote: "Every rule is a rule of thumb."[41] Winter and Fish are following the footsteps of Aristotle:

> [Aristotle] cautions against [the] . . . intrinsic defects and the dangers of over-rigorous applications [of rules] . . . ["Law" is not] external or rigid, but . . . an expression of ongoing and active reason. What is final is not the deliverances of written law, but rather the best judgments of those who, guided by experience and the law, can improve upon it . . . Law is . . . inevitably general.[42]

Philosopher Andy Clark points out significant limitations of moral rules, but his concerns apply equally to legal rules:

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[33] *City of Sedalia v. Donohue,* 89 S.W. 386, 388 190 Mo. 407, (Mo. 1905); *O'Leary v. Illinois Terminal R.,*299 S.W.2d 873, 879 (Mo. Banc 1957).
[34] *Powell v. Bowen,* 214 S.W. 142, 148, (Mo. 1919).
[35] *Crabtree v. Bugby,* 967 S.W.2d 66, 72 (Mo. 1998).
[36] *Unnerstall v. City of Salem,* 962 S.W.2d 1 (Mo.App. S.D. 1997).
[37] *Southwestern Bell Yellow Pages v. Dir. of Revenue,* 94 S.W.3d 388, 390-391 (Mo. 2002); *State ex rel. Zahnd v. Van Amburg,* 533 S.W.3d 227, 231-232 (Mo. 2017).
[38] *U.S. Life Title Ins. v. Brents, supra; McGaw v. McGaw,* 468 S.W.3d 435, 441 (Mo. App. W.D. 2015).
[39] Steven Winter, *A Clearing in the Forest: Law, Life and Mind,* 186-188 (2003).
[40] *Id. 189.*
[41] *Id.*
[42] Nancy Sherman, *The Fabric of Character: Aristotle's Theory of Virtue* (1989).

> The attempt to condense [legal] expertise . . . . into a set of rules and principles that can be economically expressed by a few sentences of public language may thus be wildly optimistic, akin to trying to reduce a dog's olfactory skills to a small body of prose. [43]

Clark reconceptualizes rules as "guides and signposts" that enable collaborative exploration "rather than as failed attempts to capture the rich structure of our individual . . . knowledge." Clark's view resonates with me. Researching prior cases provides a menu of suggestions for discussing and collaborating (through briefing and oral arguments) to attempt to resolve difficult legal issues.

Motivations for Embracing SD as Determinative.

The Missouri Constitution doesn't tell judges how to decide cases. It merely provides that "the judicial power of the state shall be vested in [a court system]."[44] Though it is often said that legislatures *make* the law and courts *interpret* laws, *making* law versus *interpreting* law are points along the same continuum of governing human behavior. Is a court ruling merely putting gloss on a statute or is that court creating something that wasn't there before? This framing struggle often erupts into separation of powers territorial battles, making the selection of judges contentious.

Do courts "make" law? Retired Court of Appeals Judge Richard Posner says yes:

> [T]he judicial game has a legislative component. Having to make an occasional legislative determination is as we know a correlate of one of the judging game's most important rules—the duty to decide. But the rule that requires occasional legislating jostles uneasily with the other rules, which seek to distinguish the judicial role from the legislative on the basis of a distinctive judicial protocol. As a result, many judges hesitate to acknowledge, even to themselves, as one of the rules of their game, a duty to legislate, albeit only occasionally.[45]

Most judges are reluctant to admit that they ever "legislate." Suggesting this would risk the integrity and independence of the court system. According to James L. Gibson, it's politically safer for judges to portray themselves as law-robots:

> [H]ow is this fact of politicization [and polarization of the U.S. Supreme Court] compatible with the view that the American people subscribe to the "myth of legality" – "the belief that judicial decisions are based on autonomous legal principles" and "that cases are decided by application of legal rules formulated and applied through a politically and philosophically neutral process of legal reasoning"? If the public believes that judges do nothing more than interpret and apply law through the discretionless processes of syllogisms and stare decisis (sometimes referred to as "mechanical jurisprudence") . . . many threats to judicial legitimacy dissipate. By this view, judges are legal technicians simply doing what they are supposed to do in an objective and value-free manner.[46]

[43] Andy Clark, "Connectionism, Moral Cognition, and Collaborative Problem Solving," in *Mind and Morals: Essays on Cognitive Science and Ethics* (1996).
[44] *Art. VI, §§ 1.*
[45] Richard Posner, *How Judges Think*, p. 91 (2010).
[46] Gibson, James and Michael Nelson, *The Legitimacy of the U.S. Supreme Court.* Annual Review of Law and Social Science,10: 201-219 (2014).

Gibson cites to *Bush v. Vera*[47] to illustrate that the U.S. Supreme Court seems to agree: "Our legitimacy requires, above all, that we adhere to *stare decisis*, especially in such sensitive political contexts as the present, where partisan controversy abounds."

Linguist George Lakoff suggests similar motivations for taking the stance that one is making decisions objectively, without discretion:

> There is a major folk theory in our society according to which being objective is being fair, and human judgment is subject to error or likely to be biased. Consequently, decisions concerning people should be made on 'objective' grounds as often as possible. It is the major way that people who make decisions avoid blame. If there are 'objective' criteria on which to base a decision, then one cannot be blamed for being biased, and consequently one cannot be criticized, demoted, fired, or sued.[48]

It is easier for a judge to tell the losing side that the judge's "hands were tied" than to simply say "You lose." James Gibson cites to the research:

> Simon and Scurich find that concern over the decision-making process is confined to those who are told of Court decisions contrary to their preferences. This fits well with the notion that "legitimacy is for losers"; those who win in disputes rarely question the fairness of the decision-making process. Those who lose, however, seek to understand their loss by examining the process leading to the decision.[49]

SD might thus serve compelling needs even if it doesn't function as commonly suggested. As Nietzsche points out, positing formal structures does not prove their efficacy:

> We have arranged for ourselves a world in which we are able to live--by positing bodies, lines, planes, causes and effects, motion and rest, form and content; without these articles of faith no one could endure living! But that does not prove them.[50]

Courts benefit when they attribute decision-making to SD, a technical-seeming process, because this draws attention away from the ineffable subjective discretion-laden judgment of all-too-human judges. Less attention on court discretion means fewer accusations of law-*making*, which helps to stave off both separation-of-powers accusations and the slings and arrows of losing parties.

Explanations

Does SD "explain" court decisions? Trying to determine what constitutes an "explanation" has confounded scientists for centuries. Philosopher Andy Clark once wryly commented: "An explanation is a description that makes you feel good."[51] Yes, actually. Well-constructed explanations give us an inner feeling of satisfaction. According to William Bechtel one of the most common types of explanations are "mechanistic explanations, comprised of a structure performing a function in virtue of

[47] 517 U.S. 952, 985 (1996).
[48] George Lakoff, *Women, Fire, and Dangerous Things: What Categories Reveal About the Mind*, Preface, p. xiv, (1987).
[49] Gibson, James L. and Michael Nelson. *The Legitimacy of the U.S. Supreme Court.* Ann. Rev of Law and Soc, 10:201-219 (2014).
[50] Friedrich Nietzsche, *The Gay Science*, Paragraph (Kaufmann trans.) p 177 (1887).
[51] Personal Communication, circa 1997.

its component parts, component operations, and their organization."[52]

SD can be seen to be a jurisprudential version of a mechanistic explanation. After isolating the "relevant" facts and principles embedded in prior cases, judges determine the interrelationships of these bits and "apply" them to the case at hand. Even if SD does not really function as a little physical engine, the moving parts offered by SD give it the feel of an explanation rather than a static pronouncement.[53] Explaining cases in terms of the working parts of prior cases lessens the worry that a judge offered only gut justice.

When SD is combined with syllogisms, this makes legal reasoning look even more mechanistic and objective. What are syllogisms? If we have three containers *A*, *B* and *C*, if *A* is *in B* and *B* is *in C*, then *A* is *in C*. That's about it. Sometimes, syllogisms look impressive up on whiteboards.[54] That said, has there ever been a lawyer who uses syllogisms to write briefs? Richard Posner would add: "As for the syllogism, it should be apparent by now that it is an unhelpful template for legal reasoning."[55]

Here is my suspicion: Formulaic approaches such as syllogisms and SD *feel* like explanations. They serve as useful fictions in difficult cases. They give the appearance that judges are working technically, algorithmically, and they downplay the subjective side of deciding. If the hands of judges seem to be tied by technical processes, this broadcasts an aura of objectivity which, really and truly, promotes confidence in the legal system.

Cognitive Science Says It's Not that Simple.

It is often said that SD determines particular case outcomes because judges subjectively believe this to be true. Introspection is highly problematic, however. We are not good at knowing how we think.[56] Compare, that we're very good at catching baseballs, but we're are terrible at knowing how we catch a baseballs.[57] Deciding a legal issue can be orders of magnitude more complicated than catching a ball, which should make us hesitant to pontificate about how judges decide cases.

Consider, also, the experiments of neuroscientist Benjamin Libet, who demonstrated that prior to the moments when subjects voluntarily decided to move their fingers, the decision to initiate those movements had already occurred elsewhere in their brains. Libet's findings confirm that

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[52] William Bechtel and Adel Abrahamsen, A Mechanist Alternative, *Stud. Hist. Phil. Biol. & Biomed. Sci. 36* (2005) 421–44.

[53] The "covering law" model is another theory of explanation, that would seem to account for the satisfaction of connecting facts to a subsuming law: https://en.wikipedia.org/wiki/Deductive-nomological_model

[54] George Lakoff points out that "[T]he logical properties of classical categories can be seen as following from the topological properties of containers plus the metaphorical mapping from containers to categories." *The Contemporary Theory of Metaphor* (1992). https://terpconnect.umd.edu/~israel/lakoff-ConTheorMetaphor.pdf

[55] Richard A. Posner, *The Problems of Jurisprudence*, p. 54 (1990).

[56] Erich Vieth, "Laughing at Funny Things," https://dangerousintersection.org/2006/04/26/laughing-at-funny-things-and-the-limits-of-introspection/

[57] "[R]un so that the acceleration of the tangent of elevation of gaze from fielder to ball is kept at zero. Do this and you will intercept the ball before it hits the ground." Andy Clark, *Being There: Putting Brain, Body and World Together Again*, p. 28 (1997).

introspection is not an accurate way to know what happening inside of our heads.

We should tread lightly when claiming to explain the inner-workings of the human brains:

> It is the rule of thumb among cognitive scientists that unconscious thought is 95 percent of all thought—and that may be a serious underestimate. Moreover, the 95 percent below the surface of conscious awareness shapes and structures all conscious thought. If the cognitive unconscious were not there doing this shaping, there could be no conscious thought. The cognitive unconscious is vast and intricately structured. It includes not only all our automatic cognitive operations, but also all our implicit knowledge. All of our knowledge and beliefs are framed in terms of a conceptual system that resides mostly in the cognitive unconscious. Our unconscious conceptual system functions like a "hidden hand" that shapes how we conceptualize all aspects of our experience.[58]

Using SD often doesn't seem complicated. It is said that a judge simply "applies" precedent to the case at hand. This truism is repeated so often that it seems unproblematic. Psychologist Robert Zajonc dubbed this process of repetition "the mere exposure effect," however, and it is a foundation for advertising.[59] The ubiquitous repetition of the idea that SD decides cases makes us confident that we simply "apply" precedent, and that's that. Feelings of certainty can be misleading, however. They are "sensations that feel like thoughts, but arise out of involuntary brain mechanisms that function independently of reason."[60]

It is said that SD decides difficult cases, but we have very little understanding of the complex thought processes occurring within judges' brains. Yet many lawyers cavalierly utter the phrase "apply precedent" as though this is a simple action akin to "applying" a band aid to a paper cut. It's clearly not that simple. There are many ways for judges to consciously (and unconsciously) evaluate precedent. The judge must:

- Decide what particular words of prior cases mean.[61]
- Distinguish the holding from dicta.
- Decide whether the facts of the prior case are "on point."
- Decide whether to read a prior case narrowly or broadly.
- Decide whether a cited case is "persuasive."
- Decide whether to rely on a prior case or downplay it and follow an alternate line of cases.

For these reasons, whenever someone claims that judges "apply the law," we should imagine "apply" to be a huge black box with this warning label: "Use the word 'apply' at your peril because this word comically under-appreciates the vast complexity of human cognition."

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[58] George Lakoff and Mark Johnson *Philosophy in the Flesh: The Embodied Mind and its Challenge to Western Thought* (1999). Loc 175.

[59] Jonathan Haidt, *The Righteous Mind: Why Good People Are Divided by Politics and Religion,* (2012). Loc 1106.

[60] Robert Burton, *On Being Certain: Believing You Are Right Even When You're Not* (2008).

[61] A classic case of what words "mean" is illustrated by the debate between H.L.A. Hart and Lon Fuller of the meaning of "A legal rule forbids you to take a vehicle into the public park" Frederick Schauer calls this "the most famous hypothetical in the common law world." Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 NYU L. Rev. 1009 (2008).

It is beyond dispute that judges studiously review precedent before deciding difficult cases. The question is whether the precedent *compels* a particular decision. There is a three-pound organ with 100 billion neurons and trillions of synapses between those copies of cited precedent and the case at hand, and it's not a trivial matter. It's a big fat hairy deal. Some lawyers might wonder what cognitive science has to do with jurisprudence, but it's too late to put that genie back in the bottle. New exciting cognitive science findings are announced so often that staying current feels like trying to drink out of a fire hydrant. The counter-intuitiveness of many of these important findings might even make your brain hurt. Here are several (of many) findings that should make us skeptical of the traditional account of SD:

"Intuitions come first, strategic reasoning second." People constantly make intuitive (gut) decisions, then roll up their sleeves to rationalize those gut decisions. Experiments have shown that this "social intuitionism" commonly occurs when people make important moral judgments. There are obvious parallels to legal decision-making, where the rationalization can take the form of SD. Psychologist Jonathan Haidt describes this dynamic within each of us as two personas: a big elephant ("automatic processes, including emotion, intuition") and a less influential lawyer-like rider, who is skilled at fabricating post hoc explanations for whatever the elephant, including dishing out reasons to convince others.[62]

Emotions. Judges often claim to set aside their emotions when deciding cases, but this is impossible, according to Antonio Damasio.[63] Patients with damage to the prefrontal area of their brains are unable to make decisions because distinct affect values cannot attach to each of their options; their decision-making landscape is thus "hopelessly flat." Damasio concludes that rational thought devoid of emotion *paralyzes* us. Emotions are a necessary condition to make even purely "logical" decisions. Even "our most refined thoughts . . . use the body as a yardstick." Therefore, David Hume was correct: "Reason is, and ought only to be the slave of the passions, and can never pretend to any other office than to serve and obey them." Emotions must be part of every judicial decision, even when judges attempt to channel Mr. Spock while considering precedent.

Embedded Metaphorical Meaning. Substantial research challenges the traditional idea that word meanings are transcendent and objective. According to George Lakoff and Mark Johnson, "The mind is inherently embodied. Thought is mostly unconscious. Abstract concepts are largely metaphorical."[64] These three findings clash with the notion that SD can determine outcomes of difficult cases. Lakoff and Johnson have made a strong case that, without the use of conceptual metaphors that sprout from our sensory-motor experiences, we would have no meaningful understanding of most abstract concepts. Whenever we discuss any abstract concept, we relentlessly engage in embodied understanding and imagination—there is no other way to talk or write about abstract topics. Many people might object to these ideas. They would prefer that we stick with the careful, emotionally-detached use of reason. However, responding to the Enlightenment claim that Reason itself is "rigorous, linear, cool, and unemotional," Steven Winter has pointed out that such a claim clearly demonstrates the metaphorical quality of reason:

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[62] Jonathan Haidt, *The Righteous Mind: Why Good People Are Divided by Politics and Religion* (2012), Loc 920.

[63] Antonio Damasio, *Descartes' Error: Emotion, Reason and the Human Brain* (1994).

[64] Lakoff and Johnson, *supra*.

> [R]eason is cold; it is rigorous; it is linear; it is clear; it is felt. Indeed, in its dependence on embodied experiences like temperature and rigor, the metaphorical quality of reason is anything but detached and impersonal.[65]

The days where one can blithely insist that words, phrases and prior appellate cases simply and objectively mean what they mean, while ignoring, imagination, conceptual metaphor and embodied cognition, is over.[66]

Economist Daniel Kahneman has offered dozens of additional reasons for judges and lawyers to be cautious about introspection.[67] One of these reasons, "what-you-see-is-all-there-is" (WYSIATI), is our willingness to "jump to conclusions on the basis of limited evidence." We crave consistency in our explanations, not completeness, which leads to overconfidence. We are profligate generators of flimsy explanations and we are "rarely stumped." Kahneman's theory of "Substitution" captures our willingness to answer a simple substituted question when asked a complex question, i.e., we freely substitute SD pattern-matching for nuanced legal issues permeated with equities. Kahneman also points out that we often make decisions in conformity with what is perceived as a societal default (SD could be seen as a default) because we are over-influenced by our fear of regret.[68] Another of Kahneman's heuristics, "Hindsight Bias," endows legal decisions with an aura of inevitability, a confident belief in correctness, after they are decided. Many difficult cases could have been decided for the opposite party, but Hindsight makes this difficult to see, causing us to overstate the power of SD.

Mortality Salience. Cases often have high personal stakes and judges are forced to sit in the front row watching these things, day after day. Robert Cover famously wrote, "Legal interpretation takes place in a field of pain and death."[69] According to Terror Management Theory, "mortality salience" (things that remind us of suffering or death, such as 9/11) causes us to seek refuge within our culturally-familiar rarified symbolic systems. Numerous experiments have linked mortality salience to harsh legal judgments "as a form of protection against feelings of anxiety."[70] Might this need for refuge from emotionally stressful cases incentivize judicial decision-makers to find it in ornate courtrooms and long black robes, as well as in an idealized abstract system that attempts to explain wrenching decisions using the culturally sanctioned technique of pattern-matching to past cases?

The above cognitive science snippets are the tip of the iceberg. The take-home of this section is that when SD is touted as the reason for a decision, this should raise many red flags. A meaningful understanding of judicial decision-making requires far more analysis than SD.

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[65] Steven L. Winter, "Death is the Mother of Metaphor," 105 HARV. L. REV., 745, 749 (1991).

[66] Erich Vieth, "How We Really Think About Religion and Politics: The Power of Metaphors," https://dangerousintersection.org/2006/05/17/how-we-really-think-about-religion-and-politics-the-power-of-metaphors/

[67] Daniel Kahneman, *Thinking, Fast and Slow* (2011).

[68] *Id.*

[69] Robert Cover, *Violence and the Word*, Yale L.J, Vol. 95, No. 8, 1986, p. 1601.

[70] Crawley and Suarez, Empathy, Mortality Salience, and Perceptions of a Criminal Defendant (2016). https://journals.sagepub.com/doi/full/10.1177/2158244016629185

Alternate Constraints to Decision-Making

What if SD turned out to be merely ad hoc post-facto window-dressing in difficult cases? Wouldn't our legal system become haphazard and undependable? Economist Doug North emphatically concludes no. In addition to SD, there are many other real-world constraints to judicial decision-making.

North identifies the legal system as an "institution." By "institution," he means "the humanly devised constraints that shape human interaction."[71] Institutions are not bounded by brick and mortar (or by particular people), but by two kinds of constraints: formal and informal. Together, these constraints comprise what North and John Drobak call "the rules of the game." SD is one type of *formal* constraint for resolving cases (along with statutes and constitutions), but these formal restraints explain only a small part of the process.[72] Even if one were to consider only one individual judge deciding one individual case, no person is an island. North and Drobak adopt Andy Clark's approach that human cognition extends beyond skin and skull to exploit externalized social "scaffolding." The extensive structure of the world surrounding courthouses[73] includes numerous *informal* constraints. These constraints "act to minimize the effects of belief systems, random intuitions, and other hidden factors that make case outcomes unpredictable and surprising."[74]

> [This] article considers the constraints built into the judicial process, which act as a limitation on judicial discretion in most cases. These constraints on judges also make it appear as if they are deciding cases in the manner described by the rational, doctrinal theory of judicial decision-making, even when they are not. Although we would like to conclude with a model that accurately includes discretion and non-doctrinal factors, the state of knowledge of human decision-making is still too primitive to allow us to do that.[75]

What are those informal restraints offered by Drobak and North? It is a long list that includes such things as standardized law school training, the structure of appellate courts (multiple judges and nested levels), inter-connections between the legislative and judicial branches, elections of judges and the thick soup of contemporary cultural values permeating the judicial system.[76] These complex informal constraints help maintain equilibrium in our legal system.

Conclusion

SD often serves us well on "easy" cases, but SD doesn't dictate outcomes of difficult cases. If SD doesn't decide difficult cases, however, who does? Steven Winter tells us to look in the mirror:

> Though we conceptualize it as an authority that rules over us, we will find

[71] Julio Faundez, Douglas North, *Theory of Institutions: Lessons for Law and Development*, Hague Journal on the Rule of Law, October 2016, 8(2), p. 373. https://link.springer.com/article/10.1007/s40803-016-0028-8

[72] John Drobak and Douglas North, *Understanding Judicial Decision-Making*, Wash U.J Law & Pol, Vol 26 (2008), p. 131.

[73] [I]t may for some purposes be wise to consider the intelligent system as a spatio-temporally extended process not limited by the tenuous envelope of skin and skull." Andy Clark, *supra*, p. 221.

[74] Doug North, *supra.*, p. 147.

[75] *Id.*, p. 132.

[76] *Id.*

> that law is but one consequence of a more pervasive cultural process of meaning-making. And this insight will bring us face to face with the conclusion that what actually stands behind the majestic curtain of Law's rationality and impartiality is nothing other than ourselves and our own, often unruly social practices.[77]

Judges clearly consult prior cases for guidance, but there is no way to resolve difficult cases without employing temperament, discretion, imagination, and those many other things that make us complex human animals. Deciding tough cases is a human activity, despite attempts portray the process as a formulaic offloading of the decision-process to judgments of the past. We feel this in our bones and that's why we work so hard to select new judges.

I've gnawed on this topic for many years and I've found it to be intense, compelling, and frustrating, but also fascinating. I hope you have enjoyed this article, which has seemingly also served as my personal catharsis.

[77] Steven Winter, *supra*, p. xiv.