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# Reflections on Holding and Dictum

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The aim of these reflections, which adopt the perspectives of ordinary judges and lawyers, is to try to help clarify what is uncontroversial about the distinction between holding and dictum, to explain what is troublesome about it, to provide—in fairly sketchy form—a way of understanding the authority of various legal formulations that do not fit indisputably or wholly comfortably in the category of holding or that of dictum, and to suggest a conceptual vocabulary for expressing the practical realities I consider.

In the autumn of 1986, I taught a course in Legal Method for beginning students at Columbia Law School. During the term, the class read cases from Jones, Kernochan, and Murphy's *Legal Method*[1] that relied, at least ostensibly, on the distinction between holding and dictum. Because I had some reservations about the casebook commentary, I spent part of one class lecturing on the distinction. After the students responded with almost total confusion, I decided to put my ideas in writing for class distribution. I sought to set out how holding and dictum operate and how they may be conceived by judges and lawyers who employ the terms in practice, without burdening what I said with extensive references to competing views or with accounts of how modern skepticism about the determinacy of law might affect one's perspectives on holding and dictum.[2]

## I. The Basic Nature of the Distinction and the Reasons Underlying It

At its essential core the distinction between holding and dictum concerns judicial practice. The distinction is part of a system in which courts are "bound" to follow precedents. Very roughly, what that means in the American system of law is that the same court that decided an earlier case, as well as courts under that court in the same jurisdiction, are supposed to follow what the first case establishes, unless what the first case establishes is so wrongheaded that it is appropriately overruled.

Without elaborating a theory of overruling, let it suffice to say that under our doctrine of precedent, later courts will follow what a first case establishes even when they are not persuaded that what it establishes would

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1. Harry W. Jones, John M. Kernochan & Arthur W. Murphy, Legal Method: Cases and Text Materials (Mineola, N.Y., 1980).
2. The present version retains the purpose and form of the original effort. Although I believe that both the soundness and significance of my analysis could be defended against radical challenges to traditional ideas about legal reasoning, I offer no such defense in this essay.

be the best approach if the issue were presented to them anew. The later judges may not be persuaded either because they have definite opinions that the first case was "wrong," though not seriously wrong, or because they do not pause to decide whether the first case established what it should have established. I take the "force of precedent" as a given, without trying to assess either just how great that force is or the reasons that underlie the doctrine of precedent.

The distinction between holding and dictum concerns what the first case *establishes*, as opposed to what its opinion may say that is not established. My focus on situations in which a single precedent case is of great importance oversimplifies the actual work of courts. In many legal settings courts attempt to synthesize the determinations of a substantial number of cases, so that what any single case establishes may not seem critical. In some situations, however, it is the significance of a central preceding case that is of overriding importance, and even in other situations, what a particular case establishes can matter.

I make the critical assumption that for judges in the same court that decided the first case, the distinction between holding and dictum is genuinely important, or, to be a little more precise, the judges' assignment of weight to elements in the earlier case depends on differences that the conceptual distinction between holding and dictum is designed to reflect. The terminology of "holding" and "dictum" is not merely, or even mainly, a set of terms that misportrays reality and conceals the true bases on which later courts reach decisions. I certainly do not wish to say that never happens. No doubt judges with some frequency say they are constrained to follow earlier results when they really decide for other reasons, and no doubt their expression, and even their own sense, of what earlier cases hold is often determined by a predisposition to decide in a particular way. But despite all this, in many circumstances courts really do feel constrained to follow their own earlier decisions; and in all probability were there not this substantial core of constraint, the concealments and one-sided formulations of earlier precedents would cease to have much significance.

When a court regards itself as constrained by its own earlier precedent and tries to figure out what aspects of the earlier case to treat as fully authoritative, it seeks to determine what it *should* now do in respect to the earlier case. If it decides that one aspect of that case is holding and another dictum, it most certainly is *not* engaging in a prediction; it is determining the appropriate latitude for deference to "established case law" and the appropriate latitude for judgment based on other criteria.

The position of a lower court is significantly different from that of the court that establishes a precedent. One important aspect of the functioning of a lower court—some might say its determining perspective—is prediction of what its own superior courts are likely to do if the case comes up for review. The division between holding and dictum for a lower court, then, may involve a prediction of what a higher court would do. Further, a lower court faced with dictum of a higher court that a higher court will probably follow is likely to feel constrained to a much greater extent by that dictum than is the higher court itself. When the lower court engages in prediction

about what the higher court will do with the higher court's precedents, the lower court's serious attention to the distinction between holding and dictum depends on the distinction's making a difference to the higher court itself.

The advice lawyers give to clients also involves prediction of what courts will do, or would do if a case arose. The categories of holding and dictum are, of course, not of ultimate importance for the advising lawyer. Imagine the lawyer who says to his client, "Well, I can assure you that your situation is squarely within the holding of an earlier case, and I can further assure you that it will be considered to be such by the court. Unfortunately I have a small piece of bad news to go with this highly encouraging appraisal. It is now virtually certain that the court will overrule the earlier case." Of course, what matters from the client's point of view is whether the case will be won; a loss due to overruling is just as bad as a loss in which the court says the case fails to fall within previous holdings and disavows dicta that support the client's side. For the advising lawyer, the distinction between holding and dictum is an intermediate step in predicting outcomes; the distinction matters to lawyers' predictions because it matters to courts' decisions.

So far I have made an obvious point, one essentially similar to the general criticism of the loose realist idea that law is fundamentally a matter of prediction. The point is that "predictive" approaches, by lower courts or lawyers, to the distinction between holding and dictum are parasitic on an established normative assumption within our system, one accepted by higher courts, that holdings are more authoritative, that they *should be* given greater deference, than dicta.

How widely limiting are the constraints of holdings? If the amount of genuine constraint is extremely slight and the amount of latitude for the second court extremely great, then perhaps in the vast majority of cases there is no genuine constraint, and all one can do before the second court acts is to predict how far that court will *say* it is constrained. In that event, my theoretical point that holdings constrain might be preserved, but, most of the time, lawyers' talk about the holding-dictum distinction would be *just* a matter of prediction. However, most judges take with some seriousness the idea that they should follow precedents, and the effort to determine the scope of precedents is important for them. Often it will be difficult, or impossible, to state a single precise holding; plausible formulations may be at higher and lower levels of generality, and there may be confusion at the edges. But usually there will be some substantial number of subsequent possible cases that plainly fall within the holding of an earlier case. And many statements in opinions are clearly dicta. Though the later court's drawing a distinction between the holding and dictum of an earlier case inevitably involves the difficulties attendant on interpretation of texts more generally, typically the opinion of the earlier case does set substantial boundaries on what can plausibly be called holding and what can plausibly be called dictum.

At its core, then, the distinction between holding and dictum is an aspect of a practice under which what is *established* by a previous case is treated as authoritative by a subsequent court. What counts as holding is what the

earlier case establishes, and it carries very considerable authority. What counts as dictum has much less weight. It is sometimes said that dictum has *only* as much weight as the force of the reasoning behind it. This is probably wrong as a general matter; dictum by the court usually carries a little more weight in our system than the similar thought expressed by an obscure scholar and brought to the court's attention. But what matters for my inquiry is that plain dictum has much less weight than holding, not exactly how much weight dictum has.

The justifications for the distinction are roughly as follows. Courts are most to be trusted when they focus on particular disputes. They are aware of the relevant facts, and the possible competing legal positions have been argued at length by lawyers. What courts decide, therefore, is much more reliable than their passing comments on peripherally related legal subjects. If the authority of courts to "make law" in a society with a legislative branch is largely a product of the necessity of courts' resolving disputes, then the authority of a particular court should extend only to what is needed to resolve the dispute, not further. How far this notion of the court's authority needs to be qualified in terms of the supervisory and educational functions of higher courts is a controversial question. Nevertheless, the basic idea of courts as determiners of particular disputes does support the notion that dictum should not carry too much authority.

## II. The Elements of Ideal Instances and How They Relate to the Distinction

Once we understand the logic behind the holding-dictum distinction, we can identify the aspects of a case that are most undeniably holding or dictum. Suppose that a point was extensively argued by counsel, is necessary to the decision of the case, is stated by the court as its rule of law for the case, and is indicated by an appraisal of the material facts joined to the outcome. Such a point is clear holding. If, however, a legal point in the opinion was not argued by counsel, had no important bearing on decision of the case, is not covered by any stated rule of law for the case, and is beyond any scope of the material facts of the case, the court's treatment of the point is dictum. Let us explore the elements of these ideal instances.

### *A. Has the Point Been Fully Argued By Counsel and Considered By the Court?*

The precise weight of earlier authority may rest to some extent on whether the point covered was argued by counsel and carefully considered by the court. Discussion that is evidently dictum because of the way a case is finally resolved can have somewhat more power if it reflects extensive argument by counsel and careful judicial consideration. An example of such discussion occurs in Chief Judge Fuld's opinion for the New York Court of Appeals in *Estate of Hemingway v. Random House, Inc.*,[3] a suit claiming that in his book *Papa Hemingway*, A. E. Hotcher breached a

3. Estate of Hemingway v. Random House, Inc., 23 N.Y.2d 341, 296 N.Y.S. 2d 771, 244 N.E.2d 250 (1968).

common-law copyright in oral conversations by quoting Ernest Hemingway's remarks in private talks. The Court said a great deal to suggest that in some cases a copyright in oral conversations might be appropriate but, "without deciding" that issue, concluded that what Hemingway said would not qualify because he had in no way marked it off from ordinary discourse. Occasionally, courts decide that something is critical to resolution of a case that lawyers either missed or chose not to raise. What would otherwise certainly be holding is generated without the benefit of argument to the point. Quite possibly if the subsequent court is made aware of this, it may take a slightly more skeptical view than if the first court's action had followed full argument. Actually, nowadays, when appellate judges have extensive research help from law clerks, what probably matters most is whether the court that decides the initial case evidences awareness of relevant authority and arguments. Ascertaining whether points have been argued by counsel is one inquiry that bears on that question; but a written opinion may show that law clerks have filled the gap left by counsel, and if counsel are inept, their having argued a point is not necessary assurance that the court has had in mind all that is centrally important.

In any event, it may matter to the second court how fully the first court has considered an issue, and how extensively counsel have argued the point can bear on how full the consideration has been. But it is quite clear that what counts as holding or dictum does not depend on what counsel have done. The most fully argued points can end up being dictum, and an unargued point can end up being holding. Although holdings are given more weight than dicta partly because they are usually supported by full argument and full consideration, categorization as "holding" does not depend on full argument and full consideration.

### *B. Necessity to the Decision*

What the court says or determines that is necessary to its decision is holding; what it says in passing that is not required for the decision is dictum. Although the distinction sounds simple, it requires some comment.

#### 1. The Order in Which Issues Are Addressed

Imagine that in the course of its opinion, the court resolves an issue that the facts of the case clearly present, but its disposition of some other issue shows that the case would have come out the same way even if the court had not addressed the first issue or had decided it in the opposite way. In retrospect, we can say that the court's discussion of the first point was unnecessary to the decision in a strict sense. Does that mean that what it says about that issue is therefore relegated to the status of dictum? Such a broad generalization would misstate the practice of courts.

Consider, for instance, a case in which the first court considers issues in their "natural" order. Pauline, a taxpayer but not a parent, sues to stop a "moment of silence" in a local public school. The school board argues, first, that Pauline's status as a taxpayer confers no standing to raise the claim

because no public money is expended for a moment of silence, and, second, that a moment of silence is permissible under state and federal constitutions. The highest state court resolves that Pauline does have standing but that the argument on the merits in favor of a moment of silence is correct. The case would have come out the same way—that is, Pauline would have lost—if the court had simply assumed standing without deciding the question and proceeded directly to the merits. Normal judicial practice, however, is to take threshold issues of jurisdiction, standing, and procedure first, before considering the merits. The court followed normal practice when it resolved the standing question before proceeding to the underlying constitutional issue. What it determined about standing is usually considered holding even though it may turn out to be unnecessary to the decision.

We reach somewhat murkier waters when the court's choice of order for issues is not dictated by normal practice, or is even contrary to that practice, or when the court offers two alternative grounds of decision each of which alone would be sufficient. The issues in the *Hemingway* case present the first situation. To win, Hemingway's estate and widow needed to establish that there was such a thing as a common-law copyright in oral conversations and that Hemingway's conversations with Hotchner satisfied the conditions for such a copyright. Random House could win either if there was no common-law copyright in oral conversations or if the conditions for such a copyright were not satisfied. As I have indicated, what the court did was to suggest at some length, but without deciding, that there could be a common-law copyright; it *decided* that Hemingway's failure to try to mark off the conversations disqualified them for any right that might exist. For the two substantive issues, no natural order of determination is apparent. Rather than approaching the issues as did the Court of Appeals, a court might simply have said that the Hemingway conversations would not qualify even if a common-law copyright were to exist, without discussing whether it did exist; or a court might have set as the first question whether there was any common-law copyright in oral conversations and, after resolving that question in favor of copyright, might then have determined whether the conditions for copyright were satisfied. Suppose that a court had taken the last approach and agreed with the Court of Appeals that the conditions were not satisfied? Would all the court had said positively about the existence of common-law copyright be mere dictum? Second courts probably assume that the first court can set its agenda for considering issues with considerable flexibility. If issues are resolved in some logical progression, the court's resolution of an early issue is not considered mere dictum because resolution of a later issue shows that the outcome of the case would have been the same even if the first issue had been resolved differently. The authority that attaches to resolution of the first issue may, however, be somewhat less than if its resolution were essential to disposition of the case *or* its initial resolution were dictated not by the individual court's choice but by a "natural" order of consideration, as in the "standing" example. If a court has not only made a choice about order but has obviously reversed the

natural order of considering issues, its disposition of a first issue may have even less authority; a later court may decide that the earlier court reached out inappropriately.

Sometimes courts provide parallel reasons for deciding against a party, saying, for example, that A's claim for recovery against B is barred by two separate statutes. What is the status of the "alternative holdings"? Because the decision would be the same if either were eliminated, it might be said that neither is necessary to the decision. I do not think courts typically treat alternative holdings as dictum, though perhaps the authority of an alternative holding is less forceful than the authority of a single holding.

#### 2. The Filling Between Holding and Dictum

The issue of holding or dictum is usually raised in connection with a court's indication of how a particular legal problem should be handled. Is there a common-law copyright for oral conversations? Is the estate of a joint subscriber to a charity liable to other joint subscribers? Judicial opinions commonly contain not only comments on such points but indications of interpretive strategies and broad reasons that bear on particular problems. A court might say, for example, that the critical question in constitutional interpretation is the intent of the framers, or that people are ordinarily entitled to the fruits of their labors. What can be said about such comments? Sometimes they are essential to the decision that the court finally reaches. Were the court to have taken a different plausible position on constitutional interpretation or were it not to have thought the right to fruits of labor relevant, the decision might have come out the other way. In truth, it is usually extremely difficult to know how crucial such stated positions are, because one cannot often be sure how the court would have resolved the case had it gone on a different tack. Although a court's general observations do not fall within the doctrine of precedent and bind its successors, the underlying premises of the court's more particular reasoning hardly seem mere dictum. When the kind of general considerations I have mentioned play a prominent role in the resolution of a particular legal issue, they hardly fit comfortably into the holding-dictum dichotomy at all.

### *C. Rule of Law or Material Facts Joined to Outcome*

So far I have assumed that what the first court does with a case, beyond its simple decision one way or the other, has something to do with the holding of the case. I shall defend that assumption in the next section, but first I want to focus on a puzzle: Which is more important, the rule of law that the court's opinion announces, or the court's determinations about material facts in a case joined to its outcome? When the court indicates the circumstances in which a manufacturer will be liable to a remote user in negligence, it is stating a rule of law. When the court indicates which facts of the case are critical, it reveals its view about material facts.

As long as one focuses exclusively on the first court, whether the holding rests on announced rule of law or on material facts and outcome is of minor

significance, because application of the two criteria usually has the same practical effect. I shall illustrate the point in connection with the piquant old case of *Barholt v. Wright*,[4] after indicating a few assumptions and simplifications.

Two people agree to an ordinary fight. In the course of the fight, Barholt bites off a finger of Wright's (in the actual case he only injured the finger so badly it had to be amputated). Wright sues for damages on a theory that Barholt has committed a civil battery. We can imagine three possible legal theories on which Wright might recover: (1) consent to a fight is not ever a bar to recovery for injuries suffered because fights are against public policy[5]; (2) consent to an ordinary fight does not reach severe biting, so that Wright's consent to an ordinary fight does not cover injuries caused by tactics clearly in excess of those contemplated; (3) whatever may be the case for ordinary tactics and ordinary injuries, consent is ineffective in respect to tactics and injuries as serious as the biting off of fingers.[6]

Suppose that the court's stated view is that consent to a fight is irrelevant to recovery, whatever the tactics and scope of injuries. The excessiveness of Barholt's tactics would not matter to the theory of recovery, nor would Wright's consent to an ordinary fight or his failure to consent to a fight with vicious bites. For recovery these matters are not material facts (i.e., the result would be the same regardless of Wright's consent and its limits, and regardless of Barholt's tactics). Thus, in a coherent judicial opinion the critical material facts would be plaintiff's suffering of injury from an intentional act of aggression by defendant in a fight, leading to an outcome of recovery; and the stated rule of law would be that one who commits an intentional act of aggression in a fight is liable for injuries caused.[7] If the court regarded as legally relevant the excessiveness of the tactics, the consent to an ordinary fight, or the failure to consent to excessive tactics, both the court's view of the material facts and its sense of the applicable rule of law would be different. In any opinion that carefully tailors the rule of law to the material facts, the ambit of the rule of law will conform to the ambit of the material facts and outcome.

In reality, ascertaining clearly either the rule of law or the court's view of the material facts is sometimes difficult. Often figuring out the appropriate level of generality at which to state the material facts or principle of law can be a problem. On occasion, the opinion will not indicate sharply whether

4. Barholt v. Wright, 45 Ohio St. 177, 12 N.E. 185 (1887).
5. I disregard two ways in which consent might matter even if this basic theory were adopted. The first, clearly accepted by the court in the actual *Barholt* case, is that consent bears on damages, presumably because a blow is "less offensive" if agreed to. The second is that consent might bear on what would or would not count as self-defensive action.
6. Strictly, the tactics used are distinguishable from the injury caused. Excessive tactics might produce only ordinary injuries, and ordinary tactics—e.g., a blow to the jaw—might produce very serious injuries that are not wholly unforeseeable—e.g., the person hit falls against a sharp edge and fractures his skull. Although the logic of a rule that makes consent ineffective beyond a certain point would probably focus on excessive tactics rather than actual seriousness of injury, for the purposes of this discussion I shall simply refer to excessive tactics and injuries together and assume that, as in *Barholt*, they are joined.
7. I am not trying to sum up the civil law of battery in any jurisdiction; rather, I am using the illustration only to clarify the theoretical point.

some possibly important fact is critical. In *Barholt v. Wright*, for example, passages in the opinion and at least one citation seem to suggest that consent to a fight is never effective, while other passages lay emphasis on the severity of the tactics and injury. Extracting *either* a single rule of law or a single view of the material facts is therefore difficult. In cases of uncertainty, one would ordinarily use what the court says about material facts to understand its rule of law and what it says about its rule of law to understand its view of the material facts.[8]

There can, however, be a clear disjunction—what the court says about material facts will simply not fit with the rule of law it purports to employ. What counts as the holding in that event? If the views of the first court matter to the second court, as I have so far assumed, we can imagine that the second court will try to ascertain which aspect of the opinion engaged the first court's most careful judgment. Usually one would place more confidence in the court's view of the material facts, because the facts have been sharply presented to it and imprecision in abstract generalization is a common human failing; but in cases in which the court worries much more about an applicable rule of law than the facts of the particular case, the stated rule of law may appear a more reliable indication of its considered judgment. If, as I believe is probable, second courts take into account and do not relegate to dictum both a first court's view of the material facts and its stated rule of law, and if they do not have some automatic practice to disregard one or the other in cases of a divergence, then we should hesitate to identify the holding exclusively either with the stated rule of law or with the material facts joined to outcome.

As I have said, in cases of divergence between material facts and the stated rule of law, the barometer of material facts is *usually* a more reliable indication of what matters to the first court. Further, a focus on material facts most pointedly raises the issue of the respective authority of the first and second courts. I shall proceed therefore in the rest of the discussion by supposing that the holding can be reduced to a formulation concerning the material facts and outcome.

### *D. The First Court and Subsequent Courts—Who Determines the Holding?*

In approaching the general question of which court determines a holding, we must be careful not to confuse separate inquiries. If what the first court regards as critical is unclear, then inevitably much is left to the second court. It may itself recognize the indeterminateness of the first court's disposition, either candidly acknowledging it in its own opinion or not so candidly "interpreting" the first court's disposition to support its own perception of a sound approach. Even if the second court conscientiously

8. I pass over the subtle distinction between accepting a view that appears best supported by the text of the opinion and accepting a view that appears best to capture the actual intentions of the judges joining the opinion. For determining intention, materials such as a judge's speeches off the bench might be relevant in a way they would not be for a "literal" reading. This difference in how to define the views in the earlier case represents one manifestation of the general question of how "intentionalist" legal interpretation should be.

attempts to ascertain what the first court was about, its own view of what would be sound is bound to influence its sense of what the first court did, so long as the first court was not relevantly clear.

I want to put the common situation of an unclear first court's opinion to the side and to address circumstances in which what the first court thought is relevantly clear.[9] We need first to face the substantive question of what carries authority for the second court, and then to inquire what conceptual terminology best reflects that understanding.

Let us suppose that in a case after *Barholt*, two persons have clearly agreed to a fight that includes such tactics as gouging and severe biting, and that plaintiff's finger has been bitten off. Let us also suppose that on the facts of *Barholt* itself consent to fight clearly did not encompass such tactics,[10] and that the opinion in *Barholt* makes evident that consent to such tactics would not bar recovery for battery.[11] The second court is inclined to the view that the most sound legal approach would be to bar civil recovery for injuries inflicted in a manner freely consented to;[12] but it asks itself whether *Barholt* is a serious impediment to its deciding in this way.

Had *Barholt* itself involved consent to severe biting, then an undoubted holding would stand in the way of the second court's inclination. *Then*, both the *Barholt* court's view of the material facts *and* the second court's view of the material facts would not distinguish *Barholt* from the second case. The new principle of "no recovery for tactics consented to" could be established only if *Barholt* were explicitly or implicitly overruled. (I count a court's saying "we disapprove of the reasoning of *Barholt* and limit the result to its precise facts" as an implicit overruling.)

Our hypothetical situation is different because biting tactics were consented to in the second case, but not in *Barholt*. From the second court's point of view, an important difference exists in what ideally would be understood as material facts of the two cases; but the *Barholt* court did not suppose there was such a difference, because it thought consent to severe tactics was legally irrelevant. For the second court, there are three possible assessments of the authority of what the *Barholt* court supposed.

The first possibility is that all that matters is the second court's view of possible material facts. All it needs to consider is the *outcome* and its own view of the material facts of the first case and the material facts of the second case. The result in *Barholt* then poses no problem because it is perfectly consonant with the second court's view of the soundest legal principle, and a crucial difference in material facts exists between the two cases. Any contrary indications in *Barholt* itself will be viewed as mere

9. The word "relevantly" is important in the text. There is no sharp division between opinions that state clear holdings and those that state indecipherable ones. Clarity must be judged in respect to the subsequent case. If one looks at case A, it may have a holding that plainly extends to the facts of case B but whose import for the facts of case C is unclear.
10. Given the procedural posture in *Barholt*, this formulation seems highly probable for the actual case but not certain.
11. That is how I read the actual opinion.
12. This approach would leave to the criminal law any response to persons who agree to fight in a way contrary to public policy and who do not exceed the agreed-upon tactics.

dictum, and what the *Barholt* court said about material facts and applicable rule of law carries no greater weight than what is indisputably dictum.

I am reasonably confident that this is not the typical approach of second courts. Rather, the first court's view of the material facts and rule of law does count for something. In *Silver v. Great American Insurance Co.*,[13] for example, the New York Court of Appeals, considering whether dismissal for forum non conveniens should be granted to a defendant that is a New York corporation, assumed that earlier cases stood for the proposition that forum non conveniens should never be granted when either party is a state resident. That is the *view* reflected in at least two of the earlier cases; yet the degree of need for a different forum will vary for dissimilar cases. Why did the *Silver* court not ask if the practical need for suit in another jurisdiction in the earlier cases was as great as the need in *Silver*? If the need was markedly less, the cases could have been plausibly distinguished on their facts from *Silver*; and if all that counts is the second court's view of the various material facts, then no overruling of the earlier cases would have been required. The court, however, took the rule stated in the earlier cases on its face and did not bother to inquire what the result in those cases would have been under the new, more flexible rule it announced. I believe, as *Silver* shows in one instance, that second courts typically take rather seriously what first courts think about material facts and applicable rules when the first court's thoughts are clear.

A second possible approach is that the second court attempts an honest appraisal of the first court's view of the material facts and the outcome, and that the first court's views are taken as controlling by the second court. Under this approach, how much force the second court would give to the first court's disposition would depend on how it thinks the first court conceived the material facts rather than on the second court's own view of the respective material facts. This account of the authority of the first case is also probably erroneous. Instead, a second court will be more hesitant to deviate from the reasoning of the first court if the second court perceives no difference in the material facts of the two cases than if it perceives a difference. The court considering consent to biting would be more reluctant to impose a new rule that consent to tactics always bars recovery if that rule is plainly at odds with the *Barholt* outcome as well as with the views of the *Barholt* court. In other words, the authority of what the *Barholt* court said about material facts and rule of law is *somewhat diminished* if the second court can find a plausible distinction in the material facts as *it* sees them.

If I am right so far, a third possibility reflects actual practice. Both the first court's and second court's views of the respective material facts count significantly for the second court. A second court will be somewhat hesitant to decide differently a case clearly covered by the material facts as the first court undoubtedly perceived them; a second court will be even more hesitant to decide differently a case whose material facts, as it sees them, are not distinguishable from those of the earlier case.

13. 29 N.Y. 2d 356, 328 N.Y.S.2d 398, 278 N.E.2d 619 (1972).

A subsidiary problem of conceptual terminology remains. Although I am inclined to say that, after a case is decided, its holding is determined by the court's view of the material facts and applicable rule of law, as far as these are clear, I would recognize that the authority of the case will be greatest for fact situations that cannot plausibly be distinguished from the facts of the first case. Thus, although the holding of *Barholt* indicates that plaintiffs can recover for injuries caused by excessive tactics regardless of consent, the holding carries less weight (through much more weight than dictum) when applied to a subsequent instance of actual consent than would a similar holding for a case in which actual consent to excessive tactics had been present.

Once the second court has interpreted the first case, no single answer can be given to questions about the holding of the first case. If someone asks about its holding, he or she may be interested in what has survived subsequent cases or in what the first court *really* was getting at. Only when the context of the question is clear can a definitive answer be given.[14]

Finally, how do we describe the situation in which the second court disavows the reasoning of the first court, but its own theory establishes that the result of the first case was plainly correct?—i.e., if the *Barholt* court thought consent to excessive tactics was legally irrelevant, but the subsequent court decided consent was critical, and in *Barholt* consent had been absent. The second court's view of material facts would yield the actual result in *Barholt*. In this case, the best phraseology for what is happening is tricky. Without much confidence, I would be inclined not to speak of overruling but to say something like, "The second court disavowed the central basis for decision of *Barholt*, but its own standards of material facts and its rule of law would leave standing the results in cases such as *Barholt* in which consent to severe tactics is not present." I would limit the term "overruling" to situations in which the new principles show that the earlier result was mistaken or leave the status of the earlier result unclear (we do not know how the decision about forum non conveniens would have come out in the earlier cases if the flexible standard of *Silver* had been applied).[15]

## III. Conclusion

My suggestions indicate that simple dichotomies such as holding-dictum and overruling-distinguishing do not adequately capture our complex practices. Lawyers who want to use concepts in a way that will persuade may not need to worry too much about these subtleties, but for scholars who seek to illuminate what the practices are really like finding an appropriate terminology is difficult. Although my treatment has been summary and relatively superficial, it does reveal that many different issues are packed into the distinction between holding and dictum, and that arriving at a satisfactory conceptual vocabulary that fairly reflects the authoritative weight for later courts of what earlier courts have done is no simple matter.

14. Insofar as the opinions are unclear, no definitive answers may be forthcoming even then.
15. This situation will be fairly common. Because by present lights the earlier court did not apply the right standards or ask the right questions, what would have happened had it done so will often be shrouded in uncertainty.