from Karl Llewellyn (1930) *The Bramble Bush*, NY: Oceana, pp. 70-76.

recedent takes as its raw material what judges have *said* about precedent, I propose to take as mine not so much what they have said as what they have *done* about it.

First, what is precedent? In the large, disregarding for the moment peculiarities of our law and of legal doctrine -- in the large, precedent consists in an official doing over again under similar circumstances substantially what has been done by him or his predecessor before. The foundation, then, of precedent is the official analogue of what, in society at large, we know as folkways, or as institutions, and of what, in the individual, we know as habit. And the things which make for precedent in this broad sense are the same which make for habit and for institutions. it takes time and effort to solve problems. Once you have solved one it seems foolish to reopen it. Indeed, you are likely to be quite impatient with the notion of reopening it. Both inertia and convenience speak for building further on what you have already built; for incorporating the decision once made, *the solution once worked out,* into your operating technique without *reexamination* of what *earlier went into* reaching your solution. From this side you will observe that the urge to precedent will be present in the action of any official, irrespective of whether he wants it, or not; irrespective likewise of whether he thinks it is there, or not. From this angle precedent is but a somewhat dignified name for the *practice* of the officer or of the office. And it should be clear that unless there were such practices it would be hard to know there was an office or an officer. It is further clear that with the institution of written records the background range of the practice of officers is likely to be considerably extended; and even more so is the possible outward range, the possibility of outside imitation. Finally, it is clear that if the written records both exist and are somewhat carefully and continuously consulted, the possibility of change creeping into the practices unannounced is greatly lessended. At this place on the law side the institution of the bar rises into significance. For whereas the courts might make records and keep them, but yet pay small attention to them; or might pay desultory attention; or might even deliberately neglect an inconvenient record if they should later change their minds about that type of case, the lawyer searches the records for convenient cases to support his point, presses upon the court what it has already done before, capitalizes the human drive toward repetition by finding, by making explicit, by urging, the prior cases.

At this point there enters into the picture an ethical element, the argument that courts (and other officials) not only do, but *should* continue what they have been doing. Here, again, the first analogue is in the folkway or the individual habit. I do not know why, nor do I know how, but I observe the fact that what one has been doing acquires in due course another flavor, another level of value than mere practice; a flavor on the level of policy, or ethics, or morality. What one has been doing becomes the "right" thing to do; not only the expected thing but the thing whose happening will be welcomed and whose failure to happen will be resented. This is true in individuals whose habits are interrupted; this is true in social intercourse when the expected event, when the expectation based upon the knowledge of other people's habits, materializes or fails to materialize. Indeed, in social matters in the large, there develops distinct group pressure to *force conformity* with the existing and expected social ways.

All of this, now, the lawyer brings to bear upon law itself. Here speaks the judicial conscience.

And apart from the unreasoned and unreasoning fact that oughtness attaches to practice, they are, particularly in the case of officials, and most particularly in the case of judges, reasons of policy to buttress this ethical element. To continue past practices is to provide a new official in his inexperience with the accumulated experience of his predecessors. If he is ignorant, he can learn from them and profit by the knowledge of those who have gone before him. If he is idle he can have their action brought to his attention and profit by their industry. If he is foolish he can profit by their wisdom. If he is biased or

corrupt the existence of past practices to compare his action with gives a public check upon his biases and his corruption, limits the frame in which he can indulge them unchallenged. Finally, even though his predecessors may themselves, as they set up the practice, have been idle, ignorant, foolish and biased, yet the knowledge that he will continue what they have done gives a basis from which men may predict the action of the courts; a basis to which they can adjust their expectations and their affairs in advance. To know the law is helpful, even when the law is bad. Hence it is readily understandable that in our system there has grown up first the habit of following precedent, and then the legal norm that precedent is to be followed. The main form that this principle takes we have seen. It is essentially the canon that each case must be decided as one instance under a general rule. This much is common to almost all systems of law. The other canons are to be regarded rather as subsidiary canons that have been built to facilitate working with and reasoning from our past decisions.

But it will have occurred to you that despite all that I have said in favor of precedent, there are objections. It may be the ignorance or folly, or idleness, or bias of the predecessor which chains a new strong judge. It may be, too, that conditions have changed, and that the precedent, good when it was made, has since become outworn. The rule laid down the first time that a case came up may have been badly phrased, may have failed to foresee the types of dispute which later came to plague the court. Our society is changing, and law, if it is to fit society, must also change. Our society is stable, else it would not be a society, and law which is to fit it must stay fixed. Both truths are true at once. Perhaps some reconciliation lies along this line; that the stability is needed most greatly in large things, that the change is needed most in matters of detail. At any rate, it now becomes our task to inquire into how the system of precedent which we actually have works out in fact, accomplishing at once stability and change.

We turn first to what I may call the orthodox doctrine of precedent, with which, in its essence, you are already familiar. Every case lays down a rule, the rule of the case. The express *ratio decidendi* is prima facie the rule of the case, since it is the ground upon which the court chose to rest its decision. But a later court can reexamine the case and can invoke the canon that no judge has power to decide what is not before him, can, through examination of the facts or of the procedural issue, narrow the picture of what was actually before the court and can hold that the ruling made requires to be understood as thus restricted. In the extreme form this results in what is known as expressly "confining the case to its particular facts." This rule holds only of redheaded Walpoles in pale magenta Buick cars. And when you find this said of a past case you know that in effect it has been overruled. Only a convention, a somewhat absurd convention, prevents flat overruling in such instances. It seems to be felt as definitely improper to state that the court in a prior case was wrong, peculiarly so if that case was in the same court which is speaking now. It seems to be felt that this would undermine the dogma of the infallibility of courts. So lip service is done to that dogma, while the rule which the prior court laid down is disemboweled. The execution proceeds with due respect, with mandarin courtesy.

Now this orthodox view of the authority of precedent-which I shall call the *strict* view -- is but *one of two views* which seem to me *wholly* contradictory to each other. it is in practice the dogma which is applied to *unwelcome* precedents. It is the recognized, legitimate, honorable technique for whittling precedents away, for making the lawyer, in his argument, and the court, in its decision, free of them. It is a surgeon's knife.

It is orthodox, I think, because it has been more discussed than is the other. Consider the situation. It is not easy thus to carve a case to pieces. It takes thought, it takes conscious thought, it takes analysis. There is no great art and no great difficulty in merely looking at a case, reading its language, and then applying some sentence which is there expressly stated. But there is difficulty in going underneath what is said, in making a keen reexamination of the case that stood before the court, in showing that the language used was quite beside the point, as the point is revealed under the lens of leisured microscopic refinement. Hence the technique of distinguishing cases has given rise to the closest of scrutiny. The technique of

arguing for a distinction has become systematized. And when men start talking of authority, or of the doctrine of precedent, they turn naturally to that part of their minds which has been *consciously* devoted to the problem; they call up the cases, the analyses, the arguments, which have been made under such conditions. They put this together, and call this "*the* doctrine". I suspect there is still another reason for the orthodoxy. That is that only finer minds, minds with sharp mental scalpels, can do this work, and that it is the finer minds -- the minds with sharp cutting edge -- which write about it and which thus set up the tradition of the books. To them it must seem that what blunt minds can do as well as they is poor; but that which they alone can do is good. They hit in this on a truth in part: you can pass with ease from this strict doctrine of precedent to the other. If you can handle this, then you can handle both. Not vice versa. The strict doctrine, then, is the technique to be learned. *But not to be mistaken for the whole*.

For when you turn to the actual operations of the courts, or, indeed, to the arguments of lawyers, you will find a totally different view of precedent at work beside this first one. That I shall call, to give it a name, the *loose view* of precedent. That is the view that a court has decided, and decided authoritatively, *any* points or all points on which it chose to rest a case, or on which to chose, after due argument, to *pass*. No matter how broad the statement, no matter how unnecessary on the facts or the procedural issues, if that was the rule the court laid down, then that the court has held. Indeed, this view carries over often into dicta, and even into dicta which are grandly obiter. In its extreme form this results in thinking and arguing exclusively from *language* that is found in past opinions, and in citing and working with that language wholly without reference to the facts of the case which called the language forth.

Now it is obvious that this is a device not for cutting past opinions away from judges' feet, but for using them as a springboard when they are found convenient. This is a device for *capitalizing welcome precedents*. And both the lawyers and the judges use it so. And judged by the *practice* of the most respected courts, as of the courts of ordinary stature, this doctrine of precedent is like the other, recognized, legitimate, honorable.

What I wish to sink deep into your minds about the doctrine of precedent, therefore, is that it is two-headed. It is Janus-faced. That it is not one doctrine, nor one line of doctrine, but two, and two which, *applied at the same time to the same precedent, are contradictory of each other*. That there is one doctrine for getting rid of precedents deemed troublesome and one doctrine for making use of precedents that seem helpful. That these two doctrines exist side by side. That the same lawyer in the same brief, the same judge in the same opinion, may be using the one doctrine, the technically strict one, to cut down half the older cases that he deals with, and using the other doctrine, the loose one, for building with the other half. Until you realize this you do not see how it is possible for law to change and to develop, and yet to stand on the past. You do not see how it is possible to avoid the past mistakes of courts, and yet to make use of every happy insight for which a judge in writing may have found expression. Indeed it seems to me that here we may have part of the answer to the problem as to whether precedent is not as bad as good -- supporting a weak judge with the labors of strong predecessors, but binding a strong judge by the errors of the weak. For look again at this matter of the *difficulty* of the doctrine. The strict view – that view that cuts the past away -- is *hard* to use. An ignorant, an unskillful judge will find it hard to use: the past will bind him. But the skilful judge -- he whom we would make free – is thus made free. He has the knife in hand, and lie can free himself

Nor, until you see this double aspect of the doctrine-in-action, do you appreciate how little, in detail, you can predict *out of the rules alone; how* much you must turn, for purposes of prediction, to the reactions of the judges to the facts and to the life around them. Think again in this connection of an English court, all the judges unanimous upon the conclusion, all the judges in disagreement as to what rule the outcome should be rested on.

Applying this two-faced doctrine of precedent to your work in a case class you get, it seems to me, some such result as this: You read each case from the angle of its *maximum* value as a precedent, at least from the angle of its maximum value as a precedent of *the first water*. You will recall that I recommended taking down the *ratio decidendi* in substantially the court's own words. You see now what I had in mind. Contrariwise, you will also read each case for its *minimum* value as a precedent, to set against the maximum. In doing this you have your eyes out for the narrow issue in the case, the narrower the better. The first question is, how much can this case fairly be made to stand for by a later court to whom the precedent is welcome? You may well add -- though this will be slightly flawed authority -- the dicta which appear to have been well considered. The second question is, how much is there in this case that cannot be got around, even by a later court that wishes to avoid it?

You have now the tools for arguing from that case as counsel on *either* side of a new case. You turn them to the problem of prediction. Which view will this same court, on a later case on slightly different facts, take: will it choose the narrow or the loose? Which use will be made of this case by one of the other courts whose opinions are before you? Here you will call to your aid the matter of attitude that I have been discussing. Here you will use all that you know of individual judges, or of the trends in specific courts, or, indeed, of the trend in the line of business, or in .the situation, or in the times at large-in anything which you may expect to become apparent and important to the court in later cases. But always and always, you will bear in mind that each precedent has not one value, but two, and that the two are wide apart, and that whichever value a later court assigns to it, such assignment will be respectable, traditionally sound, dogmatically correct. Above all, as you turn this information to your own training you will, I hope, come to see that in most doubtful cases the precedents must speak ambiguously until the court has made up its mind whether each one of them is welcome or unwelcome. And that the job of persuasion which falls upon you will call, therefore, not only for providing a technical ladder to reach on authority the result that you contend for, but even more, if you are to have your use of the precedents made as you propose it, the job calls for you, on the facts, to persuade the court your case is sound.

People -- and, they are curiously many -- who think that precedent produces or ever did produce a certainty that did not involve matters of judgment and of persuasion, or who think that what I have described involves improper equivocation by the courts or departure from the court -- ways of some golden age -- such people simply do not know our system of precedent in which they live.