Article

The Duty to Disclose Adverse Precedents: The Spirit of the Common Law and Its Enemies

Andrea Pin & Francesca M. Genova†

We must move forward into the future. But we can only do so by marching backwards, so to speak, with our eyes in the past.

Harold J. Berman†

INTRODUCTION............................................................................................................................. 240

I. BACKGROUND: THE EUROPEAN SYSTEMS .............................................................................. 245
   A. The Court of Justice of the European Union............................................................... 245
   B. The European Court of Human Rights ....................................................................... 246

II. STARE DECISIS AND THE STRUCTURE OF ADJUDICATION: WHAT SHAPED THE MODERN COMMON LAW AND HOW THE SUPRANATIONAL EUROPEAN SYSTEMS ARE DISTINCT ... 247
   A. Structural Components that Affect Common-Law Adjudication ............................... 247
      1. The Structure of Trials and the Appeals System............................................. 247
      2. Caseload and Departures from Precedent ....................................................... 248
      3. The Adversarial System .................................................................................. 249
   B. Structural Components that Affect Supranational European Systems............... 249
      1. The Structure of Adjudication and the Appeals System................................. 249
      2. Caseload and Departures from Precedent ....................................................... 250
      3. The Inquisitorial System ................................................................................. 252

III. STARE DECISIS AND LEGAL REASONING ............................................................................ 252
   A. Common-Law Jurisdictions ........................................................................................ 254
      1. A Focus on the American Rule ....................................................................... 255
         a. The Rule’s History and Current Status ................................................256
         b. The Rule’s Influence on Stare Decisis ................................................ 259
   B. The Intellectual Framework of Common-Law Lawyers and Comparative Law ...... 262
   C. Supranational European Law and Lawyers ......................................................... 264
      1. Supranational Lawyers and Supranational Procedure .................................. 264

† Associate Professor of Comparative Public Law, University of Padua, Italy; Trial Attorney, United States Department of Justice, Juris Doctor, Notre Dame Law School, 2015. The opinions expressed in this article are those of the author and do not represent the views of the United States Government or the Department of Justice. The authors would like to thank the many friends, professors, and colleagues who have participated in the discussions that culminated in this paper. Special thanks go to Tony Fine for organizing a Visiting Scholar and Fellow Research Seminar at Fordham Law School; Judge Richard Sullivan and the Federalist Society of Columbia Law School for organizing a debate on this topic; the many friends at Notre Dame Law School (among whom are A.J. Bellia, Jeff Pojanowski, Randy Kozel, Rick Garnett, Nicole Garnett, Christine Venter, Barry Cushman, and John Finnis) who actively participated in a colloquium to discuss an earlier draft; and the organizers and participants at the Loyola Chicago Law School Annual Symposium on Constitutional Law who discussed our ideas.

INTRODUCTION

Stare decisis is much more than a rule for common-law judges. It is a specific intellectual framework that is also essential to the practice of common-law lawyers. It both commands and lives off of certain practices, among which the lawyer’s duty to disclose adverse precedents factors prominently. The marriage of stare decisis with the duty to disclose precedents provides insight into some of the most hotly debated issues in litigation, namely the use of foreign law in adjudication and the acceptance of amicus curiae.

The relationship between stare decisis and the lawyer’s duty to display all relevant precedents to the court is also clear from a historical perspective. One of the most significant decisions in English legal history—as much of a watershed as *Erie Railroad Co. v. Tompkins*—came to be because of a counsel’s candor. In 1898, the House of Lords ruled in *London Tramways Co. Ltd. v. London County Council* that it would refuse to review any legal question on which it had already decided without exception—thus freezing the doctrine of stare decisis for more than sixty years until a change in policy in 1966.

The *London Tramways* rule probably would not have come into existence if the lawyer on the losing side of the case had not alerted the court to a precedent that foreclosed his side’s success. The Earl of Halsbury, who penned the decision that dismissed the appeal, admitted that it was “[b]y the candour of the learned counsel who very properly raised the question in the first instance” that the House of Lords came to realize that there was “upon this very question a decision of this House.” The candid counsel caused the House of Lords to drop his own case. He lost the case for his client—a lawyer’s great dread. But, far from being an act of self-sabotage, the counsel fulfilled one of the lawyers’ core duties of conduct that guide common-law jurisdictions: disclosing to the Court previous decisions that could influence the ruling.

---

2. 304 U.S. 64 (1938).
5. *Id.*
The importance of parties incorporating all the relevant cases within their arguments has not subsided. A few years ago, the United States Court of Appeals for the Seventh Circuit, in a situation where an appellant failed to address in its reply brief a precedential case that had just been decided between the filing of the appellant’s initial brief and the appellee’s response, mocked the appellant in vitriolic terms. The opinion, authored by Judge Richard Posner, stated that “[w]hen there is apparently dispositive precedent, an appellant may urge its overruling or distinguishing or reserve a challenge to it for a petition for certiorari [to the Supreme Court] but may not simply ignore it.” The court included a photo of an ostrich with its head in the sand next to an image of a lawyer with his head similarly in the sand, writing, “The ostrich is a noble animal, but not a proper model for an appellate advocate.”

This Article argues that London Tramways more than a century ago and the Seventh Circuit today were making the same crucial observation about the expectations for legal reasoning that foster a commitment to stare decisis. In common-law jurisdictions, consistency among cases is not just a normative command or a cultural trend but a shared practice that informs legal reasoning itself. To borrow from Professor Jeremy Waldron’s terminology, for legal systems that adopt stare decisis, arguments from precedent are “process-related”: they “stand independently of considerations about the appropriate outcome.” They matter because they inform the way the parties and the court view the case at hand, even though the final decision may depart from them.

This Article explores how legal reasoning incorporates previous decisions. It does so by analyzing the shared expectations of common-law jurisdictions and contrasting them with the characteristics of the supranational European legal order, which similarly develops through the judiciary—even though most European countries that adhere to those courts’ decisions are civil law regimes domestically. It assumes that one shared feature of common-law jurisdictions consists of giving adequate weight to previous decisions and building a legal reasoning that resonates with them.

The Article analyzes this issue by examining the role that legal systems assign to litigating attorneys and considers whether those attorneys are expected to participate in ensuring that courts take previous decisions into consideration before drafting new ones. To focus the analysis and substantiate it with examples drawn from legal practice, the Article identifies the relevant rules of several common-law jurisdictions, with a specific focus on those of England and the United States, and highlights their strong commonalities—as evidenced by the divergent legal practice at the supranational European legal systems. It does not focus on whether these provisions are enforced, but rather on what they show about the mentality of the common law. It reflects on what it should mean to

8. Id.
9. Id.
11. Id.
think "like a lawyer" from the perspective of the legal system in which lawyers operate. The parties’ duty to cite adverse authorities is particularly telling in an age in which technology has rendered the rule itself potentially irrelevant. Online search engines have made the rule less necessary to ensure that the court is informed; indeed, its resilience over time should be understood in light of the legal narrative that it helps to create.

Litigation is important for legal development in non-common-law jurisdictions as well. Lawyers’ codes of conduct, for instance, are meaningful proxies for expectations. In Europe, supranational courts have been among the main drivers of the development of European law, either directly or indirectly. Two courts are particularly relevant: the European Court of Human Rights (“ECtHR”) and the Court of Justice of the European Union (“CJEU”).

The ECtHR patrols the enforcement of the Council of Europe’s Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) among its forty-seven Member States. It is considered the “de facto supreme jurisdiction over European human rights.” Its “genius” is commonly believed to be the theory of the “living instrument,” by which the Convention’s meaning and scope can progressively expand to cover more, newer circumstances. The CJEU, formerly the European Court of Justice, is almost universally considered a main driver of European Union law.

Both European supranational entities expound the law through their rulings. The types of legal reasoning that those jurisdictions produce, however, are

15. A European Court of Human Rights decision only binds a Member State in that specific case as to the party that brought the suit. It does not directly affect State laws unless each State endows the Court’s judgments with this power. Nonetheless, it is beyond doubt that several European States have been pushed to develop their own laws in line with the ECtHR’s decisions. See Janneke Gerards, The European Court of Human Rights and the National Courts: Giving Shape to the Notion of “Shared Responsibility,” in IMPLEMENTATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND OF THE JUDGMENTS OF THE ECtHR IN NATIONAL CASE-LAW 71 (Janneke Gerards & Joseph Eleuren eds., 2014) (“The national courts are asked to adopt the Court’s autonomous and evolutive definitions of Convention rights and apply them in their own case-law. If they do not do so, or lack the competence to set aside national legislation, the state may be held accountable for a violation of the Convention. By copying the Court’s interpretative approach, the national courts can avoid the occurrence of such violations.”).
imperfect copies of common-law decisions.21 This issue has been present in the ECtHR’s rulings in particular.22 The ECtHR’s judgments may contradict or overlap with each other, or they may interfere with previous lines of reasoning without providing an adequate explanation for doing so. As a result, they can suffer from a high level of unpredictability or inconsistency.23

The Article contends that these flaws of the European supranational courts confirm the importance of the collective obligation of parties and judges to consider and address previous case law. This obligation is an inherent part of stare decisis. Adherence to stare decisis is neither solely the judge’s responsibility nor exclusively dependent on whether judges themselves understand stare decisis to be an “inexorable command.”24 Although common-law jurisdictions differ widely in their adherence to stare decisis doctrines, they generally affirm the ethical duty to respect previous judicial decisions.

There are significant variations on the level of authority that attaches to precedents. In American law, the extent to which precedent applies is open to debate and change.25 The British tradition of stare decisis, which is stricter than the American one, has also vacillated between a rigid adherence to precedents and openly evolutionary patterns.26 Thus, the normative value of precedent in common-law systems does not inhere simply in its binding force but more broadly in the type of legal reasoning that it creates. A jurisdiction is not required to adhere to an understanding of stare decisis that obliges a judge to follow all precedents: a judge need not “follow a mistaken (to her) earlier decision solely because of its existence”27 in order to respect precedent while expounding the law. But the jurisdiction necessarily needs to care about previous decisions.

A thorough consideration of previous decisions also affects the scope of jurisdiction: when courts consider precedent, they indirectly relate their legal reasoning back to the past in a way that can also limit judicial power.28 If a court is required to examine the past carefully, that requirement disciplines or even constrains its capacity to innovate within the law. If a court must make judgments

21. See Takis Tridimas, Precedent and the Court of Justice: A Jurisprudence of Doubt?, in PHILOSOPHICAL FOUNDATIONS OF EUROPEAN UNION LAW 307 (Julie Dickson & Pavlos Eleftheriadis eds., 2012) [hereinafter PHILOSOPHICAL FOUNDATIONS] (noting that the Court of Justice of the European Union does not follow common-law courts methodologically, even though it seeks guidance in its prior decisions).
24. Payne v. Tennessee, 501 U.S. 808, 828 (1991) (“Stare decisis is not an inexorable command; rather, it is a principle of policy and not a mechanical formula of adherence to the latest decision.”) (internal quotations omitted).
in line with precedent, it takes quite a leap to depart from it. It is not by accident, then, that when a court respects precedent,

[t]he mere fact that a court disagrees with one of its earlier rulings is not in itself sufficient to justify overruling. Overruling demands special justification. There must be a cogent reason or it must appear right to do so. Sticking to precedent is a value in itself and there must be an interest outweighing that value to persuade the court to overrule.29

In other words, respect for precedent does not stem merely from the persuasiveness of earlier decisions but also from the normative value of the mere existence of precedent.

This Article will identify the core components of common-law systems' reliance on precedent, contrasting it with the broader legal culture concerning precedent in European supranational jurisdictions. To provide a framework for analysis, Part I provides a background of the European court systems. Part II isolates three structural factors involved in the crafting of judicial reasoning: (a) the structure of judicial systems, (b) courts' attempts at capping their caseload and overruling previous decisions, and (c) the adversarial system. It then details these factors in common law and supranational European jurisdictions and provides an overview of the treatment of precedent in Europe.

Part III focuses on the dynamic role that lawyers play in courts' treatment of precedent by examining lawyers' legal or ethical obligations. It describes the duties of lawyers to provide judges with an adequate picture of previous decisions and compares that duty with the degree to which judges adhere to precedent in the legal system within which they operate. To that end, it focuses primarily on the English and American systems, paying particular attention to the American rule's history, enforcement, and role in fostering precedent-bound judicial arguments. It argues that the American rule requiring the disclosure of adverse precedent forces lawyers to supply judges with lines of reasoning that take into consideration precedent, which in turn encourages judges to consider prior decisions in their rulings. It also contends that, because this rule does not apply to non-precedential sources, it causes British and American jurisdictions to be skeptical of foreign cases, since parties can selectively choose those that best serve their arguments and discard the rest. Finally, it describes the nonexistence of any similar duty at the European supranational level.

Part IV expounds upon the benefits of the duty to disclose adverse precedent and how it affects constitutional and statutory interpretation. It maintains that precedent-bound reasoning provides stability and societal acceptance without causing stagnation in the development of legal doctrine. Part V analyzes the expansive role of amici curiae, who are not under the obligation to disclose precedents that run against their submissions. Their role, which is a staple in constitutional litigation, seems to affect the spirit of common law, regardless of their effectiveness in influencing the outcome of individual decisions. Paradoxically, the role of amici confirms the centrality of the rule requiring lawyers to display all precedents to the court.

29. Tridimas, supra note 21, at 312 (internal quotations omitted).
The Article concludes that the common-law framework of legal reasoning, by including a duty to disclose relevant precedents, forces parties to try to make sense of them. By contrast, the European supranational systems' current lack of legitimacy and their poor reliance on precedent are related. Considering precedents can only be successful as part of a legal mindset shared among participants in a controversy and which the legal system as a whole deems necessary. It is neither a matter solely for a judge to consider nor a self-executing logical outgrowth of judicial reasoning. It can succeed only as a deep and shared commitment of a legal order.

I. BACKGROUND: THE EUROPEAN SYSTEMS

This Article will first provide a brief overview of the two European systems of adjudication in order to establish a frame of reference for how the common law is unique.

A. The Court of Justice of the European Union

The CJEU is widely considered the European Union’s main vehicle for the interpretation of European law. The EU can legislate in a variety of ways, and the EU’s Member States are tasked with applying their own domestic laws in conformity with those acts and laws. The Member States' domestic courts interpret and apply domestic law in accordance with the EU’s laws for the most part, with the CJEU having plenary jurisdiction over some limited areas.30

The CJEU considers cases concerning questions of legal interpretation, called “preliminary rulings,” and certain actions to annul EU acts that violate EU treaties or fundamental rights in a constitutional style of review.31 In preliminary rulings, national courts ask the CJEU to issue an advisory opinion concerning the implementation of EU law in a case currently in front of the national court.32 A national court can ask the CJEU for those preliminary rulings only while the case is ongoing.33 Once the CJEU provides the national court an answer to the question of law, that court in turn considers the answer when applying the law in the case before it.34 The CJEU is supposed to only provide an interpretation of the law, not advise on its application, and it cannot order a national court to declare its own laws invalid.35 National courts retain discretion in applying the substance of the rulings, although the preliminary ruling’s answer on the question of law is binding on the referring court and subsequent actors.36 The
preliminary ruling’s answer to the legal question is considered precedent for all national, domestic courts.\(^{37}\)

Depending on the complexity of the issue, three, five, or fifteen judges (the whole court) are assigned to the case.\(^{38}\) The CJEU then determines whether an oral hearing is needed.\(^{39}\) The CJEU employs Advocates General to assist the judges in deciding the issue.\(^{40}\) If the CJEU determines that a case is complex enough to require an Advocate General’s opinion, an Advocate General provides an impartial, written opinion of how the CJEU should rule.\(^{41}\) The CJEU then deliberates and rules on the case.

**B. The European Court of Human Rights**

The ECtHR has been called “the single most important rights-protecting tribunal in the world.”\(^{42}\) It is exclusively dedicated to interpreting the European Convention on Human Rights, with which forty-seven European countries must comply. Its decisions are binding on those countries but require State implementation. Once the ECtHR rules on a matter, the State brought before it is expected to rectify the issue not just for the individual case but for future cases as well.\(^{43}\) The cases before the ECtHR mostly involve a private citizen or group making a claim that a country—through its actions or inaction in the face of a third party’s violation of rights—violated his or her rights under the Convention.\(^{44}\) The initial decision on the matter is decided by a seven-judge panel; in exceptional circumstances, a panel of seventeen judges will review that decision de novo.\(^{45}\) Unlike the CJEU, which considers questions in pending cases, the ECtHR only considers a case once the entire process has completed in domestic courts.\(^{46}\)

The ECtHR considers itself the “conscience of Europe” and views its Convention as a “living instrument which must be interpreted in the light of present-day conditions.”\(^{47}\) Often, the ECtHR will recognize rights when it perceives that a consensus is growing in European domestic courts and wants to

37. Id. at 98.
39. Id.
40. Horspool, supra note 30, at 68.
41. Id. at 68.
44. See, e.g., THE EUROPEAN COURT OF HUMAN RIGHTS, YOUR APPLICATION TO THE ECHR 10 [hereinafter ECHR APPLICATION], http://www.echr.coe.int/Documents/Your_Application_ENG.pdf (discussing suits against Member States).
46. Anagnostou, supra note 42, at 7.
further that consensus throughout Europe.\textsuperscript{48} It is concerned with maintaining its effectiveness in addressing "contemporary social issues." Evolving consensus—more than precedent—is the driving force in the ECtHR system.\textsuperscript{49} ECtHR opinions are to the point. Unlike in common-law opinions, the ECtHR does not engage in a rigorous analysis of prior cases, but rather cites prior cases only for their propositions upon which the Court relies.

II. \textbf{STARE DECISIS AND THE STRUCTURE OF ADJUDICATION: WHAT SHAPED THE MODERN COMMON LAW AND HOW THE SUPRANATIONAL EUROPEAN SYSTEMS ARE DISTINCT}

Stare decisis is not self-executing. Several factors affect how adjudication and stare decisis operate. First, this Part describes the structural components of the common law that affect adjudication: at the broadest level, the structure of trials and the system of appeals; at the individual court level, the way a court caps its caseload and departs from precedent; and at the party level, the nature of the adversarial system. It discusses how these factors affect adjudication in the common law. Then, this Part details the aspects, structure, and logic of supranational European law that affect its handling of precedents, and contrasts them with the basics of common-law regimes.

A. \textit{Structural Components that Affect Common-Law Adjudication}

Three main structural components of the common law promote consideration of precedents. What follows is therefore a description of "constituent parts of a coherent body of knowledge about law, and in that sense [of] elements of a legal science as well as a legal method."\textsuperscript{50} These are the logical prerequisites for the functioning of stare decisis.

\textit{1. The Structure of Trials and the Appeals System}

The structure of trials and the appeals system plays a special role in a common-law court's attention to precedent. As Neil Duxbury has stressed, that a suit is initiated with a complaint is a key factor in framing the whole process of adjudication: because a complaint is put forward before the litigation begins, parties are forced to stay within the four corners of it.\textsuperscript{51} Duxbury argues that this practice of asserting preliminary claims made the entire system of English stare

\textsuperscript{48} See, e.g., Goodwin v. United Kingdom, App. No. 28957/95, 2002-VI Eur. Ct. H.R. (Grand Chamber) ¶ 74 ("While the Court is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability, and equality before the law that it should not depart, without good reason, from precedents .... However, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond .... to any evolving convergence .... ").

\textsuperscript{49} Id.

\textsuperscript{50} Harold J. Berman & Charles J. Reid, Jr., \textit{The Transformation of English Legal Science: From Hale to Blackstone}, 45 EMORY L.J. 437, 440 (1996) (including in the list the "doctrine of precedent, forms of action, legal fictions, jury trial, rights of the accused, the adversary system, evidence, [and] treatises").

decisis possible because it narrowed the scope of the whole trial. It forced the judge to ascertain whether the complaint fell within the scope of precedent and required both the litigants and the courts to focus on the existing case law on the subject instead of allowing later compromises to alter the cause of action itself.\(^5^3\)

The common-law system’s understanding of the role of judges in relation to juries is also crucial. From the United States’ founding until the early nineteenth century, questions of law were deferred to juries in most trials.\(^5^4\) Since “each judge was free to state to the jury his opinion of the law and each jury was free to select the opinion it preferred,” the “adherence to past precedents was at best fortuitous, and legal certainty and predictability were unobtainable.”\(^5^5\) It was only when judges started controlling legal determinations that it became possible to avoid conflicting legal decisions on the same subjects.\(^5^6\)

Another basic feature of systems that allow for case law consistency through time is the capacity to record and transmit authorities.\(^5^7\) For centuries, English common law suffered from a near complete unavailability of records of previous decisions, which made it impossible to locate the relevant body of law and thus gave the judge substantial liberty in ruling.\(^5^8\) Access to judicial decisions may be taken for granted now since technology enables lawyers and judges to find them relatively easily—today, sorting through cases is often more difficult than finding them. But in those earlier times, stare decisis was stymied by judges’ inability to access previous decisions.\(^5^9\)

Finally, the common-law system of appeals is conducive to maintaining stare decisis. At a minimum, a structured appellate system with a clear hierarchy of appeals is needed to secure vertical stare decisis.\(^6^0\) The vertical dimension of precedent tends to bind lower courts to higher courts’ decisions simply because lower court decisions that do not respect high courts’ interpretations of the law run a high risk of being overturned on appeal.

2. Caseload and Departures from Precedent

A clear system of appeals is not enough to guarantee the consistency of case law. Capping the caseload is key.\(^6^1\) The Anglo-American system of appeals

\(^5^2\) Id.
\(^5^3\) Id. ("A consequence of this development was that judges began more regularly to produce reasoned decisions rather than merely steer parties towards agreement on what should be pleaded.").
\(^5^5\) Id.
\(^5^8\) See, e.g., CHRISTOPHER W. BROOKS, LAWYERS, LITIGATION AND ENGLISH SOCIETY SINCE 1450, 204 (1998).
\(^5^9\) DAWSON, supra note 57, at 80.
\(^6^1\) See RAIMO SILTALA, A THEORY OF PRECEDENT: FROM ANALYTICALPOSITIVISM TO A POST- ANALYTICAL PHILOSOPHY OF LAW 81 (2000) ("A vast overload of cases ... will make it extremely
The Duty to Disclose Adverse Precedents

protects higher courts from an excessive caseload by allowing them to control their docket. For example, the U.S. Supreme Court in the vast majority of cases chooses which cases to hear. Meanwhile, the U.K. Supreme Court has recently issued a Practice Direction in which it allows appeals that ask “the Supreme Court to depart from one of its own decisions or from one made by the House of Lords” only “for applications that . . . raise an arguable point of law of general public importance which ought to be considered by the Supreme Court at that time, bearing in mind that the matter will already have been the subject of judicial decision and may have already been reviewed on appeal.” An excessive caseload is detrimental to a sound policy of stare decisis and even an ordered schema of previous decisions itself.

3. The Adversarial System

The adversarial system plays a role in shaping common-law courts’ reliance on precedents and their resilience to change. If, as John Finnis has put it, “[a]djudication is the effort to identify the rights of the contending parties now by identifying what were, in law, the rights and wrongs, or validity or invalidity, of their actions and transactions when entered upon and done,” then the adversarial nature of common-law adjudication is essential to its structure. That adversarial structure by necessity slows down the rate of legal change because it focuses on the law at the time that past actions occurred while at the same time shaping the legal expectations of non-parties going forward.

B. Structural Components that Affect Supranational European Systems

Supranational European law has a different approach to those three components of the common law—the trials and appeals system, caseload management, and the adversarial system—that contributes to the differences between the two systems.

1. The Structure of Adjudication and the Appeals System

The CJEU and ECtHR have novel adjudicatory structures that have historically caused issues in determining how to handle cases. Cases receive disparate development based on domestic law before the case appears at the CJEU or ECtHR. Relatively recently, the European Union and the ECtHR have streamlined cases by enabling the courts to focus especially on those cases that raise new legal issues or reveal that the existing case law should be reconsidered. The CJEU, while broadly welcoming applications, has expressed its reluctance
to address identical issues multiple times\textsuperscript{65} and provides for simplified procedures when a case raises no new legal issues.\textsuperscript{66} These developments bring them more in line with their Anglo-American counterparts, but the ECtHR and the CJEU diverge from each other with respect to their treatment of precedent.

Both have historically suffered from difficulties managing precedent, and only relatively recently have addressed, to varying degrees of success, their burgeoning caseload. The issues of capping its workload and controlling its docket have been particularly urgent for the ECtHR, which, as a result of its fame as the supreme protector of human rights, has been strained under the weight of several thousand applications.\textsuperscript{67} Many states, such as Italy, cause a number of clone cases because they do not comply with previous judgments.\textsuperscript{68} This noncompliance prompts applicants to file new applications before the ECtHR about already-decided issues, which the State has failed to broadly remedy.\textsuperscript{69} In response to this issue, the ECtHR itself has crafted the “pilot-judgment” procedure, which identifies Convention violations that derive from structural problems within a State and “imposes an obligation on [the] State[] to address those problems.”\textsuperscript{70} This procedure thereby encourages the State to adjust their laws in order to avoid more condemnations from the ECtHR. Finally, the Convention’s original text was amended in 2004 to enable smaller panels of judges to deny applications that are clearly inadmissible.\textsuperscript{71} While this change has no role in disincentivizing applications, it eases the ECtHR’s work.\textsuperscript{72}

2. Caseload and Departures from Precedent

The aforementioned changes have not completely resolved the ECtHR’s difficulties. A court’s degree of adherence to precedent plays a crucial part in

\begin{itemize}
  \item \textsuperscript{66} Statute of the Court of Justice of the European Union, supra note 38, art. 20. The provisions allow the Court to decline the involvement of the Advocate-General, who normally “acting with complete impartiality and independence [makes], in open court, reasoned submissions on certain cases brought before the General Court in order to assist the General Court in the performance of its task.” \textit{Id.} art. 49. On the avoidance of the Advocate-General’s intervention in the hearing, see also Practice Directions to Parties Concerning Cases Brought Before the Court, 2014 O.J. (L31/1), art. 44 [hereinafter Practice Directions], http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014Q0131(01)&from=EN. Moreover, in the context of the preliminary ruling procedure, see Rules of Procedure of the Court of Justice, 2012 O.J. L265/1, art. 99 [hereinafter CJEU Rules of Procedure], http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012Q0929(01)&from=EN.
  \item \textsuperscript{68} See COURTNEY HILLEBRECHT, DOMESTIC POLITICS AND INTERNATIONAL HUMAN RIGHTS TRIBUNALS: THE PROBLEM OF COMPLIANCE 122 (2014) (discussing noncompliance issues in general and stating that “98 percent of Italian cases pending compliance were clone cases” in 2011).
  \item \textsuperscript{69} Id.
  \item \textsuperscript{70} PILOT JUDGMENTS, supra note 43, at 1.
  \item \textsuperscript{72} HILLEBRECHT, supra note 68, at 153–54.
\end{itemize}
either inviting more applications and, hence, increasing its caseload or disincentivizing them and limiting its caseload. A great likelihood that a court will rely on its previous decisions hardly invites appeals from plaintiffs who hope to win with arguments that have already lost. More broadly, adherence imposes a clear burden on the party seeking change to demonstrate its necessity, as the U.K. *Practice Direction* shows.\(^{73}\) Conversely, the ECtHR’s “living instrument” theory seems to attract applications, as individuals and groups have greater reason to hope that the court will change its position.

Alasdair Mowbray has identified three patterns of change in the ECtHR case law, two of which seem to support this conclusion.\(^{74}\) In addition to when the ECtHR updates its case law in order to clarify it and make it more uniform,\(^{75}\) the Court also departs from its previous decisions when: (a) under the “living instrument” doctrine, socio-legal developments within the ECtHR’s Member States and worldwide have conferred a new meaning on the text, as discussed above;\(^{76}\) or (b) there is a sizeable increase in the number of applications that target a certain type of State conduct, persuading the ECtHR that there is a widespread perception that a human right has been violated.\(^{77}\) In the latter case, the ECtHR proclaims that there has been a human rights violation in the hope that its condemnation will force the State to change its policy, thereby curbing applications on that issue.\(^{78}\)

Like the ECtHR, the CJEU’s level of deference to its previous rulings is not particularly high, for two main reasons. First, its “lack of discursive reasoning, which is typically present in individual judgments of Anglo-Saxon courts, makes it more difficult for the Court to engage in detailed discussion of its previous judgments.”\(^{79}\) Second, the CJEU, given its civil law background, normally avoids explicitly overruling previous decisions.\(^{80}\)

Still, the CJEU profits from two aspects of its jurisprudence that provide it with at least some degree of consistency in its case law: its “preliminary ruling” mechanism, described above, by which a domestic court can refer a case to it before applying EU law, and its control over the development of EU law.\(^{81}\) Since the CJEU’s preliminary ruling guides a domestic court before it applies EU law, the ruling functions as precedent for the domestic case at hand. Because the domestic court itself requests the CJEU’s input, the CJEU can expect that the domestic court will respect its decision and apply its interpretation of that law.\(^{82}\) Furthermore, since the CJEU’s goal is the ordered development of EU law, it has

\(^{73}\). *Practice Direction*, supra note 62.


\(^{76}\). *Id.* at 193.

\(^{77}\). *Id.* at 191.

\(^{78}\). *Id.*

\(^{79}\). Tridimas, *supra* note 21, at 315.

\(^{80}\). *Id.* at 320.

\(^{81}\). *Id.* at 308 (maintaining that the CJEU would be methodologically distant from Anglo-American courts but equivalent in the result of its rulings).

been constantly aware of its pivotal role in expanding and deepening the European integration process. This understanding has prompted the CJEU to keep a measured pace in developing its jurisprudence after a thorough consideration of its case law. The CJEU is thus better able to maintain control over its caseload and its precedent.

3. The Inquisitorial System

The absence of an adversarial scenario may shift the focus of the proceedings. At the ECtHR, as discussed above, the defendant is always a Member State, which can be sued for allegedly harming or failing to protect a person’s or group’s rights. The applicant can bring a case against the State even if a third party infringed his or her rights, and the State simply failed to provide redress afterwards. Similarly, the CJEU’s preliminary ruling mechanism, by which domestic courts can request that the CJEU interpret the EU law that they need to apply, is “characterised by the absence of adversarial proceedings,” since the European Union’s Advocate General advises the judges on how to rule in light of the EU’s interest on an impartial and independent ground. As such, the focus in both courts is not so much on what the law is, but rather what the law should be in order to further the two courts’ teleological aims.

III. STARE DECISIS AND LEGAL REASONING

As the aforementioned Part shows, how the structure of trials, the judicial system, and the prevailing legal doctrine affect a court’s approach to previous judgments varies. But differences in these structural factors, while important contributors to a system’s overall functioning, do not explain the distance between common-law reasoning and that of the supranational European systems. This is apparent even in comparing the two supranational European systems to each other. Although the CJEU and the ECtHR share some structural similarities—such as the lack of a thorough adversarial system, a weaker tradition of following precedents, and a tendency to interpret law

83. See id. at 237; George Letsas, Harmonic Law: The Case against Pluralism, in PHILOSOPHICAL FOUNDATIONS, supra note 21, at 82 (stating that included among the claims of supremacy that the European Court of Justice has made is “that it has ultimate authority to decide all matters of European law,” and noting that the Member States have never challenged this claim).
84. See J.H.H. Weiler, Deciphering the Political and Legal DNA of European Integration, in PHILOSOPHICAL FOUNDATIONS, supra note 21, at 137, 150-151 (Julie Dickson & Pavlos Eleftheriadis eds., 2012).
85. See, e.g., EHCR APPLICATION, supra note 44, at 3-9 (discussing the procedure to sue in the European Court of Human Rights).
86. See, e.g., Daniel Augenstein & Lukasz Dziedzic, State Obligations to Regulate and Adjudicate Corporate Activities under the European Convention of Human Rights, 6 (European Univ. Institute Dep’t of Law, Working Paper No. 2017/15) (Even in cases concerning “‘violations’... of human rights by non-state actors,” a State’s positive obligations require it “to ensure the effective realisation of human rights even in the face of events for which they do not bear direct responsibility.”).
87. Practice Directions, supra note 66, art. 9.
The Duty to Disclose Adverse Precedents

progressively—their reputations are rather different: the ECtHR is criticized for being fairly unpredictable, whereas the CJEU is respected as being rather deferential towards its own precedents and by one metric enjoys Europeans’ highest support compared to other EU institutions and sometimes even domestic institutions.

Still, one crucial distinction exists between the European systems and the common law: both European courts seem to pay little attention to how they explain why they depart from previous decisions. The oft-cited reason for this difference is that they derive their understanding of adjudication from civil law systems. But that answer proves insufficient. It may be true that European supranational law was founded with continental legal concepts according to which previous decisions are not, technically, authorities. Yet this initial founding fails to explain why these supranational courts have not clarified how they deal with their precedent more recently. Despite the courts’ authoritative status, there seems to be no definitive explanation as to why they have not found an asset in the Anglo-American tradition of precedents and the importance that it attaches to previous decisions. A mere reference to history, then, is insufficient.

This Article contends that pan-European courts do not treat precedents as authorities because they do not share common-law courts’ pattern of legal reasoning. This explanation starts with the different duties that legal practitioners have in these jurisdictions. In European courts, lawyers may craft arguments in which precedents play a much smaller role than they do in common-law courts. The practitioners’ arguments in turn are reflected in the reasons that the European judges give for their decisions, which may quote precedent selectively because the intellectual framework they operate within does not expect them to address all of the authorities on the subject.

Hence, the ECtHR and the CJEU may fail to fully exploit the potential of a precedent-based form of argument because the type of reasoning presented orally and in written pleadings allows them to do so. Practicing lawyers in Europe have no ethical or legal obligation to build their reasoning upon precedent as do their British and American colleagues. This lack of duty parallels judges’ lack of logical obligation to expound law considering their own prior judgments. Conversely, in jurisdictions that give a special weight to the duty to disclose precedents, “the parties, any appellate court and the wider

90. See Heydon, supra note 23, at 399.
91. See CROSS & HARRIS, supra note 60, at 17.
92. Kelemen, supra note 19, at 123.
93. See CROSS & HARRIS, supra note 60, at 17 (“Although the Court often explicitly follows one of its previous rulings, it does not discuss them in an analytical way.”).
94. As for the CJEU, see id. at 17 (describing the CJEU’s creation).
96. This seems to reflect the overall approach among European domestic courts. See Hall & Co. v. Simons, [2000] UKHL 38 (Lord Steyn, J.) (recognizing that “in the field of criminal procedure the role of a judge in England is far more passive than in European Union countries”).
community, will be concerned to know why a judge has reached a particular decision and to assess for themselves whether the reasoning is the most cogent according to law and not arbitrary." If parties are forced to provide a full landscape of previous decisions, the most likely way in which courts will ensure that "they have not been let down by incorrect judicial reasoning" is by navigating the precedents that have been quoted. This difference is more than a structural one for which other structural changes can compensate. Instead, it is a core value upon which the entire system of law is based.

An analysis of common-law jurisdictions' codes of conduct and court rules on the subject elucidates how this difference affects legal reasoning. Section III.A describes common-law jurisdictions' ethics rules, focusing on the American rule, and their relationship with stare decisis. Section III.B discusses how this relationship between the ethics rules and precedent strengthens further and discourages the incorporation of foreign decisions into common-law reasoning. Section III.C describes how the absence of precedent-bound reasoning in supranational European law affects it and details how the different levels of respect of precedent in common law and supranational European law combine with the practice of interpreting statutes and constitutions.

A. Common-Law Jurisdictions

Common-law jurisdictions often have provisions describing the duty to cite precedent. The Conduct Rules for the English Bar are quite strict in requiring that barristers "take reasonable steps to ensure that the court has before it all relevant decisions and legislative provisions." Less demandingly, the American rules generally expect that attorneys disclose controlling legal authority that is directly adverse to their client's position unless the opposing party already has cited it. Analogously, the Australian Solicitors Conduct Rules require that the attorney "inform the court of any persuasive authority against the client’s case." The Federation of Law Societies of Canada's Model Code of Professional Conduct sanctions the practicing lawyer who "deliberately

99. Id. at 219.
101. MODEL RULES OF PROF’L CONDUCT r. 3.3 (AM. BAR ASS’N 2015). The American Bar Association's Model Rules of Professional Conduct have been adopted in almost every state. State Adoption of the ABA Model Rules of Professional Conduct, (AM. BAR ASS’N 2015), http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited March 29, 2019). The United States' federal structure permits different requirements among the states in practice, however, as the Restatement of the Law Governing Lawyers notes: "A barrister in Britain may be subject to more stringent requirements. In the other direction, the California regulations... go no further than prohibiting knowing misstatements of law and legal materials." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 111 (AM. LAW INST., Tentative Draft No. 8, 1997). This Article focuses on the ABA Model Rules of Professional Conduct because of its near-universal adoption, although differences among the states expose the state bars' potentially divergent understandings of stare decisis and legal ethics.
refrain[s] from informing a tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by another party." The New Zealand Lawyers and Conveyancers Act Rules 2008 specify that a lawyer's "duty to the court includes a duty to put all relevant and significant law known to the lawyer before the court, whether this material supports the client's case or not." The Code of Conduct for the Bar of Ireland mandates that

[i]n a civil case Barristers must, at the appropriate time in the proceedings, inform the court of any relevant decision on a point of law and, in particular, of any binding authority or of any applicable legislation of which they are aware and which the Barrister believes to be in point whether it be for or against their contention.

These succinct provisions have implications that go beyond the mere burden of providing the court with the information needed to make an informed judgment. After all, the digitization of the legal profession has made this rule technically superfluous, as many search engines now provide the parties and the court relatively easy access to precedents. But this rule still seems to bear significance for legal reasoning. If lawyers are expected to provide courts with information about previous decisions, the courts are in turn expected to provide reasons for their judgments in line with those decisions. Since "[i]t is a basic principle of the administration of justice that like cases should be decided alike," if a party discusses a previous judgment, a judge will hardly ignore it when making his or her judgment. Common-law judges thus will normally consider previous decisions in their lines of reasoning. The parties and the judge may determine that some judgment is not relevant and distinguish them from the case at hand—after all, "lawyers can (and lawyers did) distinguish cases not congenial to their argument rather than submit to an unwelcome earlier decision." But they still need to address the prior case in order to distinguish it.

1. **A Focus on the American Rule**

An in-depth examination of the American rule confirms its importance not just for the legal profession or the development of precedent, but for the legal reasoning that governs the entire adjudication process. The rule, part of American law for over a century, encourages courts to engage in precedent-bound reasoning by forcing lawyers to incorporate directly adverse precedents into their arguments.

105. BAR OF IRELAND, CODE OF CONDUCT FOR THE BAR OF IRELAND r. 5.8 (2016).
106. CROSS & HARRIS, supra note 60, at 3.
107. Ian Williams, Early-Modern Judges and the Practice of Precedent, in JUDGES AND JUDGING, supra note 56, at 52.
Some iteration of this rule has been a part of the American tradition in codified form since the nineteenth century. A similar rule was part of the very first codification of ethics codes in the United States, the Alabama Code of Ethics of 1887, which proscribed "[k]nowingly citing as authority an overruled case" and "knowingly misquoting the language of a decision." The Alabama Code, and hence this rule, became the basis for the American Bar Association's (ABA) ethics rules.

As one commentator has noted, the ABA's position on disclosing legal authority has vacillated between a mere prohibition against misleading the court to a sweeping requirement to disclose any cases a judge may deem relevant before formally settling on its current "middle ground." Building from the Alabama code, the ABA's Canons of Professional Ethics, promulgated in 1908, stated that a lawyer must not "cite as authority a decision that has been overruled." The ABA in 1935 took the additional step of requiring disclosure of adverse cases, regardless of whether they were precedential. In 1949, it further enhanced this duty to disclose cases in its Formal Opinion 280, in which it set out a number of questions a lawyer should consider when determining whether to alert the court to a case. These included whether “the court should clearly consider” the case “in deciding” it, whether a “reasonable judge” would think that a lawyer who failed to disclose it was “lacking in candor and fairness,” and whether “the judge [would] consider himself misled by an implied representation that the lawyer knew of no adverse authority.” This heightened duty was diminished in 1969 when the ABA adopted the Model Code of Professional Responsibility, which required a lawyer to disclose adverse legal authority that opposing counsel failed to cite. While since 1969 lawyers have been bound to a lower standard than the apex of Formal Opinion 280, some judges and authorities still cite it as a valid schema for a lawyer to use in determining whether a case should be cited.

110. Thomas Spahn, Lawyers’ Duties to Advise the Courts of Adverse Facts and Law, EXPERIENCE, Summer 2010, at 46–47.
111. CANONS OF PROF’L ETHICS § 22 (AM. BAR ASS’N 1908).
112. See Deering, supra note 109, at 69.
114. ABA Standing Comm. on Ethics & Prof’l Resp, supra note 113. Or, Geoffrey Hazard and W. William Hodes have an easy rule for lawyers: "[T]he more unhappy a lawyer is that he found an adverse precedent, the clearer it is that he must reveal it." Wayne Schiess, ETHICAL LEGAL LAWYERING, 21 REV. LITIG. 527, 532 (2002) (quoting GEOFFREY HAZARD & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 3.3:206 (2d ed. 1990)).
116. See Elaine Bucklo, The Temptation Not to Disclose Adverse Authority, LITIG., Winter 2014, at 26 (discussing Formal Opinion 280 as a means for lawyers to determine whether they should disclose...
Under the current ABA Model Rule of Professional Responsibility 3.3, a lawyer “shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.” The failure to cite adverse authority “may have the same effect as a misstatement of the law,” and the mere citation of an adverse case without elaboration is insufficient. The general understanding is that “directly adverse” means “all decisions with holdings directly on point, but . . . does not include dicta.” Distinguishing the holding from dicta narrows the universe of cases that must be disclosed. While it may behoove parties to cite dicta for its persuasive value, parties do not need to address every case on point to adhere to their ethical obligations because dicta lack authoritative weight.

In addition to this ethics rule, in federal appeals cases Federal Rule of Appellate Procedure 28 ingrains the precedent-bound nature of legal thinking by requiring appellants to provide their "contentions and the reasons for them, with citations to the authorities . . . on which the appellant relies." When parties have not complied with this rule, appellate courts have considered arguments abandoned on appeal. These two rules work together to encourage the citation of a case and citing a 2001 case that referred to the Opinion in sanctioning attorneys for nondisclosure.

117. MODEL RULES OF PROF'L CONDUCT r. 3.3 (AM. BAR ASS'N 2015). In addition to their formal adoption by 50 American jurisdictions (including the U.S. Virgin Islands and Washington, D.C.), the Model Rules of Professional Conduct have persuasive force in other legal opinions. For example, in Elder v. Holloway, the Supreme Court cited the disclosure rule concerning legal authority in overruling a United States Court of Appeals for the Ninth Circuit case. 510 U.S. 510 (1994). In that case, the Ninth Circuit had held that it must disregard a case unconsidered by the district court in determining whether a right was “clearly established” for purposes of determining a government actor's qualified immunity. Id. at 514. A unanimous Supreme Court disagreed, citing Model Rule 3.3’s requirement to alert the court of adverse legal authority to show that the Ninth Circuit’s rule caused issues in light of this ethical obligation. Id. at 515 n.3. Further, some courts have interpreted the two federal rules concerning sanctions, Federal Rule of Civil Procedure 11 and Federal Rule of Appellate Procedure 38, to incorporate this duty, although other courts have said otherwise. See Daisy Hurst Floyd, Candor Versus Advocacy: Courts' Use of Sanctions to Enforce the Duty of Candor toward the Tribunal, 29 GA. L. REV. 1035, 1065 (1995) (discussing the Ninth Circuit’s rejection of this interpretation of Rule 11).

118. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 111 cmt. c (AM. LAW INST. 2000).

119. Douglas R. Richmond, Appellate Ethics: Truth, Criticism, and Consequences, 23 REV. LITIG. 301, 323 (2004) [hereinafter Richmond, Appellate Ethics]. This disclosure is not enough partly because "[c]ourts rely on counsel to supply most legal argument. Conscientious though judges and their law clerks may be, it is unreasonable to rely on them to scour every cited case for issues or points relevant to the dispute at hand." Id.

120. § 111 cmt. c.


123. See Heft v. Moore, 351 F.3d 278, 285 (7th Cir. 2003) ("[Appellant] offers no case law in support of her claim that the district court improperly granted the defendant a directed verdict. The failure to cite cases in support of an argument waives the issue on appeal, despite counsel’s contentions at oral argument that case law is unnecessary "window dressing"); see also Ball v. City of Indianapolis, 760 F.3d 636, 645 (7th Cir. 2014) ("But beyond noting the uncertainty in Indiana law, Ball has devoted no more than three sentences to her argument, and has cited no authority to support . . . [her claim]. In this regard, she has not complied with her obligations under Federal Rule of Appellate Procedure 28(a)(8)(A), and has waived any contention that the district court erred with respect to her state constitutional claims."); Projects Mgmt. Co. v. Dyncorp Int'l LLC, 734 F.3d 366, 376 (4th Cir. 2013) ("In any event, by failing to support its contentions with citations to the authorities and parts of the record on which [it] relies, [Appellant] has waived this argument.") (internal quotations omitted); Pignanelli v. Pueblo Sch. Dist. No.
of authorities in parties’ briefs.

If a lawyer fails in his or her duty to disclose directly adverse precedent, punishments may vary. Historically, courts have rarely found a rule violation for non-disclosure, yet the judiciary now seems to be more inclined to mention or act on ethical violations than in prior times. While there may not be much more than a symbolic sanction attached to this rule, practitioners’ commentaries stress that lawyers may suffer reputational damage if they violate it, and a judge may be more skeptical of a lawyer’s pleadings when adverse precedent is undisclosed. The reputational damage and judges’ skepticism of those pleadings confirm that the disclosure rule is connected to the very essence of the common law. Lawyers who fail to abide by this rule run afoul of the basic premises of stare decisis to such an extent that judges do not give them full credit.

60, 540 F.3d 1213, 1217 (10th Cir. 2008) (“Because [Appellant] has not directed us to any legal authority or record evidence supporting a claim for relief . . . her appeal on this ground must fail.”).

124. See Susan J. Irion, How to Deal like a Professional with Adverse Legal Authority, 37 LITIG., Winter 2011, at 49 (“[A] violation for non-disclosure does not occur with great frequency.”).

125. See Francis C. DeLaurentis, When Ethical Worlds Collide: Teaching Novice Legal Writers to Balance the Duties of Zealous Advocacy and Candor to the Tribunal, 7 DREXEL L. REV. 1, 18 (2014). The increased willingness for courts to chastise lawyers for failing to cite cases may be a result of what Lawrence Duncan MacLachlan predicted: “[t]he minimum standards of professional competence . . . rise with the increased availability of this information.” Lawrence Duncan MacLachlan, Gandy Dancers on the Web: How the Internet has Raised the Bar on Lawyers’ Professional Responsibility to Research and Know the Law, 13 GEO. J. LEGAL ETHICS 607, 607 (2000). As online legal databases like Westlaw and LexisNexis become more refined, lawyers can find more relevant cases and read them more easily. This process decreases the potential that lawyers would inadvertently miss relevant adverse precedent, although it simultaneously increases the likelihood that a lawyer may not have the time to complete a thorough examination of all non-binding cases from sister jurisdictions. Courts have exacted a number of different punishments for non-disclosure, from requiring lawyers to write letters describing why they did not cite the rule, to upbraiding lawyers harshly in opinions, to reversing a prior decision based on that non-disclosure and awarding the opposing party’s legal fees. See, e.g., Gonzalez-Servin v. Ford Motor Co., 662 F.3d 931 (7th Cir. 2011) (castigating a party for not addressing adverse precedent that the opposing counsel already cited); Irion, supra note 124, at 54–55 (summarizing punishments). Courts have issued particularly stinging rebukes and punishments in cases where the attorney or law firm was part of the litigation that originated the directly adverse precedent. Douglas R. Richmond, The Ethics of Zealous Advocacy: Civility, Candor and Parlor Tricks, 34 TEX. TECH L. REV. 3, 43–45 (2002) (citing Forum v. Boca Burger, Inc., 788 So. 2d 1055, 1062 (Fla. Dist. Ct. App. 2001)). Judges seem reluctant to impose harsh sanctions on attorneys who violate the rule in other cases since the lawyer’s incompetence, and not his or her ethical obfuscation, could be to blame for the failure to cite adverse legal authority. See, e.g., Nw. Nat’l Ins. Co. v. Guthrie, 1990 WL 205945 (N.D. Ill. Dec. 3, 1990) (offering a rebuke rather than a sanction for failing to cite adverse precedent). While a court may decline to impose sanctions for violating this rule, surely a court’s rebuke that “[w]e will assume counsel’s glaring omission is the result of sloppy research and writing, and not an intentional effort to mislead or misdirect this Court” is almost just as bad. Id. at *2.

126. See, e.g., Richmond, Appellate Ethics, supra note 119, at 324 (“Failing to reveal adverse authority destroys judicial trust.”).

127. See, e.g., Irion, supra note 124, at 49 (“Surely, the more a court realizes it can rely on an attorney to be fair and accurate, the more likely the attorney’s arguments will carry weight. A court’s confidence in an attorney could give the client the benefit of the doubt in close situations. Or a court may be more inclined to helpfulness toward a litigant whose counsel forthrightly disclosed adverse authority.”).

128. See, e.g., id. (“Your objective in every argument . . . is to show yourself worthy of trust.”) (quoting JUSTICE ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES xxiii (2008)).
The Duty to Disclose Adverse Precedents

b. The Rule’s Influence on Stare Decisis

The precedent disclosure rule “is perhaps the clearest example of a lawyer’s role as an officer of the court rather than solely an advocate for a client.” Its official commentary implicates this role: it states that the rule’s “underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.” As one commentator has noted, “[i]mplicit in that statement is the notion that counsel should also address how the court should treat the authority.” Practitioners have criticized this concept for arguably being in tension with the lawyer’s “zealous advocacy” on behalf of a client. The rule ensures that the court is at least aware of the cases that may preclude or restrict a particular outcome, even though it does not require parties to cite every case. It thus provides that lawyers are participants in the proper administration of justice.

The marriage of lawyers’ dual roles—officer of the court and zealous advocate—means that a lawyer’s success as an advocate is bound with his or her protection of precedent. The practical consequences of placing zealous advocacy above the duty to disclose directly adverse precedent profoundly harm the lawyer’s case in court.

In harmonizing lawyers’ duty to their clients with their duty to alert the court to precedent, this rule helps promote the court’s application of stare

---

129. AM. BAR ASS’N, LAWYER LAW § 5.9.A (2007). See Nathan M. Crystal, Limitations on Zealous Representation in an Adversarial System, 32 WAKE FOREST L. REV. 671, 724-25 (1997) (discussing how the balance of interests between erroneous decisions and attorneys’ duty to their client weighs in favor of disclosure); Deering, supra note 109, at 64-66 (discussing how, while the image of the lawyer as “hired gun” is often promoted, the characterization as an officer of the court implies a “special duty” that “at least implicitly[] elevates the interests of the judicial system above those of the client or the attorney”); Eugene R. Gaetke, Lawyers as Officers of the Court, 42 VAND. L. REV. 39 (1989) (describing how the understanding of lawyers as officers of the court affects their rules of professional responsibility).

130. MODEL RULES OF PROF’L CONDUCT r. 3.3 cmt. 4 (AM. BAR ASS’N 2015). The ABA has also stated that the continuing duty to disclose applies throughout the entire case, even after a decision has been rendered on that issue. ABA Comm. on Ethics & Prof’l Responsibility, Informal Op. 1505 (1984). Other reasoning for the rule includes that “the purpose of litigation is to promote justice and truth[,] . . . litigation is not a game, and . . . justice is promoted” by this obligation. J. Michael Medina, Ethical Concerns in Civil Appellate Advocacy, 43 S.W. L.J. 677, 708 (1989).

131. Irion, supra note 124, at 50.

132. MODEL RULES OF PROF’L CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS’N 2015) (stating that a lawyer must act “with zeal in advocacy on the client’s behalf”); see also Risa B. Lischkoff, Recent Decisions on Citing Authorities to Courts: Model Rule 3.3(A)(3) of the Model Rules of Professional Conduct, 19 J. LEGAL PROF. 315, 315 (1994) (discussing how lawyers may not want to give their research to the court, thereby aiding an opponent who has not been similarly diligent in searching for cases on point).

133. The same holds true in English courts: the English Court of Appeal dealt with advocates’ dual duties of loyalty towards the court and the client and considered the perils of granting the advocate immunity against suits brought by clients, conclusively confirming the “overriding duty of an advocate to the court.” Hall & Co. v. Simons, [2000] UKHL 38, [2002] 1 AC 615 (appeal taken from Eng.).

134. See Richmond, Appellate Ethics, supra note 119, at 324-25 (“It is also possible that a lawyer’s failure to reveal directly adverse authority will enhance that authority in the court’s eyes, for if it was inapposite or erroneously decided, the lawyer surely would have revealed it.”); Sanford Hausler, Young Lawyers’ Corner: What to Do About Adverse Precedent, AM. BAR ASS’N (March 4, 2016), https://www.americanbar.org/groups/litigation/committees/appellate-practice/articles/2016/winter2016-0316-young-lawyers-corner-what-do-about-adverse-precedent/ (discussing the requirement of candor to the courts); Delaurentis, supra note 125, at 18 (discussing how to teach this ethical requirement among others).
decisis. The lawyer's task is to "acknowledge and address the competing considerations" in a case so that the court may make a precedent-bound decision. The lawyer's success is bound up in alerting the court to the proposition that opposes his or her position and distinguishing it, rather than merely making an oblique reference to it. Hence the lawyer by necessity must make his or her analysis case-bound.

Parties' framing of the issues and incorporation of directly adverse precedent are vital for stare decisis because a court uses parties' pleadings as the starting point for analysis and should consider their concerns. The rule requires that the lawyer "recognize the conflict and suggest how it might be resolved in such a way that his client prevails." In doing so, the lawyer provides the court with his or her strongest argument for how a judge may work within the bounds of precedent to reach the proper result. The judge then is provided with at least two reasoned alternatives—from both the plaintiff's and defendant's counsel—for engaging in precedent-bound decision-making. In reviewing lawyers' arguments, as Geoffrey Hazard has stated, "the court must acknowledge that the authorities are in conflict or that there is an unresolved question of legal policy at issue. In other words, to make a rational choice among legal alternatives presuppose[s] a recognition that there are alternatives." The judge need not analyze precedent sua sponte but is provided the logical conclusions of precedent-bound argument by the parties themselves. The parties thus promote stare decisis by explaining how their position comports with or deviates from prior case law.

In addition to guiding judges through reasoning that incorporates adverse precedent, the rule encourages them to grapple with cases whose propositions differ from that of one party. Because a judge has been alerted to directly adverse cases, in rendering a decision the judge must confront these cases and similarly engage in rigorous legal analysis of their facts and holdings. A decision must provide a reasoned argument, even if merely in a footnote, as to why that adverse precedent does or does not apply to the case before it.

135. Although most articles and commentaries decline to address this rule in stare decisis terms, at least one other commentator has recognized how the doctrine of stare decisis promulgates this rule. Angelica Gilmore, Self-Inflicted Wounds: The Duty to Disclose Damaging Legal Authority, 43 CLEV. STA. L. REV. 303, 307–09 (1995) ("An advocate’s duty to disclose directly adverse legal authority in the controlling jurisdiction under Rule 3.3(a)(3) seems to be an outgrowth of the drafters’ commitment to the principle of stare decisis."). Indeed, even court opinions addressing this issue rarely relate it to stare decisis. A thorough search has produced only one case, subsequently cited by other courts, that explicitly draws the connection between the lawyer’s duty and stare decisis, and does so in a footnote:

While good faith efforts to distinguish a situation from those in which the law is well settled and efforts to evolve the law based on reason and experience are appreciated, attempts to blindside the Court through failure to bring relevant, binding, and instructive authority to the Court’s attention are injurious to the administration of stare decisis.


137. Id. at 830.

138. Of course, lawyers may provide alternative ways of understanding precedent in their own briefs, and litigation often concerns more than two parties.

139. Hazard, supra note 136, at 830.
Since the rule requires lawyers to alert judges to directly adverse cases and causes them to provide judges with ways to incorporate those cases into their reasoning, it facilitates courts' analysis of those cases. The court's decision will not merely acknowledge differing cases. Instead, it will use the lines of reasoning within them, generally fleshing out how a precedential rule applies to different facts and developing the precedent by showing the extent to which it applies to a new circumstance. If a court decides to deviate from the adverse authority, it must provide compelling reasons for doing so in order to retain legitimacy and avoid overruling.

The disclosure of precedential adverse authority also aids stare decisis by requiring lawyers to cite cases regardless of the time they were decided. Lawyers must cite directly adverse cases even when they are "stale": "the mere passage of time does not transform directly adverse authority into something else and thus excuse lack of disclosure to the court."140 Because of this rule, a court will be confronted with the precedential cases that the lawyers cite even when they seem from a different legal era. There is no expiration date after which a court can discard old opinions. In fact, the strength of some precedent grows with the passage of time depending on how many times it has been cited or implicitly relied upon.

Some courts have interpreted the definition of "directly adverse" in a way that encourages stare decisis more broadly, especially when there is less case law on point. While the rule technically only addresses vertical stare decisis issues, U.S. courts have criticized lawyers for declining to cite substantially similar cases from other district courts or other circuits, which are not binding on the court.141

Furthermore, some courts still encourage lawyers to follow ABA Formal Opinion 280, which advises that, "[w]here the question is a new or novel one, such as the constitutionality or construction of a statute, on which there is a dearth of authority, the lawyer's duty may be broader."142 Although a lawyer on the face of the rule is not required to take into consideration the law as it percolates among sister courts and appellate courts outside the jurisdiction in which the case applies, those courts have interpreted the rule as requiring a


141. See CRIMINAL DEFENSE ETHICS § 5:23 (2d ed. 2015) (describing the range of requirements courts have for disclosure—from informing the court of "significant developments in the law" to prohibiting the citation of unpublished cases); J. Lyn Entrikin Goeming, Legal Fiction of the "Unpublished" Kind: The Surreal Paradox of No-Citation Rules and the Ethical Duty of Candor, 1 SETON HALL CIR. REV. 27 (2005) (discussing how prohibitions on citation to unpublished opinions affect this duty); Richmond, Appellate Ethics, supra note 119, at 319 (stating that lawyers "may be required to cite trial court decisions . . ., a lower-court opinion even if it is on appeal, so long as the applicable law provides that the decision has value as precedent pending appeal . . ., or unpublished decisions" unless doing so is "prohibited[,]" and further noting that, under a lawyer's general duty of candor, a lawyer who has cited outside precedent to support his or her point may be held to correspondingly cite any precedent that cuts against the argument); Richard Silverman, Is New Jersey's Heightened Duty of Candor Too Much of a Good Thing?, 19 GEO. J. LEGAL ETHICS 951, 955 (2007) (mentioning cases that chastise attorneys for failing to provide adverse precedent from other circuits).

142. Irion, supra note 124, at 51 (quoting ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 280 (1949)).
certain harmonization of the law through the citation of similar, nonbinding cases.

Overall, the adversarial nature of common-law proceedings does not allow parties to hide authorities that are potentially relevant; on the contrary, it forces parties to make sense of authorities that either contradict or weaken their allegations. All of these requirements build the foundations upon which a court can provide an in-depth analysis of prior decisions and determine where precedents fit within them.

B. The Intellectual Framework of Common-Law Lawyers and Comparative Law

In a digital age, the obligation to disclose adverse authorities may seem superfluous—after all, a court now can find precedent itself relatively easily. On the contrary, it remains relevant because it encodes the expectation that all parties provide narratives of the existing authorities. By imposing a duty on parties to cite precedential cases, common-law jurisdictions force judges to pay close attention to those precedents in legal reasoning. This attention preserves stare decisis as being at the “heart of common law legal method” while nurturing a specific type of legal reasoning. “[L]awyers and judges refer to the things they cite as authorities because they frame and guide their lines of reasoning. What they cite matters not solely because of what they say but mostly because of where they come from.

The importance of this issue is seen in the debate about the legitimacy of comparative law arguments in courts. To argue for the use of comparative law in American courts, Vicki Jackson has evoked the adversarial logic that governs common-law trials. She has stated that, since for American judges “the ‘adversary’ system assumes that judges can be informed—at least in part—about issues with which the judge is not otherwise familiar through briefing by well-trained advocates,” parties can legitimately exploit foreign law in their arguments. In actuality, the practice is problematic precisely because the adversarial nature of the trial—and a lawyer’s duty to be a “zealous advocate” for his or her client—is not counterbalanced by the lawyers’ duty to quote all relevant decisions when they draw from foreign law.

This point was recently emphasized by U.K. Supreme Court Justice Lady Hale, who touched upon the problems of indulging in comparative law inquiries from the bench. She noted that, while “it would be foolish not to look at” other countries, difficulties arise in determining what foreign laws say “in a reliable

143. Harris, supra note 98, at 223.
144. Frederick Schauer, Authority and Authorities, 94 VA. L. REV 1931, 1934 (2008).
145. Id. at 1939 (“[W]hen a source is authoritative it provides a potentially determinative reason for a decision other than the decision that the subject might have made after taking into account all of the knowledge, wisdom, and information she can obtain from herself or others.”).
146. Id. at 1936.
The Duty to Disclose Adverse Precedents

way." In fact, Lady Hale continued, "[i]n our adversarial system, we cannot always rely upon the parties to do this. They may not have the resources and, even if they do, they may tend to concentrate on the material which helps their case." She showed particular concern that the sources of knowledge for foreign law may be unreliable, as each party would focus on the foreign case law that helps it the most while ignoring, or even hiding, the rest. Parties could use foreign law in a way that they are prohibited from using domestic law.

Lady Hale's preoccupation draws from the English code of conduct: no specific provision would require English barristers to disclose the weaknesses in their arguments by pointing to adverse decisions that were delivered in other jurisdictions. While there is "stringent professional discipline in matters of ethics," which allows courts to "rely on members of the bar to inform them fully and fairly of all legal authorities (statute or case-law) bearing on a point in issue between parties," the lack of a corresponding duty for foreign sources allows lawyers to easily hide or misrepresent foreign precedents. English judges, then, would bear the burden of exploring foreign precedents more accurately—but "the court has no duty to decide any matters not in issue, or to inform itself independently about the law governing them."

As Patrick Glenu famously put it, foreign case law can offer persuasive authority, which has no normative authority but can still convince a court because of the soundness of its reasoning. But, that is all. This different status of foreign decisions singles them out from the authorities that common-law lawyers are expected to share with the judge.

There is therefore a striking parallel between the different statuses of domestic and foreign case law within common-law lawyers' codes of conduct and the different statuses of these two categories within judges' legal reasoning, in Lady Hale's words. Domestic precedents are incorporated into judicial reasoning because they are authorities that bind judges and lawyers alike. If foreign cases are incorporated into the reasoning of the parties or of the judges, it is only because they are persuasive. And persuasion is viewed with circumspection, as it may have the power to alter the strict normative logic of domestic precedents.

Persuasive arguments work well as outcome-driven arguments. Parties and courts may be inclined to use them because they believe that such arguments could shed light on the case at issue. Conversely, arguments from domestic precedent are process-related. They are necessary to process the case, independent from the result that follows from them.

149. Id.
150. Id.
151. Id.
153. Id.
The adversarial system, which causes judges to rely on parties’ pleadings, obligates parties to take advantage of narratives that best support their arguments. The possibility that lawyers may cherry-pick\(^{155}\) the domestic decisions they prefer is mitigated by the duty to cite the relevant authorities and the attendant need to construe a narrative that takes them into account. Foreign law is technically not authoritative and is thus susceptible to outcome-oriented selectivity. Therefore, it is a cause of controversy.

C. Supranational European Law and Lawyers

1. Supranational Lawyers and Supranational Procedure

In supranational European law, there is quite a different approach to precedent. This is no surprise. Transnational legal practice at large is unfamiliar with this concept. Both the Charter of Core Principles of the European Legal Profession and the Code of Conduct for European Lawyers are silent on this matter. The Charter is a transnational document and its values are shared by the professional guilds of lawyers of forty-five European states;\(^ {156}\) the Code is a binding document for all European lawyers in their transnational activities.\(^ {157}\) Both prohibit lawyers from misleading judges and providing them with false information, but are silent on precedents.\(^ {158}\)

Of course, the two aforementioned documents do not apply to the CJEU and the ECtHR, per se, as they target transnational legal practice, while the CJEU and the ECtHR fall within the spectrum of international law.\(^ {159}\) But the rules governing litigation before the CJEU and the ECtHR provide a specific approach to litigation, compared to that of common-law courts, and certainly do not deal with how lawyers should treat precedent.

There is no specific set of rules for lawyers practicing at either the CJEU or the ECtHR, nor is there a clear indication of what their role is with regard to the client and the judges. Legal scholarship is also of little help here, as interest in professional ethics for lawyers practicing in those courts has grown only recently.\(^ {160}\) The CJEU’s and the ECtHR’s rules of procedure only require that the parties submit the relevant facts and the “reasons”\(^ {161}\) of action or the

---


\(^{157}\). Id.


\(^{159}\). Arman Sarvarian, Common Ethical Standards for Counsel before the European Court of Justice and European Court of Human Rights, 23 EUR. J. INT’L L. 991, 999 (2012).

\(^{160}\). Id. at 991-992.

Arguments may of course include previous judgments, but there is no requirement to do so. The rules of procedure’s silence on precedents echoes the practice of most of their Member States’ domestic regimes. As the English Court of Appeal has recognized, “[f]or example, in Germany there is apparently no duty to refer the court to adverse authorities as in England.”

The rules and practices of the CJEU and the ECtHR can, however, shed some light on what they expect from lawyers. From the time that it was the Court of Justice of the Coal and Steel Community and the Court of Justice of the European Communities, the CJEU has inherited many of the rules that govern the procedure of the International Court of Justice. Its proceedings consist of a written part and an oral part. The oral part starts with the reading of a summary of written pleadings by the Judge Rapporteur, whom the CJEU assigns to handle the case. The report then provides the CJEU and the parties with a concise recapitulation of the submissions of the parties as well as the facts.

At the CJEU, the oral pleadings tend to be as succinct as possible. It has become customary to hand out the Judge Rapporteur’s summary to the parties instead of reading it aloud, and the advocates are advised to restrain their oral pleadings to a limited amount of time, around fifteen minutes normally. This basically means that the legal arguments need to be fully articulated within the written pleading, which now is limited to twenty pages maximum, and that there is very little time for litigants to argue orally about the applicability of precedents to the case at hand. Such brevity of written and oral submissions may have affected the lawyers’ focus on precedent, forcing them to be selective rather than exhaustive in their analysis of the existing case law.

Confidentiality also seems to have affected the role of precedents in the CJEU’s legal reasoning. Until the current Rules of Procedure allowed anyone to consult the CJEU register that keeps all the relevant documents of a case, “[t]he practice of the European Court of Justice [was] to treat as confidential the text of the written observations of the parties, unless the latter expressly consent to their disclosure.” This means that, notwithstanding the overwhelming importance of written submissions for the case in comparison with the oral

162. Practice Directions, supra note 66, arts. 1 & 12.
165. Id. at 12.
166. Id.
167. Id.
169. CJEU Rules of Procedure, supra note 74, art. 44; see Practice Directions, supra note 66, arts. 44 & 52.
170. Id.
171. CJEU Rules of Procedure, supra note 74, art. 22.
pleadings, the audience and future litigants were likely to know only the summary that the Judge Rapporteur made at the oral pleading and the parts that the Advocate General found relevant while drafting his or her opinion. The opacity of the proceedings must have also affected the transparency of how the CJEU navigates its case law, at least until the confidentiality rule was removed.

The distinct typology of the CJEU’s proceedings has also created a group of lawyers with a particular style of litigation. There is no single, unified body of lawyers practicing at the CJEU, since lawyers litigating at the CJEU simply need to be qualified to practice before a court of a member State or of a member of the European Economic Area, whose territories cover the European Union and also Iceland, Liechtenstein, and Norway. The European Union, however, has helped to create a common mentality across EU domestic jurisdictions. This happened from the very beginning, as lawyers and other experts in legal matters played a crucial role in conceiving and expounding the founding Treaties that later culminated in the EU. Moreover, “[t]he [CJEU], along with other EU institutions, actively cultivated and supported the training of networks of national judges committed to European law who might send them cases through the preliminary ruling procedure.”

All in all, the type of lawyers who litigate before the CJEU tend not to provide the judges with good, consistent, and comprehensive analysis of the existing precedent. Their role, however, coheres with the logic and dynamics of the CJEU itself. Its judges’ scope of inquiry is not confined to the parties’ allegations, as the CJEU’s procedure follows an inquisitorial and not adversarial system. Moreover, through a written opinion, the Advocate General feeds the CJEU with facts and legal reflections pursuant to the European Union’s interest in the outcome. Within this framework, the parties do not need to assist the CJEU the way common-law lawyers are supposed to assist common-law courts.

The ECtHR shares many similarities with the CJEU. While the ECtHR does not have any office similar to the CJEU’s Advocate General, a Judge Rapporteur shepherds the case proceeding, similar to what happens within the CJEU. All documents filed to the Registry of the ECtHR are available to the public.

Lawyers can practice as long as they are qualified in “any of the

173. Id. at 22; see CJEU Rules of Procedure, supra note 74, art. 59.
174. CJEU Rules of Procedure, supra note 74, art. 44; see Practice Directions, supra note 66, art. 44.
177. Practice Directions, supra note 66, art. 9 (emphasizing that the “written part of the procedure in preliminary rulings is characterized by the absence of adversarial proceedings”).
178. Id.
179. Baudenbacher, supra note 88, at 524.
180. RULES OF COURT, supra note 161, Rule 49(2).
181. Id. Rule 33(2).
Contracting Parties and resident in the territory of one of them. This openness means that the pool of lawyers is very rich and as diverse as the practices of the State members.

The ECtHR’s subject matter has provided a special type of litigation and inflated the ECtHR’s docket beyond its capacity. Since the ECtHR deals with human rights issues, lawyers frame their applications in human rights terms; thus, many legal cases are transformed into human rights disputes. The success of this transformation in turn has expanded the scope of the ECtHR’s docket, making its case law less manageable.

4. The Supranational Culture of Precedent

If parties have no duty to mention all previous decisions in their submissions, judges will have more leeway in framing their arguments. This is reflected in the “very free style of interpretation of the [CJEU].” In ruling, they likely will cite the decisions that fit with their line of reasoning and conclusions, possibly consider the judgments that parties have mentioned, and be able to disregard controversial precedents that parties may have overlooked. Conversely, in common-law systems, parties are supposed to cite all relevant precedents and expect that judges will consider them in their judgment. Therefore, they are likely to develop narratives that include all the precedents that they are required to mention, while providing arguments for the irrelevancy of others. Judges will hardly avoid discussing controversial decisions, as parties have not just mentioned them but also tried to make sense of them.

In Europe, the outcome of a case is not constrained by previous case law. Departures from it are not understood as controversial ruptures but rather as legitimate exercises of judicial review. For example, the CJEU makes choices among possible interpretations of the law according to the probable effect they would have on European integration instead of trying to achieve simple consistency with previous case law. More generally, the absence of the obligation to consider previous rulings thoroughly is closely linked to the court’s practice to look more prospectively while judging. Supranational European courts lack clear threads of case law not because they are taciturn. Actually, they write a lot. The ECtHR quotes itself multiple times and the CJEU develops its legal doctrine through the Advocate General’s rich opinions. In fact, continental European legal culture has primed itself for constant modernization.

---

182. Id. Rule 36(a). The President of the Chamber, however, can dispense with such requisites.
183. Hillebrecht, supra note 68, at 151.
184. Id. at 150-51.
185. Claus Gulmann, Methods of Interpretation of the European Court of Justice, 24 SCANDINAVIAN STUD. L. 187, 190 (1980).
187. Heydon, supra note 23, at 407 (“[T]he judgments lack reasoning. The judgments are long and earnest.”).
188. Balcerzak, supra note 74, at 139.
and a purpose-oriented legal approach. The ECtHR’s “living instrument” theory, as described above, has tried to ensure that the ECtHR acts with a progressive spirit to keep pace with cultural and legal developments worldwide in a way that is largely unknown to English common-law judges.

The disparity between European and common-law approaches can be seen in the ECtHR’s effects on British common law. The United Kingdom provided for a moderate integration of the ECtHR’s case law into British law through the adoption of the Human Rights Act in 1998, which requires domestic courts to consider ECtHR case law when deciding a case involving rights under the Convention. This modest integration has increased the activism of the British judiciary’s approach to human rights cases.

From its inception, meanwhile, the CJEU has maintained a teleological line of reasoning in its judgments, adopting “a particular legal thinking about the constitutional nature of the ECJ developed during the 1950s [that] was shared by a number of important actors in the field of European law.” This approach was much more oriented toward the future than to the past. It was preoccupied with the likely effects of a judgment for the sake of legal integration among EU members rather than with its coherence with the existing case-law. Admittedly, once the teleological approach was explicated, the decisions of the Court became, on the whole, consistent, principled, and “highly predictable.”

IV. STATUTORY AND CONSTITUTIONAL INTERPRETATION AND JUDICIAL PRECEDENT

Common law and pan-European patterns of statutory and constitutional interpretation provide additional evidence about the different logic that governs the development of the law in these two regimes and the role that precedents play in it. Pan-European jurisdictions are much more progress-oriented and have crafted modes of interpretation that start with the text but do not confine themselves to it.

Differences inhere in how broadly common-law jurisdictions interpret statutes. Anglo-American courts tend to interpret statutes relatively narrowly and start by examining the literal meaning of the words themselves. Yet, even with

---

191. Human Rights Act 1998, c.42 (Eng.).
194. Rasmussen, Origins, supra note 144, at 97.
195. Fennelly, supra note 189, at 667.
197. Sir Philip Sales & Richard Ekins, Rights-Consistent Interpretation and the Human Rights
this shared commitment to studying the text, there are various approaches to statutory interpretation in common-law systems. English courts until recently clearly preferred focusing on the plain meaning of the text rather than the political will of its drafters.\textsuperscript{198} They therefore lack an extensive tradition of interpreting statutes in light of any original intent. Meanwhile, American legal theory sees a conflict between its text-bound theories: textualists rely on the plain meaning of the text,\textsuperscript{199} intentionalists focus on the intentions of the Congress that enacted it,\textsuperscript{200} and purposivists attempt to extrapolate and further the text's purpose.\textsuperscript{201} These many strands of interpretation can be in tension with some proponents of stare decisis, who would prefer not to alter the law as settled by the relevant precedents even if these modes of interpretation would lead to a different result.\textsuperscript{202}

Many of these dynamics are missing in Europe. Supranational European courts decline to explore the original intent of the text's drafters, as evidenced by decisions disregarding the clear meaning of the relevant treaty.\textsuperscript{203} This non-use is outside the norm for international law. Usually in international law the official working papers from the drafting of international documents, the \textit{travaux préparatoires}, have a special status for the interpretation of documents. In fact, the meta-treaty that often governs the background principles for the interpretation of international documents, the Vienna Convention on the Law of Treaties (VCLT), requires that courts interpret ambiguous treaty texts in accordance with the \textit{travaux préparatoires}.\textsuperscript{204} Yet, until recently, the CJEU could not even reference its \textit{travaux préparatoires} because they were unavailable.\textsuperscript{205} Meanwhile, the ECtHR clearly departed from the VCLT in declining to interpret the Convention in accordance with the meaning that it had

\textit{Act 1998, 127 Law Q. Rev. 217, 221 (2011) ("The object of statutory interpretation . . . is the meaning the legislature intended to convey in enacting the statutory text.")}

198. This remained the case until \textit{Pepper v. Hart}, which changed the law and allowed the examination of legislative history to ascertain the will of the legislature. \textit{Pepper v. Hart} [1992] UKHL 3, [1993] AC 593.


202. See, e.g., M. Stokes Paulsen, \textit{The Text, the Whole Text, and Nothing but the Text, So Help Me God: Un-Writing Amar's Unwritten Constitution}, 81 U. CHI. L. REV. 1389, 1407 (2014) ("[t]he precedent is already consistent with the written Constitution, the precedent adds nothing new to analysis of the Constitution. . . . [T]he rest of it is improper — If precedent is inconsistent with the written Constitution, following precedent is unfaithful to the Constitution."); see also Christopher Serkin & Nelson Tebbe, \textit{Is the Constitution Special}, 101 CORNELL L. REV. 701, 739–740 (2016) (discussing constitutional interpretation).

203. For example, when considering the \textit{Van Gend en Loos} decision, which revolutionized then-European Economic Community law by recognizing the doctrine of direct effect of European law, "[c]learly no one would suggest that the decision of the Court was legally compelled by the language of the Treaty. Even the Advocate General held, in the circumstances of this case, that direct effect should not be given." Weiler, \textit{Court of Justice}, supra note 196, at 571.

204. Article 31 commands that a treaty be interpreted according to its ordinary meaning; when necessary, according to Article 32, the "preparatory work of the treaty and the circumstances of its conclusion" is a "supplementary means of interpretation." Vienna Convention on the Law of Treaties, arts. 31-32, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

205. Fennelly, supra note 189, at 666; Gulmann, supra note 185, at 199.
when it was drafted. European courts fail to cultivate an interest in textualist modes of interpretation to compensate for their lack of interest in precedent.

Within European legal culture, the text itself is not a solid anchor for interpretation. The ECtHR reads the Convention’s provisions in light of “present-day conditions.” Former ECtHR Judge Lech Garlicki candidly acknowledged that, under certain circumstances, the text of the Convention may simply hinder the full development of the ECtHR’s case law. The CJEU similarly is eager to “set sail from the secure anchorage and protected haven of ‘plain words’ and to explore the wider seas of purpose and context.” Both courts have adopted these interpretations for decades. The ECtHR espoused the idea of the “living instrument” in the late-1970s. The then-European Court of Justice embraced its teleological interpretative theory as early as 1963 when it stated in a seminal opinion that it was “necessary to consider the spirit, the general scheme,” and not just “the wording” of a provision when deciding how to interpret it.

American constitutional law shows that legal reasoning, rather than the theory of stare decisis alone, is what matters most for the vitality of a legal tradition that is based on precedent. Some legal doctrines contend that constitutional law precedents are potentially more flexible than statutory ones, since the Constitution should be able to adapt to new and unforeseeable developments in order to maintain its resilience over the course of generations. Others maintain that constitutional precedents should remain flexible because Congress cannot change an incorrect constitutional decision, only the courts may. Although precedent may be considered to be more flexible in the field of constitutional law than in others, it is certainly not overlooked: the Supreme

---


207. Tyrer v. United Kingdom, supra note 18, at ¶ 31.

208. KANSTANTIN DZEHTSIAROU, EUROPEAN CONSENSUS AND THE LEGITIMACY OF THE EUROPEAN COURT OF HUMAN RIGHTS 203 (2015). More precisely, he stated that the text of the Convention halts the expansion of conventional rights, which normally happens through the use of consensus. In determining consensus, the ECtHR examines changes in domestic laws in a relevant field, from which it may conclude that a consensus among Member States has established the existence of a new right. Id.

209. Fennelly, supra note 189, at 657.


211. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 410–411 (1932) (Brandeis, J.) (“In cases involving the Federal Constitution, the position of this court is unlike that of the highest court of England, where the policy of stare decisis was formulated and is strictly applied to all classes of cases.”) (internal quotations omitted). See HAROLD J. BERMAN & WILLIAM R. GREINER, THE NATURE AND FUNCTIONS OF LAW 493 (1966) (“In matters of constitutional law... the doctrine of precedent has still less value than in matters of tort law, since it is a function of the courts under our system of law to adapt the provisions of the Constitution to the changing needs of society.”).

212. See, e.g., Patterson v. McLean Credit Union, 491 U.S. 164, 172–73 (1989) ("Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done."); Smith v. Allwright, 321 U.S. 649, 665 (1944) ("In constitutional questions, where correction depends upon amendment and not upon legislative action[,] this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions."); see also C. Serkin & N. Tebbe, IS THE CONSTITUTION SPECIAL, 101 CORNELL L. REV. 701, 762 (2016) (discussing the possibility of construing a Constitution in the least harmful way).
The Duty to Disclose Adverse Precedents

Court itself has clarified that, in interpreting the Constitution, prior precedents are key considerations. Stare decisis may not be strictly applied, but "[t]his does not mean that the Constitution has no fixed meaning and that the courts will overturn previous constitutional decisions whenever they disapprove of them; on the contrary, the Constitution has an extraordinary stability as a framework . . . and the Supreme Court of the United States, in interpreting it, is strongly influenced by its own past decisions."

Stare decisis can unfold in several alternative ways: it is one thing to freeze the development of the law into a set of unchangeable precedents; it is another thing to rely on previous decisions to help guide a change of precedent. But the legal reasoning that normally adopts stare decisis surely refuses to cite precedents without explaining why and how the case law changes. If, as Duxbury believes, "precedents are vectors for reason," that legal reasoning considers them—potentially all of them—cheerfully, as they drive arguments and reveal the intellectual framework within which stare decisis operates.

V. AMICI CURIAE AND THE DUTY TO DISCLOSE ADVERSE AUTHORITIES

A. The Transformation of Litigation and Amici

One of the practices that can interfere with precedent-bound reasoning is the third-party filing of amicus briefs with the court. "Amicus curiae" in Latin literally means "friend of the court." In Roman law and ancient common law, it referred to people who were invited or permitted to make observations that would help the court decide a case.

There has been a steady growth of amicus briefs in litigation worldwide. The practice of filing briefs has been part of strategies of groups, lobbyists, and stakeholders who, although they do not have vested interests in a specific case, expect to be affected by it. This concern has also increased the transnational practice of filing briefs in other jurisdictions, hoping that a decision of a foreign or supranational court would be favorable for use in domestic litigation. International tribunals, alongside domestic courts, are receiving a sizable number of amici briefs. The ECtHR is no exception, as its "number of amicus participants, as well as amicus briefs, has been growing steadily over the years."
The interest in filing a brief as an amicus is particularly understandable in legal systems that consider precedents binding or authoritative. A judicial decision to which someone is not a party may establish a precedent that will bind that person, setting a rule to which that party will need to comply. In fact, the rule of stare decisis is among the core reasons that have encouraged judges to accept, or even invite, non-parties to submit their observations.222

The more that common-law systems rely on precedents, the more potential that parties in future trials may try to make their argument before a precedent is established.223 This is particularly true with regard to the shifts that common-law systems like those in the United States and the United Kingdom have experienced in recent times.224 The courts’ role has shifted with increased nationwide and constitutional litigation, as the ramifications of their judgments now go beyond the single dispute that they are asked to assess and resolve. While stare decisis turns single controversies into cases of utmost importance, it can also result in the reverse, by mitigating the strength and breadth of precedents precisely in order not to prejudice further constitutional reflections and developments in later controversies. It is beyond dispute, however, that the salience of certain cases invites amici briefs and intervenors more than it did before.

B. The U.S. Model of Public Law Litigation

In a pioneering work in 1976, Professor Abram Chayes noted that U.S. courts were experiencing a powerful shift in their role, which he called “public law litigation.”225 From his perspective, since the late nineteenth century, under the pressure of “a growing body of legislation designed explicitly to modify and regulate basic social and economic arrangements,”226 “a new model of civil litigation” was emerging.227 One century later, this model was replacing the traditional conception of the lawsuit as a “vehicle for settling disputes between private parties about private rights.”228 Professor Chayes observed that the standard “bipolar,” “retrospective” litigation,229 which consisted of a “self-contained episode,”230 was collapsing under the pressure of trials that consisted in the “vindication of constitutional or statutory policies.”231 This new judicial fashion was characterized by the amorphous structure of parties, the fading away

---

226. Id. at 1288.
227. Id. at 1282.
228. Id.
229. Id.
230. Id. at 1283.
231. Id. at 1284.
of the "traditional adversary relationship," and the rise of the judge as the "dominant figure in organizing and guiding the case."\textsuperscript{232} The judge relied on a "wide range of outsiders."\textsuperscript{233} Contemporary legal doctrine reveals that Professor Chayes's prophecy has been realized.\textsuperscript{234}

This activity has impact beyond the dispute at hand. By establishing a precedent, cases may provide the general public and governmental institutions with a certain interpretation of constitutional or statutory texts that indirectly puts an end to future disputes. The classical model of judges as umpires of single controversies, making decisions that will affect only parties, does not accurately portray the actual role that they play.\textsuperscript{235} They are concerned with the issue of getting "the law right," and not simply resolving a dispute.\textsuperscript{236}

In such circumstances, allowing amici to intervene in the proceedings by submitting briefs helps courts identify issues, explore angles, or shine a light on contours that are not part of the architecture of the case at hand. It also helps courts to consider items about which the parties have no knowledge or even prefer not to bring to the attention of the judge. Amicus briefs are an asset that the judge utilizes to "inform himself on aspects of the case not adequately developed by the parties."\textsuperscript{237} As Professor Linda Sandstrom Simars has observed, "The emergence of the public law model and its maturation . . . created a ripe environment for interested non-parties to weigh in on the development of policy through the courts; the amicus brief provided the tool to accomplish this goal."\textsuperscript{238}

It is no surprise, then, that U.S. appellate courts have been flooded with amicus briefs, especially since the 1950s, when amici's submissions "played a critical role in the civil rights litigation."\textsuperscript{239} In appellate courts, "the process reach[ed] beyond the immediate parties to achieve a wider import through the elaboration of generally applicable rules."\textsuperscript{240} Amici's attention to superior courts coheres with such courts' role in overruling precedents and charting new courses in statutory and constitutional interpretation, and to "[p]ublic law litigation['s] . . . call for adequate representation in the proceedings of the range of interests that will be affected by them."\textsuperscript{241}

As a result, "between 1945 and 1995, the number of amicus brief filings increased by more than 800%, while the numbers of cases decided on the merits did not increase. Between 1996 and 2003, at least one amicus brief was filed in

\textsuperscript{232} Id.
\textsuperscript{233} Id.
\textsuperscript{234} Simard, supra note 223, at 673.
\textsuperscript{235} Id. at 1294–95 ("We may call this a stare decisis effect, but it is quite different from the traditional image of autonomous adjustment of individual private transactions in response to judicial decisions. In cases of this kind, the fundamental conception of litigation as a mechanism for private dispute settlement is no longer viable.").
\textsuperscript{237} Chayes, supra note 225, at 1312.
\textsuperscript{238} Simard, supra note 223, at 674.
\textsuperscript{239} Anderson, supra note 236, at 369.
\textsuperscript{240} Chayes, supra note 225, at 1285.
\textsuperscript{241} Id. at 1310.
95% of cases." However, after the Supreme Court was flooded with amicus briefs in one case about abortion, its rules were amended to discourage amicus briefs that do not add anything to the discussion; as a matter of fact, however, the Court still accepts them with a certain largesse.

C. Litigating Human Rights in the Highest British Courts

When the United Kingdom implemented the Human Rights Act in 1998, it replaced the House of Lords as the highest court with a Supreme Court and required that the Supreme Court do what is possible to have British law comply with the European Convention of Human Rights. Basically, that means either a) giving domestic law an interpretation that does not conflict with the Convention or b) signaling to the Parliament that a domestic statute conflicts with the Convention, so that the Parliament can amend the legislation to conform it to the Convention.

These provisions highlighted the role of the Supreme Court as the adjudicator of human rights. Again, this role hardly replicates that traditionally held by common-law courts, be they superior or inferior. Adjudicating human rights and suggesting that the Parliament amend the existing legislation are types of activity that touch upon an indefinite series of potential controversies of public salience. The common law basic framework that sees "two competing legal interests . . . pitted against each other with a judge charged with deciding in accordance with existing law which of the two should prevail" has become no longer viable.

English common law does not ignore third parties' interventions. But amicus briefs traditionally encompassed interventions "in the judicial interest": such amici "neither advocate[d] in [their] own interest nor represent[ed] the public interest." The transformation of litigation into a mechanism of human rights redress has attracted wider interests, and interventions might "even seem . . . to threaten the integrity . . . of the process."

After surveying existing data, commentators have concluded that the

242. Anderson, supra note 236, at 369-70 (quoting Omari Scott Simmons, Picking Friends from the Crowd: Amicus Participation as Political Symbolism, 42 CONN. L. REV. 185, 193 (2009)).
244. According to Supreme Court Rule 37.1, "an amicus curiae brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An amicus curiae brief that does not serve this purpose burdens the Court, and its filing is not favored."
245. Human Rights Act 1998, c.42, § 3 (Eng.) ("So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.").
246. Id., § 4 ("If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.").
248. Id. at 296.
249. Id. at 297.
250. Id. at 296.
The Duty to Disclose Adverse Precedents

Human Rights Act has dramatically changed the role of the highest British court. The Supreme Court has become the target of a sizable number of interventions,\(^\text{251}\) which have focused on human rights claims, while other types of controversies seem to be less interesting. There is no clear correlation between third party interventions and the final outcome of the case, but their advocacy seems to affect the legal reasoning of a judgment.\(^\text{252}\)

**D. Amici’s Arguments**

The success of amicus briefs reflects the changes in the role of adjudication of common-law courts. This affirmation holds true both qualitatively and quantitatively. As stated above, amicus curiae briefs find their roots in the Roman and English traditions,\(^\text{253}\) which welcomed the intervention of experts and other figures who could effectively inform the judge.\(^\text{254}\) This type of nonpartisan help,\(^\text{255}\) provided by people unaffected by the facts of the case or by experts, has never disappeared from the legal scene. But such intervention by those uninterested in the dispute has become secondary.\(^\text{257}\) It is more likely that amici have a specific interest in the judgment—either in its outcome or in its reasoning. It does not mean that they necessarily support some party, although using amici to reinforce one’s own view is a common tool for litigants\(^\text{258}\) of which courts are deeply aware. Amici may even intervene in support of neither of the parties, but out of the interest of pushing the judgment in a certain direction: the public character of litigation cannot but encourage this practice, as non-parties may legitimately expect to suffer the consequences of a judgment of a case in which they have no standing to participate, and therefore resort to filing an amicus brief. They may give “voice to other persons potentially affected by the suit.”\(^\text{259}\)

In doing so, amicus briefs are in a special position during judicial proceedings.\(^\text{260}\) Common-law jurisdictions vary in how they treat amicus briefs—U.S. courts tend to welcome them,\(^\text{261}\) although some judges have voiced their skepticism toward the wide recourse of amici that merely duplicate parties’

---

\(^{251}\) *Id.* at 302, 311. Third parties’ interventions do not fall within the category of amici unless their participation is solicited by the court itself, so we are not calling them “amicis” here.

\(^{252}\) *Id.* at 318–19.

\(^{253}\) Mohan, supra note 243, at 353–54.

\(^{254}\) *Id.* at 368 (“[B]y the 13th century the small but active body of early English barristers known as serjeants-at-law were regularly consulted and were frequently present in court to offer their services...”); see Stuart Banner, *The Myth of the Neutral Amicus: American Courts and Their Friends, 1790-1890*, 20 CONST. COMM. 111, 111 (2003).

\(^{255}\) Anderson, supra note 236, at 363.

\(^{256}\) Mohan, note 243, at 357.

\(^{257}\) *Id.* at 363.

\(^{258}\) *Id.* at 370 (stating that enlisting potential amici has become a valuable skill).

\(^{259}\) Anderson, supra note 236, at 367.

\(^{260}\) *Id.* at 361 (“[A]mici curiae...are not bound by rules of standing and justiciability, or even rules of evidence...”).

\(^{261}\) *Id.* at 364 (“The Supreme Court of the United States has helped the cause of amicus curiae considerably with its open door policy for amicus briefs.”). Anderson also discusses some substantial differences between the potential lobbying pressure of amici in state courts, which still accept amici at the level of last resort. *Id.* at 365, 397.
argument, considering them an "abuse." In some circumstances, judges have not allowed amici to support their allegations through evidence and have prevented them from intervening during oral hearings or on matters of fact. More broadly, courts "have no obligation toward amici: if an amicus brief is not helpful, the court can simply ignore it."

In the United States, fewer privileges come with fewer obligations. Amici in U.S. courts do not have the obligation to disclose precedents that run against their arguments. While judges might appreciate the novelty of amici’s arguments and information, there do not seem to be examples of judges reprimanding amici who lack a thorough consideration of all relevant precedents within their submissions. Judges expect amici to see a controversy from a different angle than the parties and will sometimes criticize briefs that add nothing substantial to issues of which they are already aware.

The special status of amici may also allow them to make arguments that push the law in a certain direction, also evoking foreign laws and practices in order to justify "their law reform efforts." In this respect, they can lobby, promoting specific legal agendas. Several groups, non-governmental organizations, and associations make their case for legal change through amici submissions. In contrast, it is no surprise that the frequent amici briefs that are filed before the ECtHR, which is not precedent-bound, are believed to confirm the ECtHR’s self-understanding "as an institution whose pronouncements would have policy implications for all of Europe." But the role of amici is unsettling for common-law courts, whose legal framework is essentially defined by the existing case law: their lawyers are supposed to keep up with existing laws before making them evolve.

The practice of accepting amici briefs and the changes in the nature of common-law litigation transform the spirit and the logic of common law. The public nature of litigation draws wide attention for specific controversies. As judgments on statutory or constitutional law have an impact that extends beyond the parties involved, amici submit arguments to protect themselves from the consequences of the judgments, and to help establish a precedent that would be favorable to them. But in the United States, they can do so without adopting the

262. Ryan v. Commodity Futures Trading Comm’n, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner J.) (internal citations omitted).
263. Id.
264. O’Brien, supra note 224, at 8 (noting that the Irish Supreme Court accepts only legal submissions from amici).
265. Anderson, supra note 236, at 364.
266. Id. at 361 (“[A]mici curiae . . . can present the court with new information and arguments . . .”).
267. Simard, supra note 223, at 690 (presenting a survey that indicates that “all three levels of the federal bench find amici curiae helpful in offering new legal arguments that are absent from the parties’ briefs”).
268. Shah et al., supra note 247, at 299 (“Third party interventions can be a useful vehicle for bringing international and comparative materials to the attention of the court.”).
269. Id. at 362.
270. Id. at 315 (“NGOs are a very big player in human rights cases post-HRA.”).
271. Dolidze, supra note 221, at 878.
basic intellectual framework that dominates common-law logic: namely, making arguments that incorporate, explain, and develop all the relevant case law that already exists.

In other words, amicus briefs undercut the adversarial process, not simply because amici may provide courts with views others than those of the parties but also because some legal systems allow them to expound their reasonings without having to address all the relevant decisions. Amici may not add anything substantial, but they are able to argue without adopting the precedent-bound legal reasoning.

CONCLUSION: THE UNIVERSAL LESSON OF THE COMMON LAW

The common law has developed a unique pattern of legal reasoning. The dynamics of common-law systems seem to nurture a respect for the past that requires parties and judges to consider previous decisions thoroughly, constraining legal reasoning as well as forging a specific path that all the parties that participate in a judicial controversy should follow. The narratives about the past need not be the same—in fact, they are expected to diverge significantly—but should overlap in their consideration of previous decisions. This approach applies across generations of practicing lawyers as well as jurisdictions.

While a few essential factors—its system of trials and appeals, inherent ability to manage its caseload, and adversarial system—have shaped the common law, they do not categorically distinguish the common law from supranational European systems. The supranational European systems do have a novel type of structure unique from both domestic and international tribunals that makes them distinct. It is also true that the European supranational systems have struggled with caseload management in a way that common-law jurisdictions do not. And the absence of an adversarial system does indeed affect how the European supranational jurisdictions understand and consider cases. But those factors are not the controlling ones that cause the chasm between the common law and supranational European systems. Indeed, in how it handles its caseload and considers cases, the ECtHR is more like common-law jurisdictions than the CJEU is. And yet, the CJEU’s decisions have more of a common-law-like consistency even though the CJEU’s unique structural features have no analogues in common-law jurisdictions. The unique mechanism of “preliminary rulings” makes the CJEU’s opinions precedent for the case at the national level, and the CJEU’s preoccupation with the ordered development of EU law discourages sharp deviations from previous decisions as well as repeated requests for preliminary rulings on the same issue.

There is one main difference that sets common-law systems apart from the European supranational ones, no matter how superficially similar a judicially

272. See Jeremy Waldron, Stare Decisis and the Rule of Law, 111 Mich. L. Rev. 1, 11 (2012) (stating that a judge’s deferential treatment of precedents “will make no sense unless she expects them to cooperate in the respecting of expectations—not necessarily by accepting and applying her formulation as canonical but at least by participating in the creating and sustaining of expectations rooted in decisions like hers”).

273. See infra Section III.B.1-2.
driven form of reasoning may seem. All of the common-law countries examined in this article have some form of an ethical rule that requires disclosure of relevant cases to one degree or another. This shared requirement reveals the expectation held across these systems that the litigators themselves, and not just judges, foster precedent-bound thinking. The way parties frame the issues and incorporate precedent is vital to the courts’ adherence to stare decisis because a court uses the parties’ pleadings as the starting point for its analysis. The case is shaped by the lawyers’ decisions regarding which issues to raise and which decisions to appeal. Since the judge needs to work within parties’ arguments, rather than make determinations about that which is not pleaded, the way lawyers shape a case before the court has even begun to make its determinations is essential to the case’s outcome. The backward-looking approach is not merely an option for common law-based systems: it is required by the common law’s own legal reasoning. Former Judge Posner in his personal capacity shows dissatisfaction about “the backward-looking tendency of legal thinkers, especially judges;” but he acknowledged the importance of that tendency in his capacity as a judge when he mocked a lawyer for behaving like an ostrich. The lawyer had breached one of the common law’s basic premises, not Judge Posner’s favored legal philosophy.

If no ethics rule requires a similar disclosure, and parties are only required to submit their arguments, a judge has greater leeway over how to frame arguments and use precedent. The court is likely to include precedent that agrees with the holding but has no real need to distinguish cases that differ from its outcome. Even more obviously, a court can ignore controversial decisions that may weaken the rationale of the new decision when parties are not expecting it to be addressed.

This striking difference between pan-European adjudication and common-law systems could also help Europeans identify what they are currently lacking. Supranational European law has incentivized a sort of judicial activism, which is rooted in the idea of progress and legal development through the continuous reinterpretation of the existing body of law. This activism is particularly apparent in the field of the ECtHR’s case law, which has famously espoused the theory that the Convention it expounds is a “living instrument” that needs adaptation to the current times.

Because of these courts’ philosophical commitment to legal development through judicial interpretation, the judiciary consistently has been recognized as European supranational law’s main driver. Amicus curiae and inspiration from foreign law have been a trademark of this judicial fashion. This process of legal development in courtrooms has been the target of increasing dissatisfaction and
skepticism, however, from both a theoretical and a practical point of view.276 From a theoretical perspective, some have maintained that it would be inappropriate for a court to modernize the interpretation of written provisions without political consent.277 From a practical one, this type of development is considered ambiguous, incoherent, and largely unpredictable.278

The practical criticisms reach the core of the common-law legacy. They oftentimes have specifically targeted how European law has manipulated previous decisions.279 For a constitutional-style body of law that develops incrementally through judicial decisions, it seems necessary to maintain a transparent legal reasoning that departs from existing case law for substantial and explicit reasons. That is what seems to happen at first sight, as supranational courts now cite precedents routinely and abundantly. But supranational European law is still criticized for being “arcane,” for being deprived of clarity, and for blending holdings and dicta with imprecision.280 It fails to both distinguish and overrule cases explicitly.

These flaws do not result from the lack of a rigid stare decisis. Rather they are products of the absence of one of the essential features of common law: a legal reasoning that works by addressing previous decisions instead of merely citing favorable ones. This absence cannot be compensated by merely implementing rules that require parties to cite all relevant precedents within their argument. Lawyers alone cannot correct a court’s reasoning that is inattentive in how it cites previous judgments. Instead, a court may push parties to be more attentive to precedent in their pleadings by crafting decisions that closely examine its case law and try to incorporate all relevant cases, rather than selectively choosing them based on outcome.

A pattern of legal reasoning more concerned with the past may slow the development of law. But that is not a given. Instead of limiting development, this reasoning through enhancing the consistency of case law and disciplining legal reasoning itself may invite it. The ECtHR’s evolutionary jurisprudence exemplifies this dynamic adequately. The ECtHR’s legal development is undisciplined and lacks adequate justification because of its weak culture of precedent. It therefore fails to support its evolutive case law with adequate


277. Heydon, supra note 23, at 399 (arguing that the ECtHR’s pattern of reasoning would be proper for a legislature).

278. Id. at 404.

279. The ECtHR’s process of creating general principles has sparked special controversy. See Gerards, supra note 15, at 64–65 (internal quotations omitted). Gerards argues that:

[The ECtHR] usually builds on previous case-law, drawing together small pieces of argumentation that it has previously provided, and combining them into a set of general principles or criteria… Although the result of this approach may be a rather ‘deep’ definition, the Court tends to stress that this is the unavoidable outcome of small definitional steps taken in previous cases. Mostly, moreover, the definitions are given at such a high level of abstraction and generality that it would be difficult to disagree with them.

Id.

justification. Its decisions "conflict among themselves" and "are full of dicta." Courts that care about precedent normally draw sharp distinctions between holding and dicta because it allows them to limit the scope of prior judgments and develop the law without creating conflicting lines of case-law.

Finally, a precedent-considering approach can protect courts from the accusation that they legislate from the bench. A legal analysis that considers and thoroughly tries to make sense of previous decisions will cause less controversy than one that creates narratives of the past by highlighting some judgments while overlooking others in order to reach a certain outcome. Harold Berman identified the demise of a "belief in the organic development of law over generations and centuries" in the widespread opinion that expounding the law is just a means to "effecting the will of those who exercise political authority." Courts that want to avoid the risk of politicizing the law should be open to discussing controversial past judgments rather than selectively avoiding them.

281. Id.

282. Randy J. Kozel, Stare Decisis in the Second-Best World, 103 CALIF. L. REV. 1139, 1143 (2015) ("Before a court considers whether a precedent should be overruled, it must determine whether the precedent applies to the case at hand. That inquiry is one of precedential scope . . . .").

283. CHAIM PERELMAN, JUSTICE, LAW, AND ARGUMENT 40 (1980) ("[T]he common-law judge, who seems to be bound by precedents . . . has nevertheless been able to escape from the excessive rigidity that generates injustice by limiting the scope of precedents to the ratio decidendi, which he then defines in his own way, introducing distinctions whenever they are deemed necessary.").

284. Berman, supra note 1, at 255.