

# Teaching the Holding/Dictum Distinction

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The distinction between holding and dictum has received a fair amount of scholarly attention, but much less in legal education. “Every lawyer thinks he knows what [dictum] means, yet few lawyers think much more about it.”<sup>1</sup> Those of us who teach legal writing are in a prime position to rectify this problem.

## An Overview of the Holding/Dictum Distinction

The holding/dictum distinction has been debated for decades.<sup>2</sup> There is no universal agreement on the definitions for these terms, but most typically “holding” is defined as that portion of a legal opinion that is “necessary to the result.”<sup>3</sup> Dictum, on the other hand, is anything that is not a holding.<sup>4</sup> Some question this distinction because, at least arguably, a case’s “holding” is always dependent upon the reader and future circumstances.<sup>5</sup>

<sup>1</sup> *Dictum Revisited*, 4 *Stan. L. Rev.* 509, 509 (1952). This article is adapted from a longer article I wrote. If you would like to see this issue addressed in more detail, see Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 *Brook. L. Rev.* 219 (2010).

<sup>2</sup> See, e.g., Larry Alexander, *Constrained by Precedent*, 63 *S. Cal. L. Rev.* 1, 25 (1989); *Dictum Revisited*, *supra* note 1, at 509; Michael C. Dorf, *Dicta and Article III*, 142 *U. Penn. L. Rev.* 1997, 1998 (1994); Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 *N.Y.U. L. Rev.* 383, 385–86 (1964); Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 *Yale L.J.* 161 (1930); Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 *N.Y.U. L. Rev.* 1249, 1263 (2006).

<sup>3</sup> See, e.g., Kent Greenawalt, *Reflections on Holding and Dictum*, 39 *J. Legal Educ.* 431, 435 (1989); Dorf, *supra* note 2, at 2003.

<sup>4</sup> See, e.g., Leval, *supra* note 2, at 1257. Many argue that a case’s holding should be limited to its facts plus outcome; others argue that a case’s rationale should also be included. See, e.g., Alexander, *supra* note 2, at 29–30; Dorf, *supra* note 2, at 2024.

<sup>5</sup> See, e.g., Teresa Godwin Phelps & Jenny Ann Pitts, *Questioning the Text: The Significance of Phenomenological Hermeneutics for Legal Interpretation*, 29 *St. Louis U. L.J.* 353 (1985).

Despite these issues, our system of stare decisis relies on determinate holdings. Therefore, it is important for lawyers to be able to identify a case’s holding and, as a corollary, identify its dicta.

Knowing the distinction is important because when lawyers (and judges) can’t distinguish a case’s holding from its dicta, injustice can occur. For example, a criminal defendant was procedurally barred from pursuing a federal habeas corpus petition because the federal district court treated dicta from several previous cases as holdings.<sup>6</sup> The defendant had appealed his conviction to the state court of appeals, but the federal court, relying on dicta, held that habeas relief was barred because he had not appealed to the state supreme court.<sup>7</sup> That dicta was based on a state statute that had been amended almost 20 years earlier.<sup>8</sup> Yet the court relied on that dicta and elevated it to a holding—without seeming to notice that it was not binding and that it was in fact an inaccurate statement of the law. Just as the judge read dicta as a holding, it appears that the defendant’s attorney failed to notice and raise the courts’ error, and his client paid the price.<sup>9</sup>

## How Can Lawyers (and Law Students) Learn to Distinguish Between Holding and Dictum?

There are several ways lawyers and law students can learn to distinguish between holding and dictum. First, they can learn in practice from senior lawyers and judges by way of modeling. After seeing the

<sup>6</sup> *Stern v. Schriro*, No. CV 06-16-TUC-DCB, 2007 WL 201235 (D. Ariz. Jan. 24, 2007).

<sup>7</sup> *Id.* at \*6.

<sup>8</sup> 1974 *Ariz. Laws*, Ch. 7, § 3 (codified as amended at *Ariz. Rev. Stat. Ann.* § 13-4031 (1977)); amended by 1989 *Ariz. Laws*, Ch. 58, § 1 (codified as amended at *Ariz. Rev. Stat. Ann.* § 12-120.21(A)(1)).

<sup>9</sup> To complicate the problem, oft-repeated dicta from previous cases becomes binding once a court adopts it as a holding. *Stern* was a trial court decision; when an appellate court adopts dicta, though, lawyers can argue the decision is incorrect but lower courts are bound by that new holding.

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distinction being made clearly, newer lawyers ought to be better themselves at making the distinction. The problem with this approach is that most lawyers and judges are not making the distinction clearly. Perhaps they see a tactical advantage in keeping the distinction muddy. Or perhaps even senior lawyers and judges have difficulty distinguishing between holding and dictum. In either event, newer lawyers are unlikely to learn about the distinction from other lawyers and judges.

Second, they can learn from books (in law school or in practice) about the distinction. Practice aids, study aids, casebooks, and legal writing texts devote some time, although not a substantial amount, to the distinction. The problem with this method is that reading about a skill is not as helpful as practicing a skill, especially practicing it with feedback.

Third—and this is the best option—we can teach them in law school.<sup>10</sup> Furthermore, although the distinction can and should be taught throughout law school, this is a more difficult task in casebook courses because casebooks typically edit out dicta. Unless the professor is willing to create her own materials for the course, casebook courses present a more limited opportunity to address this distinction.

Legal writing courses, though, are in a perfect position to actually teach students the difference between holding and dictum. This is true because 1) we have more control over our materials and assignments; and 2) in our courses, we force students to do more than just think about legal analysis—we teach them to communicate that analysis in writing. That process provides a unique opportunity to teach the holding/dictum distinction.

How much time do we actually spend *teaching* the difference between holding and dictum? We

*tell* students about the difference, but not much space is generally devoted to the topic in texts, and likely not much time is devoted in class. More significantly, rather than simply telling students about the holding/dictum distinction, we ought to make them *apply* that distinction.

### How Can Legal Writing Professors Teach the Holding/Dictum Distinction?

We are most likely to actually teach students how to distinguish between holding and dictum if we assign problems that force them to identify dicta and to use it properly. If we create assignments where some cases have helpful (or potentially harmful) dicta, students will have a chance to 1) identify the dicta; and 2) use the dicta to argue persuasively for a result that helps their case.

Here are six steps that can help us teach the distinction:

1. Talk about the distinction. Assign readings. Raise it in class discussion. Get students thinking about this as an important topic.
2. Find cases with dicta and don't edit it out. This step shouldn't be difficult because most judicial opinions include plenty of dicta.
3. Craft an assignment where the dictum from a precedent case is relevant; if it was the case's holding, the issue would be resolved.
4. Let the students struggle some with the distinction (on a first draft or an outline). Even if you have already talked about the distinction, chances are a large percentage of students will fail to identify that the relevant language is dictum.
5. Discuss the distinction again in class or in individual conferences, where students can be asked directly whether the language they are relying on is the case's (binding) holding or merely (persuasive) dictum.
6. Discuss how lawyers can properly use dicta to argue for a rule. Dictum, especially by a higher court, can be persuasive! But when using dictum to persuade, students must work harder. Simply quoting some key language and citing the case that contained the dictum is not enough. Students

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<sup>10</sup> Judge Leval, senior judge on the U.S. Court of Appeals for the Second Circuit, believes that the single best cure for the blurred distinction between holding and dictum is legal education. We should spend more time in law schools having students actually apply the distinction.

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need to explain why the rule they propose (and that the dictum suggests) is sound and the court should adopt it. In short, students can't treat dictum like a binding case holding. And finally, they are obligated to disclose that the statement is dictum.<sup>11</sup>

The following concrete case example might help. In *NLRB v. Mackay Radio & Tel. Co.*,<sup>12</sup> the Supreme Court upheld an order by the National Labor Relations Board that required the employer to reinstate employees after a strike.<sup>13</sup> Yet the Court stated, in dictum, the general proposition that employers did not have to reinstate striking employees following a strike.<sup>14</sup> Although that statement was not “necessary to the decision,” a number of courts, including the

Supreme Court itself, have repeatedly framed this dictum as the holding of *Mackay Radio*.<sup>15</sup>

As a simple closed-universe problem, students could be given *Mackay Radio* (and perhaps a later case claiming that the dictum was *Mackay Radio*'s holding) and instructed to draft a short memo or motion addressing whether an employer had an obligation to reinstate a striking employee. This exercise would provide students with the opportunity to distinguish between holding and dictum and to properly use the dictum.

### Conclusion

Dicta can be used effectively. But the first step is for students—our future lawyers and judges—to identify that the language they are relying on is dicta. We can help teach them both how to identify it and how to properly use it.

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<sup>11</sup> *The Bluebook: A Uniform System of Citation* R. 10.6.1(a), at 100 (Columbia Law Review Ass'n et al. eds., 19th ed. 2010). That rule states: “When a case is cited for a proposition that is not the single, clear holding of a majority of the court (e.g., alternative holding; by implication; *dictum*; dissenting opinion; plurality opinion; holding unclear), indicate that fact parenthetically.” *Id.* (emphasis added).

<sup>12</sup> 304 U.S. 333 (1938).

<sup>13</sup> *Id.* at 336, 348, 351.

<sup>14</sup> *Id.* at 345–46, 347.

<sup>15</sup> See, e.g., *Trans World Airline, Inc. v. Indep. Fed'n of Flight Attendants*, 489 U.S. 426, 433 (1989).

## Another Perspective

“What about Supreme Court dicta? Some who would agree with my point as applied to the inferior courts would assert that things are different when it comes to the Supreme Court. It is sometimes argued that the lower courts must treat the dicta of the Supreme Court as controlling. Various reasons are given: Great respect is owed to the Supreme Court; it always sits en banc, assuring that all of its Justices have participated in whatever it decides; its small docket means it will not likely hear enough cases to cover any area of law by its holdings.

I certainly agree that great respect is owed to the Supreme Court. It is indisputably supreme among courts. By the same token, however, it is but a court. It may make law only in the ways in which a court may make law. Its constitutional function is to adjudicate. Its holdings are without doubt the law of the land. Its dicta? Anything the Supreme Court says should be considered with care; nonetheless, there is a significant difference between statements about the law, which courts should consider with care and respect, and utterances which have the force of binding law. The Supreme Court's dicta are not law. The issues so addressed remain unadjudicated. When an inferior court has such an issue before it, it may not treat the Supreme Court's dictum as dispositive. It must adjudicate.

I am not counseling disrespect for a higher court, least of all the Supreme Court. I am saying only that a lower court has a constitutional responsibility to decide the case in accordance with law. Dictum is not law. The court must decide a previously undecided question.”

—Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. Rev. 1249, 1274–75 (2006).