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STARE DECISIS IN LOWER COURTS: PREDICTING THE DEMISE OF SUPREME COURT PRECEDENT

The proposition that lower federal courts must follow Supreme Court precedent evokes little controversy. The hierarchical inferiority of the lower federal courts and the doctrine of stare decisis combine to impose a seemingly exceptionless rule of deference to the Supreme Court. But the contours of this rule are not well-defined. Lower courts occasionally decline to follow Supreme Court precedent, even while purporting to follow the Court.

A recent federal court case prompts a fresh examination of the lower courts' duty to follow Supreme Court dictates. In *McCray v. Abrams*,[1] a federal district court held that racially motivated peremptory challenges offend the equal protection clause.[2] In so holding, the court refused to follow an eighteen year old Supreme Court decision, *Swain v. Alabama*.[3]

1. 576 F. Supp. 1244 (E.D.N.Y. 1983).

2. *Id.* at 1249. The court's reliance on the equal protection clause was not unequivocal. Relying on Taylor v. Louisiana, 419 U.S. 522 (1975), the court also intimated that discriminatory use of peremptory challenges violates the sixth amendment requirement that juries be selected from a fair cross-section of the community. 576 F. Supp. at 1247–48. Barring discriminatory use of peremptory challenges on sixth amendment grounds is dubious, however, because the Supreme Court has applied the fair cross-section requirement only to jury pools and venires, never to petit juries. In fact, *Taylor* expressly cautioned against extending the fair cross-section requirement to petit juries. *Taylor*, 419 U.S. at 538.

3. 380 U.S. 202 (1965). In *Swain*, the Court held that racially motivated peremptory challenges in any particular case do not constitute a constitutional violation. *Id.* at 221. However, the Court opined in dicta that a cause of action may exist where the prosecution has systematically excluded minorities from juries by peremptory challenges over a period of time. *Id.* at 223–24.

If the *McCray* court's alternative sixth amendment ground is valid, *see supra* note 2, *McCray* is not necessarily characterized as refusing to follow *Swain*. The Supreme Court did not hold the sixth amendment right to a jury trial applicable to the states until three years after the Court decided *Swain*, an equal protection case. Duncan v. Louisiana, 391 U.S. 145 (1968). But since the equal protection clause is the more plausible ground for prohibiting racially motivated peremptory challenges, and since the court in *McCray* believed its holding unjustified if *Swain* were still "good law," 576 F. Supp. at 1246, this Comment treats *McCray* as resting on the equal protection clause and thus repudiating *Swain*.

There is abundant literature advocating the prohibition of racially motivated challenges. *See, e.g.*, Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235, 283–303 (1968); Comment, *The Defendant's Right to Object to Prosecutional Misuse of the Peremptory Challenge*, 92 HARV. L. REV. 1770 (1979); Comment, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 YALE L.J. 1715 (1977) (advocating recognition of a sixth amendment cause of action). *But see*, Saltzburg & Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 MD. L. REV. 337 (1982) (defending the *Swain* rule). Several state courts have held that racially motivated peremptory challenges violate their state constitutions. *See, e.g.*, People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978); Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979).

The *McCray* defendant had exhausted his appeals for a robbery conviction,[4] and the United States Supreme Court denied a hearing on this conviction.[5] In denying certiorari, however, the Supreme Court appended two opinions. One, a dissent from the certiorari denial joined by two Justices, expressed a dissatisfaction with *Swain* and a desire to hear the case.[6] The other, a concurrence joined by three Justices, acknowledged the importance of the underlying issue,[7] but reasoned that the Supreme Court should delay reconsideration to allow the arguments to fully develop in other courts.[8] Following the denial of certiorari, the *McCray* defendant brought a habeas corpus petition in federal district court. Relying on the expressed willngness of five Justices to reconsider the issue, the district court arrived at a result contrary to *Swain*.[9] The court in *McCray* thus repudiated a Supreme Court case that still possessed precedential authority.

If *McCray* is sound, it implies that lower courts may refuse to follow an authoritative Supreme Court precedent while still upholding their general

4. The trial court denied McCray's motion to set aside the verdict on the ground of invalid prosecutorial use of peremptories. People v. McCray, 104 Misc. 2d 782, 429 N.Y.S.2d 158 (N.Y. Sup. Ct. Kings Co. 1980). The appellate division affirmed without opinion and the court of appeals again affirmed the conviction in a four-to-three decision. 57 N.Y.2d 542, 443 N.E.2d 915, 457 N.Y.S.2d 441 (1982).

5. McCray v. New York, 103 S. Ct. 2438 (1983).

6. Justice Marshall, joined by Justice Brennan, authored the dissent. The dissent avoided expressly stating that the Court should overrule *Swain*, but its criticism leaves little doubt that the dissenters would not follow *Swain*. *Id.* at 2440–41.

7. *Id.* at 2438.

8. *Id.* Justices Blackmun and Powell joined the concurrence written by Justice Stevens. By its terms, the six sentence concurrence took no position on the validity of racially motivated peremptory challenges; it merely expressed the three Justices' interest in examining the issue at a later date. The concurrence reasoned that since judicial review of peremptory challenges is a recent phenomenon, the Court could make a more informed resolution of the issue after other courts addressed some of the practical problems of such review.

As the District Court in *McCray* noted, Justice Stevens' opinion is ambiguous regarding which courts may experiment with judicial review of peremptory challenges. McCray v. Abrams, 576 F. Supp. 1244, 1246 (1983). Stevens' opinion contains some language that a court could construe as inviting federal as well as state courts to examine the issue, and other language apparently directing the invitation exclusively to the states. 103 S. Ct. at 2438–39. State courts, of course, need no invitation to find that criminal defendants enjoy greater rights under their state constitutions than under the federal constitution.

The mere fact that the concurring Justices expressed a willingness to consider the issue, however, casts doubt on *Swain's* continued vitality. This, combined with the concurrence's interest in solutions to the practical problems associated with judicial review of peremptory challenges, indicates that Justices Stevens, Blackmun, and Powell are disposed to determine the limits of such review rather than reject it altogether by reaffirming *Swain*.

9. *McCray*, 576 F. Supp. at 1246. The court noted that "[i]t is unusual, to say the least, for a district court to reexamine a Supreme Court case squarely on point." *Id.* Another unusual aspect of *McCray* is that the respondent, Kings County District Attorney, agreed with the petitioner that the court should not follow *Swain*. *Id.*

obligation to follow the Supreme Court. The question therefore arises, whether and under what circumstances lower courts may disregard the command of authoritative Supreme Court precedent directly on point while not engaging in outright disobedience.[10]

This Comment contends that under limited circumstances lower courts may refuse to follow authoritative precedent. The Comment begins by distinguishing the doctrine of stare decisis in the Supreme Court and the doctrine as applied to lower courts. Next, the Comment discusses the doctrine of implicit overrule and suggests that the concept of implicit overrule is not sufficiently broad to encompass all of the circumstances in which lower courts should be allowed to disregard precedent. Using *McCray* as a paradigm, this Comment concludes that lower courts, within narrow limits, should be free to disregard even authoritative precedent when it is predictable that the Supreme Court would no longer follow the precedent.[11]

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10. The "directly on point" limitation is important because that is where the force of precedent in lower courts is strongest. The hypothesis throughout this Comment is that a precedent directly on point, i.e., precedent that cannot be meaningfully distinguished, confronts a lower court. This limitation isolates the impact of precedent on lower court outcomes, thereby preventing confusion between a precedent not followed because it lacks authority, and one not followed because its authority in the particular case is weakened by factual disanalogies. Since lower courts have no obligation to follow precedents materially dissimilar to the case at bar, excluding dissimilarity as a consideration improves analysis of whether lower courts may disregard Supreme Court precedent.

What is meant by "directly on point" is a question of considerable controversy; the question turns on what it is about a precedent that lower courts must follow. *See, e.g.*, Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161 (1930); Hardisty, *Reflections on Stare Decisis*, 55 IND. L.J. 41 (1979); Montrose, *The Language of, and a Notation for, the Doctrine of Precedent*, 2 U.W. AUSTRALIA ANN. L. REV. 301 (1952). This Comment assumes that what courts follow in a precedent is a rule containing two elements: (1) an antecedent, a generalized description of a fact pattern; and (2) a consequence, the rights and liabilities that the law attaches to that pattern. Where the facts of a case fall within the generalized description in the antecedent, the precedent is "directly on point."

The degree of generality in the antecedent is often at issue, and courts frequently distinguish precedents because the rules they stand for are not as generally applicable as one of the litigants contends. As the facts of a case approach identity with the facts of a precedent, however, the precedent's applicability is increasingly certain; and while no two cases are exactly alike, this Comment assumes that there are cases where a precedent cannot be meaningfully distinguished on its facts.

This Comment also assumes that *McCray* is such a case. The facts in *McCray* and Swain v. Alabama, 380 U.S. 202 (1965), were materially identical: deliberate exclusion of minorities from the petit jury through the use of peremptory challenges. But the court in *McCray* found an equal protection violation; the Court in *Swain* did not.

11. The Comment discusses only methods by which lower courts can disregard precedent and still "follow" the Supreme Court. Some lower courts, however, assert a power to disregard Supreme Court precedent on the ground that the latter court has erred. *See, e.g.*, Jaffree v. Board of School Comm'rs of Mobile County, 554 F. Supp. 1104 (S.D. Ala.), *stayed*, 103 S. Ct. 842, *rev'd sub nom.* Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983). In *Jaffree*, the district court upheld Alabama statutes authorizing prayer in the public schools, in contravention of Engel v. Vitale, 370 U.S. 421 (1962). After an independent review of the history surrounding the adoption of the first and fourteenth amendments, the court found that the establishment clause was never meant to apply to the states, and that "the United States Supreme Court has erred in its reading of history." 554 F. Supp.

I. THE LOWER COURTS' MANDATORY OBLIGATION TO FOLLOW SUPREME COURT PRECEDENT

Initially, stare decisis as it applies to the Supreme Court must be distinguished from the role of stare decisis in lower courts' decisionmaking. The Supreme Court adheres to its own precedents as a matter of policy.[12] In its most thorough discussion of stare decisis, the Supreme Court in *Moragne v. States Marine Lines*[13] adopted a method for determining the degree of deference properly accorded an unsound but controlling precedent. Deciding at the outset that it confronted erroneous precedent, the Court stated that stare decisis promoted the policies of (1) certainty in the law's application, (2) fairness and efficiency in the administration of justice, and (3) maintenance of public confidence in judges as impersonal decisionmakers.[14] The Court then considered the impact that overruling the particular precedent would have on each policy.[15] Finding none of the

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at 1128. Aside from the question of whether the court in *Jaffree* was right about the establishment clause's intended application to the states, the validity of the district court's action depends upon the extent to which it is possible for the Supreme Court to "err," or whether Supreme Court holdings are law simply because the Court so held. Such questions are beyond the scope of this Comment. It should be noted, however, that the Supreme Court has declared that lower courts may not decline to follow Supreme Court holdings thought to be erroneous: "[A] precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." Hutto v. Davis, 454 U.S. 370, 375 (1982).

12. Boys Market, Inc. v. Retail Clerk's Union, Local 770, 398 U.S. 235, 241 (1970) (quoting Helvering v. Hallock, 309 U.S. 106, 119 (1940)).

The Court has traditionally exercised considerable freedom in overruling constitutional decisions, since normal legislative processes cannot correct these errors. Smith v. Allwright, 321 U.S. 649, 665 (1944); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting); *see* Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736–37 (1949). *But see* Smith v. Allwright, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting) (concern that Supreme Court overrule of its own precedents "tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only").

The Court is more reluctant to overrule prior statutory constructions. Monell v. Department of Social Serv., 436 U.S. 658, 695 (1978); *see* Runyon v. McCrary, 427 U.S. 160, 189–92 (1976) (Stevens, J., concurring).

13. 398 U.S. 375 (1970).

14. *Id.* at 403. Detailed analyses of these and other policies supporting the doctrine of stare decisis are found in E. BODENHEIMER, JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF THE LAW, 368–75 (1962); R. WASSERSTROM, THE JUDICIAL DECISION 39–83 (1961); H. Hart & A. Sacks, The Legal Process 587–88 (1958) (mimeographed course materials published by Harvard Law School).

Among the numerous insightful commentaries on various aspects of stare decisis are: Green, *The Development of the Doctrine of Stare Decisis and the Extent to Which it Should Be Applied*, 40 ILL. L. REV. 303 (1946); Hardisty, *supra* note 10; Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1 (1979); Montrose, *supra* note 10; Pound, *What of Stare Decisis?*, 10 FORDHAM L. REV. 1 (1941); Radin, *Case Law and Stare Decisis: Concerning* Präjudizienrecht in Amerika, 33 COLUM. L. REV. 199 (1933); Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3 (1966).

15. *Moragne*, 398 U.S. 403–05.

policies significantly threatened, the Court deemed it appropriate to overrule the precedent.[16]

It is doubtful, however, that lower courts have authority to engage in a similar analysis of Supreme Court precedent. The same basic policies that favor a court following its own precedents also support the duty of lower courts to follow the dictates of higher courts.[17] Yet lower courts are also constrained by their subordinate position in the judicial system. The American judicial hierarchy deprives lower courts of the right simply to refuse to follow binding Supreme Court precedent.[18]

II. IMPLICIT OVERRULE: AN OBLIGATION NOT TO FOLLOW PRECEDENT

There are certain exceptions to the general mandate requiring lower courts to follow Supreme Court precedent. For example, where the Supreme Court has overruled an on point precedent, lower courts must not follow the precedent. Yet the Supreme Court does not always expressly overrule precedents. Indeed, express overrule is relatively rare.[19] More often the Court will distinguish the precedent, interpret it to mean something different, or simply ignore it.[20] Thus, lower courts frequently find themselves in the difficult position of determining whether the Supreme

16. The precedent was *The Harrisburg*, 119 U.S. 199 (1886), which held that maritime law provides no remedy for wrongful death. The *Moragne* Court found the *Harrisburg* rule anomalous in light of modern widespread recognition of wrongful death actions. 398 U.S. at 404.

17. *See supra* note 14 and accompanying text.

18. *See* Kelman, *The Force of Precedent in the Lower Courts*, 14 WAYNE L. REV. 3, 4 (1967) ("The doctrine can be stated simply: there is an *absolute* duty to apply the law as last pronounced by superior judicial authority."). *But see* Green, *supra* note 14, at 319 n.73 ("if the [lower court] is convinced that the former decision should be reconsidered [it] may refuse to follow it so as to give the appellate court the opportunity to reconsider"); *see also supra* note 11 (discussing lower court refusal to follow "erroneous" Supreme Court precedent).

19. Note, *Lower Court Disavowal of Supreme Court Precedent*, 60 VA. L. REV. 494, 511 (1974); *see* Blaustein & Field, *"Overruling" Opinions in the Supreme Court*, 57 MICH. L. REV. 151, 152–59 (1958) (cataloguing various methods by which the Supreme Court overrules its precedents).

20. *See* Harris v. Younger, 281 F. Supp. 507, 511 (C.D. Cal. 1968) ("But a [Supreme Court] decision may be overruled simply by being bypassed and ignored, as well as by being denounced specifically"), *rev'd on other grounds*, 401 U.S. 37 (1977). *See also* Llewellyn's "incomplete" list of 64 ways to deal with precedent, K. LLEWELLYN, THE COMMON LAW TRADITION 76–91 (1960).

The most frequently cited reason for the Supreme Court's failure to expressly overrule discredited precedents is that frequent express overrulings damage the Court's credibility. *See, e.g.*, Note, *supra* note 19, at 515. Commentators are less quick to point out a similar damage to the Court's reputation when it is less than forthright in its treatment of precedent. *But see* Douglas, *supra* note 12, at 749:

> [I]t would be wise judicial administration when a landmark decision falls to overrule expressly all cases in the same genus as the one which is repudiated, even though they are not before the Court. There is candor in that course. *Stare decisis* then is not used to breed the uncertainty which it is supposed to dispel.

Court's past treatment of a precedent is a signal that the precedent is implicitly overruled.[21]

The question in implicit overrule is whether the Supreme Court has so undermined the precedent in subsequent decisions that a lower court should conclude that the precedent does not represent present doctrine.[22] As discussed, there are numerous means available to the Supreme Court to undermine precedent without expressly overruling it. But the analysis is essentially one of the sufficiency of the evidence. The Supreme Court must display some minimum manifestation of disaffection before a lower court can responsibly refuse to follow a precedent.[23]

21. *See, e.g.*, Gold v. DiCarlo, 235 F. Supp. 817, 819 (S.D.N.Y. 1964), *aff'd mem.*, 380 U.S. 520 (1965). In *Gold* the three judge district court upheld an anti-ticket-scalping statute against a due process challenge, despite the fact that the Supreme Court had declared the statute's predecessor violative of substantive due process principles in Tyson & Brother v. Banton, 273 U.S. 418 (1927). Although the Supreme Court had never expressly overruled *Tyson*, the district court noted that "Tyson's fictional test was soon . . . rejected in Nebbia v. New York, 291 U.S. 502 . . . (1934)," and that the Supreme Court had continually refused to strike economic regulations under substantive due process since *Nebbia*. 235 F. Supp. at 819. The court stated: "We would be abdicating our judicial responsibility if we waited for the Supreme Court to use the express words 'We hereby overrule Tyson' . . . before recognizing that the case is no longer binding precedent." *Id.*; *see also* Browder v Gayle, 142 F. Supp 707, 715 (N.D. Ala.) (court found that Plessy v. Ferguson, 163 U.S. 537 (1896), was implicitly overruled), *aff'd mem.*, 352 U.S. 903 (1956).

22. Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1298 (1952). Commentators frequently speak of the "erosion" of precedent: a process of gradually distinguishing, ignoring, and discrediting a precedent until, at some point, the precedent becomes quite clearly impotent. *See, e.g.*, Blaustein & Field, *supra* note 19, at 156–59. The authors note that in such a process "it is extremely difficult to pinpoint *the* decision which results in the actual, practical overruling." *Id.* at 157. Nevertheless, the impossibility of pointing to the decisive case does not negate the possibility that the combination of a number of subsequent decisions can implicitly overrule a prior precedent, sometimes without even mentioning the precedent. See the discussion of *Gold v. DiCarlo*, *supra* note 21.

23. Courts and commentators have suggested a full range of standards, usually without discussion. *See, e.g.*, Salerno v. American League of Professional Baseball Clubs, 429 F.2d 1003, 1005 (2d Cir. 1970) ("near certainty"), *cert. denied*, 400 U.S. 1001 (1971); Mason v. United States, 461 F.2d 1364, 1375 (Ct. Cl. 1972) (lower court disregard permitted when precedent has been "seriously weakened or eroded"), *rev'd*, 412 U.S. 391 (1973); Wyzanski, *supra* note 22, at 1298 ("reasonably clear [the precedents] no longer represent the present doctrine"); Comment, *Stare Decisis and the Lower Courts: Two Recent Cases*, 59 COLUM. L. REV. 504, 508 (1959) (rebuttable presumption of a precedent's continued validity); 56 HARV. L. REV. 652, 653 (1943) (preponderance of the evidence); Note, *The Attitude of Lower Courts to Changing Precedent*, 50 YALE L.J. 1448, 1455 (1941) (same).

At least one court has recognized the subjectivity of these general standards. *In re* Korman, 449 F.2d 32, 39 (7th Cir.) (disregard of precedent permitted "if we are convinced that it has been undermined"), *rev'd sub nom.* United States v. Korman, 406 U.S. 952 (1971). A few courts reject the notion of implicit overrule and insist that the Supreme Court expressly overrule a precedent before they decline to follow it. *See, e.g.*, United States v. Chase, 281 F.2d 225, 230 (7th Cir. 1960) (declaring precedent's vitality "extremely doubtful," but still considering the precedent as binding).

Although it is generally agreed that there must be some threshold of sufficiency for finding a precedent implicitly overruled, the more difficult question is divining the proper threshold. It seems, however, that a "reasonable certainty" standard is appropriate. This standard is high enough to give effect to the notion that the Supreme Court should make its intention to devitalize a precedent clear and unequivocal. And the standard supports the notion that lower courts should have good reason to

Implicit overrule is a useful doctrine. It allows for the incremental and organic growth of the common law by recognizing that precedents can slowly lose their authority without being expressly overruled. The doctrine requires lower courts to declare undermined precedent impotent, and saves the Supreme Court from having to review cases to confirm the obvious.[24]

The doctrine of implicit overrule has limited applicability, however. Lower courts can only infer implicit overrule from Supreme Court dispositions that are capable of overruling a precedent by themselves. They cannot infer implicit overrule from concurring or dissenting opinions, or opinions attached to certiorari denials.[25] Thus, the court in *McCray* could not refuse to follow *Swain v. Alabama*[26] on the ground that *Swain* was implicitly overruled, because statements in a certiorari denial were the only basis for doubting that precedent's continued vitality.

McCray illustrates the limitations of the doctrine of implicit overrule, and the need to expand lower courts' authority to disregard Supreme Court precedent. Occasional cases arise where an authoritative precedent confronts a lower court, but it is reasonably certain that the Supreme Court would not follow the precedent. Within certain constraints, lower courts should be permitted to disregard such precedent. The remainder of this Comment will define the foundation for such action.

III. PREDICTION AS A BASIS FOR DISREGARDING SUPREME COURT PRECEDENT

In addition to implicit overrule, courts and commentators have discussed prediction of Supreme Court outcomes as a basis for disregarding precedent.[27] Under this theory, a lower court need not follow a precedent if it can predict that the Supreme Court would not follow the precedent.

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disregard on point Supreme Court precedent. But the standard is not so high as to altogether eradicate the possibility of an implicit overrule finding by a lower court.

24. *See* Note, *supra* note 12, at 501 ("[W]hen it appears to a certainty that subsequent Supreme Court decisions in an area have rendered a precedent obsolete, so that the precedent serves only to confuse unwary litigants or judges, a lower court can perform a service by formal disavowal.").

25. *See,* H. BLACK, LAW OF JUDICIAL PRECEDENTS, 131–32 (1912); Linzer, *The Meaning of Certiorari Denials,* 79 COLUM. L. REV. 1227, 1304 (1979).

26. 380 U.S. 202 (1965).

27. *See, e.g.,* Spector Motor Serv. v. Walsh, 139 F.2d 809, 814–15, (2d Cir.), *vacated sub nom.* Spector Motor Serv. v. McLaughlin, 323 U.S. 101 (1944); 139 F.2d at 823 (Hand, J., dissenting) (lower court "duty is to divine, as best it can, what would be the event of an appeal"); United States v. Girourard, 149 F.2d 760, 765 (1st Cir. 1945), (Woodbury, J., dissenting) ("duty to prophesy") *rev'd,* 328 U.S. 61 (1946); Buzynski v. Oliver, 538 F.2d 6, 7 (1st Cir.), *cert. denied,* 429 U.S. 984 (1976); *see also* Comment, *supra* note 23; Comment, 37 B.U.L. REV. 137 (1957); 56 HARV. L. REV. 652 (1943); Note, *The Attitude of Lower Courts, supra* note 23. *But see, e.g.,* Mans v. Sunray DX Oil Co., 352 F. Supp. 1095, 1097 (N.D. Okla. 1971) ("This court is disposed to follow the pro-

In one sense these two approaches, implicit overrule and prediction, are merely two ways of arriving at the same conclusion: the current status of a Supreme Court precedent. Both require lower courts to examine evidence pertaining to the Supreme Court's view of the precedent's continued vitality. Further, as with implicit overrule, a lower court cannot refuse to follow a Supreme Court precedent on predictive grounds unless it is reasonably certain that the Supreme Court would not follow the precedent.[28] Thus, in many cases it makes little difference whether a lower court disregards precedent because it is implicitly overruled, or because predictably the Supreme Court would not follow it. The result is the same.

Yet, in other cases the difference between implicit overrule and prediction are readily apparent. For instance, lower courts may confront a precedent predictably impotent yet not implicitly overruled. *McCray v. Abrams*[29] is one example. At the time of the *McCray* decision, the Supreme Court had never decided a case inconsistent with its holding in *Swain*. Yet there were persuasive grounds for believing that the Supreme Court would not follow *Swain* again. With five Justices questioning the vitality of *Swain* in opinions attached to a certiorari denial,[30] the court in *McCray* could predict with some certainty that the Supreme Court would no longer follow *Swain*.[31]

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nouncements of the Supreme Court, not predict them."); Family Security Life Ins. Co. v. Daniels, 79 F. Supp. 62, 69 (E.D.S.C. 1948) ("It is not our duty to speculate on what the Supreme Court as now constituted may do on an appeal in this case"), *rev'd*, 336 U.S. 220 (1949).

28. The proper sufficiency threshold is the subject of debate in the prediction context, as well as the implicit overrule context. *See supra* note 23 and accompanying text. Some courts recognize their power to predict Supreme Court refusal to follow a precedent, but find the basis for prediction in the particular case too weak. *E.g.*, Buzynski v. Oliver, 538 F.2d 6 (1st Cir.), *cert. denied*, 429 U.S. 984 (1976); *In re* Korman, 449 F.2d 32 (7th Cir.), *rev'd*, 406 U.S. 952 (1971).

29. 576 F. Supp. 1244 (E.D.N.Y. 1983). For a summary of *McCray*, see *supra* notes 1–9 and accompanying text.

30. Justice Stevens' concurrence in the *McCray* certiorari denial, 103 S. Ct. 2438, did not explicitly condemn *Swain*. But there is a strong inference that Justice Stevens and the two Justices joining him were dissatisfied with *Swain*, given their express willingness to reconsider the issue. *See supra* note 8; *see also* the discussion of Justice Stevens' concurrence in *The Supreme Court, 1982 Term*, 97 HARV. L. REV. 4, 193–97 (1983).

31. Certiorari denials, and opinions attached thereto, cannot overrule precedents because such denials are wholly without authoritative value. Brown v. Allen, 344 U.S. 443, 488–513 (1952) (opinion of Frankfurter, J.); *see* Linzer, *supra* note 19, at 1251–55. Indeed, Justice Stevens, author of the concurrence to the denial of certiorari in *McCray*, has characterized opinions attached to certiorari denials as "the purest form of dicta." Singleton v. Commissioner, 439 U.S. 940, 945 (1978).

The court in *McCray* did not purport to predict the demise of *Swain;* rather, it accepted an "invitation" to reconsider the issue. 576 F. Supp. at 1246. However, as the court recognized, the invitation theory is dubious in the *McCray* case even if persuasive generally. Any invitation to lower courts to reconsider *Swain* "was perhaps not intended to apply to a collateral attack on the very conviction the Court was addressing." *Id.* Further, it is doubtful that the district court would have considered itself authorized to repudiate *Swain*, in spite of the invitation, were that precedent's demise not predictable.

McCray presents a situation where prediction is valid as a basis for disregarding Supreme Court precedent. Still, some commentators have derided lower court prediction of Supreme Court outcomes as an affront to judicial propriety, both because of the nature of the data upon which predictions are based, and because of the form of predictive reasoning. These objections suggest that there are only narrow circumstances in which prediction is valid. But, as circumscribed by considerations of judicial propriety, prediction is a valid and useful device for lower courts dealing with precedent.[32]

A. Limiting Admissible Predictive Data

The first objective to prediction is that use of much of the relevant data offends judicial propriety. Logically, relevant predictive data include anything probative of the Supreme Court's disposition toward the precedent, not just subsequent decisions, as with implicit overrule. Such a broad scope of relevant data introduces elements unaccustomed and inimical to judicial reasoning. As one court feared, prediction that considers all probative evidence could "subvert the salutary doctrine of stare decisis into a study of personalities."[33]

But prediction per se is not offensive. Rather it is the kinds of data relevant to the prediction that offend. Factors such as changes in Court personnel or the personal ideologies of the Justices are relevant and sometimes reliable indications of the Supreme Court's probable disposition of an issue. For example, a lower court might confidently predict the demise of a precedent if Justices who prior to their appointments publicly

Finally, the fact that the court in *McCray* did not actually predict is not important. The important fact is that *McCray* serves as a fine example of a circumstance where an on point precedent is not implicitly overruled but is predictably impotent.

32. Lower court authority to predict the demise of Supreme Court precedent is permissive, instead of mandatory, because it would be anamolous to find lower courts legally bound to disregard a precedent which the Supreme Court has not overruled. Compare the implicit overrule situation where the duty to disregard the precedent is unquestionably mandatory.

33. Family Sec. Life Ins. Co. v. Daniels, 79 F. Supp. 62, 68 (E.D.S.C. 1948), *rev'd*, 336 U.S. 220 (1949). Lower courts have been particularly averse to predicting Supreme Court outcomes on the basis of changes in Court personnel, or intimations of the Justices' personal beliefs. *See, e.g.*, United States v. Silverman, 166 F. Supp. 838, 840 (D.D.C. 1958) ("It would not do, as counsel suggests, for the Court to speculate on what at some future time the Supreme Court might decide in the light of changes of personnel, and in the light of various remarks of individual members of the Court"), *aff'd*, 275 F.2d 173 (D.C. Cir. 1960), *rev'd*, 365 U.S. 505 (1961); United States v. Swift & Co., 189 F. Supp. 885, 901 (N.D. Ill. 1960) ("We are not free to . . . speculate upon probabilities or personalities."), *aff'd*, 367 U.S. 909 (1961); Grove Press, Inc. v. City of Philadelphia, 300 F. Supp. 281, 291 (E.D. Pa.) ("[I]t is not this Court's function to predict reversals of Supreme Court decisions based upon changes in personnel of the Court."), *modified*, 418 F.2d 82 (3d Cir. 1969); *see also* United States v. Cincotta, 146 F. Supp. 61, 62 (N.D.N.Y. 1956) (refusal to predict on basis of a dissenting opinion).

opposed the precedent joined a closely divided Supreme Court.[34] But personal ideologies or extra-judicial intimations of Justices' legal views, while valuable as predictive aids, are not acceptable reasons for reaching a legal result.

Prediction is a legitimate basis for refusing to follow precedent, but only if the data is amenable to judicial decisionmaking and includable in judicial opinions.[35] The courts must narrow the field of admissible data beyond the constraints of relevance and reliability, so that considerations not customarily part of judicial decisionmaking do not become reasons for disregarding precedent. Justices' personalities, extra-judicial utterances, and other subjective factors may be relevant and reliable. But lower courts should not apply these factors because reference to them violates the concept that law is separate from the judges who declare it.[36]

34. This seems to be what happened in Roofing Wholesale Co. v. Palmer, 108 Ariz. 508, 502 P.2d 1327 (1973). In Roofing Wholesale, the Arizona Supreme Court refused to follow Fuentes v. Shevin, 407 U.S. 67 (1972), a four-to-three decision holding that due process requires a hearing prior to pre-judgment attachment of property. The Arizona court had "doubts" that *Fuentes* would stand "when the two judges who did not participate in the particular case [Justices Rehnquist and Powell, both newly appointed] are called up to participate in a similar question." 502 P.2d at 1329. Apparently, knowledge of the ideological positions of the newly appointed Justices led the court to believe that the *Fuentes* issue would be decided the other way next time.

Roofing Wholesale is noted and criticized in 86 HARV. L. REV. 1307, 1309 (1973) (criticizing "the implicit assumption that it was proper for the Arizona court to speculate about the views of the two nonparticipating Justices"); *see* Kelman, *supra* note 18, at 10 ("And certainly it is not within the compass of the lower courts to disregard authoritative cases on the basis merely of recent substitutions of personnel on the high bench, even when the smart money bets that a change in the law is imminent."). *But see* Note, *The Attitude of Lower Courts*, *supra* note 23, at 1455 (regarding Justices' "personal philosophies" as validly considered by lower courts in determining whether to disregard a precedent).

35. *See* Monaghan, *supra* note 14, at 25 ("A Justice who initially reached a decision on the basis of factors he is unwilling to assert publicly as a justification is, to my mind, under a duty to reconsider his decision with the impermissible factors excluded so far as is humanly possible.").

Some commentators maintain that judges need not disclose the true basis of their decisions if such would reflect adversely on the judicial process. *See, e.g.*, Spruill, *The Effect of an Overruling Decision*, 18 N.C.L. REV. 199, 203 (1940) (agreeing with realists that judges "make" law but approving of judicial opinions which purport to "discover" law because of the public's need to believe in an objective legal reality: "We should worry less about the people who demand that they be fooled and more about the part of the bench and bar which fools itself."). It seems, however, that if judicial "integrity" is to denote more than a mask donned by a cynical legal profession to beguile a naive public, judges are obliged to be candid about their reasons for decisions. To the argument that the court should not express some reasons because the public would not accept them, the short answer is that the courts should not consider such reasons at all, overtly or covertly.

36. *But see* Roofing Wholesale Co. v. Palmer, 108 Ariz. 508, 502 P.2d 1327 (1973) (discussed at *supra* note 34). *Cf.* Barnette v. West Virginia St. Bd. of Educ., 47 F. Supp. 241 (S.D.W. Va. 1942), *aff'd*, 319 U.S. 624 (1943). In *Barnette* the district court held, in direct opposition to a two-year-old Supreme Court precedent, Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940), that a state regulation requiring compulsory flag salutes in public schools was an unconstitutional infringement of religious liberty. *Gobitis* was decided by an eight-to-one majority, but before the *Barnette* case arose two members of the *Gobitis* majority retired and three others, dissenting in Jones v. Opelika, 316 U.S. 584 (1942), *vacated*, 319 U.S. 103 (1943), confessed that they had erred in *Gobitis*.

Although an attorney might rely on these factors as impetus to pursue a case through the appellate hierarchy, no lower court should base its decision on such considerations.

In cases like *McCray*, however, where the basis of prediction derives from statements of Justices made in their judicial capacities, the predictive data are more appropriately included in lower courts' reasoning. Of course dicta such as opinions attached to certiorari denials, concurring and dissenting opinions, or statements not necessary to the holding in majority opinions, generally cannot overrule a precedent.[37] But while dicta seldom overrule a precedent, they are not improper elements in lower courts' reasoning processes. Indeed, where there is no holding directly on point, many lower courts consider themselves bound by Supreme Court dicta,[38] and probably all assign it some weight.

Limiting admissible predictive data to Justices' judicial pronouncements answers the first objection to prediction. Lower courts exclude data offensive to judicial reasoning. Yet, the scope of admissible data is considerably broader than that relevant to determining whether a precedent is implicitly overruled. Under prediction, a lower court may refuse to follow a precedent if it is reasonably certain on the basis of Justices' judicial pronouncements that the Supreme Court will no longer follow the precedent, regardless of whether the precedent is expressly or implicitly overruled.

B. Head-counting: The Form of Predictive Reasoning

The second objection to prediction is that it is inappropriate because of the form of reasoning involved. Some commentators contend that

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Thus, it was clear when *Barnette* was decided that at least four Justices would not follow *Gobitis;* the positions of the two new Justices apparently were not known. The court in *Barnette* stated:

> [W]e feel that we would be recreant to our duty as judges, if through a blind following of a decision which the Supreme Court itself has thus impaired as an authority, we should deny protection to rights which we regard as among the most sacred of those protected by constitutional guarantees.

47 F. Supp. at 253. *Barnette,* like McCray v. Abrams, 576 F. Supp. 1244 (E.D.N.Y. 1983), *see supra* notes 29–31 and accompanying text, is a good example of a lower court confronted by an on point and unoverruled precedent which may be predictably impotent. *Barnette* is discussed in 56 HARV. L. REV. 652 (1943).

37. H. BLACK, *supra* note 25, § 57. An interesting exploration of the concept of dicta is found in Montrose, *supra* note 14, at 325–29.

38. *E.g.*, United States v. Kahn, 251 F. Supp. 702, 708 (S.D.N.Y. 1966); Central La. Elec. Co. v. Rural Electrification Admin., 236 F. Supp. 271, 277 n.10 (W.D. La. 1964), *rev'd,* 354 F.2d 859, *cert. denied,* 385 U.S. 815 (1966); *see also* United States v. Bell, 524 F.2d 202, 206 (2d Cir. 1975).

prediction entails "head-counting,"[39] a form of reasoning they believe is inconsistent with the legal analysis expected of lower courts.[40]

Head-counting is cataloguing individual Justices' known views on an issue to determine whether a majority agrees on the issue's resolution. It is an intuitively obvious method of predicting Supreme Court outcomes. If five or more incumbent Justices have recently expressed disagreement with a precedent, the next time the issue reaches the Court it is reasonably certain that the law will change.[41] This is the form of reasoning the court in *McCray* used. Noting five Justices' dissatisfaction with *Swain*, the court relied on the willingness of five Justices to reconsider the *Swain* decision[42] as permission to stray from the precedent.[43]

The major objection to head-counting is the heavy emphasis on the positions of individual Justices.[44] Head-counting departs considerably from the traditional school of interpreting law—a school that envisions lower courts abstracting rules from majority opinions. Lower courts cannot always apply the traditional method, however, because with increasing

39. *See, e.g.*, Note, *supra* note 19, at 537; Comment, *supra* note 23, at 509.

40. Aside from the traditional duty of judges to give reasons for their decisions, an important function of lower courts is providing the appellate court with a helpful legal analysis. *See* Kelman, *supra* note 18, at 11; *see also* Wyzanski, *supra* note 22, at 1299. Lower courts that justify their decisions solely on the basis of "head-counting" appellate judges do little to enlighten the appellate courts on the legal issues.

41. It may be necessary for the statements to be recent and for the Justices to be incumbent to make the prediction with reasonable certainty. *See generally supra* note 28 and accompanying text.

42. 576 F. Supp. at 1246.

43. For other examples of head-counting as a method for predicting the demise of Supreme Court precedent, see Barnette v. West Virginia St. Bd. of Educ., 47 F. Supp. 251 (S.D.W.Va. 1942) (discussed at *supra* note 36), *aff'd*, 319 U.S. 624 (1943); Maxfield v. Denver & Rio Grande W.R. Co., 8 Utah 2d 183, 330 P.2d 1018 (1958). At issue in *Maxfield* was the quantum of proof required of a plaintiff attacking a release under the Federal Employer's Liability Act, 45 U.S.C. § 51 (1982). In Callen v. Pennsylvania R. Co., 332 U.S. 625 (1948), the Court had employed a high quantum. But in its examination of various opinions subsequent to *Callen*, the court in *Maxfield* determined that "at least six of the Justices were opposed to requiring the employee to meet the highest burden of proof." 330 P.2d at 1020. *Maxfield* is discussed in 8 KAN. L. REV. 165 (1959).

44. *See, e.g.*, United States v. Silverman, 166 F. Supp. 838, 840 (D.D.C. 1958) ("It would not do, as counsel suggests, for the Court to speculate on what at some future time the Supreme Court might decide in the light of . . . various remarks of individual members of the Court in different cases. This exercise might be interesting for the author of an article in a legal periodical, but it would be inappropriate for a Court in deciding actual controversies."), *aff'd*, 275 F.2d 173 (D.C. Cir. 1960), *rev'd*, 365 U.S. 505 (1961).

Commentators have not articulated this objection to head-counting, instead they usually object to the practice because it is unreliable. Comment, *supra* note 23, at 509. Head-counting is not, however, inherently unreliable. Of course lower courts must possess a minimum amount of evidence to validly predict the demise of a precedent, *see supra* note 28 and accompanying text, but there is no reason to believe that evidence obtained through head-counting can never meet the sufficiency threshold.

frequency the Supreme Court fails to present a majority opinion.[45] Very often, for example, the only way to determine the holding in a plurality decision is to head-count.[46]

Until the Supreme Court begins to manifest greater unity in its decisions, head-counting will continue to be a practical and necessary form of judicial reasoning. Discordant Supreme Court voices also validate the use of head-counting for prediction. The form is no more offensive in the prediction context than it is in contexts where its use is already accepted.[47]

C. The Utility of Limited Prediction

So long as lower courts base predictions upon a high standard of sufficient evidence, and limit the predictive data to statements found in Supreme Court writings, the integrity of judicial decisionmaking seems safe. The final issue then is whether predicting Supreme Court outcomes serves to improve the lower courts' decisionmaking process.

Lower courts' power to predict the demise of Supreme Court precedent serves at least two purposes. The first is judicial efficiency. Where a lower court knows that the Supreme Court will not follow a precedent, the lower court may save costly appeals by ruling contrary to the precedent. The second purpose is fairness. If a precedent is predictably impotent, it is overly formalistic to deprive a litigant of a result in lower court because the Supreme Court has not yet done what it predictably will do.[48]

Efficiency and fairness are not always served by prediction, however.

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45. Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 756 (1980).

46. Head-counting is an accepted method for interpreting plurality decisions. *See* Note, *supra* note 45, at 761. The Supreme Court itself head-counts to interpret its plurality precedents. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 169 (1976) (opinion of Stewart, J.) (interpreting Furman v. Georgia, 408 U.S. 238 (1972)).

47. Lower court decisions in contravention of predictably impotent precedent should not rely solely on the head-count. The court's opinion should also contain an analysis of the substantive issues. *See supra* note 40; *see also* McCray v. Abrams, 576 F. Supp. 1244, 1246–49 (E.D.N.Y. 1983). But the head-count renders permissible a legal analysis that is otherwise foreclosed by the precedent.

48. Efficiency and fairness are among the most frequently cited reasons for general adherence to the doctrine of stare decisis. *See, e.g.*, Hart & Sacks, *supra* note 14, at 587–88; Moragne v. States Marine Lines, 398 U.S. 375, 403 (1970). It is important to recognize that the application of these factors to lower court predictions of the Supreme Court is not purely coincidental. Prediction is not inconsistent with the traditionally conceived stare decisis relationship of lower courts to higher courts. Lower courts that decline to follow precedent on predictive grounds are still following the higher court. Instead of following a particular case, however, they are following a trend or a tendency.

Where predicting a precedent's demise is likely to stir great controversy, the Supreme Court should, and probably will, settle the point. Prediction may threaten rather than serve judicial efficiency in this situation, because lower courts are likely to disagree and unsettle law that was once clear.[49] Similarly, where litigants act in reliance on a precedent, prediction may not effectuate fairness. Thus, the propriety of prediction depends on the particular circumstances of a case. But when prediction effectuates fairness, efficiency, or some other judicially cognizable value, there is no reason why lower courts should not disregard predictably impotent precedent.[50]

IV. CONCLUSION

Lower courts serve a valuable function by refusing to follow on point precedents in appropriate circumstances. While they cannot overrule Supreme Court precedent, lower courts can help clarify the law by determining that the Supreme Court has implicitly overruled a precedent. But this lower court authority to disregard precedent should not be limited to the implicit overrule context. Occasionally, lower courts confront precedents that are not implicitly overruled, but that the Supreme Court predictably would not follow. In such circumstances, and where prediction would not exceed the bounds of judicial propriety, lower court authority to disregard predictably impotent precedent should be recognized as a valid and valuable characteristic of the legal system.

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49. The point is made in Note, *supra* note 19, at 520: "If there is reason to believe that disavowal will not be convincing to other lower courts—if it is likely that the Supreme Court must take a similar case on appeal ultimately to resolve the issue—disavowal serves no useful purpose."

50. Even where a lower court decides to follow the precedent rather than the prediction, the lower court is always free to state its objections to the precedent in its opinion. *See* Wyzankski, *supra* note 22, at 1299 ("Where the precedent has not been impaired, the balance is in favor of the trial judge following it in his decree and respectfully stating in his accompanying opinion such reservations as he has.").

For a recent example of a lower court following but criticizing a precedent in the peremptory challenge context, see the en banc decision of the Eighth Circuit in United States v. Childress, 715 F.2d 1313 (1983) (criticizing Swain v. Alabama, 380 U.S. 202 (1965), but failing to predict its demise), *cert. denied*, 104 S. Ct. 744 (1984).