Chapter Thirteen

Common Law Reasoning and Precedent

13–01 At most English and American law schools, the first year is taken up primarily with teaching the concepts, rules, and modes of analysis from the traditional common law subjects (Contracts, Torts, Criminal Law and Property). The extent to which common law reasoning continues to be central or dominant in the practices of "common law legal systems" is a matter of debate,[1] but it still appears to be central to the way legal actors in common law countries *view* their own systems (as both exemplified by and reinforced by the place of common law reasoning in legal education).

In past centuries, judges and theorists described the English common law as rules in force by "long and immemorial usage."[2] This is not a position seriously maintained anymore; it neither fits the facts of common law rules that have changed markedly over the course of centuries (and, sometimes, over the course of decades), nor does it offer a morally attractive vision. Some ancient customs and long-standing rules (e.g. slavery, subjugation of women) may not warrant our respect. As Justice Oliver Wendell Holmes wrote: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."[3] In more recent discussions (though the view goes back many hundreds of years), common law decision-making is more likely to be thought of in terms of a form of common or collective reasoning, or a common or collective form of moral intuition.[4]

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[1] One can argue that even where most cases turn on the interpretation of statutes, administrative regulations, or constitutional provisions, the law is often developed (rightly or wrongly) by the judges in an incremental case-by-case method that is very similar to traditional common law reasoning.

[2] Sir Matthew Hale, *The History of the Common Law of England* (6th ed., Henry Butterworth, London, 1820), p. 21.

[3] Oliver Wendell Holmes, "The Path of the Law", 10 *Harvard Law Review* 457 at 469 (1897).

[4] See the overview offered in Gerald J. Postema, "Philosophy of the Common Law", in Jules L. Coleman and Scott Shapiro eds., *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, Oxford, 2002), pp. 588–622.

Common law reasoning involves the (1) incremental development of the law, (2) by judges, (3) through deciding particular cases, (4) with each decision being shown to be consistent with earlier decisions by a higher or co-equal[5] court. To put the matter a different way, common law reasoning is the uneasy but productive mixture of moral intuition, hierarchical discipline, and principled consistency.

The common law, in this sense of the term, contrasts with laws developed from statutes, administrative regulations, or constitutional provisions. Common law systems (such as Great Britain, the United States,[6] Canada, Australia and New Zealand), are based historically on the English common law. Common law systems are contrasted with civil law systems, which predominate on continental Europe, Central and South America, and much of Asia, and can be traced to ancient Roman Law.[7]

In the past, judges and some legal theorists characterised common law decisions as "discovering existing law" rather than making new law.[8] Whether one thinks that judges are (or should be) discovering existing law rather than making new law, in difficult cases the effect will usually be the same: a retroactive application of a standard to actions that occurred at a time when that standard had not been clearly promulgated. This led Jeremy Bentham (1748–1832), an ardent opponent of judicial legislation and common law decision-making, to comment:

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[5] Whether prior decisions by the same court are binding varies jurisdiction to jurisdiction, and even court by court within a jurisdiction. Within England and Wales, the Court of Appeal is generally bound by its earlier decisions, *Young v Bristol Aeroplane Co Ltd* [1944] K.B. 718, while the House of Lords was not, *Practice Statement (Judicial Precedent)* [1966] 1 W.L.R. 1234.

[6] There is one state in the United States, Louisiana, which has a civil law system.

[7] "The characteristics of civil law systems are, normally, the existence of codes covering large areas of the law and setting down the rights and duties of persons in fairly general terms, the use of terminology and concepts and frequently principles that can be traced back to the Roman law, a less strict regard for judicial precedents, and a greater reliance on the influence of academic lawyers to systematise, criticize, and develop the law in their books and writings." David M. Walker, *The Oxford Companion to Law* (Clarendon Press, Oxford, 1980), p. 223 (entry on "civil law systems").

For a useful short introduction to civil law systems, see John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition* (3rd ed., Stanford University Press, Stanford, 2007); on the role of precedent in European civil law systems, see Eric Tjong Tjin Tai and Karlijn Teuben, "European Precedent Law" (2008), *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1148115*.

[8] One can see evidence of this in Justice Story's comment in *Swift v Tyson*, 41 U.S. 1, 18 (1842):

"In the ordinary use of language, it will hardly be contended, that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not, of themselves, laws."

Justice Oliver Wendell Holmes offered a widely quoted response:

"The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified. . .". *Southern Pacific Co v Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

"It is the judges . . . that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way judges make law for you and me."[9]

The fourth point given for common law reasoning above, the effort to show that current decisions are consistent with prior decisions (at least those made by a higher or co-equal court) is the idea of precedent, of "*stare decisis*"—to abide by, or adhere to, decided cases. The central idea of precedent derives from a basic notion of justice: that like cases should be treated alike. However, this principle merely begins the analysis needed for precedential reasoning. One might say of legal cases what is said of snowflakes: that no two are exactly alike. In what sense, then, can any case determine how a later case should be resolved? The answer is, that though the second case (inevitably) is different from the first, the differences are not morally or legally significant. Perhaps the first case happened on a Wednesday, and the second on a Friday; or the first defendant had blond hair, and the second defendant had red hair: these are not the kind of differences which seem likely to *justify* treating the second defendant differently from the first. At least *some* differences seem clearly to be morally irrelevant. For a large percentage of differences, the moral significance, or lack thereof, will be a matter on which reasonable minds can disagree—and it is those sorts of disagreements which have generated hundreds of volumes of reported cases (and millions of hypotheticals in law school classroom discussions).

The notion of adherence to precedent, deciding in the same way as earlier cases, leads to one of the paradoxes of common law reasoning: that precedent is only of crucial importance when the prior case was *wrongly decided* (or at least could have been decided in a different way with equal legitimacy). Here is why: if the one morally correct way to resolve a particular legal dispute is to hold the defendant liable, then that is how the court should decide, just as a matter of doing the right thing, regardless of how past cases came out. If a prior court deciding the same question came out the same way (holding the defendant liable), this gives *another* reason for holding the defendant liable the second time the case comes up, but it is a *superfluous* reason; morality or public policy already requires that result. It is only if morality or public policy would have prescribed a verdict *in favour of* the defendant, or if morality and public policy would have been indifferent on the question, that a prior decision

[9] Jeremy Bentham, "Truth versus Ashhurst", in *The Works of Jeremy Bentham* (W. Tait, Edinburgh, 1843), vol. V, pp. 233–237, at p. 235.

against the defendant would affect our "all things considered" judgment about who should win.[10]

It is like the parent of many children who has to figure out whether her young daughter is old enough to be given a bicycle. The daughter may well be quick to point out that an older sibling had been given a bicycle at the same age. Precedent! It may be that the "all things considered" the best decision *is* for the child to have the bike, even without taking into account past practices. However, past practices will only affect what we should otherwise do when the past practice was *not* clearly the right answer. (This also shows how precedent differs from a related notion: learning from experience.[11])

The above analysis might be modified or clarified in the following way. If we take the perspective not of a particular decision-maker making a decision, but rather the perspective of someone trying to set up an institutional process that will increase the chance of correct decisions being made, precedent is important even when the prior decision was correct, because precedent constrains fallible later decision-makers who might otherwise be tempted to incorrect decisions.[12]

Common law reasoning is far more than respect for precedent. It is also a belief that there is value to the incremental development of rules and principles, evolving, mostly cautiously, through the consideration of highly detailed factual situations. Part of the magic of common law reasoning, and part of the complexity of the role of precedent within such a system, is that cases are subject to re-characterisation. The judge or panel of judges deciding the first case may believe that the basis for a result is one legal-moral principle, and that the crucial facts are A, and C. A later court, considering a similar case, may well revisit the st case *in light* of subsequent cases, and conclude that the principle stantiated in the first case was different from what the initial decision-maker(s) thought—either broader or narrower than claimed by the first court—and that the first court may also have been wrong about which facts were significant (e.g. stating that one of the facts mentioned by the first court was in fact irrelevant or superfluous, or that an additional fact *not* emphasised by the first court was also central to the case coming out the way it did). A later court is said to be bound *only* to the "holding" (or "*ratio decidendi*") of the prior case—the principles *necessary* for the disposi-

[10] See Frederick Schauer, "Precedent", 39 *Stanford Law Review* 571 at 575, 576 (1987). As Justice Antonin Scalia stated: "The whole function of the doctrine [of *stare decisis*] is to make us say that what is false under proper analysis must nonetheless be held to be true, all in the interest of stability." Antonin Scalia, *A Matter of Interpretation* (Amy Gutmann ed., Princeton University Press, Princeton, 1997), p. 139.

[11] See Schauer, "Precedent", pp. 575–576.

[12] Cf. Frederick Schauer, *Playing by the Rules* (Clarendon Press, Oxford, 1991), pp. 158–162 (discussing the way that rules serve to allocate power).

tion; however, the later court has some freedom in interpreting what the holding was of the prior case.[13]

It is common to hear it argued that what constitutes the "ratio" of a prior case, and what the "*obiter dictum*"[14] (in principle, the latter can be legitimately ignored) is indeterminate or entirely subject to manipulation; I will not consider the charge (or its possible responses) in detail here.[15] A comparable topic for cynical comment is the ability of a later court to re-characterise a prior case in such a way that it is no longer on point: "distinguishing" (rather than "following" or, where the court has the power, "overruling") the case. The comment sometimes made is that the ability to distinguish a case is unlimited, and thus a judge may give the appearance of respecting all the prior cases without having her decisions be in any way constrained by those cases.[16] As noted above, though, there would appear to be at least some limits, however minimal, on the ways in which one can distinguish a prior case (assuming a judge who cares at least a little about not being overruled, and about maintaining the respect of her peers). Some of those limits on limits of language: on what can (in good conscience) be said to be "the same thing" (within the same category).[17]

Given all the strange twists and turns of common law reasoning, one might be tempted to conclude that this seems an utterly bizarre way to run a legal system, were it not for the fact that common law reasoning seems to reflect at a more public level the way people develop their own moral principles and views on life.[18] This sort of gradual development of principles and concepts, and the testing of intuitions against real and hypothetical fact situations, also is related to the way of thinking through moral questions John Rawls described in *A Theory of Justice*. Rawls' idea of "reflective equilibrium" involves the testing of particular judgments against broader theories, and vice versa, with adjustments being made when the two are found to be inconsistent.[19]

In common law reasoning, as in individuals' moral reasoning, the statement of principles is likely to be tentative and subject to significant

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[13] The discussion in the text may be understating the complexity and controversy regarding precedent. For a fuller overview, see, e.g., Larry Alexander, "Constrained by Precedent", 63 *Southern California Law Review* 1 (1989).

[14] Latin for "a remark in passing".

[15] For two attempts to respond to this challenge, see Rupert Cross and J. W. Harris, *Precedent in English Law* (4th ed., Clarendon Press, Oxford, 1991), pp. 39–96, particularly p. 52; and Neil MacCormick, "Why Cases Have *Rationes* and What These Are", in Laurence Goldstein ed., *Precedent in Law* (Clarendon Press, Oxford, 1987), pp. 155–182, particularly pp. 180–182.

[16] See the discussion in Schauer, *Playing by the Rules*, pp. 181–187.

[17] See Schauer, "Precedent", pp. 584–585.

[18] In general, much of what passes for "legal reasoning" can be found in many other kinds of individual and collective decision-making. Schauer, "Precedent", pp. 602–603.

[19] See John Rawls, *A Theory of Justice* (Harvard University Press, Cambridge, Mass., 1971), pp. 48–51.

revision, when first facing a novel set of questions.[20] After enough decisions have been made at a specific level, a more confident statement of principle at a higher level of generality might be assayed. In common law reasoning, such a broad restatement will usually be consistent with and grounded on a long run of cases; occasionally, though, a judge will re-characterise the prior cases in a surprising way, but a way which persuades by the force of the judge's rhetorical power or the force of the moral vision underlying the re-characterisation. Examples of such landmark decisions include Lord Atkin's speech in *Donoghue v Stevenson*[21] and Judge (later Justice) Cardozo's decision in *MacPherson v Buick Motor Co*,[22] both of which established a general principle that allowed recovery in tort even in the absence of privity of contract between plaintiff and defendant.[23]

At the core of common law reasoning, and central to all legal reasoning, is analogical reasoning: X should be treated the same as Y, because the two are sufficiently alike in relevant characteristics. While such reasoning seems indeterminate (and/or subject to manipulation) in comparison to deductive reasoning and other forms of logical reasoning, Lloyd Weinreb has argued that the ability to make analogical arguments—and rely on them—is as central to everyday life as it is to the law, and that we are right to be confident generally in our ability to reason in this way . . . which is different from having any illusion that our reasoning here will be infallible.[24]

Suggested Further Reading

13–02 Larry Alexander, "Precedent", in *A Companion to Philosophy of Law and Legal Theory* (2nd ed., D. Patterson ed., Blackwell, Oxford, 2010), pp. 493–503.

Brian H. Bix, "Law as an Autonomous Discipline", in Peter Cane and Mark Tushnet eds., *The Oxford Handbook of Legal Studies* (Oxford University Press, Oxford, 2003), pp. 975–987.

Benjamin N. Cardozo, *The Nature of the Judicial Process* (Yale University Press, New Haven, 1921).

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[20] Consider some recent examples: the legality—and morality—of new reproductive technologies, surrogacy, and cloning; or the appropriate way to apply traditional rules of intellectual property to software or to scientifically transformed bacteria.

[21] [1932] A.C. 562.

[22] 217 N.Y. 382; 111 N.E. 1050 (1916).

[23] I discuss some of these themes, and their application to *R. v Brown* [1994] 1 A.C. 212, in Brian H. Bix, "Consent, Sado-Masochism and the English Common Law", 17 *Quinnipiac Law Review* 157 (1997).

[24] See Lloyd L. Weinreb, *Legal Reason* (2nd ed., Cambridge University Press, Cambridge, 2017). For a sharp critique of the first edition of that book, see Richard A. Posner, "Reasoning by Analogy", 91 *Cornell Law Review* 761 (2006). For the author's response, see Weinreb, *Legal Reason*, pp. 86–94.

Rupert Cross and J. W. Harris, *Precedent in English Law* (4th ed., Clarendon Press, Oxford, 1991).

Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge University Press, Cambridge, 2008).

Melvin Aron Eisenberg, *The Nature of the Common Law* (Harvard University Press, Cambridge, Mass., 1988).

Laurence Goldstein ed., *Precedent in Law* (Clarendon Press, Oxford, 1987) (includes contributions by Gerald Postema, Neil MacCormick and Michael Moore).

Kent Greenawalt, *Statutory and Common Law Interpretation* (Oxford: Oxford University Press, Oxford, 2013).

Grant Lamond, "Analogical Reasoning in the Common Law", 34 *Oxford Journal of Legal Studies* 567 (2014).

—, "Precedent and Analogy in Legal Reasoning", *http://plato.stanford.edu/entries/legal-reas-prec/* (2006).

Barbara Baum Levenbook, "The Meaning of a Precedent", 6 *Legal Theory* 185 (2000).

Edward H. Levi, *An Introduction to Legal Reasoning* (University of Chicago Press, Chicago, 1949).

Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford University Press, Oxford, 2005).

Gerald J. Postema, "Philosophy of the Common Law", in J. L. Coleman and S. Shapiro eds., *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, Oxford, 2002), pp. 588–622.

Frederick Schauer, "Precedent", in Andrei Marmor ed., *Routledge Companion to Philosophy of Law* (Routledge, London, 2012), pp. 123–136.

A. W. B. Simpson, "English Common Law", in Peter K. Newman ed., *The New Palgrave Dictionary of Economics and the Law* (Macmillan, London, 1998), vol. 2, pp. 57–70.

—, "The Ratio Decidendi of a Case and the Doctrine of Binding Precedent", in A. G. Guest ed., *Oxford Essays in Jurisprudence* (Oxford University Press, Oxford, 1961), pp. 148–175.

Lloyd L. Weinreb, *Legal Reason* (2nd ed., Cambridge University Press, Cambridge, 2016).