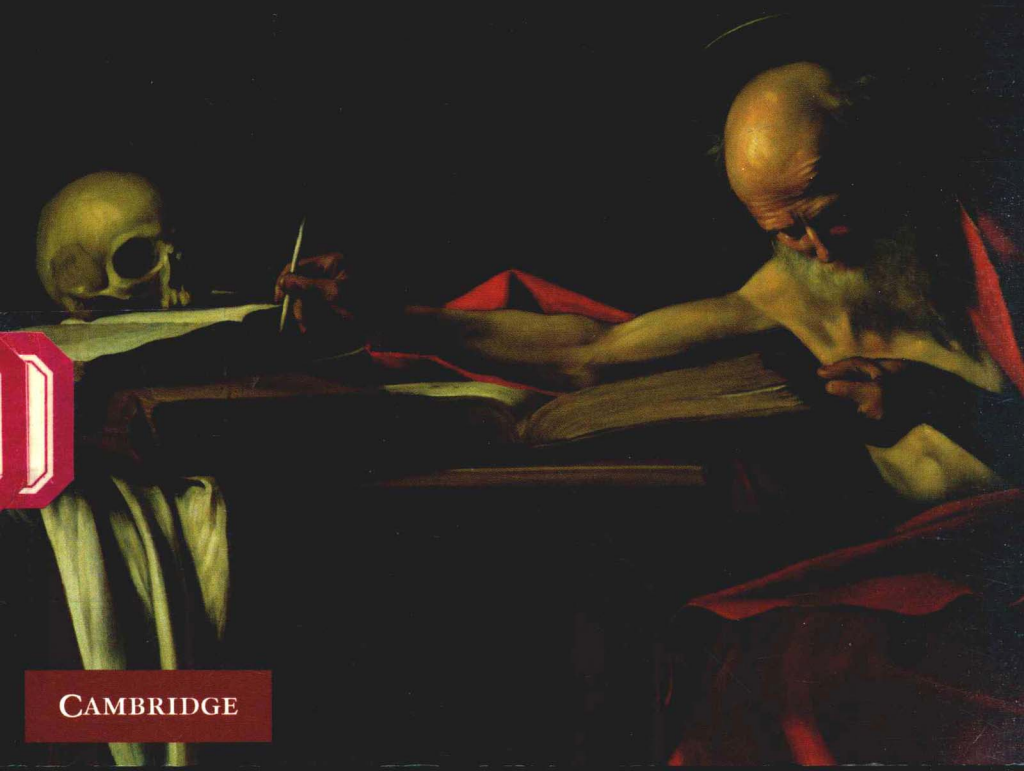
The Nature and Authority of Precedent

Neil Duxbury



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PREFACE

I wrote this book while serving as the deputy head of the law school and the director for all the undergraduate law admissions programmes at the University of Manchester. In both roles I, like many of those around me, would often try to invest an argument with more authority by saying – if not always quite showing – that it was backed by a precedent. While sitting in committee rooms and carrying out administrative chores I found myself increasingly trying to make sense of such behaviour. Sometimes, pointing to a precedent was clearly a way of trying to be fair. But at other times I was sure it was the coward's way out or an excuse for inertia. The study which follows is mainly about judicial precedent. But there are plenty of instances where, in trying to illuminate a problem, I draw upon more general instances of decision-making by precedent, many of which, I confess, came to mind in administrative contexts when I am sure I should have been concentrating on other matters.

In so far as this book is concerned specifically with judicial precedents, it is not supposed to present the law relating to precedent in any particular jurisdiction. Rather, it is an exercise in understanding precedent as a jurisprudential concept. In undertaking this exercise I have relied mainly on English law illustrations and problems, though quite often I have used examples from other systems, particularly American law, when those examples point to difficulties and insights which are not immediately apparent from the English sources. The book is not a textbook; none the less, I attempt that difficult balance between achieving a level of depth and technicality that will make the project valuable to professional legal thinkers and writing in a manner that will engage, intrigue and enlighten law students or indeed any non-specialist who is serious about understanding the intricacies of precedent. While the intricacies on which I focus are generally best described as theoretical rather than doctrinal, the point of the book is most definitely not to articulate a distinctive theory of precedent. Indeed, one of the claims of the book is that no one theory can offer a plausible comprehensive or

systematic explanation of why precedents constrain. The purpose of this book, rather, is to examine the various possible explanations for such constraint, and to advance a number of arguments which might facilitate a better understanding of the nature and authority of precedent.

There is no harm in stating immediately, if very briefly, what those arguments are. First, the development of classical positivist jurisprudence was to a large degree an exercise in trying to explain the authority of precedent, and misgivings about the concept of binding precedent probably have less to do with the fact that earlier judicial decisions cannot literally bind as with the fact that such decisions cannot bind in the classical positivist sense. Secondly, even if a decision-maker feels no obligation to follow a precedent, the precedent might lead him to decide differently from how he would have decided if the precedent did not exist. Thirdly, precedents really are precedents, to adapt Bishop Butler's famous insight, and not another thing, and so any effort to equate precedent and precedent-following with some other legal concept or practice – the concept of a rule, for example, or the practice of reasoning by analogy – will fail to capture the *distinctive* nature and authority of precedent. Fourthly, reason – a concept which, in this context as in many others, needs disaggregating – played a special role in the formation of a common-law doctrine of precedent. Fifthly, respecting the principle that like cases be treated alike does not necessitate a doctrine of precedent. Indeed, one of the objectives of this book is to determine just what might generate the emergence of *stare decisis*, given that the principle of formal justice certainly cannot achieve this on its own. Finally, the doctrine of precedent, properly conceived, must allow the possibility of a court of last resort overruling as well as following its earlier decisions, for the doctrine requires that the court not only keep the law on track, but put it back on track when previously it has made mistakes. The value of the doctrine of precedent to the common law, we might say, is not simply that it ensures respect for past decisions but also that it ensures that bad decisions do not have to be repeated.

Those with no interest in quirky interludes about maverick jurists making fallacious arguments might resolve to skip section (4)(b) of chapter 4, though I expect that this advice will lead some readers to head there first. My principal reason for retaining that section is that the point to which it builds – that it matters little, if at all, if precedential authority does not satisfy the tests of logic – seems worth making. For recollections of Roy Stone, the jurist at the centre of the section, I am

grateful to George Christie, Dave Fleming, Tom Hadden, Clifford Hall, John and Cherry Hopkins, Brian Simpson and John Tiley.

An amalgamation of early versions of chapters 2 and 4 was presented at the law faculties of McGill University, Montreal, and the University of Toronto in October 2005, and at the University of Minnesota Law School in April 2006. An early draft of chapter 3 was presented at the Institute of Advanced Legal Studies, London, in February 2006 and a late version of chapter 2 at the School of Law at the University of Virginia in April 2007. For detailed comments on chapter 3 I owe thanks to Brian Bix. I owe the same to Lillian BeVier, Ted White and Ian Williams for some very helpful observations on chapter 2, and for feedback on an entire first draft of the book I am immensely grateful to John Bell, Sean Coyle, Andrew Griffiths, Matt Kramer, Mark McGaw, William Lucy, Manolis Melissaris, Richard Posner, Mike Redmayne, Mark Reiff, Mike Wilkinson and the anonymous readers who acted for the Cambridge University Press. I am also indebted to Barry Cushman, Angela Fernandez, John Harrison, Caleb Nelson and Stephen Waddams for help and advice when my understanding of precedent as a common-law doctrine outside England proved deficient.

May 2007

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Introduction: the usable past

So often in life we are looking for ways to make decisions with which we will be content. The appropriate options will be determined by the circumstances of the decision, and so it would be impossible, in the abstract, to set out an exhaustive list of ways to decide. But some of those ways are obvious. We might act on our instinct, or deliberate on the reasons supporting different possible decisions, or treat some rule, formal or otherwise, as a reason which pre-empts all others. We might try to devise a strategy, as Solomon did, to make others reveal information that would make deciding easier. Or we might even, though only exceptionally, decide not to decide and entrust an outcome to chance. This book is concerned with one specific decision-making option: deciding on the basis of what was done when the same matter had to be resolved in the past. When we decide in this way, we decide according to precedent.

1. Precedent

A precedent is a past event – in law the event is nearly always a decision – which serves as a guide for present action. Not all past events are precedents. Much of what we did in the past quickly fades into insignificance (or is best forgotten) and does not guide future action at all. Understanding precedent therefore requires an explanation of how past events and present actions come to be seen as connected. We often see a connection between past events and present actions, and regard the former as providing guidance for the latter, when they are alike: if, in doing *Y*, we are repeating our performance of *X*, we may as well look back to *X* for guidance when doing *Y*. However, our recognition that the act we are about to perform is one we have undertaken before does not always lead us to treat the past event as a guide for present action. We might now see that our performance of *X* was wrong: the experience of *X* has taught us that when crossing the road,

it makes sense first to look both ways. Or it may just be that our tastes have changed: our notion of what makes for clever behaviour or a good cup of coffee might alter over time, so that past attempts at impressing others and coffee-making now strike us not as wrong but as unsophisticated. Often, we repeat actions without feeling any commitment to performing them in the same way as we did before. A past event, in other words, may be just that, no matter that our present action replicates it.

To follow a precedent is to draw an analogy between one instance and another; indeed, legal reasoning is often described – by common lawyers at least – as analogical or case-by-case reasoning.[1] Not all instances of analogy-drawing, however, are instances of precedent-following. When I say of an athlete with exceptional stamina and strength that 'the guy is like a machine', I draw an analogy but I do not invoke a precedent. Similarly, although following a precedent entails looking for guidance to an established standard, to set a standard is not necessarily to set a precedent. The most studious pupil in the class is setting a standard – one by which other classmates might be judged and to which some of them might even try to conform. But that standard does not have to set a precedent: the standard might have been met or even exceeded by pupils in other classes, and even if the standard has never been achieved before it will not necessarily operate as a precedent (indeed, although setting a precedent means doing something new – unprecedented – not everything that is done for the first time is a precedent).

Experience often guides present action, but reasoning from precedent is not identical to reasoning from experience. When my youngest daughter made her case for my buying her a mobile phone on her eleventh birthday, she reasoned from precedent: her elder sister received a mobile phone for her eleventh birthday. When I refused to buy my youngest daughter a mobile phone on her eleventh birthday, I reasoned from the experience of her sister's inability to be a responsible mobile-phone owner at the age of eleven. When we make a decision on the basis of experience, we are valuing experience for what it teaches us. When we make a decision on the basis of precedent, we consider significant the fact that our current predicament has been addressed before, but we will not necessarily value the precedent for what it

[1] See Edward H. Levi, *An Introduction to Legal Reasoning* (Chicago: University of Chicago Press, 1949), 1–8.

teaches us.[2] Sometimes, we might even follow precedents of which we do not approve.[3]

Note that the decision on the basis of precedent emphasizes the *fact* of prior dealing with the current predicament. When we decide on the ground of precedent we appear to believe that part of the reason the precedent is authoritative is that it is not an imagined event.[4] Common-law courts, for example, recognize that hypothetical instances can be instructive and compelling and yet, as a general rule, they will accord more weight to previously decided cases.[5] Even when it is reasonable to speculate that a precedent is not merely hypothetical – when it is reasonable, that is, to think that it will exist somewhere – there is still

[2] See Frederick Schauer, 'Precedent' (1987) 39 *Stanford L. Rev.* 571–605 at 575.

[3] As, indeed, judges sometimes do: see *Jones* v. *DPP* [1962] 2 WLR 575, 633, CCA, *per* Lord Devlin ('[T]he principle of *stare decisis* . . . does not apply only to good decisions; if it did, it would have neither value nor meaning'); Jon O. Newman, 'Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values' (1984) 72 *California L. Rev.* 200–16 at 204 ('The ordinary business of judges is to apply the law as they understand it to reach results with which they do not necessarily agree').

[4] The authority of a precedent might be weakened, furthermore, because for one reason or another the prior court, in deciding the case, proceeded without a full determination of the facts: recent examples in English law would be *Bayer* v. *Agropharm* [2004] EWHC 1661 (summary judgment without full hearing); *Pfizer* v. *Eurofood* [2001] FSR 17 (defendant's side not being argued owing to his failure to appear during proceedings); *Mirage Studios* v. *Counter-feat Clothing* [1991] FSR 145 (claimant awarded interim injunction, bringing litigation to end before full hearing); and *Guinness* v. *Saunders* [1990] 2 AC 663, HL (claimant's case so unanswerable that it did not require a full trial).

[5] See S. L. Hurley, 'Coherence, Hypothetical Cases, and Precedent' (1990) 10 *Oxf. Jnl Leg. Studs* 221–51 especially at 246–7. There is no doubt that common-law courts generally do not treat hypothetical instances as precedents. The main reason for this is probably that to treat such instances thus risks diminishing doctrinal clarity, 'at least to the extent that abstract or tangential hypotheticals obscure what a judge was actually required to resolve in the immediate case.' Michael Abramowicz and Maxwell Stearns, 'Defining Dicta' (2005) 57 *Stanford L. Rev.* 953–1094 at 1037. But there is no reason in principle that a precedent cannot be established by a conclusion based on a fact which has not been determined by a court. An historical example of such a precedent would be the case decided on demurrer, whereby a court would take the opportunity to pronounce upon the rights of parties on the assumption that the facts are as the claimant alleged. Not all legal precedents, furthermore, are judicial decisions. There are instances, for example, where one jurisdiction will adopt the judicial precedents of another system in a codified form so that the courts of that jurisdiction can, instead of creating their own precedents or having to keep referring back to the precedents of the other system, find governing legal principles in consolidating legislation. Perhaps some of the best-known illustrations of precedents in legislative form are those created by Sir James Fitzjames Stephen and the other Victorian reformers who codified various English principles for use in Indian law. See generally, Eric Stokes, *The English Utilitarians and India* (Oxford: Clarendon Press, 1959).

an expectation that those arguing before decision-makers discover and present the precedent if it is to be taken into consideration.

Precedent-following is very obviously a backward-looking activity: when we decide on the basis of precedent, we treat as significant the fact that essentially the same decision has been made before. Perhaps less obvious is the fact that creating precedents, and even following precedents, can be a forward-looking activity. Today's decision-makers are tomorrow's precedent-setters, Karl Llewellyn appreciated, and so they have a 'responsibility for the precedents which their present decisions may make'.[6] Our decision today to do something new, or to affirm something old, may guide or influence decision-makers in the future. So it is that precedent, according to Frederick Schauer, 'involves the special responsibility accompanying the power to commit to the future before we get there'.[7] A significant constraint on decision-making activity might well be the decision-maker's imagination – his capacity, that is, to envisage just what the implications of a particular decision could be for future cases. Even when there is no precedent to guide a decision, the notion of precedent – awareness, that is, that what we do now may become a precedent – might still influence the decision-making process.

The point that precedents have a consequential as well as an historical dimension, while a good one, can be overemphasized. Since 'the conscientious decisionmaker must recognize that future conscientious decisionmakers will treat her decision as precedent', Schauer argues, 'today's conscientious decisionmakers are obliged to decide not only today's case, but tomorrow's as well'.[8] Certainly, there are times when there is little or no need to deliberate an issue because our predecessors were so scrupulous in dealing with it. But did they have to be so scrupulous?

[6] K. N. Llewellyn, 'Case Law', in *Encyclopaedia of the Social Sciences*, ed. E. R. A. Seligman (London: Macmillan, 1930), III, 249–51 at 251. In a similar vein, see Gerald J. Postema, 'Melody and Law's Mindfulness of Time' (2004) 17 *Ratio Juris* 203–26 at 214–15.

[7] Schauer, 'Precedent', 573. The same point has been made on many occasions by Neil MacCormick. See, e.g., Neil MacCormick, 'Why Cases Have Rationes and What These Are', in *Precedent in Law*, ed. L. Goldstein (Oxford: Clarendon Press, 1987), 155–82 at 160–1; 'Formal Justice and the Form of Legal Arguments' (1976) 6 *Études de logique juridique* 103–18.

[8] Schauer, 'Precedent', 589; see also Jan G. Deutsch, 'Precedent and Adjudication' (1974) 83 *Yale L. J.* 1553–84; MacCormick, 'Formal Justice and the Form of Legal Arguments', 110 ('[A]t any point in time, a court which is called upon to give a decision on any matter in litigation ought only to decide the case conformably to such reasons as it considers will be acceptable for the disposition of any similar case which may come up for decision by it at any later time').

Sometimes we will create precedents, even good precedents, unintentionally; it might even be the case that only in retrospect is a particular action seen to have set a precedent. It is hardly possible to be responsible about setting a precedent without the awareness that one is setting a precedent. Even with this awareness, furthermore, it is not clear why conscientious decision-makers 'are obliged', as opposed to likely or minded, to decide with an eye to the future. A decision-maker's priorities might legitimately be in the present; and even when there exists a strong feeling that the decision-maker has thought too little about the future, this is insufficient in itself to establish that there has been a breach of obligation. We might, but we do not have to, make decisions with the future in mind; and thoughts about the future might, but do not have to, constrain what we decide to do.

It is sometimes assumed to be in the nature of a precedent that it must be knowable to those who might be constrained by it.[9] But it is possible that a precedent might apply to our situation even though it is inconceivable that we would have discovered its existence before it was revealed to us. 'It is a firmly-established rule of interpretation', C. K. Allen wrote in 1925, 'that the Court may take its precedents from any intelligible source whatever – newspapers, manuscripts, historical documents, and sometimes simply the recollection of judges of cases which they have heard or heard of.'[10] If we must have judge-made law, Bentham argued, it ought at least to be systematically reported, for, without such reporting, the common law cannot be easily identified and it may be difficult if not impossible to tell if a court is relying on precedent or creating a new offence.[11] Yet, even once systematic

[9] See, e.g., Barbara Baum Levenbook, 'The Meaning of a Precedent' (2000) 6 *Legal Theory* 185–240.

[10] Carleton Kemp Allen, 'Precedent and Logic' (1925) 41 *LQR* 329–45 at 341.

[11] '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 any thing you want to break him of, you wait till he does it, and then beat him for it . . . What way then has any man of coming at this dog-law? Only by watching [Judges'] proceedings: by observing in what *cases* they have hanged a man, in what *cases* they have sent him to jail, in what *cases* they have seized his goods, and so forth.' Jeremy Bentham, *Truth* versus *Ashhurst; or Law as it is, contrasted with what it is said to be* (London: Moses, 1823 [1792]), 11–12. Dr Johnson had already expressed much the same sentiment in the Scottish Court of Session. See Johnson to Boswell, 1 July 1772, in James Boswell, *The Life of Samuel Johnson*, ed. R. W. Chapman (Oxford: Oxford University Press, 1998 [1791]), 496–7 ('To permit a law to be modified at discretion, is to leave the community without law . . . It is to suffer the rash and ignorant to act at discretion, and then to depend for the legality of that action on the sentence of the Judge. He that is thus governed, lives not by law, but by