# PRECEDENT IN LAW

EDITED BY

LAURENCE GOLDSTEIN


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# Preface

The theory of speech-acts, an area of linguistics opened up by the philosopher J. L. Austin, was my own rather unlikely point of entry into the problems of precedent in law. I had been working on some logico-linguistic paradoxes and believed that from speech-act theory I could extract a solution to the ancient paradox of the Liar (a paradox which arises when someone says 'The very statement I am now making is not true', or words to that effect). My attention was drawn to a paper in the *Cambridge Law Journal* (1971) by J. C. Hicks which alleged that paradoxes of like profundity were to be found in legal theory. In a paper published in the 1979 issue of the same journal, I undertook to dissolve all of Hicks's paradoxes, and, for the paradox in the theory of precedent that he discussed, I proposed a solution modelled on how I then thought the Liar ought to be tackled.

A bizarre consequence of this solution was that (according to me) judges pronouncing on precedent are not making pronouncements at all and in fact are not saying anything, but just mouthing empty sounds. Instead of seeing this ludicrous, offensive consequence as a *reductio ad absurdum* of my theory, I willingly embraced it, thus committing myself to a conclusion that normal people would rightly regard as absurd. Enamoured by theory, we become blind to the facts and instead of tailoring our hypotheses to the evidence, we let the tail wag the dog. The remedy, as Wittgenstein saw, lies in squarely confronting the messy complexities of our institutions and practices, and abandoning any preconceptions about achieving theoretical elegance in examining them—'the axis of reference of our examination must be rotated, but about the fixed point of our real need' (*Philosophical Investigations* § 108).

In the legal world, there seems to be a great gulf separating practitioners and theorists. One suspects that a reason for this is that theorists are fond of letting their fancies run free. Unconstrained by reality, they develop elaborate abstract constructions far removed from the practices they are supposed to be theorizing about. Hence their results are unlikely to be of value to practical

men and women. Sir Matthew Hale claimed that schoolmen and moral philosophers make the worst judges 'because they are transported from the ordinary measures of right and wrong by their over-fine speculations, theories and distinctions above the common staple of human conversations'. J. A. G. Griffith spoke of the delusions of academics who believe that their 'belly rumblings' are of interest to anyone in the real world. And A. W. B. Simpson, in a recent book review (*Times Literary Supplement*, 10 August 1984) said that clarity in legal theory will not be achieved 'unless the philosophers move from discussing each others' theories to discussing the complex institution whose nature their theories are supposed to elucidate'.

There may be an element of philistinism in some of these remarks, but there is also a good deal of truth in them. Contributors to this volume were exhorted to strive for maximum clarity, mindful of the fact that, with an intended audience comprising a mixture of lawyers, philosophers, and others, no shared framework of assumptions could be presupposed. I am glad to say that our authors have heeded this plea and, instead of winging off into the stratosphere of ever more rarefied theories, each has sought to anchor his views in the solid ground of *what actually happens*. This is gratifying, for my aim has been to produce a collection of essays that may be read with pleasure and profit by students, practitioners and, indeed, by anyone with an interest in the workings of the law.

Special thanks are due to Sheila Murugasu who provided the initial impetus for this volume and whose continued support was invaluable. Rodney Griffith, Roda Mushkat, Joseph Raz, and Peter Wesley-Smith were generous with their help and advice. David Chan, Vivian Chu, Loletta Li, and Tiffany Hung gave secretarial assistance over and above the call of duty. I am grateful to Aletheia Goldstein for help with editorial work, and to Pauline M. Aranas, Robert Rich, M. Lisabeth Shean, and Jill Sidford who compiled the bibliography. They in turn wish to express their gratitude to the staff of the University of Southern California Library for their support, to Professor Michael S. Moore for his advice, and especially to Misao Okino, who was solely responsible for the typing of this bibliography.

L. G.

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## ERRATA

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# Introduction

LAURENCE GOLDSTEIN

PRECEDENT, it has been said, is the life blood of legal systems.[1] What this suggests is that, in any legal system, a practice exists of deciding cases on the basis of decisions made in similar cases in the past. This comfortable thought is regrettably, and emphatically, false. I am writing this introduction in Hong Kong, a territory colonized by Britain but due to be returned to China in 1997. It is unlikely that existing institutions will remain unchanged, but unlikely also that an entirely different regime will be imposed, since the people of Hong Kong have been promised a high degree of autonomy. Debate is currently raging as to the design of the new political and legal order. Currently democracy (of a sort) exists here, and the English system of common law prevails. But a body of opinion says that neither of these institutions is desirable. In such a situation, questions of the most fundamental kind get raised and one is forced to excavate and to confront some rather basic assumptions. Why is it a good thing (if it is) that all citizens should have the right to elect people to represent them in government? Why should there be any *rules* of law rather than *ad hoc* rulings? What, indeed, is the purpose of government and the purpose of law, and should the law be a province of the government or should it be free of political control?

In trying to understand the emergence of our current conceptions of precedent it is salutary to bear in mind that the political and legal systems of developed countries *developed* and that this development was shaped by early theoreticians grappling passionately with the kind of issues adumbrated above. Some sense of the intensity of the resulting debates may be gleaned by those who are witnessing, or participating in, the arguments now taking place in Hong Kong, where what is at stake is nothing less than the planning of a



[1] C. K. Allen, *Law in the Making* (7th edn. Oxford, 1964), p. 243.

*civilized* society. Examining the history of the doctrine of precedent causes us to be reminded of why thinking about the law *matters*.

Two essays in this collection trace the historical roots of the notion of precedent. Gerald Postema writes on the seventeenth and eighteenth centuries, a period in which the theory of law was being moulded by great judges and by moral and political philosophers such as Hobbes, Bentham, and Hume. In this period, the classical common law conception of precedent and the classical positivist theory took shape. Although they supply radically different accounts of the law, it would be simple-minded to think that these are two competing theories, at least one of them false, of a practice identifiable independently of those theories. For first, both descriptive and *prescriptive* elements tend to feature in such theories so that it is frequently irredeemably unclear whether what is being offered is a discussion of how a practice *is* or of how it *ought to be*. Second, in an age when legal theorists were no mere gadflies but were highly influential figures, a writer's description of an existing practice, even though a misdescription, would frequently have the effect of contributing to *altering* that practice, bringing it into closer conformity with that description.

In the traditional common law theory, judicial precedent was, as Postema puts it, 'pivotal', for according to that theory laws acquire what binding force they have by virtue of 'a long and immemorial Usage and by the strength of Custom and Reception' (Sir Matthew Hale). Past decisions acquire weight in virtue of belonging to a historic body of reasoning. They do not generate inflexible rules which must be followed in subsequent cases, but serve as the inspiration for further reflection by judges. By contrast, the positivist theory views precedents as performing the minor, or secondary task of tidying up those corners left untouched by the broad sweep of statutory law, and as acquiring authority in much the same way as statutes do. Postema points out that this latter conception of judicial precedent implies a rather strong doctrine of *stare decisis*.

As I indicated earlier, the appearance of a sharp contrast here between competing conceptions may be somewhat deceptive. Jim Evans who, in his paper, takes up the historical story where Postema leaves off, thinks that, despite apparent conflicts in their theoretical pronouncements, the *practice* of judges at the end of the eighteenth century betrayed a substantial core of agreement on the

nature of case-law and the role of precedents. If Evans has read the evidence correctly, it would appear that the doctrine of *stare decisis* then in operation was a fairly relaxed one. Judges, even when they recognized a rule enshrined in previous decisions, did not shy away from examining the reasons underlying such a rule and, when they perceived unreasonableness or conflict with moral precept, were wont to ignore or modify the rule or to make exceptions. However, there can be no doubt that, in the course of the nineteenth century, the English doctrine of precedent hardened and we may see, as the culmination of this process, the so-called *London Street Tramways* case of 1898 when the House of Lords declared itself bound by its own previous decisions. Evans undertakes to study the details of this change. His paper provides fascinating insights into the workings of courts, the emergence of the hierarchy, and the pressures for law reform.

The strict rule of binding precedent enunciated by Lord Halsbury in *London Street Tramways* represents an attempt to inhibit change in the law. Lord Halsbury's pronouncement has been described as 'the most undesirable statement in English judicial history and . . . contrary to the English sense of justice'.[2] Perhaps it was a growing feeling about the undesirability and injustice of the doctrine that led to its eventual abandonment in the twentieth century. But perhaps also there developed a dim perception that the strict view could not be theoretically justified, thus creating an uncomfortable tension in the minds of reflective practitioners. Peter Wesley-Smith essays to demonstrate that neither of the dominant theories of adjudication is able to sustain the thesis that precedents are absolutely authoritative. Consider the common law (otherwise known as *natural law* or *declaratory*) theory which holds that laws are not made by judges, but that the judges' task is to discover and declare *the true law* which is logically independent of human opinions as to what that law might be. Now, given that judges are fallible and sometimes mistakenly declare to be law what is not *the true law* then, if it is a judge's duty to declare true principles of law, it follows that a judge cannot be strictly bound to follow the possibly erroneous declarations of his predecessors. Wesley-Smith shows that the positivist theory fails just as badly to support the strict doctrine of binding precedent.

[2] M. N. Ahmed, '*Stare Decisis* and its development in Malaysia' (1975) *JMCL* 59.