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"Precedent in English Law"

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In *Gulliver's Travels* Gulliver on his last voyage finds himself in the country of the Houyhnhnms, a species of highly intelligent, talking horses. The Houyhnhnms are devoted to reason. They are so rational and orderly that they do not need a legal system. At one point Gulliver tells his astonished host about the legal system in his own country. After some unflattering descriptions of lawyers and judges, he mentions the doctrine of precedent. Gulliver explains:

> "It is a maxim among these lawyers that whatever has been done before, may legally be done again: and therefore they take special care to record all the decisions formerly made against common justice, and the general reason of mankind. These, under the name of *precedents*, they produce as authorities to justify the most iniquitous opinions; and the judges never fail of directing accordingly."[1]

As always with Swift, the satire raises a serious point. How can it be right to treat a previous decision as a precedent if the decision was unjust? By following the decision, are you not simply repeating or extending that injustice?

The role of precedent in English law is my topic for this lecture. I have chosen it because it is a subject that has always fascinated me and also because it is a point of connection with Jim Harris, the law tutor in whose honour your society and this annual lecture are named. *Cross and Harris on Precedent in English Law* is a book that I have possessed and consulted periodically for more than 30 years.[2] It is the work of two brilliant legal scholars, both physically blind yet both possessed of great intellectual vision. After the original author, Sir Rupert Cross, died, Jim Harris took on the work and updated it for this 4th edition, published in 1991. Although this proved to be the last edition, it is still in print and is still often cited. Indeed, in the appeal on which I sat last week one of the parties quoted a passage from it in their written argument. Not many law books stand the test of time in that way.

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[1] J Swift, *Gulliver's Travels* (1726), Pt 4, ch V.

[2] Cross & Harris, *Precedent in English Law*, 4th ed (1991).

Precedent in English Law is a large topic, far larger than I could possibly cover in one lecture. I will focus on one question, which may sound simple but is itself a big question: just what does it mean to follow a precedent?

The question is important because there remain large parts of the law of England and Wales which are not contained in any statute. Where there is no statutory provision in point, courts apply the common law. The common law has as its primary source reports of past cases. It is largely constituted by the principle which Swift satirised of doing again what was done before. Without precedents to follow, a judge would just be sitting (metaphorically) under a palm tree, doing whatever he or she thinks right. Justice would be arbitrary, as it would depend simply on the conscience of the individual judge, with nothing to promote any sort of consistency between decisions made by different judges and between what is decided in one case and the next. I would not call that law at all. What gives content to the common law is the obligation or expectation that judges will, generally at least, follow precedents.

The question that I want to consider is therefore fundamental to our legal system. Given that the facts of every case are different, what exactly does following a past decision involve? Or put another way: how do judicial decisions create the common law?

I also want to place our contemporary doctrine of precedent in a historical context. The way in which we think about case law and precedent today is different from how common lawyers thought of it, say, 300 years ago when Swift wrote *Gulliver's Travels*. Nor should we assume that the exact role of cases and the correct way of arguing from them has ever been a matter of agreement at any given time. Professor John Baker in his *Introduction to English Legal History* has written that, in truth, there have always been differences of attitude towards precedent and that "to seek a uniformity of judicial philosophy at different periods may be to seek what never existed."[3]

My thesis will be that, in how we argue from precedent in English law today, there are two very different approaches which co-exist with each other. They have different historical roots and reflect contrasting legal philosophies. Most of the time lawyers muddle along with a combination of the two approaches without reflecting on or even recognising the inconsistencies between them.

[3] JH Baker, *An Introduction to English Legal History*, 5th ed (2019), p 211.

To seek to make this claim good, I will divide what follows into two parts. The first part will consist of some legal history. This will necessarily be at a high level. I will then consider our contemporary understanding of precedent in the light of this history.

Historical origins

Precedents have been important in English law for as long as records of decided cases have been kept and consulted. Indeed, it seems plain that in any age the essential purpose of publishing and reading case records and reports must be to enable reliance of some kind to be placed on past cases. And when judges know that their decisions may be relied on as precedents, that feeds into their approach to decision-making. John Baker quotes from the medieval year books a report of a case in 1454 in which Prysot CJ is recorded as saying (translated from the Norman French) that, to accept one party's argument "would be a bad example to the young apprentices who are keeping terms, for they would never give credence to their books if a judgment such as this which has so often been adjudged in their books should now be adjudged the contrary."[4]

I do not have time to discuss the medieval attitude towards precedent, which was different from that which developed later.[5] I will go straight to what I believe to be the first systematic study of the common law: a book called *The History and Analysis of the Common Law of England* by Sir Mathew Hale, Chief Justice of the King's Bench, who died in 1676. (The book was printed some 30 years after his death.) He began by saying:

> "The laws of England may aptly enough be divided into two kinds: *lex scripta*, the written law; and *lex non scripta*, the unwritten law."[6]

The written law was statute law or Acts of Parliament. The common law was *lex non scripta*, unwritten law. In describing the common law as unwritten law, Hale was not suggesting that the common law existed as a purely oral tradition without any written materials. Even in the 17th century, that was obviously not true. His point was a more profound one. Hale explained that, when he used the term *lex non scripta*:

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[4] JH Baker, *An Introduction*, p 208, citing *Wyndham v Felbrigge* (1454) YB Mich 33 Hen VI, fo 38, pl 17, at fo 41, per Prysot CJ.

[5] See JH Baker, *An Introduction*, pp 208-209.

[6] Hale, *History of the Common Law of England* (1716), p 1.

> "I do not mean as if all those laws were only oral, or communicated from the former ages to the later, merely by word. For all those laws have their several monuments in writing, whereby they are transferred from one age to another, and without which they would soon lose all kind of certainty ..."[7]

Hale mentioned that the written materials in which the common law was communicated included records of pleas, proceedings and judgments, books of reports, learned tracts and so forth. But he went on:

> "I therefore style those parts of the law *leges non scriptae* because their authoritative and original institutions are not set down in writing in that manner, or with that authority, that Acts of Parliament are, but they are grown into use, and have acquired their binding power and the force of law by a long and immemorial usage, and by the strength of custom and reception in this Kingdom. The matters indeed, and the substance of those laws, are in writing, but the formal and obliging power and force of them grows by long custom and use ..."[8]

In the case of statutes, it is the text itself as enacted by Parliament which is authoritative. It is authoritative precisely because Parliament has enacted those particular words. What the statute says is law because Parliament in the exercise of its law-making power has so decreed. And it is the original words of the statute which continue to have the force of law unless and until they are amended or repealed. Hale was making the point that the common law is not textual in that way. There are no original or fixed forms of words which are the definitive expressions of propositions of common law. One way of putting this is to say that case reports and other written materials are not themselves law but are *evidence* of the common law.

If the common law does not derive its authority from the enactment of texts, what is the source of its authority? Hale's answer was that the common law acquires its binding force from custom. Custom is not a concept which has much traction nowadays. To say "we should do this because we have always done it" or "because it is our custom to do it" may be thought a sufficient reason for, say, drinking a particular toast at a dinner. But it would hardly carry weight in an argument about what justice requires.

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[7] Hale, *History*, p 22.
[8] Hale, *History*, p 23.

In the passage I quoted to you, Hale referred to "long and immemorial usage". The idea that the common law consisted of custom and usage that had existed since time immemorial was always an obvious fiction. It implied that the law was immutable, which clearly it was not. The common law has never stood still. But Hale was perfectly well aware of that. His analysis was more subtle. In his book he expressly acknowledged that the common law in his day was different from how it was in the time of Henry II or Henry III. But he claimed that, though "particular variations and accretions have happened in the laws, yet they being only partial and successive, we may with just reason say that they are the same English laws now that they were 600 years [ago]."[9] He compared the common law with the ship of Jason and the Argonauts which "was the same when it returned home as it was when it went out, though in that long voyage it had successive amendments, and scarce came back with any of its former materials."[10]

In another significant passage Hale explained the role of judicial decisions. Decisions of courts of justice, he said:

> "do not make law properly so called (for that only the King and Parliament can do); yet they have a great weight and authority in expounding, declaring and publishing what the law of this Kingdom is, especially when such decisions hold a consonancy and congruity with resolutions and decisions of former times …"[11]

My gloss on what Hale was saying is that the common law draws its authority from the past in the sense that it represents a body of collective wisdom, practice and experience which is part of the common heritage of the English people.[12] The common law commands our allegiance because it is *our* law - law which reflects and is part of the shared civic life of the community whose law it is. The common law changes and evolves as social conditions and values change but in a way that is incremental and preserves continuity across time. Judicial decisions have weight and authority in later cases not because judges have power to make laws, which they do not; but because those decisions are part of a continuous body of knowledge, practice and usage which we have inherited and which connects us with our past and our future.

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[9] Hale, *History*, p 58.
[10] Hale, *History*, pp 58-59.
[11] Hale, *History*, p 67.
[12] See the valuable discussion of Hale's ideas in Gerald J Postema, *Bentham and the Common Law Tradition* (1986), chs 1 and 2.

If you think about precedent in this way, it is not individual case decisions which have authority as precedents but the common law as an organic whole. A decision in an individual case might be wrong because it is not congruous or consistent with the general body of the common law - in which case a judge should not follow it.

We can see this consequence spelt out by Sir Mathew Hale's contemporary, Sir John Vaughan, Chief Justice of the Court of Common Pleas, in his report of a case that he heard in 1672 called *Bole v Horton*. Vaughan said that, when a court gives a judgment, another court is not bound to follow it, unless it thinks that the earlier judgment was "according to law". Vaughan explained that, if a judge considered a previous decision to be mistaken, then, "being sworn to judge according to law, that is, in his own conscience, [he] ought not to give the like judgment, for that were to wrong every man having a like cause, because another was wrong'd before …"[13]

In other words, if you believe that a past case was wrongly decided, it cannot be right to follow it since, if you do, you will simply be repeating the error. The same argument, you will note, that was implicitly made in the passage that I quoted from *Gulliver's Travels*.

Blackstone and Mansfield

A very similar understanding of the common law is found in Blackstone's *Commentaries on the Laws of England*, written roughly a hundred years after Hale's *History* but heavily influenced by it. The first volume of the *Commentaries* was published in 1765. But we find also in Blackstone, alongside the conception of the common law as a body of concrete knowledge and experience, a view of the common law as a rational science, a set of justifying principles which are exemplified by particular decisions and rules. "The law of England," Blackstone wrote, "acts upon general and extensive principles."[14] He saw the task of his *Commentaries* as that of "examining the great outlines of English law and tracing them up to their principles."[15]

The idea of the common law as a body of principles is a strong theme in judgments of Blackstone's contemporary, Lord Mansfield, who (like Hale) was Chief Justice of the King's Bench. In *Jones v Randall*, in 1774, Lord Mansfield is reported as saying that:

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[13] *Bole v Horton* (1672) Vaugh 360, 383; 124 ER 1113, 1124.
[14] Blackstone's *Commentaries* (1767) vol 1, p 425.
[15] Blackstone's *Commentaries* (1767) vol 4, p 5.

> "the law of England would be a strange science indeed if it were decided upon precedents only. Precedents serve to illustrate principles, and to give them a fixed certainty. But the law of England which is exclusive of positive law enacted by statute depends upon principles; and these principles run through all the cases according as the particular circumstances of each have been found to fall within the one or other of them."[16]

Lord Mansfield made similar statements in other judgments. For example, in *Rust v Cooper* (1777) he said: "… the law does not consist in particular cases, but in general principles, which run through the cases and govern the decision of them."[17] And in *R v Bembridge* (1783): "The law does not consist of particular cases, but of general principles, which are illustrated and explained by these cases."[18]

On this conception of the common law too there is no difficulty with the idea that a particular past decision might be mistaken, because it is inconsistent with the principles which run through and justify the generality of relevant past cases.

Precedent in the nineteenth century

It was only during the 19th century that the doctrine of precedent became more rigid. In 1833 even Baron Parke (described by one of his judicial colleagues as "the greatest legal pedant that I believe ever existed"[19]) could say that:

> "In our system of judicature, we are bound by precedent and the authority of previous cases, *unless they are plainly and manifestly founded upon erroneous principles*;"[20]

Similarly, in another case that year he said that precedents must be followed "where they are not plainly unreasonable and inconvenient."[21]

By the end of the century a much stricter attitude to precedent prevailed. The most striking illustration of this strict approach is the self-denying ordinance adopted by the House of Lords that it was bound by its own previous decisions. This was virtually

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[16] *Jones v Randall* (1774) 1 Cowper 37; 98 ER 954.
[17] *Rust v Cooper* (1777) 2 Cowper 629; 98 ER 1277.
[18] *R v Bembridge* (1783) 3 Douglas 327; 99 ER 679.
[19] Hanworth, *Lord Chief Baron Pollock: A Memoir* (1929), p 198, quoting a letter from Pollock CB to his grandson.
[20] *Garland v Carlisle* (1833) 2 C & M 31,64; 149 ER 663, 676 (emphasis added).
[21] *Mirehouse v Rennell* (1833) 1 Cl & F 527, 546; 6 ER 1015, 1023.

settled in 1861[22] and confirmed in 1898 in *London Tramways v London County Council*. In justifying this approach, the Earl of Halsbury LC said:

> "Of course I do not deny that cases of individual hardship may arise, and there may be a current of opinion in the profession that such and such a judgment was erroneous; but what is that occasional interference with what is perhaps abstract justice as compared with the inconvenience - the disastrous inconvenience - of having each question subject to being reargued and the dealings of mankind rendered doubtful by reason of different decisions, so that in truth and in fact there would be no real final Court of Appeal?"[23]

What led to this stricter approach? It is plausible to identify two major contributing factors - one institutional and the other intellectual.[24] The institutional development was reform of the court system. Before the Law Terms Act of 1830 there was no coherent system of appeals from decisions of the various common law courts. The methods for complaining that a court had made an error were chaotic. The 1830 Act established a new court of Exchequer Chamber, superior to each of the common law courts and intermediate between them and the House of Lords. Then the Judicature Acts of 1873 and 1875 radically overhauled the judicial system by consolidating all the different common law courts and courts of equity into a single High Court of Justice and Court of Appeal.

A further important reform was the transformation of the House of Lords into an effective final court of appeal. In 1844 the convention was clearly established that only members of the House who were learned in the law could take part in its decisions. In *O'Connell v R* (according to the case report) "one or two" lay peers tried to vote on the outcome of the appeal.[25] After some debate, it was agreed that peers who were not lawyers should abstain from voting. This was made a statutory rule by the Appellate Jurisdiction Act 1876, which also created the first life peerages enabling professional judges to be appointed for life as Lords of Appeal in Ordinary (commonly known as "law lords"). Previously, membership of the House of Lords depended on being made a hereditary peer.

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[22] *Beamish v Beamish* (1861) 9 HLC 274.

[23] *London Street Tramways Co Ltd v London County Council* [1898] AC 375, 380.

[24] See J Evans, "Change in the Doctrine of Precedent during the Nineteenth Century" in Goldstein (ed), *Precedent in Law* (1987), ch 2.

[25] *O'Connell v R* (1844) 11 Cl & F 155, 421; 8 ER 1061, 1161.

Once there was a clear hierarchy of courts with the House of Lords functioning as an effective final court of appeal at its summit, it made sense to have a doctrine which required every court to follow decisions of any higher court. There was also support for the even stricter view that decisions of a court could only be overruled by a court above it in the hierarchy (if there was one). I have mentioned the resolution of the House of Lords in 1898 that it was bound by its own previous decisions - which remained the position until 1966.[26] By the beginning of the 20th century, the Court of Appeal also generally regarded itself as bound to follow its own previous decisions, though this was not adopted as a formal rule until 1944.[27] In civil cases that rule still persists.

Influence of Bentham and Austin

The major intellectual development which affected attitudes to precedent in the 19th century was the influence of Jeremy Bentham and John Austin.

Bentham had strong, iconoclastic views about the nature of law which he expressed in colourful language. JS Mill once remarked that, when it came to jurisprudence, Bentham found the battering ram more useful than the builder's trowel.[28] Bentham developed his ideas about law in direct opposition to Blackstone. He ridiculed the notions that the common law was based on custom and that judges were in some sense involved in discovering or declaring what the law already was. He derided those ideas as pure fiction.

For Bentham, all law consisted of more or less precise commands embodied in rules. The only material difference between statute law and case law lay in who makes the rules and how they are promulgated. Statutes are of course enacted by Parliament. Case law is law enacted by judges. He referred to the common law as "judge-made law" or "judiciary law".

If the common law is, as Bentham saw it, in truth a product of judicial legislation, then it is open to two powerful objections - both of which Bentham forcefully made. The first is that, compared with statutes, judiciary law is highly inaccessible. Although

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[26] *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234.

[27] See J Evans, "The Status of Rules of Precedent" (1982) 41 CLJ 162, 170-1; *Young v Bristol Aeroplane Ltd* [1944] KB 718.

[28] JS Mill, "Austin on Jurisprudence", 118 Edinburgh Review 439 (Oct 1863), quoted in Postema, *Bentham and the Common Law Tradition*, p 148. My outline of Bentham's ideas is extracted from this excellent book.

as students you have excellent textbooks such as *Treitel on Contract*[29] and *Winfield & Jolowicz on Tort*[30] to help you, the rules of law summarised in those scholarly works have to be mined with great difficulty from a mass of case reports, and it is hard enough for lawyers to know what the law is, let alone the public. The second objection is that rules made by judges are given retrospective effect because they are applied in the very cases in which the rules are made, so that the parties cannot know what the governing rule is until after the events which led to their dispute have already taken place. Bentham described the common law as "dog law". He likened the way it works to how a dog is taught not to do something: "you wait till he does it, and then beat him for it." "This," Bentham said, "is the way you make laws for your dog; and this is the way the judges make law for you and me."[31]

Bentham thought that the only way to overcome these fundamental defects in the common law was to codify the entire system. It was a cause that he pursued passionately.

Bentham's ideas were taken up by his younger friend and neighbour, John Austin, whose *Lectures on Jurisprudence* helped to promote them among lawyers. Austin was the first Professor of Jurisprudence at University College, London, appointed soon after it was founded in 1826. He was clearly an appalling lecturer. He had the dispiriting experience, which I hope none of your lecturers have, of addressing a large audience at the start of the term, only to see it dwindle, until he found himself speaking to an almost empty room. Austin found this so distressing that after a few years he resigned his chair - an event which his wife described as "the real and irremediable calamity of his life - the blow from which he never recovered."[32]

However, Austin's lectures were more popular in print than they were in person, and they were influential. Austin's writing was more moderate in tone than Bentham's, though he did not hold back from criticising what he called "the childish fiction employed by our judges, that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing, I suppose, from eternity, and

[29] *Treitel on The Law of Contract*, 15th ed (2020), ed Edwin Peel (Fellow of Keble College).
[30] *Winfield & Jolowicz on Tort*, 20th ed (2020), ed James Goudkamp (Fellow of Keble College) and Donal Nolan.
[31] "Truth v Ashhurst; or Law as It Is, Contrasted with What It Is Said to be", in *The Works of Jeremy Bentham*, ed J Bowring (1838-43), vol V, p 235, quoted in Postema, *Bentham and the Common Law Tradition*, p 277.
[32] Oxford DNB (2008), URL = <https://doi.org/10.1093/ref:odnb/911>.

merely *declared* from time to time by the judges."[33] Here and elsewhere Austin, like Bentham, used the term "judiciary law" to describe the common law. He defined "judiciary law" as "law made by judicial, *or improper* legislation".[34] And he made similar arguments to Bentham's that such law is objectionable because it is a form of retrospective legislation and because is obscure and inaccessible to the public. His solution, like Bentham's, was that all the law needed to be codified.

The movement, which Bentham and Austin supported, to codify the common law did not meet with much success, at any rate in England. But their thesis that the common law just consists of rules made by judges had a lasting impact. In the 20th century, it became the dominant way of thinking about case law, at least among writers on jurisprudence,[35] and it remains prevalent today.

The rule theory of precedent

The idea that the common law consists of rules made by judges, established when they decide cases, has clear implications for how the doctrine of precedent is conceived. Once lawyers began to think of case law as just a set of rules of this sort, it was natural to treat rules made by higher courts as strictly binding on lower courts, and also to want to define whether courts were similarly bound by earlier decisions at the same level.[36] And once precedents are regarded as strictly binding in later cases, it becomes essential to know how exactly to identify from reading the report of a case what propositions of law are binding. For as long as cases have been relied on as precedents, it has been recognised that not everything a judge says in the course of explaining the reasons for a decision possesses authority. In *Bole v Horton*, a case I mentioned earlier decided in 1672, Vaughan CJ said:

> "An opinion given in Court, if not necessary to the judgment given of record, but that it might have been as well given if no such, or a contrary opinion had been broach'd, is no judicial opinion, nor more than a gratis dictum."[37]

Common lawyers still refer to statements made by judges which are not capable of having binding force in later cases as *dicta* or *obiter dicta*. A proposition of law which

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[33] J Austin, *Lectures on Jurisprudence, or, the Philosophy of Positive Law*, ed R Campbell (1875) p 321.

[34] Austin, *Lectures*, p 314 (emphasis added).

[35] See, among other important works: HLA Hart, *The Concept of Law* (1961); Neil MacCormick, *Legal Reasoning and Legal Theory* (1978); Joseph Raz, *The Authority of Law* (1979).

[36] See Evans, "Change in the Doctrine of Precedent" at p 70.

[37] *Bole v Horton* (1672) Vaugh 360, 382; 124 ER 1113, 1124.

constitutes binding precedent is known as the *ratio decidendi* or *ratio* of the case. The word *ratio* means rationale or reason. A reason need not take the form of a rule. But if you think of case law as a body of judge-made rules, then, when you read a judgment to look for the *ratio* of a case, you will be trying to identify a rule of law which is either expressly enunciated or is implicit in the reasoning in the judgment. I will call this approach "the rule theory of precedent".

This is, essentially, the theory of precedent adopted by Cross and Harris in their book on *Precedent in English Law*. Here is how they describe the *ratio decidendi* of a case:

> "The *ratio decidendi* of a case is any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion …"[38]

In the 4th edition Jim Harris has added that, strictly speaking, this formulation should refer to a "ruling on a point of law" rather than a "rule of law".[39] If that amendment is made, the description reads:

> "The ratio decidendi of a case is any ruling on a point of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion …"

There is much that could be said about this formulation, including what is meant by "a necessary step". I have said quite a lot about that in a judgment that I gave in the Court of Appeal in 2019 in a case called *Youngsam*.[40] But what I want to highlight today is the description of the *ratio decidendi* as a rule of law established by a judicial ruling.

Inherent in this view of precedent are three assumptions that are worth spelling out.[41]

The first is that rules derived from past cases have the force of law because they were laid down by judges. Judges are viewed as mini-legislators. They do not have power to make laws about anything they choose. But they have power to make a new rule provided it has a sufficiently close relationship with the case they have to decide and is not inconsistent with precedent binding on them. We can find this

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[38] *Cross & Harris*, p 72.

[39] Accepting a suggestion made by Neil MacCormick in "Why Cases Have Rationes and What These Are" in Goldstein (ed), *Precedent in Law* (1987), ch 6.

[40] *R (Youngsam) v Parole Board* [2019] EWCA Civ 229; [2020] QB 387, paras 48-59.

[41] For a similar critique, see AWB Simpson, "The Common Law and Legal Theory" in *Oxford Essays in Jurisprudence (Second Series)* (1973), ed AWB Simpson, p 82.

assumption expressed in *Cross and Harris*, when they write that a rule derived from precedent "is law *'properly so called'* and law *because it was made by the judges*, and not because it originated in common usage or the judge's idea of justice and public convenience."[42] *Cross and Harris* do not explain further what they mean by law 'properly so called'. But they appear to consider that law is only properly so called if it is a rule made in the exercise of a law-making power by someone who has that power.

Second, if judges have law-making powers, it is natural to think that whether a rule of law is created when a judge decides a case - and, if so, what that rule is - depends upon the intention of the judge. An extreme version of this view was articulated by Devlin J (as he was at the time) in a case in 1957 called *Behrens v Bertram Mills Circus*. (Those of you who have studied tort law may remember it as the case of the circus midget - as she was described - who was injured by a rampaging elephant.) Devlin J said that whether judicial observations are *obiter dicta* or part of the *ratio decidendi*:

> "is a matter which the judge himself is alone capable of deciding, and any judge who comes after him must ascertain which course has been adopted from the language used and not by consulting his own preference."[43]

Third, if the common law has the force of law because it has been made by the judges, then its status as law cannot depend on it having any particular content. Again, common law is seen as like statute law in this respect. The authority of a statute does not depend on whether the rules contained in it are considered to be good or bad. It is law because it has been enacted by Parliament. The same is, on this view, true of judge-made law. I quote *Cross and Harris* again:

> "Once it is recognised that a rule laid down by a judicial decision is law because it is so laid down, the source of the judicial decision, whether it be another decision, a dictum in a previous judgment, a principle of justice or convenience, ceases to be relevant from the point of view of binding authority. All that matters is the precedent and this must be followed if, according to our doctrine of precedent it is binding, even if it is not regarded as a right principle by the judge who is considering the matter."[44]

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[42] *Cross & Harris*, p 28 (emphasis added).
[43] *Behrens v Bertram Mills Circus Ltd* [1957] 2 QB 1, 24.
[44] *Cross & Harris*, p 36.

Limits of the rule theory

There is no doubt that the rule theory of precedent represents at least one way in which lawyers today often do think about case law. Thus we talk about rules of common law and sometimes name them after cases in which they were originally expressed: for example, "the rule in *Hadley v Baxendale*" or "the rule in *Rylands v Fletcher*". But the rule theory does not provide a complete or satisfactory explanation of how common lawyers reason from decided cases.

Lex non scripta

There are several serious discrepancies between the implications of the rule theory and what common lawyers generally recognise as the proper way of reading cases. One goes back to where I began my historical survey with Chief Justice Hale. If judges make law by laying down rules in a similar way to legislators, then it should follow that the language used by the judge is definitive of the rule laid down. And so it was said by Devlin J, for example, in the passage that I quoted from his judgment in *Behrens v Bertram Mills Circus*.

Now I think there is indeed a tendency, which may be growing, to read judgments in that way. This tendency has been described as the "textualization" of precedent.[45] Since joining the Supreme Court, I have become more conscious of the frequency with which counsel alight upon a snippet of text in a judgment and treat it as if the language had a similar status to that of a statutory provision, rather than engaging in an analysis of how the reasoning relates to the facts of the case and the outcome.

One factor which may contribute to this tendency is the more limited time allowed for oral argument nowadays than used to be the case. With less time to delve into the detail of case reports, it is tempting to look for sound bites. Another factor may be the current practice in the Supreme Court to try in every case, if possible, to produce one judgment with which a majority of the court agrees, even if there are also any concurring or dissenting judgments. The current President of the Supreme Court, Lord Reed, is a strong proponent of this approach. It promotes clarity and avoids what otherwise can be intractable difficulties of trying to identify what is or is not common ground in a series of separate judgments. But this practice comes with a danger, which is a reason why it has sometimes been resisted. A strong opponent of it was the previous Lord Reid, spelt differently though also a Scots lawyer, who was a

[45] See Peter M Tiersma, "The Textualization of Precedent" (2007) 82 Notre Dame Law Review 1187.

law lord for 27 years (a record length of time) until his death in office in 1975. He once said:

> "With the passage of time I have come more and more firmly to the conclusion that it is never wise to have only one speech in this House dealing with an important question of law. My main reason is that experience has shown that those who have to apply the decision to other cases . . . seem to find it difficult to avoid treating sentences and phrases in a single speech as if they were provisions in an Act of Parliament. They do not seem to realise that it is not the function of noble and learned Lords or indeed of any judges to frame definitions or to lay down hard and fast rules."[46]

I do not believe this to be a sufficient reason to encourage a plethora of judgments. But the point that it is not the function of judges to frame definitions or to lay down hard and fast rules is valid and important. It goes back to the distinction drawn by Sir Mathew Hale between statute law as *lex scripta* (or written law) and the common law as *lex non scripta* (or unwritten law). This distinction remains apposite. It is still a feature of the common law that none of its propositions has a single correct or definitive formulation. As Sir Frederick Pollock put it in *A First Book of Jurisprudence for Students of the Common Law*, published in 1896, the common law "professes … to develop and apply principles that have never been committed to any authentic form of words."[47]

That is true even of those rules which have their origin in an identified case such as "the rule in *Rylands v Fletcher*". According to *Cross and Harris*, "no lawyer would hesitate to say that the rule in *Rylands v Fletcher* is just as much a rule of English law as the statutory requirement that a will must be signed by two witnesses."[48] There is, however, a fundamental difference because, unlike the rule that a will must be signed by two witnesses, the rule in *Rylands v Fletcher* has no definitive or authentic form. You may recall that in *Rylands v Fletcher* water escaped from a reservoir on the defendant's land flooding the plaintiff's mine and causing damage. The defendant was held to be strictly liable for the damage.[49] But there has been argument ever since about the proper scope of the rule.[50] To what kinds of activity does the rule

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[46] *Cassell & Co v Broome* [1972] AC 1027, 1084-85.

[47] See F Pollock, *A First Book of Jurisprudence* (1896), p 239, quoted in AWB Simpson, "The Common Law and Legal Theory" p 89.

[48] *Cross & Harris*, p 208.

[49] *Rylands v Fletcher* (1866) LR 1 Ex 265; (1898) LR 3 HL 330.

[50] See eg *Winfield & Jolowicz on Tort*, 20th ed (2020), ch 16.

apply? Does it apply only if the defendant is using its land in an abnormal way? Does the defendant have to be the owner of the land on which the activity that causes damage occurs or is being an occupier of the land sufficient? Does the claimant have to be a neighbouring landowner? What kinds of injury come within the scope of the rule? Arguments about these and other issues are not simply arguments about the meaning of the language in which the rule was first expressed.

Distinguishing

Adherents of the rule theory can seek to accommodate the point that propositions of the common law do not have a single authentic linguistic form by crediting courts with a power to restate or revise rules made in previous cases. This is also how some writers have sought to explain the practice of distinguishing cases.

One of the first things you will have learnt when reading cases as a law student is that a court is not bound by a previous case if the decision can be distinguished. Distinguishing a case involves identifying a significant difference between the facts of that case and those of the present case which justifies reaching a different result.

One consequence of a strict doctrine of precedent is that, when faced with an otherwise binding precedent of which they disapprove, judges may be inclined to adopt a generous view of what facts are significant. An extreme instance is the approach that Lord Denning once took when faced with a previous decision of the House of Lords with which he disagreed. He described the earlier decision as one about a paint shop and said:

> "That is, to my mind, a decision on the particular facts of the paint shop and nothing else. The decision may be binding on your Lordships if there is another such paint shop anywhere, but it is not, in my opinion, binding for anything else."[51]

To explain the practice of distinguishing cases, adherents of the rule theory have asserted that all courts have what *Cross and Harris* call "a residual power to restrict the scope of the rule" laid down an earlier case.[52] On this view only appeal courts have powers to overrule a past decisions. But even lower courts have the power to

[51] *London Transport Executive v Betts* [1959] AC 213, 246. The earlier case was *Potteries Electric Traction Co Ltd v Bailey* [1931] AC 151. I have taken this example from Neil Duxbury, "Final Court Jurisprudence in the Crystallisation Era" (2023) 139 LQR 153, 159, fn 43.

[52] *Cross & Harris*, p 74; and see Joseph Raz, *The Authority of Law* (1979), pp 183-189.

amend rules made by courts above them in the court hierarchy, just so long as the revised rule is narrower and still justifies the result reached in the earlier case.

Purely as a matter of logic, this provides a way of reconciling the practice of distinguishing with the rule theory of precedent. But it is unclear *why* lower courts should be given a power to narrow rules laid down by higher courts. And I do not think that this explanation accurately represents what lawyers understand themselves to be doing when they distinguish an earlier case.

How judges make law

Another and even deeper problem for the rule theory is that, if you accept the premise that judges make law in a similar way to legislators, there is no answer to the criticism that judicial rule-making is objectionable because it operates with retrospective effect. Of course the fact that the consequence is objectionable does not disprove the premise. But it gives cause to consider whether the common law really is "judiciary law" in the way that Bentham and Austin characterised it.

In one sense the claim that judges make law is irrefutable. If this were not so the common law could never change, which obviously it does. The notion that judges simply declare what the law already is when they decide a case is untenable. In so far as anyone ever believed that, the notion has not survived the savaging that it received from Bentham and Austin. But it does not follow that judges make law in the same way as legislators. Court decisions can change the law without judges having law-making powers.[53] They can change the law, not because courts have or exercise powers to make new rules, but because courts must interpret the law in order to apply it and later courts are required generally to treat earlier decisions of certain courts as correctly decided.

Case law reasoning is an exercise of interpretation, not legislation. Although the techniques employed are different, the proper analogy is with interpreting legislation, not with enacting legislation. Many cases that come before the courts involve disputes about the meaning and effect of statutory provisions. Courts have to interpret the language used and in doing so they can be said to make law because the provision may have no clear and obvious meaning on which everyone can agree and because the court's decision will inform how the statute is interpreted in future. But that does not mean that judges have power to amend or revise statutes.

[53] See Grant Lamond, "Do Precedents Create Rules?" (2005) 11 Legal Theory 1.

Manifestly they do not. Analysing and reasoning from past cases is also best understood as a form of interpretation.[54]

Continuing relevance of traditional theories

If reasoning from past cases is an exercise of interpretation, what does this involve? I think there remains truth in the traditional theories of the common law: Hale's understanding of the common law as a body of collective practice and opinion to which courts must stay faithful but which also needs constantly to be brought up to date as social conditions and values change; but also Lord Mansfield's explanation that the task is one of searching for principles which underlie and justify past decisions. A modern philosopher who powerfully articulated such an understanding of case law was Ronald Dworkin, by whom I had the good fortune to be taught many years ago and who has profoundly influenced my own vision of law and approach to legal reasoning.

Conclusion

To develop the suggestions I have just made would require another lecture. My aim this evening has not been to argue for a particular view of the role of precedent, although I have pointed out what I see as weaknesses of the rule theory. Rather my aim has been to show that there are different ways in which the role of precedent has been understood at different periods of English history and in how it is understood now. I have sought to contrast the rule theory of precedent favoured by *Cross and Harris* with other, older traditions which are still alive. Perhaps the fundamental divide is over whether primacy is given to what judges *say* in deciding cases or to what they *do*; between viewing case law as a kind of written law or as unwritten law; between approaches that Dworkin once labelled, respectively, "precedent as edict" and "precedent as example".[55]

I think that both approaches are reflected in how lawyers and judges do in fact reason from past decisions. And that, as I suggested at the start of this lecture, the two approaches co-exist, in tension with each other.

If any members of the Harris Society have found it difficult to understand what exactly is meant by the *ratio* of a case and how you are supposed to tell for what proposition of law, if any, a case constitutes a potentially binding precedent, I am

[54] See eg R Dworkin, Law's Empire (1986) ch 7; and, for an older account, CK Allen, "Precedent and Logic" (1925) 41 LQR 329.

[55] In discussion. I have not found these terms used in his published works.

afraid that I will not have enlightened you this evening. But I hope I may have reassured you that, if you experience such difficulty, it is not your fault. The difficulty is inherent in the fact that there are different, competing understandings of what it means to follow a precedent. Like the whole of the common law, the practice of following precedent is itself one that is open to interpretation and argument. Changing and sometimes conflicting views about precedent are themselves part of a voyage, not to the land of the Houyhnhnms with Gulliver, but on the journey of the common law through time on board the Argonauts' ship.