

Introduction

The Central Question and Its Ramifications

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You have no general reason to do the same thing today that you did yesterday. Let alone the same thing that *someone else* did yesterday. So why should a judicial decision today depend on what a court decided in the past? That is the central question concerning precedent in law.

This book offers a broad array of philosophical investigations into the central question, and into the multiple, ramified issues that arise from efforts to answer it. By ‘philosophical’ we mean, in this context, having to do with basic aspects of the nature and authority of precedent and of the forms of reasoning that it involves, and with fundamental normative principles as to how and when to act in accordance with precedent.

We will not summarize the forty original contributions to the subject that this book presents. We aim to set the scene by pointing out reasons for the range and the depth of the investigations offered here. And we will explain the way in which the project has developed.

The chapters discuss and criticize a variety of practices of adhering to past decisions or precedents (we think of a precedent as a previous decision, considered under the aspect of its potential use as a guide to action). The chapters address precedent in the common law, the civil law, and allied fields of practical reasoning. Those varied practices all presuppose an answer to the central question. Without an answer, we would seem to end up with a sort of pragmatic paradox: a putative argument for the conclusion that courts cannot rationally act on the basis of precedent. On this view, you *should* do the same thing today that you did yesterday, if there were reasons that required it yesterday, and the same reasons require it today. If a court did its duty in yesterday’s case, today’s court ought to do something similar in a relevantly similar case (unless its duty has changed). But then, it is enough for today’s court to act on the grounds that also required that same decision in yesterday’s case. Today’s court need not treat the mere fact of yesterday’s decision as a ground of decision. Conversely, if yesterday’s court made the wrong decision, then it seems that today’s court should do something different (that is, it should act on the grounds that yesterday’s court ought to have acted on in a relevantly similar case). Precedent, it would seem, makes no rational difference, whether yesterday’s decision was right or wrong. It appears that courts should never act on the basis of precedent. A precedent, you might say, can only have independent force when it was decided incorrectly, and then today’s court should depart from it!

That argument needs to be met if the practice of precedent is to be justified. In this book you will see resolutions to this apparent paradox offered from diverse perspectives, and you will see arguments that it is irresolvable.

1. Surely Like Cases Should Be Treated Alike?

The answer to the central question may seem to be obvious because judicial decision is a matter of right, and in matters of right, like cases should be decided alike.

But put that way—in the passive voice—there cannot possibly be such a general principle: if there were any genuine principle, it would have to be a principle that *a particular agent or agency* ought to decide like cases alike. The unity that legal systems tend to impose on themselves offers a crucial initial step in a justification of following precedent in law. The legal unification of judicial agency may involve a hierarchy, and may allow dissenting judgments, but it secures finality and a non-contradictory form of ordering. In that unification of agency, judges tend not to be free to disregard what other judges have done. The judges who serve on a court tend to act as representatives of a single, institutional agency. That tendency generates expectations that the court will act consistently, and a sense of responsibility on the part of judges to do so. The decision of the court is seen as an action of the same agency that reached a decision yesterday, or years ago. Adherence to precedent not only makes the system look *unified*; it tends to make the system look *timeless*, conferring the stability, reliability, and consistency that are crucial elements in the rule of law. This institutional unification is crucial to making sense of precedent in law.

2. Answers to the Central Question Generate a Central Tension

And then, if an agent ought to treat like cases alike, that seems to answer the central question. And yet, even if an agency has reason to take the same action in the same circumstances, it does not actually follow that it should do the same as it did in the past. What if the agency acted improperly in the past, ignoring the reasons for action that apply in the case it decided and in all relevantly similar cases? Systems that give legal force to precedent seem to act on a presumption that what has been done has been rightly done, and because no such presumption is perfectly reliable, a tension arises between reasons for acting consistently, and reasons for reform. A court may have to choose whether to perpetuate a mistake, or to act differently today. Judges very often feel an impulse to buttress the credibility and the prestige of their institutions by adhering to what has been done before (we will call this the ‘prestige impulse’). The presumption that the court has acted rightly in past decisions becomes an element in the good repute of the court. But of course, like any responsible agent, a court should not *only* aim for consistency; it ought to be prepared to improve, and to learn from past mistakes.

The value of readiness to reform is endangered by a practice of strict adherence to precedent. A rule requiring decisions that accord with precedent creates a potential tension with justice: both with general justice (because a bad precedent may generate an unjust general rule) and with equity (because there may be some special reason of justice in a new case for departure from a general rule). All the reasons for precedent have a poignant frailty, insofar as the court that decided the earlier case was fallible. Conversely, the fallibility of the later court counts in favour of precedent. The result is a tension within the law’s effort to regulate its own content and development in a way that manages imperfections in its institutions and in its rules. Adhering to precedent promotes the rule of law, insofar as its rule-like constraint distinguishes judicial decision in a new case from the arbitrary say-so of today’s court. But a strict doctrine of precedent can also pose a threat to the rule of law, insofar as it gives legal

effect to wayward and wilful decisions, generating the arbitrariness of governance by the mere say-so of a court in an earlier case. Acting by precedent, Jeremy Bentham wrote, 'is acting without reason, to the declared exclusion of reason, and thereby in declared opposition to reason'.¹

The reasons for treating the mere fact that a court decided *this* in the past as a norm for today are very different from the reasons for treating the mere fact that a legislature (or the framers of the constitution, or the maker of a will, or the parties to a contract) decided *this* in the past as a norm for today. Yet the central question about precedent is an instance of the general question of why the community today should pay attention to what was decided on behalf of the community in the past. So it is an instance of the question of why there should be law. And therefore, the central tension is an instance of the general tension between the value of the rule of law and the demands of justice. The central tension is the very epitome of that broader tension. And because justice can require that officials and institutions adhere to the rule of law instead of presuming to act on their own conception of justice, the central tension is a tension *within* the principle that a state must act justly.

The central tension can be managed to some extent by a variety of judicial techniques. These techniques have the potential to make various practices of precedent more just:

- overruling (typically by higher courts);
- an *obiter dicta* rule (giving the effect of precedent only to the earlier court's rationale for its decision in the case—the *ratio decidendi*—and not to other statements of law made by the judges along the way);
- distinguishing a precedent (confining its effect to some new, restrictive specification of the basis on which it was decided, so as to justify a different decision in a new case);
- a *per incuriam* rule (a doctrine that a decision does not have the legal effect of a precedent insofar as it was decided on a basis that was legally mistaken, if it is incontrovertible that the court in that case would have decided differently, if the mistake had been pointed out);
- innovative techniques of interpreting precedents: the effect of a precedent can evolve (or even change radically) because of the legal effect of later decisions that interpret it or reinterpret it or misinterpret it; and
- treating precedents as sources of persuasive authority only, as is done in many civilian jurisdictions.

Because of these management techniques, the central tension is a dynamic tension with reflexive aspects. The system's management of its practice can itself generate problems. A doctrine of precedent can create a danger of hidebound, merely conformist adherence to stupid decisions, but a doctrine of precedent can also create a danger of lawless judging: the judges in a later case sometimes honour the judges in a precedent by treating the earlier judgment as if it had established whatever rule the judges in the later case would prefer.

Moreover, a legal system may use legislation as a technique to respond to perceived injustices resulting from precedent, through the legislature's capacity to reform the law made by precedent (at least, if the precedent does not change constitutional rules that are beyond the competence of the legislature!). But lawmakers may be accused of disrespect for the rule of law if a legislature reverses the particular effect of a judicial decision. The law may prevent

¹ J Bentham, *Constitutional Code for the Use of All Nations and All Governments Professing Liberal Opinions* (Robert Heward 1830) 566.

them from doing so. And lawmakers are sometimes accused of disrespect for the rule of law even when the legislature enacts a prospective departure from a rule that was made by precedent—a fascinating result of the prestige impulse, which for many generations supported a rule that statutes would be presumed not to change the common law.

3. Against a Negative Model of Precedent

If the rival risks of hidebound decisions and lawless decisions make you sceptical about precedent, let us offer you an experiment. We recommend it, at the outset of this book, as a reminder of the possibility that a doctrine of precedent might promote justice and the rule of law. Imagine an anti-precedent doctrine: when a court decides a new case in which the facts are the same as those of an earlier case, this doctrine requires the court to give an outcome that is *different* from the outcome that it gave in the earlier case. Please do not spend too much time imagining it—a moment is enough to see that an anti-precedent doctrine would be deranged (Lewis Carroll might have made it into a doctrine of the Queen of Hearts' legal system). A rule that a court should decide like cases alike has advantages and drawbacks; a rule that courts should decide like cases differently would be irrational. The community would be subjected to governance that is organized against reason. It really would involve what Bentham said a doctrine of precedent involves: acting in declared opposition to reason.

In adjudication, as in other areas of human action, there is a radical asymmetry between doing the same thing this time as you did before, and doing something different this time. The former, adopted as a general policy, involves the tensions that you will encounter in the chapters of this book. You can see that it may be worth trying to resolve those tensions, because deciding a new case differently from an earlier case cannot possibly be your general policy.

4. The Book

There are new things to be said about the role of precedent in law. Old questions can be addressed in new and different ways, and new issues are waiting to be brought into the daylight. We embarked on this project because we thought that there was an opportunity for established writers and for new voices to make original contributions to the field in a collegial and interactive project.

We had to make a strategic decision: whether to try to cover the area by commissioning people to write on particular topics, or whether to invite them to decide for themselves. We wholeheartedly took the latter approach. Our priority was for the authors to decide what would be worthwhile, in a landmark collection that would involve an inclusive and balanced group of authors coming from both the civil and the common law tradition. Although the challenge remains, we hope to continue working towards a more inclusive and interconnected community of legal philosophers.

We invited the authors to address problems of doctrine, of history, and of comparative law, using any of the methodologies appropriate to dealing with such problems. But the central purpose of each contribution was to be philosophical (in the broad sense explained earlier, which includes much of what is sometimes called 'jurisprudence' or 'legal theory'). The focus of the book is on the role of precedent *in law*, but we have also taken a broad approach to the

connection to law. We simply asked the authors to say something new and worthwhile in the philosophy of precedent in law.

That approach explains why the book is arranged in five rather fluid parts: (I) the Nature of Precedent, (II) Precedent and Legal Argument, (III) Precedent and Legal Theory, (IV) Precedent and Judicial Power, and (V) Effects of Precedent in Morality and Law. We could well have arranged the essays differently within those parts, and several of the essays deal with all five of those matters. Our allocations of essays to those parts of the book are impressionistic, reflecting our sense of each author's focus of attention. And all of the essays address the central question and the central tension, to some extent, and from very different directions.

We set out to arrange for each author to receive critical feedback from at least one of their fellow authors. To kick off that process in a convivial fashion, we organized a two-day online workshop in October 2021, in which we discussed twenty-one of the chapters offered here. We are very grateful to the authors for the responses they gave each other in the workshop, and also by correspondence.

A significant part of the value of the resulting volume lies in the diversity of problems that the authors chose to address, and in the diversity of perspectives and methods that they have brought to their work, and in their diverse opinions. As you can see, this diversity in the work did not arise from central planning, but from the variety of the authors' own ideas and approaches. It has been a pleasure to see the results of the authors' lateral thinking. Again and again we have found them working out what they might bring to the project that is original and different from what anyone else would do. It actually came as a relief to us that the essays in this unregulated array do not all simply address the central question and the central tension in the same way. You might say that we were lucky, but it isn't exactly luck: it is the result of forty-three authors asking themselves what they have to say that will shed new light on issues resulting from the central question, and from the tensions generated by ways of approaching it.

In lieu of a summary, consider the following forty questions—each of which we have drawn from one of the forty essays—as a glimpse of those ideas and approaches:

Can precedents really be distinguished, or can they only be followed or overruled? (Larry Alexander)

Can the law-creating aspect of precedent be explained in terms of criteria provided by a social rule? (Grant Lamond)

What is the relation between moral and legal grounds for following precedent? (Sebastian Lewis)

What is the relation between legal duties to follow precedent and non-legal social rules of the legal community? (Nicholas Barber)

Should findings of fact ever be treated as having precedential effect in later cases? (Adam Rigoni)

Is *stare decisis* a norm for the recognition of law, or a norm governing institutional decision-making? (Hafsteinn Dan Kristjánsson)

Does setting a precedent amount to establishing a paradigm? (Peter Hatfield and Leah Trueblood)

What forms of argument do courts use when they rely on precedent? (Claudio Michelon)

Does distinguishing a precedent amount to replacing one original rule with two new rules? (Barbara Baum Levenbook)

- Can courts extract an underlying principle from a string of previously decided cases? (Luís Duarte d'Almeida)
- Do the intentions of the court determine the content of the law that is made by its decisions? (Ralf Poscher)
- Can precedent constrain judicial decision-making in any way other than by laying down determinate, authoritative rules? (Emily Sherwin)
- Are precedents exemplars, so that reasoning by reference to precedent is a form of imitative behaviour? (Amalia Amaya)
- Is it possible for a doctrine of precedent to constrain courts when they can distinguish earlier cases? (John Horty)
- What is the relation between power and reason in precedential decision-making? (Scott Brewer)
- Does the norm applied in a precedent remain essentially the same (changing only by specification) in a later case? (Bruno Celano)
- What is the role of analogy in precedent-based decision-making? (Cass R Sunstein)
- Can perceptions of similarity lead a later court to reason from particular to particular, without the mediation of any rule or principle? (Frederick Schauer and Barbara A Spellman)
- Does a doctrine of precedent impose a duty either to follow a horizontal precedent, or to explain a departure? (Andrei Marmor)
- Is the use of precedent compatible with the idea that law is an artefact? (Kenneth M Ehrenberg)
- Do judges have a duty to decide in a way that will accord with future decisions? (Nina Varsava)
- Does a doctrine that precedents may be distinguished empower courts to amend the law? (John CP Goldberg and Benjamin C Zipursky)
- Is law capable of constraining the judgment of a court as to whether an earlier case was relevantly similar to a new case? (Brian Leiter)
- Is it true that precedents are binding (and are sources of law) in the common law but not in the civil law? (Fábio Perin Shecaira)
- Should precedents be understood as giving second-order reasons to treat first-order reasons as having a greater weight than they would otherwise have? (Stephen Perry)
- Are the reasons for following precedent genuine, or merely conventional? (Torben Spaak)
- Should courts follow a mistaken interpretation of a statute in an earlier case, or should they adopt the true interpretation that the statute ought to have been given? (Dale Smith)
- Can a court in a jurisdiction with a doctrine of precedent choose *not* to set a precedent when it decides a case? (Mikołaj Barczentewicz)
- What kind of power do we exercise when we set a precedent? (Maris Köpcke)
- Does a doctrine of precedent in constitutional cases mean that a court's erroneous interpretation of the Constitution can displace the supreme law of the land? (Richard H Fallon, Jr)
- Can precedents have binding force in countries where the courts and the jurists claim that judges must not make law but only apply it? (Lorena Ramírez-Ludeña)
- If a civil law jurisdiction imposes no obligation on judges to decide in accordance with earlier decisions, but it is the judges' regular and accepted practice to do so, how should we describe the law of their jurisdiction? (Nils Jansen)

To what extent is predictability a value that calls for adherence to precedent? (Hillary Nye)
 When judges know that their decision will set a precedent, should they be concerned that their decision may start future courts down a slippery slope? (Katharina Stevens)

How, if at all, can non-judicial precedents justify state action? (Jeremy Waldron)
 Should the law require administrative agencies to treat their previous decisions as precedents? (Adam Perry)

How do judges escape from precedent (and utilize precedent) in deciding claims that they should give effect to the norms of indigenous legal orders such as *tikanga Māori* in Aotearoa New Zealand? (Nicole Roughan)

Can it be the case that judicial decisions made long ago (and never overturned) are not legally binding as precedents? (Matthew H Kramer)

Does the justification of a doctrine of precedent depend on arguments—aesthetic, psychological, or moral—for living in the past? (Heidi M Hurd)

What roles can precedent play in the judge's emotional engagement with legal concepts and doctrines? (Emily Kidd White)

Given the many connections among the questions the authors address, you will frequently find one benefiting from the views of another. You will also find one author disagreeing deeply with another. The book could not give a clear portrayal of the state of the discipline if it were not full of controversy. But we encouraged the authors to prioritize the articulation and defence of original claims, over taking further incremental steps in established debates.

Like law in general, the practice of following precedent can flourish without consensus on crucial questions concerning its nature and value. As ever in legal philosophy, it turns out that the controversial issues tend to be basic issues. We hope that readers will gain from discovering the various forms of convergence and divergence among authors in this volume, and we would only add this caveat: not every claim by one author is challenged by another. Perfect dissensus is not attainable in a collaborative project of this kind! It is just where you find the authors agreeing with each other that we hope you will be especially prepared to disagree, and to bring to the issues your own contrary-minded thinking.

5. A Note About Joseph Raz

Just weeks before his untimely death at the age of eighty-three in May 2022, Joseph Raz agreed that we could use one of his photographs on the jacket for this book. That makes this book part of a proud tradition of books with cover photographs by Professor Raz, published by the university presses of Cambridge, Harvard, Oxford, and Yale.

The photograph that Joseph gave us portrays the connection between the roots and the ramifications of a dynamic organism. We knew that the beautiful and evocative image, and the simple fact that it was Joseph who created it, would mean something to many readers whose understanding, like ours, has been influenced and shaped through our responses to Joseph's pioneering work on precedent, on the nature of law, and on practical reasoning in general. We have all gained from his patient and brilliant and unyielding determination to situate philosophy of law in the philosophy of practical reason. That is why we dedicate this book to Joseph's memory.

6. And Finally

We thank the authors. We did not know, when we started, what a pleasure it would be to watch this unprecedented collection of original philosophical investigations come together.

Timothy Endicott
Hafsteinn Dan Kristjánsson
Sebastian Lewis