The Routledge Companion to Eighteenth Century Philosophy
Edited by Aaron Garrett

The Routledge Companion to Philosophy of Mental Disorder
Edited by Jakob Hohwy and Philip Gerrans

The Routledge Companion to Social and Political Philosophy
Edited by Gerald Gaus and Fred D'Agostino

The Routledge Companion to Islamic Philosophy
Edited by Richard C. Taylor and Luis Xavier López-Farjeat

The Routledge Companion to Philosophy of Literature
Edited by Noël Carroll and John Gibson

The Routledge Companion to Philosophy of Religion, Second Edition
Edited by Chad Meister and Paul Copan

The Routledge Companion to Aesthetics, Third Edition
Edited by Berys Gaut and Dominic Lopes

The Routledge Companion to Philosophy of Science, Second Edition
Edited by Stathis Psillos and Martin Curd

9
PRECEDENT

Frederick Schauer

Introduction

Legal systems, and especially common-law legal systems, claim to place special weight in their decision-making on the constraints of precedent. In law, more than elsewhere, legal decision-makers are expected to follow previous decisions just because of the very existence of those decisions, and thus without regard to the current decision-maker's agreement with or persuasion by the content of those previous decisions. It is the very "pastness" of previous decisions, and not necessarily the current decision-maker's view of the correctness of those previous decisions, that gives the previous decisions their authority. Why this is so, and, more importantly, what it means for it to be so, is the principal topic of this chapter.

It is worth noting at the outset that precedent, although arguably concentrated in, and more important in, law than in other decision-making domains, and more important in, common-law legal systems than in their civil-law counterparts, is by no means unique to legal decision-making. Younger children who demand to be treated just as their older siblings were treated at the same age are relying on arguments from precedent, as are consumers who insist on being given the same prices and terms as those offered to prior customers, as are members of committees and other collective decision-making bodies who treat the very existence of a previous committee decision on some subject as providing a reason to make the same decision on some subsequent occasion.

But although arguments from precedent, as well as the correlative arguments against a proposed course of action for fear of creating a dangerous precedent, appear at times to be ubiquitous, such arguments are alleged to have greater weight in the law, and to be more pervasive in the law as well. Whether these comparative claims of frequency and weight are in fact true is an interesting and important empirical question, but in this chapter I nevertheless assume the truth of the conventional wisdom that a norm of precedent is, descriptively, a more central feature of legal decision-making than it is of decision-making, even good decision-making, generally. Thus, although the analysis presented in this chapter may have some application to any domain in which arguments from precedent have some purchase, it will still be focused almost entirely on the law.

Precedent: The Basic Idea

Precedent is centrally about the (not necessarily conclusive) obligation of a decision-maker to make the same decision that has been made on a previous occasion about the same or similar matters. That seems straightforward enough, but it is nevertheless

important to distinguish two different dimensions of precedent. One, which we can label *vertical* precedent, describes the obligation of a court to follow the decision made by a court above it in the judicial hierarchy on the same question, even if that question has arisen in a different case (Schauer 2009: 36–37). When trial courts make decisions on questions of law (as opposed to determining the facts in the particular matter before them), they are expected to follow—to *obey*—the decisions of the appellate courts that sit above them in what can be analogized to the military chain of command, just as the first-stage appellate courts must, in turn, follow the decisions made by courts above *them*. So, in the American federal courts, for example, federal district courts are obliged to follow the decisions of the court of appeals in their circuit, and the courts of appeals are similarly obliged to follow the decisions of the Supreme Court of the United States.

To be contrasted with this sense of vertical precedent is *horizontal* precedent, conventionally referred to as *stare decisis* (typically translated as "stand by what has been decided") (Lee 1999; Wise 1975). Understood horizontally, the obligation of a court is not the obligation to obey a decision from above, but is instead the obligation to follow a decision by the same court (although not necessarily by the same judges) on a previous occasion. And thus the obligation is, by definition, not one of obeying an institution higher in some hierarchy. Rather, the obligation to follow precedent in its horizontal dimension is, in essence, about treating a prior decision as if it came from above, even if it did not, and is accordingly about following an earlier decision solely because it came earlier. Horizontal precedent is about treating temporal priority as sufficient grounds for authoritativeness in its own right.

Thus, both vertical and horizontal precedent are about the authoritative character possessed by, or to be given to, prior decisions. And therefore the authority of a precedent is, as with authority in general, content-independent (Hart 1982). It is the source or status of a precedent that gives it its authority—that provides the reason for a decision—rather than the content of the precedent or the content or persuasiveness of the reasoning it incorporates. For just this reason, the force of precedent is most apparent when the decision-maker in the present case—the *instant* case—disagrees with the result reached in the previous case—the *precedent* case (Schauer 1987). When the decision-maker in the instant case agrees with or is persuaded by the outcome or the reasoning in the precedent case, then an argument from precedent is superfluous. It is only when the decision-maker in the instant case disagrees with the outcome or the reasoning in the precedent case that the content-independent authority of a precedent becomes apparent (Alexander 1989). In such instances, it is most obvious that the decision-maker is under an obligation to follow the precedent because of its source or status, and just because of that source or status, even if the decision-maker in the instant case believes that the decision in the precedent case was mistaken.

Although the force of a norm of precedent is thus most apparent when it compels a decision-maker to do what she would not otherwise have done, it is still important to note that the content-independent reasons supplied by a precedent need not be conclusive. A decision-maker in the instant case who accepts the obligations of precedent, and thus accepts that precedents supply content-independent reasons for decisions, may nevertheless believe that other reasons—legal, moral or prudential, for example—may outweigh the reasons supplied by the content-independent status of the precedent. So although the Supreme Court of the United States professes (whether the court actually behaves in such a way is less certain, as will be discussed in a subsequent section) to operate under a rule of *stare decisis*, such that it believes itself under an obligation

to follow its own previous decisions even when a majority of the current court thinks those decisions mistaken, the existence and even the internalization of such a rule is not inconsistent with the current—instant—court, on occasion, overruling or refusing to follow one of its earlier decisions. When, famously, the Supreme Court in *Brown v. Board of Education* ((1954) 347 U.S. 483) in 1954 overruled *Plessy v. Ferguson* ((1896) 163 U.S. 537), which in 1896 had held that officially racially segregated public facilities did not violate the constitutional requirement of equal protection of the laws so long as the racially segregated facilities were physically or nominally equal, the court need not have claimed that the *Plessy* decision had no precedential weight. It could have claimed simply that precedent-based reasons are not conclusive, and that in *Brown* the precedent-based reasons for following the decision in *Plessy* were outweighed by, say, the moral and legal reasons in 1954 for ending official racial segregation in the public schools.

Yet although the content-independent reasons for following a precedent need not be absolute, in a domain in which a rule of precedent is actually operative it would be expected that over a long enough run of cases the reasons supplied by the principle of precedent would on occasion be outcome determinative. That is, we should expect that a court or judge who actually took the reasons supplied by the idea of precedent to provide content-independent reasons for making decisions that it or she otherwise thought mistaken would on occasion follow the precedent in spite of her or its content-based reasons for deciding otherwise. If such subjugation of first-order substantive reasons to the constraints of precedent never or rarely occurred—if a judge or court professed adherence to a norm of precedent but never reached outcomes other than those consistent with her or its content-based and all-things-considered substantive judgment—there would be reason to doubt that the norm of precedent was actually being internalized by the judge or court. This possibility, which is central to the Legal Realist claims about precedent which will be discussed in a subsequent section, should not be discounted, for claims of its empirical plausibility are far from frivolous. Nevertheless, as an initial matter we can still understand what a norm of precedent would do if it were operative, while temporarily delaying considering the extent to which, if at all, such norms are actually operative in various legal decision-making domains.

On Distinguishing Precedent from Analogy

In some of the literature on precedent and on analogy, arguments from precedent are equated with arguments from analogy (Holyoak 2005; Weinreb 2005), but this conflation is a mistake (Schauer 2008), albeit an understandable one. Because arguments from analogy are widespread in law, and because arguments from analogy typically use a previously decided case as the source of the analogy, commentators, especially those external to the legal system, assume that this form of argument is an argument from precedent, but doing so ignores the important differences between the two, and risks misunderstanding or misinterpreting the very idea of precedential constraint.

More specifically, an argument from analogy is ordinarily a form of persuasion and justification, but not of constraint. One making an argument from analogy typically finds an example, called the *source* in the literature on analogical reasoning, and then identifies some conclusion or characteristic about the source that both the user of the analogy and the object of the user's argumentative or justificatory efforts will find appealing, and then calls forth a similarity between the source and the *target*, the current issue that is

the subject of the argument from analogy (Gentner, Holyoak and Kokinov 2001; Holyoak and Thagard 1995). If the subject of the argument—those whom someone making an argument seeks to persuade—accepts the similarity, therefore, the subject may be persuaded that the similarity justifies treating the target case in the same way that the source case was treated. When President George H. W. Bush analogized Saddam Hussein to Adolf Hitler in order to justify intervention to prevent an Iraqi takeover of Kuwait, he asked his audience to recognize an important similarity between the two—that both were territory-expanding and highly dangerous dictators—so that someone who recognized the wisdom of stopping Hitler would similarly recognize the wisdom of stopping Saddam Hussein (Spellman and Holyoak 1992). And in law, the same argumentative maneuver is widespread. Consider, for example, *Adams v. New Jersey Steamboat Company* ((1896) 45 NE 369), an 1896 case from the New York Court of Appeals (New York's highest state court) in which the issue, arising out of a burglary on board, was whether a steamboat with passenger compartments was more like a train with sleeping berths, in which case the steamboat owner would be held to normal standards of negligence in determining liability, or more like an inn, in which case the substantially stricter liability standards for innkeepers would apply. In analogizing the steamboat's passenger compartments to the inn and not to the train, the court identified similarities between the two—the presence of lockable doors, for example—and used those similarities to construct an analogy such that the same result reached for innkeepers would be the result reached for the operators of steamboats with passenger cabins.

Although the analogical form of reasoning exemplified by *Adams* is ubiquitous in law, the court's argument was not an argument from precedent in the strict sense. The law relating to an innkeeper's liability did not bind or otherwise constrain the New York court, as would have been the case had there been a previous decision, involving a different steamboat and a different burglary victim, by the very same court holding steamboat owners to the strict standards applied to innkeepers. Precedential constraint is about the obligation of a lower or subsequent court to reach the same result with respect to the same question as had been reached before or above, even if the judge in the instant case believed the previous or higher decision to be mistaken. But no such mechanism was at work in *Adams*. The court in *Adams* used the analogy to justify its chosen result, and not to explain why in fact it had no choice at all, as would have been the case were we talking about precedential constraint. And the advocates in *Adams* presumably each used analogical reasoning to try to persuade the court that the steamboat's passenger cabins were more like rooms in an inn or, on the contrary, more like the open compartments on a train, but neither would have suggested that the court had no choice in the matter, as would have been the case had there been a previous decision on virtually identical facts, or had this been a lower court constrained to follow even those decisions of higher courts with which it disagreed.

Analogical argument, therefore, involves the selection of a source analog (which in legal argument is often but not necessarily a previously decided case) that the maker of the argument believes will be persuasive (Levi 1949), but genuine precedential decision-making is neither about choice nor persuasion. It is about constraint. If there is in fact a case "on point," or "on all fours" (both common legal expressions) from a higher court, or from the same court on a previous occasion, the constrained court has little choice in the matter, and the core idea of precedent, the justifications for which will be considered in a subsequent section, is about the obligation of a court to make decisions, with which it may well disagree as a matter of substance, just because of the existence of the precedent.

That analogical reasoning and precedential constraint are commonly, even if mistakenly, conflated is likely a function of two different causes. First, in legal discourse the source analogs are frequently referred to as "precedents," which in much of law is the umbrella term used to designate any previous decision of any court. It is not a linguistic mistake in legal argument to refer to a decision from another jurisdiction as a precedent, as in saying "there is precedent in Montana for this result" during an argument to a court in New Jersey, which is of course not bound by the Montana decision in any way. And because the word "precedent" is capacious in just this way, it encourages the failure to distinguish genuinely constraining precedents from those previous decisions of various courts that either did not deal with precisely the same question or did not emanate from a court whose decisions are binding on the court deciding the current case.

Perhaps more importantly, cases involving genuine precedential constraint are likely to be underrepresented in appellate decisions, by virtue of what is commonly called the "selection effect" (Priest and Klein 1984; Schauer 1988). Because parties to a dispute would not ordinarily be expected to expend resources to litigate (or appeal) a case in which the law was clearly against them, litigation typically involves disputes where each side, whilst holding mutually exclusive views about the effect of the law on their dispute, believes it has a plausible chance of victory. This can only happen, however, where the law (or, sometimes, the facts) is at least somewhat unclear. And if just this kind of plausible disagreement about the likely outcome is the standard characteristic for litigated cases, and even more so for those litigated cases that are appealed, and more so yet for litigated cases that are appealed to the highest courts of some jurisdiction, then the universe of appellate decisions and opinions is a universe disproportionately populated by hard cases. The corollary of this disproportionate selection of hard cases for litigation and appeal, therefore, is that when there exists a case directly on point from a higher court or from a previous iteration of the same court, the case will likely be an easy one in any decision-making domain in which the norm of precedent operates, and will for that reason be unlikely to wind up in court or on appeal. In other words, the realm of legal disputes in which precedent genuinely constrains will be a realm that remains largely outside of the domain of reported appellate opinions, and conversely, the domain of reported appellate opinions will be those hard cases in which analogical argument but not precedential constraint will dominate.

That analogical argument looms large in appellate decision-making, therefore, should not lead us to overestimate its importance in law generally. And the relative infrequency of reported cases in which precedent is dispositive should similarly not lead us to underestimate the importance of precedent in framing and resolving legal disputes, and in making legal decision-making generally potentially different, as analogical reasoning does not, from those domains in which decision-makers are not expected to subjugate their own best judgment to the judgments of others they believe mistaken.

On Identifying Precedents

It is one thing to observe that precedent is about the obligation of a legal decision-maker to obey those decisions from above or before that constrain the decision-maker in the instant case. It is another to determine which previous decisions actually have, or should have, this force. An important issue that has dominated the literature on precedent, therefore, is the question of what is a precedent—of what makes some previous

decision the same as the decision now under consideration (Schauer 2009: 44–60)—and it is to that that we now turn.

Obviously no previous decision from a potential precedent case will be totally identical in all respects to the instant case. At the very least, of course, the parties will be different, and the time—potentially a relevant part of the context—will be different. Still, on numerous occasions those and related differences will be patently inconsequential. In *MacPherson v. Buick Motor Company* ((1916) 111 NE 1050), for example, the New York Court of Appeals, with then-Judge (he was later to become a justice of the United States Supreme Court) Benjamin Cardozo writing the opinion in 1916, held that a purchaser of an automobile could sue the manufacturer of a defective product even though the consumer had bought the product, in this case a Buick automobile, not from the manufacturer but from an independent dealer. Had a subsequent case involving the same question then arisen a year later involving an injury not to Mr. MacPherson but instead to a Ms. Caminetti, and had Ms. Caminetti been injured by a defective Oldsmobile rather than a defective Buick, any attempt to claim that those differences were consequential would ordinarily (we can of course construct unusual hypotheticals challenging this generalization) have been frivolous. Similarly, the United States Supreme Court decided in 1966 in *Miranda v. Arizona* ((1966) 384 U.S. 436) that a suspect held in custody must be advised of his right to remain silent prior to questioning by the police. There is no doubt that the decision, as a matter of genuine precedential constraint, encompassed all felonies and not just the type of felony with which Mr. Miranda had been charged, encompassed all varieties of law-enforcement officials and not just local police officers, and was applicable throughout the United States and not just in Arizona. A judge in South Carolina dealing with a murder or burglary case (Miranda had been charged with kidnapping and rape) would have been obliged as a matter of vertical precedent to apply *Miranda* even if she thought the decision mistaken, and the same would have applied to the Supreme Court itself, as a matter of *stare decisis*, in a hypothetical case decided a year later, an obligation that would have extended even to a new justice who was not on the court when *Miranda* was decided and who believed the *Miranda* decision to be erroneous.

Although the sameness in these cases is obvious, often the question is not so straightforward, and it is just this question of whether some subsequent case is relevantly the same as the most germane precedent case that has generated the literature on just how to determine the scope of the constraint of a precedent case. Consider, for example, the British counterpart to *MacPherson*, the equally famous case of *Donoghue v. Stevenson* ([1932] AC 562 (HL)). That case, decided by the House of Lords in 1932 in litigation initiated in Scotland, involved the same legal question as that in *MacPherson* about the liability of a manufacturer to a consumer who had had no direct dealings with the manufacturer, but in this case that defective product was a bottle of ginger beer which turned out to contain the decomposed remains of a dead snail, producing physical illness and mental distress for the consumer. Putting aside the trivial cases—would the decision in *Donoghue* have applied to the remains of a dead spider, or to a bottle containing lemonade rather than ginger beer—there are still serious and non-frivolous questions about the reach of the precedential constraint of the *Donoghue* judgment. Would the case apply to other food products? Would it apply to food products sold in transparent containers rather than the opaque bottle at issue in *Donoghue*? Would it apply to food products sold at workplaces rather than in public restaurants? And would it apply to consumer products other than food, such as, for example, Buick automobiles?

In answering such questions, it is tempting to say that the holding of the precedent case applies only to *similar* cases, but such a conclusion is merely preliminary, for then the inquiry simply moves to the question of just how we are to determine similarity and difference. Two things may be similar for some purposes but not for others, as when a photographer might treat a black dog and a black pocketbook as similar for the purpose of determining the proper exposure, but not for the purpose of deciding whether or not to bring the pocketbook to the veterinarian if it was in need of repair. Indeed, even those things that would be part of what philosophers would call the same "natural kind" might still be different for legal purposes. Your dog and my dog are both members of the same natural kind—dogs—but in cases of, say, disputed ownership, there is much that matters other than the membership (or not) of something in this or that natural kind.

Because of the fruitlessness of any inquiry into whether things "really" are or are not similar, the traditional answer to the question of similarity for purposes of determining what is a precedent has turned to the question of trying to determine the *ratio decidendi* of the precedent case (Marshall 1997). That is, the question to be asked, so it is said, is just *why* did the precedent court decide the case the way it did? And thus the traditional answer to the question of what is a precedent is that subsequent cases falling within the *ratio decidendi*—or *rationale*—of the precedent case are controlled by that case (Cross and Harris 1991). Under this view, if the House of Lords had allowed liability against the ginger beer manufacturer because of the inability of either the consumer or the retailer to examine the product for defects, then this ruling would apply as well to nonfood products in which again neither the retailer nor the consumer could identify some latent defect, such as, for example, a small crack in the wheel attached to a Buick automobile which would cause the wheel to break under certain, but normal, driving conditions.

Much theoretical ink has been spilled over the question of just how one determines the rationale of some potential precedent case, with some theorists arguing that it is a matter of connecting the facts as found by the court with the outcome, others saying that it must be the connection of *material* facts with outcome and still others believing that it is a matter of actually extracting the argument from the opinion of the first decision (Goodhart 1930; Goodhart 1959; Montrose 1957; Schauer 1991: 181–87; Simpson 1958). All of these approaches, however, seem to founder on the problem of underdetermination. That is, with respect to all of these approaches to determining what is a precedent for what, there are multiple rationales that would be consistent with what can be found in the precedent case. A decomposed snail is a nauseating dead animal, but it is also a dead animal, a nauseating substance and simply foreign matter. A Buick is an automobile, but it is also a consumer product, a method of transportation, a potentially dangerous item and a manufactured product whose defects would not be apparent to an ordinary consumer. As among these and numerous other candidates for determining what the precedent case decided, and with reference to what it decided, no description of the facts and the holding, or the material facts and the holding, or even the arguments presented in the case, can uniquely determine the extension of the precise and narrowest holding of the potential precedent case. And if this is so, then except in the trivial and uninteresting ways described above, the very idea of constraint by precedent appears to be illusory, and arguments from precedent turn out to be forms of persuasion used by competing advocates who are free to construct the alleged precedential constraints in largely unconstrained ways (Levi 1949; Stone 1968: 241–57).

As a result of this problem of what we might call illusory constraint, some theorists have recognized that the key to identifying the scope of a precedent is to look at the

actual words used by the precedent court to explain and justify its holding (Alexander 1989; Schauer 2009: 53–60). If the House of Lords in *Donoghue v. Stevenson* had *said* that it reached its conclusion because, for example, "any defects in the product could not have been identified by the consumer," then the extension of the case, and the scope of its precedential constraint, would have been to all consumer products whose defects could not be identified by a consumer. But if instead the House of Lords had said that "food products involve special obligations on manufacturers," then the case would have been a precedent for future cases involving food products but not for consumer products other than food, such as Buicks.

For obvious reasons, this model of precedential reach, which relies heavily on the exact words used by the precedent court to solve the indeterminacy problem, has been called the "rule model" of precedent (Alexander 1989; Alexander and Sherwin 2001: 136–56; Alexander and Sherwin 2008: 57–62). Under this model, the exact words used by the first court function in much the same way as a written rule, and in both with reference to a rule and with reference to precedent the scope of the authoritative constraint is both established and circumscribed by the canonical and authoritative words originally employed. Obviously, there will be situations in which the words used in the precedent case will not be clear, but that is true for the rules that appear in statutes, constitutions and regulations as well. The important point is that in order to determine the reach of a precedent one must treat the actual words used by the first court as a rule, and just as the way in which the words of a rule will determine the scope of that rule, so too will the actual words used by the first or higher court determine just what the ruling of the first court will be a precedent for, and just what will lie beyond the constraining force of the first case.

The Value—if Any—of Precedential Constraint

Once we understand that a system of precedent requires legal decision-makers—especially judges—to reach decisions with which they disagree just because some other judge or court has done so previously, the virtues of precedent become more elusive. This may not be the case, of course, with vertical precedent. Lower courts may be obliged to follow the lead of higher courts even in the face of disagreement for the same reason that we expect privates to obey the orders of sergeants and sergeants to obey the orders of lieutenants, for the same reason we expect workplace subordinates to follow the instructions of their supervisors and for the same reason that we expect (and force) people to obey the law even when they disagree with its content. In this respect, vertical authority is a ubiquitous fact of effective human organization, and it should come as no surprise that this fact—or principle—is as applicable to legal decision-making as it is to so many other realms of human organization and cooperation.

With respect to horizontal precedent—*stare decisis*—however, the matter is not so simple. It may well be common to expect privates, workers and citizens to obey orders from above, but we do not typically expect privates, workers, or citizens to behave as their similarly situated predecessors have behaved in the face of belief that their predecessors were mistaken. Nor do we expect presidents and prime ministers to adopt the same policy positions as those who have preceded them just because of temporal priority. Indeed, introductory books on logic and formal and informal reasoning often treat arguments from precedent as fallacies, nasty argumentative habits to be expunged from the minds of hitherto untutored undergraduates. And thus in the normal course of things, a

principle of *stare decisis* is, at best, the exception rather than the rule, and accordingly it is hardly obvious why the law appears to place a special burden on legal decision-makers to make what they perceive to be the same mistakes that their predecessors have made. When Justice Oliver Wendell Holmes opined that it was "revolting" that courts should be bound by precedents which "persist . . . for no better reasons than . . . that so it was laid down in the time of Henry IV" (Holmes 1897: 469); when Jeremy Bentham described the constraints of *stare decisis* as "acting without reason, to the declared exclusion of reason, and thereby in opposition to reason" (Bentham 1983); and when Justice Antonin Scalia rejects the constraints of *stare decisis* as inconsistent with his oath to support the Constitution and not what his predecessors have said the Constitution says, observing as well that "[t]he whole function of [*stare decisis*] is to make us say that what is false under proper analysis must nevertheless be held to be true (Scalia 1997: 139), all have noted the peculiar nature of horizontal precedent, and the counterintuitive idea that decision-makers should follow what they believe to be the mistaken decisions of predecessors who are no higher than they are in the legal hierarchy.

Yet although the constraints of horizontal precedent have been prominently excoriated for generations, so too have they been defended. Even more prominent still than the just-quoted denigrations is Justice Louis Brandeis's observation in *Burnet v. Coronado Oil & Gas. Co.* ((1932) 285 U.S. 393, 406) in 1932 that "in most matters it is more important that [the question] be settled than that it be settled right." And thus Justice Brandeis identified what has been one of the most enduring arguments for a system of horizontal—and, indeed, vertical—precedent: the frequent need for stability for stability's sake and predictability for predictability's sake. In large part this is an argument from reliance. The ability to count on some state of affairs or some decision is important in many aspects of life, and often, as Justice Brandeis observed, more important than making sure we are as right as we can be on every occasion. So although there is of course no reason, except in particular cases, to believe that a judge of a particular court will be less able to make the right decision than a prior judge of the same court, and thus no reason to believe that the first judge was more likely correct than the second judge, it still may be true that the positive advantages of consistency will in some domains outweigh the potential advantages of allowing each judge to try to improve on the results reached by his or her predecessor.

Thus, the principal virtues of *stare decisis* are all located in the vicinity of the related ideas of stability, reliance and predictability. And if—a big "if"—we believe, as most common-law systems have apparently believed for a very long time, that stability for stability's sake is more important in the legal system than in other decision-making domains, we can understand why the seemingly peculiar idea of horizontal precedent, an idea that is by no means widespread across all decision-making domains, is especially concentrated in law. The virtues of horizontal precedent in law thus relate to the largest questions about what the law is for, and under some accounts of law's purpose—especially accounts (perhaps like Holmes's) that emphasize law as a tool for social progress and societal change—it is hardly obvious that horizontal precedent need be considered as important as it has been for some time. Interestingly, *stare decisis* is not nearly as old as the common law itself, having little authoritative recognition until the early years of the nineteenth century (Lee 1999; Wise 1975). That *stare decisis* is thus such a comparatively new idea, at least when compared to the age of the common law, to say nothing of the earliest origins of law itself, may indicate that the values of stability for stability's sake, even when coupled with the related values of reliance and predictability, are far

more fragile, contingent and context dependent than many of the other values that underlie the legal system.

In addition to the value of stability for stability's sake, *stare decisis* may foster the kind of community-wide cross-temporal integration that Ronald Dworkin has referred to as "integrity" (Dworkin 1986: 225–75). If communities are held together and even defined by shared values and norms, among other things, then requiring consistency across time, which is what a norm of *stare decisis* does, may be a way of making a community cohesive across time, and may even be part of why we can say we are members of the same community as those who are long dead. If the very fact that what has been done in the past is a reason to do it again, a link is forged between the past and the present that may not otherwise have existed.

It is important to note that one of the most common arguments for a system of horizontal precedent turns out to have less purchase than many people have commonly thought. This is the value of "treating like cases alike," and it has been promoted since Aristotle. The problem with this principle, however, as many theorists have noted (Hart 1994: 157–63; Schauer 2003: 199–207; Winston 1974), is that we cannot tell what case is like any other case without having some principle that determines similarity and difference. And thus the determination of likeness and unalikeness is inevitably normative, requiring a determination of the purpose for treating any two technically different items in the same way, or for using some but not other differences to justify treating two items in different ways. It is true that the venerable principle of treating like cases alike would say that once we have determined, with admittedly some external and normative input, that two cases or situations are alike, then a system of precedent would demand that they should be treated the same even if the second decision-maker thinks the first decision-maker was mistaken. But in that case the claim that like cases should be treated alike loses its moral force, and turns into the pragmatic principle of institutional design that Brandeis and the arguments from stability, predictability and reliance have attempted to capture. So it is not so much that the principle of treating like cases alike is wrong. Rather, it is simply that the principle is better understood as restating a conclusion rather than providing an independent argument for that conclusion.

Precedent and Legal Realism

It is one thing to say that a prescriptive norm of precedent does or should exist. But it is very much another thing to say that such a norm is an accurate description of judicial behavior, or of legal behavior more generally. This descriptive question about the actual use of precedent is an important one, in part because of the distinct possibility that norms of precedent are not nearly as strong, in practice, as is commonly believed, and in part because these skeptical inquiries about precedent are such a large part of the challenges to traditional legal reasoning offered by those typically described as Legal Realists (Leiter 1996; Twining 1973).

This chapter is not the appropriate one to describe or analyze Legal Realism in any depth, so a brief and superficial description will have to suffice. But the important idea is that Legal Realism, with its roots in Holmes and various late nineteenth-century European perspectives, is a challenge to the claim that legal rules and legal reasoning are important *causes* of judicial decisions. In the view of exemplary Legal Realists such as Jerome Frank, Joseph Hutcheson, Herman Oliphant, Underhill Moore and, in a more nuanced and qualified way, Karl Llewellyn (Llewellyn 2011), judges behave like lawyers

with clients rather than as arbiters who made their decisions only after hearing all of the facts and consulting all of the law. That is, just as the lawyer's position is initially determined by the wishes of her client, so did the Realists believe that, at least in the hard cases that wind up in appellate courts, a judge would first determine how she wanted the case to come out, and would only then marshal legal authorities to support a result reached on grounds other than what might have been dictated by the authorities. For Jerome Frank and others, the initial cause of the outcome preference would be various aspects of the judge's personality, and how those personality attributes intersected with and reacted to the numerous characteristics of the particular litigants and the particular facts of the particular dispute. By contrast, for Llewellyn and similarly policy-oriented Realists, the judge's initial choice of an outcome was more likely based on general policy considerations. But in both instances, and others, the substantial determinant of a legal outcome was, initially, something other than the "paper rules," as Llewellyn referred to the formal law in law books, and was determined prior to, or independent of, consulting the paper rules.

The Realists recognized that legal outcomes reached primarily on such nonlegal grounds could not be described as such, and would have to be justified by reference to standard legal materials such as statutes, constitutional provisions, learned legal treatises and, of course, decided judicial opinions. That is, they believed that references to such materials were not descriptions of the causes of legal decisions, or accounts of the judge's actual reasoning processes. Rather, they were ex post rationalizations or justifications of results reached on other grounds. But the Legal Realists also believed that, especially in an inevitably messy common-law system (and even more so in an especially messy multi-jurisdictional system such as that of the United States), precedents could be found (or described) to support a wide range of results reached on other grounds. For the Realists, therefore, precedents served as ex post rationalizations for decisions reached on other grounds, rather than serving as genuine causes of or constraints on judicial decisions.

The Legal Realist view of precedent—that precedents are neither causal nor constraining, but largely justificatory—is thus an empirical claim, and one that is grounded on the observation that it is often possible to locate a precedent supporting whatever result a judge might otherwise want to reach, coupled with the further observation that even individual judicial decisions are susceptible to such a broad range of interpretations and descriptions that they exercise little, if any, genuine constraint. Moreover, the empirical claim is commonly limited to claims about hard appellate cases, and thus subject to all of the qualifications that emanate out of the selection effect described above.

The Realists, who flourished in the 1930s and 1940s, tended to support their empirical claims with anecdotes and broad observations, rather than with what today would pass muster as serious empirical inquiry. Nevertheless, more contemporary research has tended to provide some support for the Realist views about the effects of precedent, at least in the highest appellate courts. A substantial number of political scientists, for example, over a period of several decades, have examined opinions and decisions of the United States Supreme Court by applying principles of multiple regression to a dataset of case attributes and justice attributes. And this research has provided—for the limited array of cases that reach the Supreme Court, and for an array which because of the political and ideological valence of these cases and in light of the selection effect may well not be fully representative—considerable support for the Realist claims about the effects

of formal law in general and precedent in particular (Maveety 2006; Segal and Spaeth 2004). Thus, the research supports the view that nonlegal attitudes and ideologies have more value in explaining the votes of Supreme Court justices, especially but not only in high-salience and high-ideological-valence cases, than do any of the more traditional and formal sources of law. Indeed, the very fact that one of the leading books in this genre is entitled *Stare Indecisis* (Brenner and Spaeth 1995) illustrates the way in which much of the focus of the attitudinal research has been to demonstrate that although the Supreme Court professes to be bound by a norm of *stare decisis*, the actual behavior of the justices suggests that the norm is weaker than is often supposed, and that Supreme Court justices are typically unwilling to subjugate their own best judgment, whether legal or moral or political or pragmatic or policy or otherwise, to the judgments of their predecessors that they believe mistaken (Schauer 2007).

Until recently, there has been much less empirical research about the actual operation of the constraints of precedent in lower courts and in state courts than there has been with respect to the Supreme Court of the United States, although the situation is changing somewhat. And with respect to the empirical question about the effect and weight of precedent in lower courts, the issue of vertical precedent reemerges, because all states' courts and lower federal courts do have a court above them. But the issue of horizontal precedent still exists as well, because state supreme courts typically profess an obligation to follow earlier decisions of their own court, and federal courts of appeals often, albeit with more complications because of the way in which panel decisions (typically of three judges) intersect with decisions *en banc* (by the entire court, which may involve close to 20 members), claim to have a similar obligation to follow earlier decisions within the same circuit. But although it is implausible to suppose that such an internalized obligation has no causal effect whatsoever on outcomes, especially in more routine cases in which judges are unlikely to have strong moral or policy or political preferences, just how great that effect is is a topic for empirical research that no amount of philosophical or jurisprudential analysis of the concept of precedent can resolve. The nature of precedential obligation is assuredly a philosophical and jurisprudential topic, as is the analysis and evaluation of the arguments that might normatively support such an obligation, but the existence—or not—of belief in such an obligation, and the extent to which actual judges and other legal decision-makers behave and decide in accordance with such a belief even if the belief exists, is in the final analysis an empirical question whose answer is likely to vary across jurisdictions, across time, across courts and even across individual judges.

References

Adams v. New Jersey Steamboat Company (1896) 45 NE 369.

Alexander, L. (1989) "Constrained by Precedent," *Southern California Law Review* 63: 1–64.

—— and Sherwin, E. (2001) *The Rule of Rules: Morality, Rules, and the Dilemmas of Law*, Durham, N.C.: Duke University Press.

—— (2008) *Demystifying Legal Reasoning*, New York: Cambridge University Press.

Bentham, J. (1983) "Constitutional Code," in F. Rosen and J. H. Burns, eds., *The Collected Works of Jeremy Bentham*, London: Athlone Press.

Brenner, S. and Spaeth, H. J. (1995) *Stare Indecisis: The Alteration of Precedent on the Supreme Court, 1946–1992*, Cambridge: Cambridge University Press.

Brown v. Board of Education (1954) 347 U.S. 483.

Burnet v. Coronado Oil & Gas. Co. (1932) 285 U.S. 393.

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

Donoghue v. Stevenson [1932] AC 562 (House of Lords).
Dworkin, R. (1986) *Law's Empire*, Cambridge, Mass.: Harvard University Press.
Gentner, D., Holyoak, K. J. and Kokinov, B. N., eds. (2001) *The Analogical Mind: Perspectives from Cognitive Science*, Cambridge: Cambridge University Press.
Goodhart, A. L. (1930) "Determining the Ratio Decidendi of a Case," *Yale Law Journal* 40: 161–83.
—— (1959) "The Ratio Decidendi of a Case," *Modern Law Review* 22: 117–24
Hart, H. L. A. (1982) "Commands and Authoritative Legal Reasons," in *Essays on Bentham: Jurisprudence and Political Theory*, Oxford: Clarendon Press.
—— (1994) *The Concept of Law*, 2nd edition, P. A. Bulloch and J. Raz, eds., Oxford: Clarendon Press.
Holmes, O. W. (1897) "The Path of the Law," *Harvard Law Review* 10: 457–78.
Holyoak, K. J. (2005) "Analogy," in K. J. Holyoak and R. G. Morrison, eds., *The Cambridge Handbook of Thinking and Reasoning*, Cambridge: Cambridge University Press.
—— and Thagard, P. (1995) *Mental Leaps: Analogy in Creative Thought*, Cambridge: Cambridge University Press.
Lee, T. R. (1999) "Stare Decisis in Historical Perspective," *Vanderbilt Law Review* 52: 647–83.
Leiter, B. (1996) "Legal Realism," in D. Patterson, ed., *A Companion to the Philosophy of Law and Legal Theory*, Oxford: Blackwell.
Levi, E. H. (1949) *An Introduction to Legal Reasoning*, Chicago: University of Chicago Press.
Llewellyn, K. N. (2011) *The Theory of Rules*, F. Schauer, ed., Chicago: University of Chicago Press.
MacPherson v. Buick Motor Company (1916) 111 NE 1050.
Marshall, G. (1997) "What Is Binding in a Precedent?" in D. N. MacCormick and R. S. Summers, eds., *Interpreting Precedents: A Comparative Study*, Aldershot: Ashgate/Dartmouth.
Maveety, N., ed. (2006) *The Pioneers of Judicial Behavior*, Ann Arbor: University of Michigan Press.
Miranda v. Arizona (1966) 384 U.S. 436.
Montrose, J. L. (1957) "The Ratio Decidendi of a Case," *Modern Law Review* 20: 587–95.
Plessy v. Ferguson (1896) 163 U.S. 537.
Priest, G. L. and Klein, W. (1984) "The Selection of Disputes for Litigation," *Journal of Legal Studies* 13: 1–23.
Scalia, A. (1997) *A Matter of Interpretation: Federal Courts and the Law*, Princeton: Princeton University Press.
Schauer, F. (1987) "Precedent," *Stanford Law Review* 39: 571–606.
—— (1988) "Judging in a Corner of the Law," *Southern California Law Review* 61: 1717–1733.
—— (1991) *Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life*, Oxford: Clarendon Press.
—— (2003) *Profiles, Probabilities, and Stereotypes*, Cambridge, Mass.: Harvard University Press.
—— (2007) "Has Precedent Ever Really Mattered in the Supreme Court?" *Georgia State University Law Review* 24: 381–401.
—— (2008) "Why Precedent in Law (and Elsewhere) Is Not Totally (or Even Substantially) About Analogy," *Perspectives on Psychological Science* 3: 454–60.
—— (2009) *Thinking Like a Lawyer: A New Introduction to Legal Reasoning*, Cambridge, Mass.: Harvard University Press.
Segal, J. J. and Spaeth, H. J. (2004) *The Supreme Court and the Attitudinal Model Revisited*, New York: Cambridge University Press.
Simpson, A. W. B. (1958) "The Ratio Decidendi of a Case," *Modern Law Review* 21, 155–60.
Spellman, B. A. and Holyoak, K. J. (1992) "If Saddam Is Hitler, Then Who Is George Bush?: Analogical Mapping Between Systems of Social Roles," *Journal of Personality & Social Psychology* 62: 913–22.
Stone, J. (1968) *Legal System and Lawyers' Reasonings*, Sydney: Maitland Publications.
Twining, W. (1973) *Karl Llewellyn and the Realist Movement*, London: Weidenfeld and Nicolson.
Weinreb, L. (2005) *Legal Reason: The Use of Analogy in Legal Argument*, Cambridge: Cambridge University Press.
Winston, K. I. (1974) "On Treating Like Cases Alike," *California Law Review* 62: 1–39.
Wise, E. M. (1975) "The Doctrine of Stare Decisis," *Wayne Law Review* 21: 1043–1078.

Further Reading

For further reading, see: L. Alexander (1989) "Constrained By Precedent," *Southern California Law Review* 63: 1–64; L. Goldstein, ed. (1991) *Precedent in Law*, Oxford: Oxford University Press;

G. Lamond (2008) "Precedent and Analogy in Legal Reasoning," in E. N. Zalta, ed., *The Stanford Encyclopedia of Philosophy*, Fall 2008 Edition, http://plato.stanford.edu/archives/fall2008/entries/legal-reas-prec/; G. J. Postema (1991) "On the Moral Presence of Our Past," *McGill Law Journal* 36: 1153–1180; F. Schauer (1987) "Precedent," *Stanford Law Review* 39: 571–602; F. Schauer (2008) "Why Precedent in Law (and Elsewhere) Is Not Totally (or Even Substantially) About Analogy," *Perspectives on Psychological Science* 3: 454–60; and F. Schauer (2009) *Thinking Like a Lawyer: A New Introduction to Legal Reasoning*, Cambridge, Mass.: Harvard University Press, chs. 3, 5.