

The concept of binding precedent is so familiar to common lawyers that they might mistakenly suppose that the concept is a simple one. Neil Duxbury has shown, in a persuasive and elegantly written book, that, on the contrary, the concept bristles with historical, practical, and theoretical difficulties.

Duxbury writes that ‘the English doctrine of *stare decisis* did not begin to take shape until the eighteenth century’ (25) and that ‘although *stare decisis* was in the making [in the mid-nineteenth century] . . . not until the later decades of the nineteenth century did the rules of precedent begin to solidify’ (18). Yet, as many of the examples throughout the book demonstrate, both the concept and the language of binding precedent are much older.

Sir John Baker has written that ‘judicial opinions from former times had been accorded an authoritative status since the very earliest days of law reporting and beyond.’¹ In *The Merchant of Venice* (c. 1597) Portia, arguing ostensibly for strict enforcement of the bond, says that

there is no power in Venice
can alter a decree established;
t’will be recorded for a precedent,
and many an error, by the same example,
will rush into the state.²

In *Gulliver’s Travels* (1726) Gulliver, explaining the institutions of English law to the Houyhnhnms, says that

it is a maxim among these lawyers, that whatever hath 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

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† A review of Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge: Cambridge University Press, 2008). Subsequent references appear parenthetically in the text.

1 Sir John Baker, *The Law’s Two Bodies: Some Evidential Problems in English Legal History* (Oxford: Oxford University Press, 2007) at 77 [Baker, *Law’s Two Bodies*].

2 Act IV, scene 1.

justify the most iniquitous opinions; and the judges never fail of decreeing accordingly.³

Turning from literary fiction to the law reports, we may consider the following report of a Chancery appeal of 1683:

But although he [the judge] thought it reasonable that the interest paid upon the assignment should be reckoned principal; yet he would not now make a new precedent; but directed the defendant's counsel to search for precedents, and if they could find any one, he would follow it in this case; but the plaintiff's counsel affirmed, there was no such precedent . . . and his lordship, after declaring the plaintiff entitled to redeem, declared his opinion in this case, and also as a rule in all other cases of this nature, for the future, that where a mortgagee and an assignee do bona fide make up an account of principal and interest, without any design to charge the mortgaged estate, and fairly pay his money principal and interest, and takes an assignment, all such money as was paid upon the assignment ought to carry interest from the time of such assignment.⁴

This report shows that the concept of binding precedent was well established at this date in the minds both of judge and counsel.⁵ The judge was prepared – or so he said – to follow a precedent, if one were found, even against what he otherwise would have considered ‘reasonable,’ and so important did he consider the matter that he ‘directed the defendant's counsel to search for precedents.’ Counsel had evidently done this, for the defendant's counsel produced no precedent and the plaintiff's counsel was ready to affirm immediately that there was none. Another significant feature of this report is the conscious laying down by the judge of a detailed rule on the point in issue, which he expected to bind future courts. The recognition of a rule-making function for the court necessarily implies some sort of doctrine of binding precedent, for it would be futile for the court to lay down ‘a rule in all other cases of this nature, for the future’ unless it could expect that future courts would observe it.

Another example of the court's rule-making function is the eighteenth-century case of *Omychund v. Barker*,⁶ in which it was established that the evidence was admissible of witnesses who could not take the Christian form of oath. The Lord Chancellor (Hardwicke), sitting for the occasion with common law judges, knowingly discarded a rule that had stood from time immemorial and consciously laid down a new

3 Jonathan Swift, *Gulliver's Travels* (1726) at pt. IV, c. 5.

4 *Earl of Macclesfield v. Fitton* (1683), 1 Vern. 168 at 169 and note, 23 E.R. 392 (Sir F. North, Lord Keeper).

5 Baker, *Law's Two Bodies*, supra note 1 at 77, dates the phrase *stare decisis* to 1673.

6 (1744) 1 Atk. 21, 26 E.R. 15.

rule that was expected to bind all English courts in the future, as indeed it has done.

Nevertheless it would be true to say that nineteenth-century attitudes brought a new perspective to the matter by seeking new heights of certainty and precision. Lord Romilly said, in 1870, that

it is a great scandal to the public and the profession generally that there should be a case in which a court of law is not able to determine what the law is. I admit the law is very difficult to determine, but I hope that, by means of improvements, the law will ultimately be reduced into a state that a man of ability, who has devoted his whole life to the subject, may be able to tell a person what the law really is on any one point. That state of things, I hope, may be arrived at; but it is not so now, and will not be so in my time.⁷

This is a quintessentially Victorian statement, with its confident faith in 'improvements' and its vision of order, certainty, predictability, and precision, a set of attitudes that led to the declaration by the House of Lords in 1898 that it considered itself strictly bound by its own previous decisions.⁸ This declaration, and its rescission by a practice statement fifty-eight years later, gives rise to a number of theoretical problems: Did the House of Lords have power to create such a rule, or, having done so, did it have the power to relax it, and, if so, could this be effected by a mere practice statement? These questions have, as Duxbury shows, been discussed very extensively and rather inconclusively. However, from a historical perspective it can be safely observed that the declaration of 1898 reflected a set of attitudes to precedent and to the judicial process that had altered considerably by 1966. The general argument of Duxbury's book suggests convincingly that the effect of nineteenth-century attitudes was to load too much onto the doctrine of precedent by demanding from it a degree of stability and precision that it could not and, in Duxbury's opinion, should not be called upon to bear.

Duxbury says that 'when judges follow precedents they do so not because they fear the imposition of a sanction, but because precedent-following is regarded among them as a correct practice, as a norm, deviation from which is likely to be viewed negatively' (21). This observation raises a question that Duxbury poses as follows: 'do past decisions really ever bind future courts?' (13). This question has theoretical, historical, and practical dimensions. On the theoretical plane, if precedent following is merely a matter of practice, which the judge need not follow (though perhaps sometimes she ought to do so), can it properly be said that judges are ever actually 'bound' by precedent? On a historical plane, there is room for enquiry into the question of to what extent, in

7 *Mullings v. Trinder* (1870), L.R. 10 Eq. 449 at 455.

8 *London Tramways Co. Ltd. v. London County Council*, [1898] A.C. 375 (H.L.).

the past, judges actually have been constrained by precedent. It is not easy to resolve this question, because even though a judge may declare that she is deciding a case as she is required to do by precedent, the historian can rarely be certain that the decision would have been different in the absence of the precedent. Similarly, when a judge says that she would have decided a case differently had there been a contrary precedent, again the historian cannot be certain that this is so, because the matter was not put to the test. On the practical plane, there are many devices available to a judge for avoiding the effect of apparently binding precedent, as most judges will readily admit extrajudicially: a former case can almost always be distinguished, or it can be explained as having been decided for reasons other than those stated, or conflicting decisions can be found, or the case can be found to have been impliedly overruled, or the reason underlying the rule applied in the former case can be restated at a higher level of generality than that formerly articulated. Duxbury quotes an extrajudicial statement of a modern English judge to the effect that he does not feel bound by precedent but does feel somewhat guilty when he defies it (22–3).

Precedent can almost always be overridden by an appeal to principle. Lord Mansfield said that ‘the law of England would be a strange science if indeed it were decided upon precedents only. Precedents serve to illustrate principles . . . and these principles run through all the cases.’⁹ But who is to say precisely what the principles are? One of the most influential judges of the nineteenth century demonstrated how readily past decisions could be departed from by an appeal to ‘principle’:

Now, I have often said, and I repeat it, that the only thing in a judge’s decision binding as an authority upon a subsequent judge is the principle upon which the case was decided; but it is not sufficient that the case should have been decided on a principle if that principle is not itself a right principle, or one not applicable to the case; and it is for a subsequent judge to say whether or not it is a right principle, and, if not, he may himself lay down the true principle. In that case the prior decision ceases to be an authority or guide for any subsequent judge, for the second judge who lays down the true principle in effect reverses the decision.¹⁰

‘Principle’ has been a very flexible concept, and the effect of this flexibility on precedent may be illustrated by the treatment by nineteenth-century English courts of the question of third-party beneficiaries to contracts. Several older cases had held that in some circumstances contracts for the benefit of third persons could be enforced, but this result came in the nineteenth century to seem inconsistent with the principle of

9 *Jones v. Randall* (1774), Cowp. 37 at 39, 98 E.R. 954 at 955.

10 *Osborne to Rowlett* (1880), 13 Ch.D. 774 at 785–6 (Sir G. Jessell, M.R.).

consideration, and the law was restated in *Tweddle v. Atkinson*.¹¹ Crompton J. expressly recognized that the law had changed:

At the time when the cases which have been cited were decided the action of assumpsit was treated as an action of trespass upon the case, and therefore in the nature of a tort; and the law was not settled, as it is now, that natural love and affection is not a sufficient consideration for a promise upon which an action may be maintained; nor was it settled that the promisee cannot bring an action unless the consideration moved from him. The modern cases have in effect overruled the old decisions; they show that the consideration must move from the party entitled to sue upon the contract. . . . I am prepared to overrule the old decisions, and to hold that, by reason of the principles which now govern the action of assumpsit, the present action is not maintainable.¹²

This is a very revealing passage, and it shows the self-consciously novel view of principle that came to predominate in the mid-nineteenth century. The ‘principles which now govern the action of assumpsit’ required the overruling of ‘the old decisions,’ even though one of these cases had stood for nearly 200 years, no one doubted its justice as between the parties, and the Queen’s Bench (the court in which Crompton J. was sitting) had no actual power to overrule it.¹³ Blackstone’s treatment of *assumpsit* as part of private wrongs, less than a century years old, was summarily consigned to a primordial period of unprincipled ignorance that prevailed until the law was ‘settled, as it is now.’ This case, decided at a time when heavy weight was given to the value of stability and predictability in law, especially contract law, shows the ability of the court, in practice, to override inconvenient precedents by describing them as unprincipled. Even so, Crompton J. appealed to the past, invoking the recent past to reject the more distant past. He said that the modern cases have *in effect* overruled the old decisions, before venturing the bolder statement that ‘I am prepared to overrule the old decisions.’

There is a complex interaction between precedent and principle. Very commonly the two concepts have been invoked together: ‘it is evident, both on principle and on authority that . . .’; ‘counsel’s startling proposition is, fortunately, supported neither by principle nor by authority.’ When invoked together, the two concepts usually point in the same direction, and this is not by chance. On the face of it, principle and precedent operate as independent reasons in support of the conclusion (my conclusion is supported not only by principle but *also* by authority).

11 (1861), 1 B. & S. 393, 121 E.R. 762 [*Tweddle* cited to B. & S.].

12 *Ibid.* at 398.

13 As pointed out by Blackburn J., *ibid.* at 399. The earlier case was *Dutton v. Poole* (1678), T. Raym. 302, 83 E.R. 156.

But the concepts are interrelated: rarely is a proposition described as a 'principle' unless it can be supported by an appeal to the past, and rarely is a past decision recognized as an 'authority' unless it is perceived to be supported by principle. Precedents serve, Lord Mansfield said, to *illustrate* principles; and he added that the principles run through *all* the cases – that is, a glossator might fairly add, all the cases that a subsequent court is prepared to recognize as authoritative.

Duxbury supplies plenty of ammunition that a radical sceptic might use to claim that legal reasoning has been a sham. But Duxbury does not take any such view. On the contrary, he considers that the doctrine of precedent has been an essential and beneficial part of the common law – but, paradoxically, that it has served the common law best by not being in practice quite what it claims to be in theory.

Duxbury discusses the various theoretical problems associated with the idea of precedent (How can it be right to reiterate wrong decisions? Are precedents law, or are they only evidence of law?) and various proposed theoretical justifications. He says that 'no case for precedent-following, consequentialist or deontological, is water-tight' (182), and his sober conclusion is that 'there can be no all-encompassing explanation of why precedents have a hold on our attention' (182). 'The authority of precedent resists satisfactory explanation by reference to some overarching theory. Precedents have authority for a variety of reasons' (24). 'The capacity of previous decisions to guide and enlighten in the present instance cannot be fully explained by an overarching theory but has to be attributed to a variety of reasons' (182); 'no one theory can offer a plausible comprehensive or systematic explanation of why precedents constrain' (ix–x).

Nevertheless Duxbury recognizes that, as a matter of history, the doctrine of precedent has been a real part of English law. Although judges are not bound as strictly by precedent as by statutes, precedents have had, and do have, some capacity to constrain: 'the truth lies somewhere between [the] two extremes [of strict constraint and none at all]' (23). An important part of Duxbury's thesis is that the common law system requires elements both of stability and of flexibility. The doctrine of precedent has supplied both these needs simultaneously, but it could not have succeeded in doing so if it had been either, on the one hand, absolutely rigid or, on the other hand, too loose:

The value of precedent rests not in its capacity to commit decision-makers to a course of action but in its capacity simultaneously to create constraint and allow a degree of discretion. A theory capable of demonstrating that judges can never justifiably refuse to follow precedent would support a doctrine of *stare decisis* ill-suited to the common law. For the common law requires not an unassailable but a strong rebuttable presumption that earlier decisions be followed. (183)

Duxbury's conclusion, that *stare decisis* creates only a rebuttable presumption (though a strong one), might seem to some to be untidy or incomplete, in that it offers no indications of how strong the presumption is, nor of precisely in what circumstances and for what reasons it should be rebutted. But the cautious conclusion follows from Duxbury's thoughtful approach to his subject, combining (as the publisher justifiably claims) historical enquiry with philosophical analysis. Historical enquiry not infrequently leads to conclusions that may seem untidy, incomplete, or even paradoxical.