Precedent in Law

ADAM PERRY

GENERAL

Times and location

There will be three classes. They will be on Tuesdays in weeks 5–7 from 2–4pm in the Platnauer Room, Brasenose College.

Format and expectations

I will talk without interruption for some of each class. This gets boring to listen to, though, so we'll aim to spend at least half of each class in discussion, either as one big group or in smaller groups.

It's okay to just listen and think for some of the time. But the classes will go better – and you'll have more fun – if everyone is engaged. You should make at least one contribution every class.

There is required reading to do before each class. Make sure you do all of this reading before class: it's the way to get the most out of class, and it will help us to have a good discussion.

Background reading

There is an excellent encyclopedia entry on our topics:

- G Lamond, '[Precedent and Analogy in Legal Reasoning]' in EN Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Spring 2016)

There is also a readable, albeit opinionated, introduction to precedent and analogy by Frederick Schauer (a leading writer on legal reasoning):

- F Schauer, *Thinking Like a Lawyer* (HUP 2012), chs 3, 5

Although this mini-option is about the philosophical dimensions of precedent and analogy, you'll need to know the relevant legal practice fairly well. We'll focus on common law practice. Mostly, that means English legal practice. Cross & Harris's book is the classic work on precedent in English law:

- R Cross & JW Harris, *Precedent in English Law* (4th edn, OUP 1991), pp 3–10, 39–164

There's no need to read the selections from Cross & Harris thoroughly at this stage. Better to have a look at them briefly and consult the book again when a doctrinal point becomes important.

WEEK 5 | PRECEDENTS AND RULES

If a court decides a case, then a court in a later, similar case may be required to either follow or distinguish that case. If so, the earlier case is a 'precedent' for the court in the later case. The standard or traditional way of thinking about precedents is as rules relied on or set down in earlier cases. One task for this week is to understand how this basic idea should be developed. If precedents are rules, how are the rules identified? What is it to follow, distinguish, and overrule a precedent, assuming a precedent is a rule? A different sort of question is evaluative: why should we think – if indeed we should – that precedents are rules?

Required

- AWB Simpson, 'The *Ratio Decidendi* of a Case and the Doctrine of Binding Precedent' in AG Guest (ed), *Oxford Essays in Jurisprudence* (OUP 1961)
- J Raz, 'Law and Value in Adjudication' in *The Authority of Law* (OUP 1979)
- L Alexander, 'Constrained by Precedent' (1989) 63 S Cal L Rev 1
- F Schauer, *Playing by the Rules* (OUP 1991), pp 174–187
- G Lamond, 'Precedent and Analogy in Legal Reasoning' in EN Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Spring 2016), §2.1

- *Moffat v Kazana* [1969] 2 QB 152
- *Parker v British Airways* [1982] 1 QB 1005
- *Waverley Borough Council v Fletcher* [1995] 1 QB 334

NB: We are reading these cases because they illustrate how courts engage with precedents. We are not interested in the law as such.

Optional

- A Goodhart, 'Determining the *Ratio Decidendi* of a Case' (1930) 40 Yale Law Journal 161
- N Maccormick, *Legal Reasoning and Legal Theory* (OUP 1978), ch 4 (esp p 81–3)

Questions

- What is the *ratio decidendi* of a case?
- In what way is Raz's theory a 'rule model' of precedent? In what way is it a 'result model'?
- How does distinguishing differ from overruling? Compare Raz and Alexander.
- Reconstruct the arguments in *Moffat* and *Parker* as Raz, and Alexanderwould understand them. Are any of these reconstructions more plausible than others?
- How does reasoning based on precedent differ from reasoning by analogy?
- What criteria should we used to assess theories of precedent? That is, how would we know a successful theory if we saw one?

WEEK 6 | ALTERNATIVE MODELS OF PRECEDENT

Last week we looked at the traditional understanding of precedent. This week we take a look at two alternatives: one that understands precedents in terms of principles and another that understands them in terms of decisions on the balance of reasons. (A fourth view is that precedents can be thought of in terms of analogy. For the reasons Schauer explains, that is misguided.)

Required

Principles

- RM Dworkin, *Taking Rights Seriously* (rev edn, HUP 1978), pp 110–118 [NB: If you are using a different edition, this is the sub-section in the chapter 'Hard Cases' titled 'Precedent'.]
- S Perry, 'Judicial Obligation, Precedent and the Common Law' (1987) 7 OJLS 215
- M Moore, 'Precedent, Induction, and Ethical Generalization' in L Goldstein (ed), *Precedent in Law* (OUP 1987)

Decisions on the balance of reasons

- G Lamond, 'Do Precedents Create Rules?' (2005) 11 Legal Theory 1
- JF Horty, 'Rules and Reasons in the Theory of Precedent' (2011) 17 Legal Theory 1 [This article is quite formal at points but please persevere – it is worth it.]

Analogy

- F Schauer, 'Why Precedent in Law (and Elsewhere) is Not Totally (or Even Substsantially) about Analogy' (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1007001)

Questions

- Dworkin, Perry, and Moore all think that courts are bound by the principles that justify the results reached in previous cases. How do their views differ?
- How would Perry or Moore understand *Moffat* and *Parker*?

- What is the distinction between following and distinguishing a case according to Lamond?
- Why does Lamond claim that even following a precedent changes the law?
- Why does Lamond claim that precedents are not rules? Why does Horty characterize precedents in terms of rules?
- How would Lamond and Horty understand *Moffat* and *Parker*?

WEEK 7 | THE JUSTIFICATION FOR PRECEDENT

This week we turn from how courts are bound by their previous decisions to *why* they are so bound. Is there a reason for having a practice or rule requiring courts to stand by their earlier decisions, even if they believe those decisions were mistaken? Is there a reason for courts to adhere to such a practice or rule? In addition to taking up these questions, we look at when courts should be permitted to overrule earlier precedents.

Required

- F Schauer, 'Precedent' (1987) 39 Stanford Law Review 571, pp 588–602
- M Golding, *Legal Reasoning* (Broadview 2001), pp 98–100
- S Hershovitz, 'Integrity and Stare Decisis' in S Hershovitz (ed), *Exploring Law's Empire* (OUP 2006)
- N Duxbury, *The Nature and Authority of Precedent* (CUP 2008), ch 5 ('Why Follow Precedent?')
- S Lewis, 'Precedent and the Rule of Law' (2021) 41 Oxford Journal of Legal Studies 873

- *Miliangos v George Frank (Textiles) Ltd* [1975] AC 443, esp 479–490 (Lord Simon)
- *Lewis v AG of Jamaica* [2001] 2 AC 50 (PC), esp pp 70–79, 89–90

- *Planned Parenthood of Southeastern PA v Casey* 505 US 833 (1992), esp pp 854–869
- Draft opinion in *Dobbs v Jackson Women's Health Org.* (available at https://tinyurl.com/jejp7st8), pp 35–62

Questions

- What is the argument from fairness (equality) for precedent? What is Alexander's objection to that argument? Is that objection persuasive?
- What is the difference between the argument from reliance and the argument from predictability? Which, if either, is more persuasive?

- Under what conditions does Roberts CJ in *June* think that a court should be willing to overrule one of its own precedents? Under what conditions does Alito J in *Dobbs* think that a court should be willing to do so?
- Should a court be more willing to overrule a precedent as to the interpretation of a statute than a precedent that simply developed the common law?