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978-0-521-71336-8 - The Nature and Authority of Precedent

Neil Duxbury

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## 1

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Introduction: the usable past

So often in life we are looking for ways to make decisions with which we will be content. The appropriate options will be determined by the circumstances of the decision, and so it would be impossible, in the abstract, to set out an exhaustive list of ways to decide. But some of those ways are obvious. We might act on our instinct, or deliberate on the reasons supporting different possible decisions, or treat some rule, formal or otherwise, as a reason which pre-empts all others. We might try to devise a strategy, as Solomon did, to make others reveal information that would make deciding easier. Or we might even, though only exceptionally, decide not to decide and entrust an outcome to chance. This book is concerned with one specific decision-making option: deciding on the basis of what was done when the same matter had to be resolved in the past. When we decide in this way, we decide according to precedent.

**1. Precedent**

A precedent is a past event – in law the event is nearly always a decision – which serves as a guide for present action. Not all past events are precedents. Much of what we did in the past quickly fades into insignificance (or is best forgotten) and does not guide future action at all. Understanding precedent therefore requires an explanation of how past events and present actions come to be seen as connected. We often see a connection between past events and present actions, and regard the former as providing guidance for the latter, when they are alike: if, in doing *Y*, we are repeating our performance of *X*, we may as well look back to *X* for guidance when doing *Y*. However, our recognition that the act we are about to perform is one we have undertaken before does not always lead us to treat the past event as a guide for present action. We might now see that our performance of *X* was wrong: the experience of *X* has taught us that when crossing the road,

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it makes sense first to look both ways. Or it may just be that our tastes have changed: our notion of what makes for clever behaviour or a good cup of coffee might alter over time, so that past attempts at impressing others and coffee-making now strike us not as wrong but as unsophisticated. Often, we repeat actions without feeling any commitment to performing them in the same way as we did before. A past event, in other words, may be just that, no matter that our present action replicates it.

To follow a precedent is to draw an analogy between one instance and another; indeed, legal reasoning is often described – by common lawyers at least – as analogical or case-by-case reasoning.<sup>1</sup> Not all instances of analogy-drawing, however, are instances of precedent-following. When I say of an athlete with exceptional stamina and strength that ‘the guy is like a machine’, I draw an analogy but I do not invoke a precedent. Similarly, although following a precedent entails looking for guidance to an established standard, to set a standard is not necessarily to set a precedent. The most studious pupil in the class is setting a standard – one by which other classmates might be judged and to which some of them might even try to conform. But that standard does not have to set a precedent: the standard might have been met or even exceeded by pupils in other classes, and even if the standard has never been achieved before it will not necessarily operate as a precedent (indeed, although setting a precedent means doing something new – unprecedented – not everything that is done for the first time is a precedent).

Experience often guides present action, but reasoning from precedent is not identical to reasoning from experience. When my youngest daughter made her case for my buying her a mobile phone on her eleventh birthday, she reasoned from precedent: her elder sister received a mobile phone for her eleventh birthday. When I refused to buy my youngest daughter a mobile phone on her eleventh birthday, I reasoned from the experience of her sister’s inability to be a responsible mobile-phone owner at the age of eleven. When we make a decision on the basis of experience, we are valuing experience for what it teaches us. When we make a decision on the basis of precedent, we consider significant the fact that our current predicament has been addressed before, but we will not necessarily value the precedent for what it

<sup>1</sup> See Edward H. Levi, *An Introduction to Legal Reasoning* (Chicago: University of Chicago Press, 1949), 1–8.

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teaches us.<sup>2</sup> Sometimes, we might even follow precedents of which we do not approve.<sup>3</sup>

Note that the decision on the basis of precedent emphasizes the *fact* of prior dealing with the current predicament. When we decide on the ground of precedent we appear to believe that part of the reason the precedent is authoritative is that it is not an imagined event.<sup>4</sup> Common-law courts, for example, recognize that hypothetical instances can be instructive and compelling and yet, as a general rule, they will accord more weight to previously decided cases.<sup>5</sup> Even when it is reasonable to speculate that a precedent is not merely hypothetical – when it is reasonable, that is, to think that it will exist somewhere – there is still

<sup>2</sup> See Frederick Schauer, 'Precedent' (1987) 39 *Stanford L. Rev.* 571–605 at 575.

<sup>3</sup> As, indeed, judges sometimes do: see *Jones v. DPP* [1962] 2 WLR 575, 633, CCA, *per* Lord Devlin ('[T]he principle of *stare decisis* . . . does not apply only to good decisions; if it did, it would have neither value nor meaning'); Jon O. Newman, 'Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values' (1984) 72 *California L. Rev.* 200–16 at 204 ('The ordinary business of judges is to apply the law as they understand it to reach results with which they do not necessarily agree').

<sup>4</sup> The authority of a precedent might be weakened, furthermore, because for one reason or another the prior court, in deciding the case, proceeded without a full determination of the facts: recent examples in English law would be *Bayer v. Agropharm* [2004] EWHC 1661 (summary judgment without full hearing); *Pfizer v. Eurofood* [2001] FSR 17 (defendant's side not being argued owing to his failure to appear during proceedings); *Mirage Studios v. Counter-feat Clothing* [1991] FSR 145 (claimant awarded interim injunction, bringing litigation to end before full hearing); and *Guinness v. Saunders* [1990] 2 AC 663, HL (claimant's case so unanswerable that it did not require a full trial).

<sup>5</sup> See S. L. Hurley, 'Coherence, Hypothetical Cases, and Precedent' (1990) 10 *Oxf. Jnl Leg. Studs* 221–51 especially at 246–7. There is no doubt that common-law courts generally do not treat hypothetical instances as precedents. The main reason for this is probably that to treat such instances thus risks diminishing doctrinal clarity, 'at least to the extent that abstract or tangential hypotheticals obscure what a judge was actually required to resolve in the immediate case.' Michael Abramowicz and Maxwell Stearns, 'Defining Dicta' (2005) 57 *Stanford L. Rev.* 953–1094 at 1037. But there is no reason in principle that a precedent cannot be established by a conclusion based on a fact which has not been determined by a court. An historical example of such a precedent would be the case decided on demurrer, whereby a court would take the opportunity to pronounce upon the rights of parties on the assumption that the facts are as the claimant alleged. Not all legal precedents, furthermore, are judicial decisions. There are instances, for example, where one jurisdiction will adopt the judicial precedents of another system in a codified form so that the courts of that jurisdiction can, instead of creating their own precedents or having to keep referring back to the precedents of the other system, find governing legal principles in consolidating legislation. Perhaps some of the best-known illustrations of precedents in legislative form are those created by Sir James Fitzjames Stephen and the other Victorian reformers who codified various English principles for use in Indian law. See generally, Eric Stokes, *The English Utilitarians and India* (Oxford: Clarendon Press, 1959).

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an expectation that those arguing before decision-makers discover and present the precedent if it is to be taken into consideration.

Precedent-following is very obviously a backward-looking activity: when we decide on the basis of precedent, we treat as significant the fact that essentially the same decision has been made before. Perhaps less obvious is the fact that creating precedents, and even following precedents, can be a forward-looking activity. Today's decision-makers are tomorrow's precedent-setters, Karl Llewellyn appreciated, and so they have a 'responsibility for the precedents which their present decisions may make'.<sup>6</sup> Our decision today to do something new, or to affirm something old, may guide or influence decision-makers in the future. So it is that precedent, according to Frederick Schauer, 'involves the special responsibility accompanying the power to commit to the future before we get there'.<sup>7</sup> A significant constraint on decision-making activity might well be the decision-maker's imagination – his capacity, that is, to envisage just what the implications of a particular decision could be for future cases. Even when there is no precedent to guide a decision, the notion of precedent – awareness, that is, that what we do now may become a precedent – might still influence the decision-making process.

The point that precedents have a consequential as well as an historical dimension, while a good one, can be overemphasized. Since 'the conscientious decisionmaker must recognize that future conscientious decisionmakers will treat her decision as precedent', Schauer argues, 'today's conscientious decisionmakers are obliged to decide not only today's case, but tomorrow's as well'.<sup>8</sup> Certainly, there are times when there is little or no need to deliberate an issue because our predecessors were so scrupulous in dealing with it. But did they have to be so scrupulous?

<sup>6</sup> K. N. Llewellyn, 'Case Law', in *Encyclopaedia of the Social Sciences*, ed. E. R. A. Seligman (London: Macmillan, 1930), III, 249–51 at 251. In a similar vein, see Gerald J. Postema, 'Melody and Law's Mindfulness of Time' (2004) 17 *Ratio Juris* 203–26 at 214–15.

<sup>7</sup> Schauer, 'Precedent', 573. The same point has been made on many occasions by Neil MacCormick. See, e.g., Neil MacCormick, 'Why Cases Have Rationes and What These Are', in *Precedent in Law*, ed. L. Goldstein (Oxford: Clarendon Press, 1987), 155–82 at 160–1; 'Formal Justice and the Form of Legal Arguments' (1976) 6 *Études de logique juridique* 103–18.

<sup>8</sup> Schauer, 'Precedent', 589; see also Jan G. Deutsch, 'Precedent and Adjudication' (1974) 83 *Yale L. J.* 1553–84; MacCormick, 'Formal Justice and the Form of Legal Arguments', 110 ('[A]t any point in time, a court which is called upon to give a decision on any matter in litigation ought only to decide the case conformably to such reasons as it considers will be acceptable for the disposition of any similar case which may come up for decision by it at any later time').

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Sometimes we will create precedents, even good precedents, unintentionally; it might even be the case that only in retrospect is a particular action seen to have set a precedent. It is hardly possible to be responsible about setting a precedent without the awareness that one is setting a precedent. Even with this awareness, furthermore, it is not clear why conscientious decision-makers 'are obliged', as opposed to likely or minded, to decide with an eye to the future. A decision-maker's priorities might legitimately be in the present; and even when there exists a strong feeling that the decision-maker has thought too little about the future, this is insufficient in itself to establish that there has been a breach of obligation. We might, but we do not have to, make decisions with the future in mind; and thoughts about the future might, but do not have to, constrain what we decide to do.

It is sometimes assumed to be in the nature of a precedent that it must be knowable to those who might be constrained by it.<sup>9</sup> But it is possible that a precedent might apply to our situation even though it is inconceivable that we would have discovered its existence before it was revealed to us. 'It is a firmly-established rule of interpretation', C. K. Allen wrote in 1925, 'that the Court may take its precedents from any intelligible source whatever – newspapers, manuscripts, historical documents, and sometimes simply the recollection of judges of cases which they have heard or heard of.'<sup>10</sup> If we must have judge-made law, Bentham argued, it ought at least to be systematically reported, for, without such reporting, the common law cannot be easily identified and it may be difficult if not impossible to tell if a court is relying on precedent or creating a new offence.<sup>11</sup> Yet, even once systematic

<sup>9</sup> See, e.g., Barbara Baum Levenbook, 'The Meaning of a Precedent' (2000) 6 *Legal Theory* 185–240.

<sup>10</sup> Carleton Kemp Allen, 'Precedent and Logic' (1925) 41 *LQR* 329–45 at 341.

<sup>11</sup> 'It is the Judges . . . that make the common law:— Do you know how they make it? Just as a man makes laws for his dog. When your dog does any thing you want to break him of, you wait till he does it, and then beat him for it . . . What way then has any man of coming at this dog-law? Only by watching [Judges'] proceedings: by observing in what cases they have hanged a man, in what cases they have sent him to jail, in what cases they have seized his goods, and so forth.' Jeremy Bentham, *Truth versus Ashhurst; or Law as it is, contrasted with what it is said to be* (London: Moses, 1823 [1792]), 11–12. Dr Johnson had already expressed much the same sentiment in the Scottish Court of Session. See Johnson to Boswell, 1 July 1772, in James Boswell, *The Life of Samuel Johnson*, ed. R. W. Chapman (Oxford: Oxford University Press, 1998 [1791]), 496–7 ('To permit a law to be modified at discretion, is to leave the community without law . . . It is to suffer the rash and ignorant to act at discretion, and then to depend for the legality of that action on the sentence of the Judge. He that is thus governed, lives not by law, but by

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reporting had become established in English law, the danger of surprise precedents – ‘unexploded land mines, ready to do damage’<sup>12</sup> – persisted. Such precedents are a danger not so much to judges (though a court might be embarrassed to have to find its way around a precedent it had never known existed) as to barristers, who could be put at a considerable disadvantage in the courtroom because opposing counsel successfully cites as authority a decision which he has located in the form of a verbatim transcript available only by special permission from a court’s private library.<sup>13</sup> The availability of electronic transcripts from legal databases has lessened this danger considerably;<sup>14</sup> nevertheless, the phenomenon of the surprise precedent remains significant for our purposes because it provides a reason for doubting the claim that ‘a

opinion ... He lives by a law (if law it be,) which he can never know before he has offended it’). On Bentham’s case for an authoritative system of law reporting, see Michael Lobban, *The Common Law and English Jurisprudence 1760–1850* (Oxford: Clarendon Press, 1991), 122–3.

<sup>12</sup> John P. Dawson, *The Oracles of the Law* (Buffalo, NY: Hein, 1986 [1968]), 84.

<sup>13</sup> For a general discussion of the position in English law, see O. M. Stone, ‘Knowing the Law’ (1961) 24 *MLR* 475–80; R. J. C. Munday, ‘New Dimensions of Precedent’ (1978) n.s. 14 *JSPTL* 201–17 at 207–13. In the United States, decisions of federal district courts are not binding precedents, be they published or unpublished. With regard to federal circuit courts, the panel deciding a case can designate its opinion as being either ‘for publication’ or ‘not for publication’. Published circuit-court opinions are, subject to a few exceptions, considered to bind district courts within the relevant circuit and subsequent panels of that circuit (though the full circuit can overrule them when sitting *en banc*). Opinions designated ‘not for publication’, even though available on Lexis and Westlaw, are not binding precedents or even persuasive authority. In 2000, the Eighth Circuit suggested that denying such opinions the status of binding precedent may be contrary to Article III of the US Constitution. See *Anastasoff v. United States*, 223 F.3d 898, 899–900 (8th Cir. 2000). Few judges appear to have been receptive to this suggestion, though some law professors have been sympathetic to it: see, e.g., Lauren Robel, ‘The Practice of Precedent: *Anastasoff*, Noncitation Rules, and the Meaning of Precedent in an Interpretive Community’ (2002) 35 *Indiana L. Rev.* 399–421.

<sup>14</sup> Of course, the very fact that many precedents which would once have been ‘unpublished’ are now available electronically creates its own problems, not least because it is likely to be especially difficult to determine what is authoritative precedent when databases enable lawyers easily to present opposing sets of more or less equally convincing prior decisions on nearly any legal issue. See, generally, Susan W. Brenner, *Precedent Inflation* (New Brunswick, NJ: Transaction, 1992), 175–312. In English law, the Court of Appeal has in recent years sought to discourage unnecessary reliance on unreported cases: see *Practice Direction (Court of Appeal (Civil Division))* [1999] 1 *WLR* 1027, 1059 (‘Permission to cite unreported cases will not usually be granted unless advocates are able to assure the court that the transcript in question contains a relevant statement of legal principle not found in reported authority and that the authority is not cited because of the phraseology used or as an illustration of the application of an established legal principle’).

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precedential decision's meaning in law is inherently public' – that the decision 'must be publicly accessible'.<sup>15</sup> Any such decision is likely to be publicly accessible, but it does not have to be.

Precedents are inherently public, Levenbook argues, because they are exemplary.<sup>16</sup> 'Rather than think of precedent as laying down a rule, it is more helpful to think of it as setting an example.'<sup>17</sup> Levenbook is certainly right to resist equating precedents, even judicial precedents, with rules. There is certainly evidence throughout the history of the common law, furthermore, of courts regarding individual precedents as illustrating general legal principles.<sup>18</sup> But this does not mean that precedents can be accurately characterized as exemplary. In establishing a precedent we will usually, but not always, set an example as well. When I raised my elder son's pocket money my younger son correctly spied a precedent – one upon which he would try to rely in due course – but he would have been mistaken if he had interpreted my action to be somehow illustrative or exemplary (which is not to deny that I could have made the raise serve as an example had I wished to do so). Likewise, when a court modifies an established legal principle a new precedent is created but not necessarily a new example. Even when a precedent does set an example, the exemplary nature of the precedent will not be the source of its authority. '[P]recedent guides best', according to Levenbook, 'when the example it sets is taken as an example of what is to be done, or is to be avoided'.<sup>19</sup> The fact that a particular precedent provides a good example, however, is not sufficient to explain why that precedent is treated as authoritative, for we often admire an example that has been set – and may even recognize it as the epitome of decency, good manners, healthy living or whatever – without feeling compelled to follow it. Certainly, in this study, we will have reason now and again to refer to the exemplary nature of precedents. But precedents, though they often serve as examples, are not merely examples. They have more of a claim on our attention than examples do.

<sup>15</sup> Levenbook, 'The Meaning of a Precedent', 186, 219. Possibly, Levenbook is assuming that what we have noted to be the position in American law is the position everywhere.

<sup>16</sup> See *ibid.*, 226–7. <sup>17</sup> *Ibid.*, 186.

<sup>18</sup> See J. H. Baker, 'Records, Reports and the Origins of Case-Law in England', in *Judicial Records, Law Reports, and the Growth of Case Law*, ed. J. H. Baker (Berlin: Duncker and Humblot, 1989), 15–46 at 38; Gerald J. Postema, 'Some Roots of our Notion of Precedent', in *Precedent in Law*, 9–33 at 23.

<sup>19</sup> Levenbook, 'The Meaning of a Precedent', 199.



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Would it make more sense to characterize precedents as customary rather than exemplary? The characterization is misleading, because precedents and customs are not only distinct from but may even counter one another: in admitting female members, for instance, an institution might set a precedent which breaks from its custom. In relation to the common law, the characterization might at first seem more appropriate. Both precedents and custom are, after all, common-law sources of received wisdom: the judge who decides on the basis of either finds authority in past practice. For at least five reasons, however, judicial precedent cannot be equated with custom. First, precedent and custom can oppose one another in law as they can elsewhere. The claim that precedents can only establish law when they are consistent with ‘the custom and course in a court’ dates back at least to the mid fifteenth century.<sup>20</sup> More than three centuries later, the sentiment was memorably articulated by Blackstone: ‘it is an established rule to abide by former precedents, where the same points come up again in litigation’, he wrote, ‘[y]et this rule admits of exception . . . For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*; that is, that it is not the established custom of the realm.’<sup>21</sup> Secondly, whereas judges who follow precedents are relying on the work of earlier courts, the customs to which judges look for authority need not have been legally recognized. When, in 1765, Lord Mansfield contended that consideration was not necessary for the creation of binding contracts between commercial parties, he relied not on precedent but on what he understood to be prevailing mercantile custom.<sup>22</sup> Thirdly, custom differs from precedent in that it may be immemorial: to decide by reference to precedent is to

<sup>20</sup> Two legal historians cite as authority for this proposition a report of cases from the fifth year of Edward IV (1466), the *Long Quinto*: see J. W. Tubbs, *The Common Law Mind: Medieval and Early Modern Conceptions* (Baltimore: Johns Hopkins University Press, 2000), 45; and T. Ellis Lewis, ‘The History of Judicial Precedent’ (pt. III) (1931) 47 *LQR* 411–27 at 412–13. (The other published parts of Lewis’s incomplete study are at (1930) 46 *LQR* 207–24, 341–60; (1932) 48 *LQR* 230–47.)

<sup>21</sup> William Blackstone, *Commentaries on the Laws of England*, 4 vols. (Chicago: University of Chicago Press, 1979 [1765–9]), I, 69–70.

<sup>22</sup> See *Pillans and Rose v. Van Mierop and Hopkins* (1765) 3 Burr. 1663. For a short while, the argument was accepted as good law, though its time had certainly passed by the end of the 1770s: see A. W. B. Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Oxford: Clarendon Press, 1975), 617–19. It is worth noting also that Mansfield was by no means opposed in principle to the doctrine of precedent. Sometimes he found precedents that served his objectives, and in such instances was not averse to following them: see, e.g., *Robinson v. Bland* (1760) 2 Burr. 1077. See also



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compare the present case with an identifiable earlier event, whereas decisions on the basis of custom often justify an outcome by observing that nobody remembers a time when the question in hand was resolved in any other way.<sup>23</sup> Fourthly, common-law judges do not follow precedents simply because they exist; they follow – or, for that matter, distinguish or overrule – precedents because those precedents support particular lines of reasoning. A custom, on the other hand, will be considered relevant or irrelevant by a court not because of the reasons it embodies but because it has been generally accepted by a particular community in the past.<sup>24</sup> Finally, perhaps the most decisive evidence that precedent and custom are different forms of legal authority is the common law itself, for, as will become clear in the next chapter, the common law existed as a form of customary law long before there was a doctrine of precedent.

Judged in the abstract, the activity of adhering to precedents cannot be shown to be a good or a bad thing; the fact is that it can be either. A precedent might liberate or constrain: knowing that the action I am about to take has been taken before might embolden me ('my predecessor did this, so why shouldn't I?') or it might inhibit me ('how could I ever match up to the standard set by my predecessor?').<sup>25</sup> Our reliance on precedent will often help us to win an argument or persuade others, or lead others to believe that we are being fair or at least consistent

Michael Lobban, *A History of the Philosophy of Law in the Common Law World, 1600–1900* (Dordrecht: Springer, 2007), 106 who observes that although, in *Jones v. Randall* (1774) 1 Cowp. 37, Mansfield emphasized common-law principle over precedent, he was nevertheless setting out his argument 'in a case of first impression. To argue thus was not to go against the common law as a system of precedent, but only to say that in cases of first impression, judges decided on the basis of natural reason.'

<sup>23</sup> For this classic common-law philosophy, see, e.g., Sir Matthew Hale, *The History of the Common Law of England*, 6th edn (London: Butterworth, 1820; 1st edn 1713), 21 ('the law *leges non scriptae* . . . have acquired their binding power and force of laws, by a long and immemorial usage'); Blackstone, *Commentaries*, I, 67 ('in our law the goodness of a custom depends upon its having been used time out of mind; or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary').

<sup>24</sup> See Stephen R. Perry, 'Judicial Obligation, Precedent and the Common Law' (1987) 7 *Oxf. J. Leg. Stud.* 215–57 at 253–4.

<sup>25</sup> Sometimes, we might make a point of describing a past action as a precedent when doing so serves to justify our current behaviour: when employees in an organization take a lunch break, for example, they normally have no need to convince anyone that their having done the same in the past indicates that their behaviour is acceptable in the current instance; but if, today, a group of employees takes a very long lunch break, they might try to convince others of the acceptability of their behaviour by pointing out that, within the organization, the taking of long lunch-breaks by similarly-situated employees is not unprecedented.

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because we are treating the present instance in the same way as we treated a materially similar past instance. On other occasions, our appeals to precedent may be a sign of weakness rather than strength. Sometimes, we may adhere to a precedent because we are simply too lazy, unimaginative or (a different kind of weakness) pressed for time to think about a problem afresh. Sometimes, we might abide by a precedent because we are not sufficiently bold to take action which would most likely establish a new precedent for which future generations might hold us responsible. 'Every public action which is not customary', F.M. Cornford archly wrote, 'either is wrong, or, if it is right, is a dangerous precedent. It follows that nothing should ever be done for the first time.'<sup>26</sup> Behind the satire lies a serious point: in establishing a new precedent we might commit ourselves or our successors to a course of action the full implications of which are either not yet apparent to us or are apparent but unacceptable to us. Our unwillingness to abandon an established precedent in such instances could indicate timidity, but could equally be a sign of prudence; for it is sometimes sensible to be wary of a slippery slope, just as it may be sensible to worry about establishing new precedents in the immediate aftermath of extreme events or when emotions run high. Adherence to a precedent does not have to be a conservative strategy: one might be deciding to keep faith with the radical reasoning of one's immediate forebears, for example, rather than deciding to support a less progressive approach to a problem. More often than not, however, following a precedent serves the cause of restraint rather than creativity.

In areas of life where creativity is the norm, precedents are likely to have less value, one might suspect, than in those areas where more emphasis is placed on maintaining stability. But matters are not quite so simple. First, precedent-setting can be creative in that it can fill a void. In a particular case, a court might be unsure of its jurisdiction – about whether, for example, it has the power to try a foreign detainee<sup>27</sup> – and so might establish a precedent whereby it creates authority for itself (and for future courts for which its precedents hold good), at least until the legislature or a higher court determines that the law should be otherwise.

<sup>26</sup> F. M. Cornford, *Microcosmographia Academica: Being a Guide for the Young Academic Politician*, 6th edn (London: Bowes & Bowes, 1964; 1st edn published 1908), 23.

<sup>27</sup> See, e.g., *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006); *R (On the Application of Al-Skeini and others) v. Secretary of State for Defence* [2006] HRLR 7; [2005] EWCA Civ. 1609, CA (Civ Div).