1 In Praise of Great Cases

The Big, the Bad, and the Goodly

For many, the law appears as an impenetrable thicket of rules and principles. Its origins are considered murky, its personnel are viewed with an odd mix of suspicion and respect, and its application to particular situations seems elusive at best. Much of this popular bemusement is warranted. Lawyers take little effort to make the law as open or available as it could be. Indeed, some lawyers seem intent on making the law as inaccessible and obtuse as it can be. It is not surprising, therefore, that, on encountering the law or trying to appreciate its complexity, many will share Alfred Lord Tennyson's frustration at what appears to be "the lawless science of our law – That codeless myriad of precedent, That wilderness of single instances." It is an uninviting edifice for the curious citizen.

It is true that understanding the law can be a daunting prospect. Yet behind its professional and often-inscrutable facade, there is much about the law that is as exciting and as stirring as any other area of human endeavor. After all, at its most basic, law is little more than a site at which one group of people attempt to resolve the problems and disputes of others. Although framed in all sorts of off-putting language and occurring in impersonal institutional settings, the legal process is really a rich slice of social life. It offers an illuminating look at one of the more important ways in which society functions. This is especially so about the so-called common law and its great cases.

In concentrating on some of the law's great cases, this book is not about the big law cases that are so often in the media spotlight – O. J. Simpson, Paul Bernardo, and the like. Even though people's lives are so affected by the law, there is a dearth of knowledge of how it comes to be and how it operates. This book is about shedding some light on the actual cases that lawyers consult and that law students are required to study. In that sense, it offers a rare glimpse into the seemingly opaque world of lawyers and law students.

By looking at the common law's great cases, I hope to avoid presenting the law as a foreign country in which its residents speak a convoluted jargon, engage in mysterious rituals, and add small print to all their communications. Instead, I want to show the law as the living, breathing, and down-the-street experience that it really is. We can all vacation there and come back refreshed and invigorated.

I will look at the ordinary people whose stories have influenced and shaped the law as well as the characters and institutions (lawyers, judges, and courts) that did much of the heavy lifting.

But before I introduce you to the eight cases that I have chosen, I need to introduce you more generally to the common law and what I mean by "great cases." This is intended to set the context for a better appreciation of these cases and their significance. By understanding what the common law is, it will be easier to grasp why great cases are of such importance. Many of these great cases reach back into the nineteenth century and are drawn from across the globe. But they still hold great sway in the legal world by virtue of their role as the bedrock of legal thinking.

The common law is often taken to refer to the vast body of judicial decisions that has developed over time; judges decide present disputes by reference to past decisions and establish rules for future controversies. Dating back to England in the eleventh century, *common law* originally referred to the customary rules that were adopted by itinerant judges as they sought to develop a 'common' law for the resolution of disputes throughout the country. These judicial episodes do not so much offer focused interpretations of the law or illustrative applications of the law – they are the law; the reasons given by judges for their decisions amount to the law itself. In this sense, although judicial decisions are now

reported extensively, the common law is often thought of as unwritten law. It is not collected or contained in any one authoritative code.

Apart from the more formal resources of law, the law is energized by reliance on customary and communal norms of behavior. Law is not only a top-down enterprise: it is also very much a bottom-up exercise. Although traditional sources of law are no longer so prominent as they once were, there are vast tracts of the law that have arisen organically from mercantile or administrative practices (e.g., *caveat emptor*). They developed independently of the courts in their force and effect; it was only later that they received official recognition from judges in later disputes. Customs were accepted as having legal authority if they were continuous, certain, reasonable, and followed. As such, the common law method is the crystallization of such a process and disposition.

Common law can best be appreciated in contrast to legislation. Legislation is an enactment by Parliament, a provincial or state legislature, or a city hall. Whether framed as statutes or contained in delegated regulations, these instruments stipulate certain rules and principles that must be interpreted and followed by the courts. Under the doctrine of legislative supremacy, legislation is superior to the common law. In any conflict between legislation and the common law, legislation will prevail. However, the common law has a historical pedigree that means that judge-made law forms

the detailed backdrop against which the enactment and the interpretation of legislation take place.

The depiction of the common law as a practice of law-making is as important as the body of legal decisions it produces. The common law is best understood as being an intellectual mind-set to lawmaking as much as a technical practice; lawyers have transformed a natural tendency to use past performance as a guide to future conduct into an institutional imperative. By way of the doctrine of *stare decisis* (to stand by decisions), the common law method insists that past decisions are not only to be considered by future decision makers but also are supposed to be followed and treated as binding. This way of proceeding is defended as providing citizens with a necessary check against the exercise of arbitrary judicial authority in deciding cases.

The traditional virtues of precedential authority (i.e., it produces certainty, allows reliance, curbs arbitrariness, effects equality, and encourages efficiency) are not to be underestimated. But that resort to the legal past need not be restricted to particular decisions made or a mechanical application of them. Judges are considered to judge best when they distill the principled spirit of the past and rely on it to develop the law in response to future new demands. As Lord Leslie Scarman, a high-ranking English judge in the late twentieth century, put it, "Whatever the court decides to do, it starts from a baseline of existing principle and seeks a

solution consistent with or analogous to a principle or principles already recognized."

However, like most matters, things are not always what they appear to be; the theory of what is supposed or said to happen is not always congruent with what actually does happen. The challenge for the courts in a rapidly changing world has been to operate the system of precedent wisely so that the need for stability is balanced against the demand for progress: the courts must not allow formal certainty to eclipse substantive justice. The judges have a huge capacity to develop and apply the law in creative ways – they are not the automatons of popular myth. There are a variety of technical tools at their disposal for avoiding or distinguishing precedents. Accordingly, although operating within an official culture of institutional conservatism, all judges and jurists not only acknowledge that the law indeed responds and changes to new circumstances and fresh challenges, but they also celebrate and champion the law's capacity to do so.

One way to understand this common law process is to imagine the existing body of legal decisions as the product of a continuing and sprawling chain-novel exercise. Judges approach the task of giving reasons for judgment in particular cases as if they had been asked to read the many chapters of earlier judgments that have already been written and to contribute a chapter of their own that in some significant way continues the narrative of the common law. Although this process places judges under certain constraints, it also leaves them, like the creative writer, with considerable

leeway to interpret what has gone before and to add a few twists and turns of their own. As such, common law is to be found in the unfolding struggle between the openings of adjudicative freedom and the closings of precedential constraint.

In this way, the common law tradition can be grasped as being as much a human process as anything else – it is something that lawyers do as much as what is produced as a consequence of their doing it. The common law is a dynamic and engaged activity in which how judges deal with rules is considered as vital as the resulting content of the rules and actual decisions made. Consequently, the common law is largely characterized by the craft-skills that judges bring to their task; they are social artisans of the first order. This is not to reduce common lawyering or judging to a purely technical proficiency, because the best craftspeople are those who bring vision and imagination as well as technique and rigor to the fulfillment of their discipline. What judges make is as important as how they make it.

So, rather than see the common law as a fixed body of rules and regulations, it is preferable to view it as a living tradition of dispute resolution. Because law is a social practice and society is in a constant state of agitated movement, law is always an organic and hands-on practice that is never the complete or finished article; it is always situated inside and within, not outside and beyond, the society in which it arises. In short, the common law is a *work–in–progress* – evanescent, dynamic, messy, productive, tantalizing, and

bottom-up. The common law is always moving but never arriving, is always on the road to somewhere but never getting anywhere in particular, and is rarely more than the sum of its parts and often much less.

There is no better symbol of the common law's evolutionary quandary than the role of so-called great cases. These are cases that are regarded by almost all lawyers as beacons of the common law tradition. Although their precise import and reach are continuously contested, any credible version of the common law has to be informed and organized around such decisions. Any account of the common law is incomplete and unpersuasive without them. Great cases are generally considered to represent the impressive pragmatic strength of the common law in being able to adapt to fresh challenges and new conditions. They confirm that the common law is much closer to being a political, unruly, and open-ended process than many are prepared to admit.

What counts as a great case is simply whatever people agree to designate as a great case. Of course, although some people, like appellate judges, exercise more clout than others in this process, court decisions do not attain greatness unless they can attract a critical mass of support among the legal community at large. There is nothing so self-evidently or intrinsically great about particular cases that automatically guarantees their inclusion in any jurisprudential hall

of fame. At another time and in a different context, great cases might become simply run-of-the-mill affairs or, more usually and more revealingly, monuments to what the law ought not to be or could have been (e.g., segregation, cruelty). This status is as much a matter of communal acceptance as conformity with any universal measure about the virtues of greatness. Or, to put it another way, the quality of greatness is part of this debate rather than an external restraint on it.

That having been said, there does seem to be a general consensus among lawyers on the notion that great cases are those that have become sufficiently and widely accepted over time as to claim central importance in the legal canon. Not only must any future development of the law be able to incorporate the holdings of great cases, but such holdings are treated as capable of pointing in the direction or illuminating the path that such new development must take. This idea of great cases as "landmarks upon the trackless wilds of the law" or as "fixed stars in the jurisprudential firmament" gives a sense of the belief in them as intellectual compasses for legal travelers who are uncertain where to turn or go. However, there is a tendency to treat these great cases as more enduring and certain than they actually are; even stars explode or implode over time, and their fixity is always relative to location. There is nothing natural or given about their status: their identification is more a process of discovery than creation. Great cases stand both as markers for wayward or lost lawyers and as reminders of the legal

community's collective faith in the common law tradition and method.

Rather than view great cases as fixed stars or landmarks, I think that it is more appropriate to think of them as temporary lighthouses, designed with a particular purpose in mind, constructed with available materials, and with a limited working life. As society moves, the need for such constructions fades and other, more useful devices are designed to take their place. As with celebrity, greatness in law is no less dependent on passing trends and shifting contexts. Once the values that underpin a case no longer garner sufficient support or the informing context has changed substantially, a great case will fall by the wayside and be consigned to the rubbish tip of errors, mistakes, and anomalies. Depending on the audience, today's star is yesterday's wannabe or tomorrow's has-been.

Although the stylistic or literary quality of a judgment helps establish its stature as a great case, it is in no way decisive in itself. It is the rhetorical success and political acceptability of the decision that will carry the day. The greatness of great cases is less about their formal attributes than it is about their substantive appeal. It is whether the outcome or judgment manages to strike the right chord with its audience that determines its fate and future significance. Great cases have to earn their authority in the salons and chat rooms of legal and popular opinion. And once that opinion begins to shift, the canonical force of such cases will be affected accordingly. Great cases are only as authoritative