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Why Precedent Works

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Precedent turns on the capacity of one judge to effectively constrain another. In a telling phrase, it has been described as 'strongly coercive',[1] yet while precedent is experienced as coercive by lawyers and judges, this experience is hard to explain. There are two features of precedent that make its coercive aspect hard to understand. First, the legal rules of precedent are often insufficiently specific to ground such constraint. Secondly, compounding this, the formal mechanisms that back it up are too weak to explain its effectiveness; much of law is coercive because it is backed by force, with fines and imprisonment underpinning its commands, but aside from the risk of being criticized by a higher court there are no obvious legal sanctions attached to the rules of precedent in many legal systems. These two challenges combine to present a paradox: while experienced as coercive, precedent seems to lack the form and institutional backing that would grant this character. This chapter argues that the answer to the paradox is to be found in the social dimension of precedent. Precedent should be understood as a social practice, a mode of argumentation partly structured by non-legal rules that operate within social groups, and social expectations are key to the effectiveness of these rules. This chapter concludes by considering some of the problems raised by the roles of social groups in the operation of precedent and suggests ways in which these problems may be mitigated.

1. The Paradox of Precedent

There have been many attempts to identify the *ratio* of cases, that is, to pick out the authoritative proposition of law for which the case stands. In some instances, this appears easy. Where a case turns on a binary question, the decision of the court can provide a clear answer. In *Gilham v Ministry of Justice*, for example, a question was raised whether a district judge was a 'worker' within the scope of the Employment Rights Act 1996, and so entitled to the protections given by that statute to whistle-blowers.[2] The Supreme Court decided that she did fall within that category, and was entitled to the protection. If the same question were to arise in a later case, *Gilham* would apply: district judges are included in the category of 'workers'. In the literature on precedent, many tests are suggested by scholars to identify the *ratio* of a case.[3] Some of these exercises embody the hope that if we are able to extract *rationes* reliably and consistently from cases, then the practice of law will start to look more like a science than an art, with legal uncertainty narrowing over time as skilled lawyers extract binding

[*] I would like to thank Hafsteinn Kristjánsson, Maris Köpcke, Sebastian Lewis, and Julius Yam.

[1] R Cross and J Harris, *Precedent in English Law* (4th edn, OUP 1991) 3. See also N Duxbury, *The Nature and Authority of Precedent* (CUP 2008) 13–17.

[2] *Gilham v Ministry of Justice* [2019] UKSC 44.

[3] Cross and Harris (n 1) ch 2; Duxbury (n 1) 67–92.

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propositions from a growing range of judgments. However, any scientific model of precedent is likely to remain an aspiration for three reasons: the difficulty of extracting a *ratio* from a case, the limited significance of these binding *rationes* to precedent as a practice, and the practical capacity of a judge, if she wished, to evade the constraints of precedent.

Extracting the *ratio* from a simple case like *Gilham* might seem easy, but it requires lawyers to distinguish between relevant, irrelevant, and ambiguous factors. The *ratio* of the case is not just the bare conclusion it reached, that the statute extended to Gilham, but the reason that led to that conclusion.[4] That Gilham held judicial office is plainly relevant, her name and gender are plainly irrelevant but other factors are ambiguous: did it matter that she was specifically a *district* judge or does the *ratio* of the case apply to any judicial office holder? A competent lawyer, reading the case, will be able to place many of the factors into one of these three categories easily, almost without thinking: some are just obviously relevant, others obviously irrelevant, and others, equally obviously, require further thought. A problem for the scientific model of precedent, though, is that it is often not obvious *why* it is clear which factor falls into which category and, indeed, judges and lawyers may struggle to provide an explanation if asked to do so. Furthermore, the boundaries between these three categories are soft: a persuasive lawyer, arguing a case before a later judge, might be able to push a factor from one category into another. Even in a simple case like *Gilham*, the identification of the *ratio* requires decisions that are hard to explain, and the reach of the *ratio* can be ambiguous and disputed. Things become even more complicated when there are multiple judgments or multiple issues in the case on which the decision could turn. In *Gilham*, the core *ratio* is easy to identify, even if its reach is ambiguous, but in other cases even the extraction of the core *ratio* maybe debatable.[5]

While the courts' capacity to produce decisions that bind other courts, decisions those courts are obliged to follow, is an important part of precedent, it is only one aspect of that practice. In addition, elements of past judgments that are not binding on a judge may be persuasive: *rationes* of cases that are not formally binding, or other elements of legal reasoning within cases, may need to be considered.[6] Lawyers and judges commonly talk of these elements of precedent as having weight; even if they do not formally bind, they possess, to steal a term from Ronald Dworkin, 'gravitational force'.[7] Once again, appreciating which elements of a past decision possess weight and, even more delicately, how much weight those elements should or will be accorded, is not easy to explain. Both lawyers and judges have a sense of the elements of past decisions that affect the present case. When these have considerable weight, they may effectively constrain the judge or at least demand that the judge provide a careful explanation of why she is not following precedent. Departure requires effort from the lawyers and judges; the easy (though not necessarily the correct) path is to follow these past decisions. Precedent can exert so powerful a gravitational pull that the line between the binding and the persuasive, though conceptually sharp, becomes blurred. A judge may find it easier to navigate around an ambiguous binding *ratio* than to set aside a piece of reasoning from a past decision that is strongly persuasive. This sense of weight, of gravitational pull, is key to the successful operation of precedent and to the law-making function of the court. In assessing weight, lawyers and judges gauge something that exists separate from them,

[4] F Schauer, *Thinking Like a Lawyer. A New Introduction to Legal Reasoning* (Harvard UP 2009) 50–51.
[5] AWB Simpson, 'The Common Law and Legal Theory' in AWB Simpson (ed), *Oxford Essays in Jurisprudence: Second Series* (OUP 1973) 89–90.
[6] Cross and Harris (n 1) 4.
[7] R Dworkin, 'Hard Cases' in R Dworkin, *Taking Rights Seriously* (Duckworth 1978); Duxbury (n 1) 23–27.

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they do not *ascribe* weight to past reasoning, they instead *identify* the weight that the past reasoning possesses. This opens the possibility of mistake, the assessment can be wrong, and can fail to accord a past decision its proper weight. But the criteria for this assessment are only partially, if at all, articulated in judgments: it seems to be something competent lawyers just know how to do, even if they would struggle to explain their reasoning.[8]

The last two paragraphs have argued that attempts to produce a scientific model of precedent are unlikely to succeed because of the nature of this process of law-making. Extracting a binding *ratio* from a case and assessing its scope are matters of judgment, over which skilled lawyers can disagree, and, moving beyond the *ratio*, the identification of the elements of past decisions which possess a gravitational pull (despite not being strictly binding), and the estimation of the weight those elements possess is a process as unclear as it is commonplace. These two features of precedent are compounded by a third: the efficacy of precedent appears to depend on the willingness of those bound by precedent to accept its demands. It is the judge who must decide what precedent requires, and the judge who must then follow it—yet it is the judge who is bound by its requirements. Taken in purely legal terms, the successful operation of precedent appears to depend on the good faith of the judge. As Carleton Allen, somewhat bemusedly put it, judges are 'only bound intellectually' to precedent.[9] A judge who wished to avoid its constraints has a range of options to choose from. She could manipulate the findings of fact to get the outcome she wanted by distinguishing the present case from the precedent, she could recite the law as found in past cases while covertly applying a different rule, she could wilfully misinterpret past case law, or, most crudely of all, she could just ignore the past decisions. All of these possibilities are rendered easier for the judge by the ambiguities around precedent; it is hard to distinguish between reasonable disagreement, a mistaken decision about the law, and one taken in bad faith. The formal sanctions that could be brought against the maverick judge are few and difficult to deploy and, given the limited capacity of appeal courts to re-hear cases, many of the judge's decisions would probably stand.

2. The Social Model of Precedent

Judges are people and, like everyone else, they live and work within communities that shape their action. In his analysis of the motivation of judges, Lawrence Baum has written of the multiple audiences to which they speak, both inside and outside the court, and the ways in which these audiences condition their behaviour.[10] Baum identifies judicial colleagues, pressure groups, and legal academia, among other possible audiences, as groups that judges may address, and which can shape the way judges make and justify their legal decisions. Baum has little to say about precedent directly, but his work provides a starting point for an account of this form of reasoning; in common law systems precedent is commonly used by judges to justify their decisions, and it seems that this form of explanation carries weight with the judges' audiences. Such an account of precedent would treat the practice as, in part, a social one; a mode of argumentation conditioned by the expectations of a group or groups.[11] Under

[8] J Hutcheson, 'The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision' (1929) 14 Cornell L Quarterly 285.

[9] CK Allen, 'Precedent and Logic' (1925) 41 LQR 329, 333.

[10] L Baum, *Judges and Their Audiences* (Princeton UP 2008).

[11] Duxbury (n 1) 151.

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the social model of precedent, precedent is effective because it operates within communities that condition how legal argument should proceed, and which determine what counts as a good legal argument. The legal rules of precedent, such as the rules of judicial hierarchy, are complemented by non-legal, social rules, and it is in these social rules that we find the answers to the challenges raised in the previous section.[12] Three elements of the social model of precedent require consideration: the groups within which precedent operates; the non-legal rules of precedent that supplement the legal rules; and the pressures which tie judges to these rules.

A. Social Groups and Precedent

Baum writes of 'audiences' to which judges speak, but it might be better to think of these as groups of which the judge is a member. Talk of an audience suggests that judges are speakers addressing listeners, outsiders communicating with insiders, but in the examples Baum gives the judge is invariably an insider talking to fellow group members. As an insider, the judge cares about what these people think because they identify as a member of the group, consciously or unconsciously accepting that the group's evaluation determines their success as a judge, and using the expectations of the group as criteria which condition their arguments.[13] So, for example, when a judge frames their reasoning in a way which will appeal to the other judges sitting in the case, she treats that set of judges as the group which tests the success of her argument, while when she addresses her remarks to lawyers more generally, it is the wider legal community's standards to which she appeals. In each case, the judge cares about their reaction because she understands her office as a judge as being constructed, in part, by these groups.

It is a strength of Baum's analysis that he identifies a range of possible audiences judges might speak to, and which might then condition her decisions. Put in terms of groups, there are multiple groups which might shape the reasoning of the judge. These groups overlap, can contain subgroups, and frequently have vague or disputed boundaries. To give some examples, there is the group of judges in the court in which the judge is sitting, the set of judges in the court system as a whole, the professional legal community in which the courts operate, and the constitutional community in which the legal system is located. These are distinct but interconnected groups. There are also subgroups within these groups of which the judge may be a member, or which may be part of a wider group to which the judge belongs. For instance, legal academia is a group of which some judges are members while others are not, but all judges are members of the wider legal community of which legal academia is a subgroup. All of these groups may help to shape the operation of precedent.

Social groups contain, create, and are created by social rules, rules which determine the purpose of the group and which set standards for successful (and unsuccessful) conduct inside the group.[14] These social rules are artefacts of the group; it is the group that, more or less clearly, formulates the rules and the group that, more or less effectively, enforces them,

[12] Even the legal rules of hierarchy can be unclear in some situations: NW Barber, *The United Kingdom Constitution: An Introduction* (OUP 2021) 22–24. See further the contribution to this volume by Sebastian Lewis (Chapter 3).

[13] R Brown and S Pehrson, *Group Processes* (3rd edn, Wiley Blackwell 2020) ch 3.

[14] ibid; NW Barber, *The Constitutional State* (OUP 2010) 25–31. See further the contribution to this volume by Maris Köpcke (Chapter 29).

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responding to their breach with criticism and censure.[15] The ambiguity over the nature and boundaries of the groups to which the judge, as judge, belongs may make it hard to determine how those rules apply to the judge. Membership of some of these groups is, for the judge, non-optional. Rules of the legal order specify that the judge is a member of a bench deciding a case and a member of the judiciary more generally—a judge that doubted if she were part of these groups would just be making a mistake. Membership of other groups may be unclear. Some judges might consider themselves members of the Bar or the international set of judges by virtue of their office, other judges might consider themselves outside these groups.

That this chapter is concerned with precedent allows us to narrow down the range of social groups we are interested in. The legal and non-legal rules of precedent relate to how a judge, as a judge, *should* decide a case. This allows us to cut away group memberships that are matters of personal attachment rather than linkages that exist by virtue of the judicial role. A judge who is a staunch supporter of a political party or a pressure group may, officially or not, be a member of these groups and the social rules of these groups may then shape how the judge decides cases. For instance, a judge who is a member of an environmental pressure group may feel the weight of expectations of that group when deciding a case over pollution legislation, and the fear of what her fellow group members will think may affect her decision. However, the judge is a member of these groups in a private capacity, and not in her capacity as a judge. While knowing that she belongs to these groups may both explain and help us to predict her decisions, these are not ties that *should* shape her decision-making in her judicial role; the rules of these social groups are irrelevant to her conduct as a judge. The task of identifying the social rules of precedent is distinct from the task of predicting the outcome of cases.[16] The rules of precedent are rules that apply to the judge because of her occupation of that legal role: consequently, the rules of precedent must apply to all judges, not just to judges with special private connections.[17]

While we can narrow the range of groups to a certain extent, it remains the case that there are multiple, linked, groups in which we might find social rules of precedent. The rules are likely to increase in quantity and precision as the groups become more legally specialized: the judiciary is likely to have a far richer set of rules determining how cases should be decided than, say, the citizenry as a whole. But it also raises the possibility that there will be conflicting rules. There is no reason to assume that the various groups of which judges are members necessarily agree on the content of the rules determining precedent.

The office of the judge, then, has a social, as well as a legal, dimension. Judges, in their capacity as judges, belong to social groups, and these groups contain rules which apply to judicial decision-making. The identification and delineation of these groups can be tricky. It can be unclear which groups the judge belongs to by virtue of her judicial role and which she belongs to in a private capacity, and, even once those social groups that shape the office of the judge have been identified, the rules of those groups may be disputable within the group or in conflict with the rules of other groups.

[15] HLA Hart, *The Concept of Law* (3rd edn, OUP 2012) 56–59.

[16] Another reason why computers may struggle with precedent: artificial intelligence might be great at predicting what a judge *will* decide, but struggle to determine what a judge *should* decide. See J Yam and M Verhagen, 'The Law of Attraction: How Similarity Between Judges and Lawyers Helps Win Cases in the Hong Kong Court of Final Appeal' (2021) 65 Int'l Rev L & Econ 105944.

[17] On the interaction of roles and precedent, see Köpcke (n 14).

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B. The Social Rules of Precedent

While many legal rules are also social rules, operative within the communities whose conduct they purport to regulate, not all social rules are also legal rules. These non-legal social rules are not found in legal sources, but exist because of broad consensuses within the groups in which they operate.[18] Because of the ways in which they are created, non-legal social rules can lack the clarity and certainty which often characterize laws. But this need not be the case; some social rules can be as clear and as certain as their legal counterparts. While some of the social rules of precedent are unclear, and some may be disputed, in many instances their implications are uncontested, even if they may prove hard to apply. There are at least two sets of social rules that determine the operation of precedent: rules that relate to the identification of the *ratio* of a case, and rules that attribute weight to a past decision or pronouncement.

The first part of this chapter discussed the problems of extracting a *ratio* from a judgment. The identification of the *ratio* required a distinction to be drawn between relevant and irrelevant factors, but the test of relevance was unclear. Competent lawyers will often agree on identification of the *ratio* of a case because they share a broad agreement over the aim of law. At the most general level, lawyers recognize that law is an institution which aspires to be as good, morally speaking, as it can be. Though the defining point of law is so obvious it is often forgotten by formalists, it animates legal reasoning and can be seen in the arguments of both lawyers and judges. The content of the *ratio* is, as a consequence, determined by a test of perceived moral salience. We know, for example, that the gender of the judge in *Gilham* was irrelevant because, unless there are good reasons to the contrary, we would not expect employee's rights to be limited on grounds of sex. On the other hand, the value of whistle-blowing—and the broader importance of protecting people from bullying in their workplace—was relevant to the decision to class district judges as 'workers' who fell within the protection of the legislation: it is (morally) valuable to enable workers to expose problems in their workplace, and it is (morally) valuable to prevent abuses of power occurring between employers and employees. This pushes towards a broader interpretation of the *ratio*, it is likely that all judges would count as 'workers' for this reason. Lawyers and judges can identify a case's *ratio* because they possess a shared set of moral beliefs about the aims of the law, and these moral beliefs help them to pick out the salient features of a decision that constitute the *ratio*.

While law aspires to meet the requirements of morality, it is not morality that, directly, serves to identify the salient elements of a decision but, rather, the beliefs of lawyers and judges about what morality requires. These shared beliefs take the form of social rules. These rules specify that the law ought to pursue or respect a given end and, as an implication of this, that judges ought to recognize some factors as salient within legal decisions and competent lawyers should pick out these in arguments to the court. Those who ignore or misunderstand these rules will be criticized and corrected by others in the group.

An objection might be made at this point. Are these rules purely social, non-legal, or are they, in fact, legal? An alternative approach to the delineation of the *ratio* would argue that these unspoken assumptions are legal principles, broad rules of law that are grounded in the past decisions of judges and statutes. These are, perhaps, the principles Dworkin talks of when he speaks of 'justification' standing alongside 'fit' in legal reasoning.[19] But these assumptions are not normally understood by lawyers as derived from legal sources. If a lawyer

[18] On social rules, see Barber, *The Constitutional State* (n 14) 58–67.
[19] R Dworkin, *Law's Empire* (Hart 1998) ch 7.

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in the course of argument claimed that the *ratio* of *Gilham* was confined to female judges, for instance, they would be corrected, but it is unlikely that those who corrected them would feel the need to point to a statute or case countering their claim. These are not source-based rules. As a result, these rules can change without necessarily requiring a change in the law or, indeed, any formal decision. The beliefs that legal rules should treat men and women equally and that homosexual relationships are as morally valuable as heterosexual relationships, for instance, have emerged slowly, pivoting the underlying assumptions of lawyers in these areas. While these changes to beliefs within the legal community may have been reflected in, or even spurred by, changes in the law, they were not dependent on legal change but were manifestations of changes in society more generally. Unlike changes to legal rules, which must be brought about through, or at least recognized by, other legal rules, changes to non-legal social rules can occur without any formal process of alteration. A second, related, line of challenge would point to AWB Simpson's brilliant, but underdeveloped, paper on the common law, 'The Common Law and Legal Theory', in which he argues that the common law should be understood as customary law, as 'the body of practices observed and ideas received by a caste of lawyers'.[20] Perhaps the social rules described in this chapter are in fact elements of customary law. Customary law exists when a rule requires the judges to look at the customs of a group and the practices, the conduct, of this group are accorded legal force.[21] However, the social rules discussed in this chapter are not generated out of practice, but are grounded in consensus: the judge, when applying these rules, does not look back at the past conduct of the legal community. And, moreover, the judge is a member of the group whose rules she applies; she does not apply these rules because she is required to render legally binding the custom of the group, she applies these rules because she is a member of the group which is bound by the rule. It is a direct, rather than indirect, obligation.[22]

A second area in which non-legal rules supplement the legal is in the attribution of weight, giving precedents their gravitational pull. There are at least two, interconnected, reasons why weight might be given to past decisions.[23] First, to maintain confidence in the law by providing litigants with guidance as to the rules that are likely to be applied in their case and, in addition, by requiring judges to explain their decisions to litigants when that guidance is not followed. Secondly, where relying on material from past cases makes it more likely the judge will reach the optimal outcome in the case before them, perhaps because the earlier decision was made by a judge with expertise in the area, or because the reasoning in the earlier decision was especially legally strong. There is a circularity here: where the earlier decision is accorded weight because of its inherent quality, its likelihood of being followed increases and, as a result, the expectations of litigants that it will be followed are raised. The combination of these two considerations entails that this is not merely a situation in which a future court looks back at a past decision for inspiration or to benefit from the learning of the previous judge.[24] The court might examine many types of legal material that are not accorded precedential weight, such as academic articles or foreign judgments, but is not, normally, required to do so. The gravitational pull of precedent is something that judges are required to

[20] Simpson (n 5) 94.

[21] On customary law, see J Gardner, *Law as a Leap of Faith* (OUP 2012) 65–74.

[22] It is also worth noting that these rules cannot be customs *in foro*, that is, the customs of a group of legal officials, as they are grounded in groups which extend beyond constitutional office holders. See J Bentham, *A Comment on the Commentaries and a Fragment on Government* (JH Burns and HLA Hart eds, The Athlone Press 1977) 182–84.

[23] See further S Lewis, 'Precedent and the Rule of Law' (2021) 41 OJLS 873.

[24] Schauer, *Thinking Like a Lawyer* (n 4) 39–40.

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honour and which litigants are entitled to expect will sway the court; even if the judge doubts there is anything to be gained from the earlier ruling they must still examine and engage with it. The assessment of the significance of the elements that feed into the pull of precedent is, in large part, a function of non-legal social rules. There are social rules which determine the reputation of judges and past cases and, moreover, some social rules which establish the methods by which these reputations can be created. These rules embody assessments of the likely value of the earlier decision and, connectedly, the likelihood of the earlier case being followed.

The reputation of a judge will depend, in part, on the collective perception of their general legal ability and their ability in the particular area in which the case was decided. For example, Lord Goff and Sir John Laws both have strong general reputations as judges but are also particularly highly regarded in certain areas of law. Goff's reasoning would be especially powerful in a restitution case, an area in which he was recognized as an expert, but might be regarded as having less force in administrative law. Laws, in contrast, has a strong reputation in administrative law but is not so highly regard as a commercial law judge. The general standing of a judge is also significant and can shift over time. The pronouncements of judges who are found to have undertaken wrongdoing outside the court are less likely to be cited and, where cited, are less likely to be engaged with by the court. It is hard to imagine, for example, Lord Devlin's judgments now carrying much weight.[25] Individual cases can also have reputations that give them precedential weight. Cases can be regarded as strong, likely to be followed, or weak, embodying mistakes. Crucially, this assessment of the case is distinct from their legal position within the court hierarchy. A Supreme Court decision might be regarded as poorly reasoned and lawyers might be slow to cite or place weight on its reasoning in subsequent cases, while a High Court decision might be regarded as path-breaking, a model that the law is likely to follow.

Reputations, including those of judges and their decisions, are artefacts of groups. The reputations discussed in the previous paragraphs are established within the legal community, the products of discussions between judges, lawyers, and, to an extent, legal academics. Of course, not everyone will agree about the reputation that judges and cases should possess, but their reputation exists separate from the views of any individual within the group, and is set through social rules. The rejection of the bare existence of the reputation is treated as a simple mistake, a failure to recognize one of the group's artefacts; however, those within the group can dispute the foundations or extent of the reputation without breaching that social rule. A lawyer who claimed Laws was a poor administrative law judge would face staunch disagreement from within the legal community, but the claim would be accepted as one that could be debated within the group, while a lawyer who denied Laws possessed a reputation as a strong administrative law judge would have broken a rule of the group, the rule attributing the reputation to Laws, and, in failing to comply with this rule, shown themself to be a less competent lawyer.

While the gravitational pull of precedent most obviously applies to the parts of precedent that are not formally binding, it also affects the delineation of the scope of the *ratio*.[26] The *ratio* of a case can be interpreted broadly or narrowly, and the stronger the reputation of the case and judge, the more likely it is that the *ratio* will be given a broad formulation. If a Supreme Court judge were to reveal misconduct in the Supreme Court, and attempted to

[25] B Campbell, '"Our Silence Permits Perpetrators to Continue": One Woman's Fight to Expose a Father's Abuse' *The Observer* (25 July 2021).

[26] Cross and Harris (n 1) 69–74.

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argue the decision in *Gilham* required that they, too, be treated as a 'worker' for the purposes of labour law legislation, the question of whether the *ratio* in *Gilham* applied to all judges or just to district judges might, in part, be determined by the reputations attached to that ruling: that is, by the standing of the judges in the case and the way in which the case had been received by the legal community.

C. Why These Rules are Effective

The social dimension of precedent also helps to explain why precedent is effective, why it is that precedent is experienced by those in the court, lawyers and judges, as coercive, both in terms of being effectively binding in some instances and requiring the judge to treat it as possessing gravitational weight in others. The overarching explanation of the force of precedent is simple: those who occupy the roles of judges and lawyers want to succeed in these roles.[27] At the most basic level, those within the legal community want to be effective, to win cases and to shape the law, and they want the material rewards that accompany success, such as wealth and power.[28] But, for many, these immediate motivations will be nested within a broader desire to be acknowledged as successful by the groups of which they are members.[29] As social psychologists have long recognized, our identity and self-esteem is, in large part, built within those social groups of which we are members.[30] It is these groups which provide us with social roles to occupy, and these groups which then determine whether we have succeeded or failed in these roles.[31] Just about everyone cares what others think of them, and the more significance a person places on their membership of a group, the more they are likely to care about their standing within that institution. The high social status of the legal community in general, and the judicial community in particular, ensures that being seen as successful within the terms of these groups is particularly attractive.[32] Adhering to the legal and social rules of precedent makes all of this more likely, the rules of precedent are part of the rules of the group which determine success in office. The ability to use these rules successfully shows that the lawyer or judge is able to exercise their office successfully—and, as a product of this, is likely to achieve the more immediate benefits of shaping the law and boosting their pay.

Precedent works because a judge who accepts the constraining force of rules of precedent is more likely to succeed in their role than a judge who rejects it. A judgment which uses precedent skilfully is more likely to persuade others in the legal community that the decision is correct, that it should be accepted and followed, than one which fails to use precedent. The skilful use of precedent provides a justification of the decision that, by following the rules of the group, is reasoned in the forms of argumentation contained within the legal community or, to make the point another way, is an explanation expressed in the language of the group. Reasoning with precedent then presents the judgment as a product of the legal community

[27] See the discussion in Duxbury (n 1) 153–59. Brown and Pehrson (n 13) ch 2.

[28] Though, as Richard Posner notes, the likelihood of success in this context generating material rewards for the judge is quite small: R Posner, 'What Do Judges and Justices Maximise? (The Same Thing Everybody Else Does)' (1993) 3 Supreme Ct Econ Rev 1, 5–7.

[29] H Tajfel and J Turner, 'The Social Identity Theory of Intergroup Behaviour' in S Worchel and W Austin (eds), *Psychology of Intergroup Relations* (Nelson Hall 1986) 15–19.

[30] D Abrams and M Hogg, 'Collective Identity: Group Membership and Self-Conception' in M Hogg and S Tindale (eds), *Blackwell Handbook of Social Psychology: Group Processes* (Blackwell 2001); Tajfel and Turner (n 29).

[31] Baum (n 10) 22.

[32] Tajfel and Turner (n 29) 17–19.

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as a whole, rather than as the judge's personal decision, it is a decision that builds upon the past decisions of other judges, as refined and evaluated by the broader legal community.[33] As a product of this group, the use of precedent signals that the decision was predictable, as it forms a coherent part of the course of the development of the law, and is likely to be correct, as it builds on the past wisdom of earlier judges and lawyers. Where the judge departs from previous decisions that have precedential weight, the rules of precedent direct the judge to explain this departure, an explanation that both acknowledges the weight of precedent and explains why the earlier reasoning should not be followed.[34] This act of explanation can be, in itself, a way of satisfying the rules attributing weight to the earlier reasoning; the judge complies with the rules giving weight to the precedent by expending the time and effort to explain why she is declining to follow it.[35] By reasoning within the language of the legal community, the judge makes it more likely that her decision will be accepted by the parties and more likely that it will sway future judges. Each of these two outcomes is relevant to the evaluation of the judge within the legal community: a judge whose decisions are rarely disputed and whose decisions are often influential in the development of the law is succeeding within their role.

3. Implications of the Social Model

This chapter started out with a puzzle. Precedent is experienced by lawyers and judges as coercive, as providing a framework for judicial reasoning that effectively constrains how judges develop the law. Yet if we treat precedent as a purely legal phenomenon, it lacks the form to constrain, it is unclear, as a legal matter, how *rationes* can be extracted from cases or how the 'weight' of precedent is assessed. And even if these problems could be overcome, there is no formal enforcement mechanism to ensure judges stick to precedent; taken in purely legal terms, the effectiveness of precedent appears to turn on the goodwill of the judge. The answer to this puzzle lies in seeing precedent as mix of legal and non-legal rules that exist within social groups, primarily, though not exclusively, the legal community. It is these groups that formulate the social rules which supplement the legal aspect of precedent, clarifying the content of *rationes*, giving weight to reasoning in past cases, and it is these groups which apply the pressure that constrains judges to precedent by determining what constitutes success in the judicial role.[36]

Seeing precedent as a practice located within, and shaped by, the legal community, a mode of argumentation structured by the rules of that group, presents it as a form of 'groupthink'. The concept of groupthink, originally drawn from George Orwell's dystopia, was developed by the psychologist Irving Janis and is normally presented in purely negative terms.[37] Groupthink arises where a group develops a set of rules which frame its decision-making.

[33] Baum (n 10) 106–09.

[34] F Schauer, 'Precedent' (1987) 39 Stan L Rev 571, 580; S Condor, C Tileagâ, and M Billig, 'Political Rhetoric' in L Huddy, D Sears, and J Levy (eds), *The Oxford Handbook of Political Psychology* (2nd edn, OUP 2013) 273–74; M Billig, *Arguing and Thinking* (CUP 1996) 49–55, 117–23.

[35] This squares with Grant Lamond's view of elements of precedent as acting as 'theoretical' authorities, giving the judge reason to think there are reasons for the law to take a certain form: G Lamond, 'Persuasive Authority in the Law' (2010) 17 Harv Rev Philosophy 16, esp 25–26.

[36] This may also help to explain the emergence of the legal doctrines of precedent: in its early stages, common law was able to function without legal rules of precedent, perhaps because the social rules were powerful enough to bring consistency and certainty: Duxbury (n 1) 31–37.

[37] I Janis, *Groupthink* (2nd edn, Houghton Mifflin 1982) ch 8.

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These rules are enforced through pressure within the group—those who challenge these rules are criticized by their fellow group members—and the rules stand, within the group, as tests of the correctness of the decision. Normally, groupthink is undesirable, and used to explain poor decision-making—it can result in important considerations relevant to the decision being ignored, and critical voices in the group being excluded—but precedent shows that groupthink can sometimes have a positive effect. By narrowing the range of accepted reasons for decisions, precedent makes legal reasoning more predictable, and by putting pressure on those who develop the law to adhere to these reasons, it makes legal decision-making more stable. However, there is a downside to precedent. Like other examples of groupthink, there is a risk that the group generates suboptimal rules, either by excluding relevant considerations from deliberation or by building in error, and the cohesiveness of the group, on which the group depends for its effectiveness, marginalizes dissenting voices. These negative aspects of groupthink may be a feature, on occasion, of legal reasoning. It is, for instance, a curious feature of legal education, experienced by many who have gone through that process, that it sometimes seems to be trying to stop its students from thinking critically about the law, shutting out certain avenues of criticism while encouraging others. The limitation of the range of critical engagement is reinforced, and doubtless partly caused by, the reasoning that is acceptable with a courtroom. After all, a lawyer who sought to argue that the institution of property was inherently oppressive, that much of what the law identifies as negligence is simply bad luck, or that it is unfair to place weight on the words of a contract one of the parties had not read, would not prove a success before a judge. There is a danger, then, that some considerations that are relevant to the development of the law are systematically overlooked by the group. Given that the legal community is also involved in the development of the law through statute, there is a risk that the narrowness of reasoning on which precedent rests may spill over to law reform more generally, and inhibit the improvement of the law. When reflecting on the hazards of precedent, there is a fine line to tread. The problems that it brings are the counterparts of its strengths, and trying to mitigate its costs without impairing its benefits will be tricky. Nevertheless, there are steps we can take to reduce the dangers of groupthink, through the use of precedent, within the legal community.

Perhaps the best guard against the evils of groupthink is diversity. Though not the only social group that plays a role in the formulation of precedent, the legal community is the most significant, refining the moral beliefs and social rules on which precedent rests, and debating and gauging the reputations of judges and cases. Ensuring that there is diversity of experiences within this group—a diversity which includes, but is not limited to, gender, race, and economic background—is of exceptional importance. Partly, diversity is needed to guard against moral error. These different backgrounds can provide differing perspectives on moral issues and, indeed, can lead to differing evaluations of reputations. While there is no reason to suppose that any one perspective should be privileged over another, discussion within a diverse group may help members of that group to refine their positions. Sometimes this might lead to attitudes shifting; a person's appreciation of the demands of morality might alter because of this dialogue. Sometimes even if the substance of beliefs is not changed, an awareness of disagreement may, itself, be of value: those within the group will become aware that what might have seemed obvious is in fact contested and requires explanation, even if consensus cannot be reached.

In addition, diversity within the group is important to ensure that the rules and assessments of the legal community have a relationship with those that are found in society as a whole, or perhaps would be found if those outside the legal community directed their minds to the issue. The non-legal rules discussed in this chapter lack a democratic foundation. They

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are not the products of a legislature, they are not even the products of a constitutional institution, the legal community as an entity being part of the environment in which the state operates, rather than an element of the state itself. Nevertheless, these rules have a significant impact on the formulation and development of the law. If the composition of the legal community resembles that of society more generally, this provides a link, however weak, between the law and the people it governs. For diversity to succeed in shaping the beliefs of the group, members of the legal community must be brought together, there must be interaction between its members. Without this interaction, the benefits of diversity are lost. The flummeries of the legal world, the dinners in the Inns of Court, the Law Society's summer party, those strange little ceremonies with judges in fancy dress, alongside the more obvious virtues of conferences, magazines, and workshops, may play a role in bringing together members of the group, enhancing group cohesion and providing forums through which social interaction can defuse tensions within the group.[38]

It is worth noting that while the demand for diversity is irresistible, it might come at a cost in terms of group cohesion and, by derivation, to the capacity of the group to pressure its members to adhere to its rules. Having a legal community that was almost exclusively white, male, educated at public school, and drawn from a narrow socio-economic background was patently unjust and probably generated many poor legal decisions as a result, but it may have added to the cohesion of the group, creating multiple points for group identification and reinforcing group boundaries. If the cohesiveness of the legal community weakens, precedent could fragment, with different groups of judges adopting different sets of precedential rules.[39] One of the core challenges for the legal community over the next few decades will be to find ways of maintaining group cohesion while diversifying its membership.

Legal academia also has a particular role to play in shaping the attitudes of the legal community. Legal academics are probably best considered a subgroup of the legal community as a whole, part of the group, but distinct from practising lawyers and judges. One of the tasks of legal academia is to educate law students. Part of this is the inculcation of the social rules on which precedent rests, giving students a sense of the arguments and forms of reasoning that will prove successful in court. But another equally important task should be to encourage students to be aware of, and to take a critical attitude towards, these rules. If we think, for example, questions about social inequality should not be relevant to judicial decisions about company law or tort, this is a claim that needs to be examined and explained, not simply assumed. Encouraging criticism can help to build dissent into the legal community, dissent that can counter some of the unhealthy pressure towards consensus that is a standing risk of groupthink.[40] Furthermore, as Tarunabh Khaitan has argued, legal academia has a vital part to play in scrutinizing and critiquing judicial reasoning.[41] Academics can act as a bridge between the broader public and practising lawyers and judges, explaining legal decisions to the public and scrutinizing the content and assumptions of judicial reasoning. They also have a role to play in ensuring that considerations relevant to an area of law that are excluded from judicial reasoning for institutional reasons—such as the inability of judges to research the economic impact of their decisions—are nevertheless included in the development of the law at the legislative level.

[38] Brown and Pehrson (n 13) 41–42.

[39] S Choi and G Mitu Gulati, 'Bias in Judicial Citations: A Window into the Behavior of Judges?' (2008) 37 J Legal Stud 87.

[40] C Sunstein, *Why Societies Need Dissent* (Harvard UP 2003) ch 1.

[41] T Khaitan, '*Koushal v Naz*: Judges Vote to Recriminalise Homosexuality' (2015) 78 MLR 672, 678.

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4. Conclusion

This chapter has argued that a legalistic approach to precedent is unable to explain its coercive nature and that to understand the operation of precedent we must recognize that its legal rules are supplemented by non-legal rules, generated within social groups of which judges and lawyers are members. Though this interpretation of precedent may depart from others developed in this volume, it might be less novel than it first appears. The tight connection between the development of the common law and the legal practice of precedent is comparatively recent; the common law operated for centuries without a doctrine of precedent. Instead, it was the common learning of the legal profession developed within the Inns of Court that shaped the law and it was not until the end of the eighteenth century that something like our modern system of precedent emerged.[42] Before this period, the common learning—which, in the terms of this chapter, comprises the rules generated by the legal community outside the courts—provided enough certainty to allow the common law to operate. While the legal aspect of precedent has grown in importance over the last two hundred years, it has been built on top of, rather than replaced, this social practice and its operation cannot be understood without reflection on its social dimension.

[42] Duxbury (n 1) 31–37; Simpson (n 5) 77–78.

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