PARALLEL LINES ON THE ROAD TO STARE DECISIS: A RESPONSE TO PROFESSOR ALBERTO GARAY

Joerg Knipprath

Professor Alberto Garay's article, *A Doctrine of Precedent in the*

perceives as the both more practical and normatively preferable common law epistemology that evolved in England and was transplanted to the United States.

After reading Professor Garay's article, I was struck less by the stark differences he has sought to portray, than by the similarities of the two approaches, especially in the domain of constitutional adjudication. Moreover, his account of the development of this facet of Argentine jurisprudence over the past two centuries reveals a distinct parallel in some particulars to several centuries of evolution of English counterparts. That said, his critique shows the difficulty of creating an instant legal tradition, a process that, more realistically, requires incremental adjustments which may depend more on fortuitous cultural and political developments than on top-down imperatives. But, in the end, it appears that the differences between the civil law and common law traditions are of degree, not of kind. Both systems must address certain common and, at times, vexing issues that arise out of the nature of law, courts, and dispute resolution and that exist apart from particular traditions.

I shall address, by necessity briefly, Professor Garay's criticism that judicial decisions are not treated as law under the civil law tradition, in contrast to the common law; the uncertain position of precedent in Argentina to bind other courts, in contrast to the United States; and the habit of Argentinian lawyers and judges to look for broad generalizations when evaluating or deciding cases, in contrast to the narrower and more fact-specific legal principles employed in common law jurisdictions. These comments will focus, when feasible, on constitutional adjudication, while recognizing that such cases may not cleanly reflect jurisprudence in the traditional domain of common law, such as the law of contracts, property, [illegible]

on "self-evident truths" (i.e. unproven postulates) and reveal political preferences as much as they enlighten about the nature of law.

community," but to resolve specific disputes and achieve "justice" between the parties, a justice that is often defined – and limited – by the command of a lawgiver. For that reason, among others, it has been a frequent trope of common law judges and commentators that the judges do not "make" law, but merely "find" it.

Law also requires ability to coerce conformance, which, again, exists only in the people collectively or "some public personage, to whom it belongs to inflict penalties."[5] Judges can impose penalties, but depend on legislation

The jurisprudential musings of Aristotle and his Christian interpreter,

Middle Ages. However, its initial success was limited, as it had to compete with the "customary Roman law" derived from the code of the Roman Emperor Theodosius II and often modified by local custom. This customary Roman law arose out of the need to deal practically with the changing conditions in diverse communities over the course of generations. It was the province of merchants, lay rulers, property owners, and their advisors on concrete legal matters, rather than of the law professors.

In England, as well, the Roman law was influential in ecclesiastical courts and, to a lesser extent, in some civil courts. The writings of Ranulf de Glanvill in the late twelfth century and Henry de Bracton several decades later show strong Roman law influence. For Bracton, described as "the flower and crown of English jurisprudence,"[15] judicial decisions were not themselves law. He wrote an influential treatise, his "Note Book" on *The Laws and Customs of England*, which sought to provide a systematic body of (what he deemed) good law. While Bracton used cases gleaned from the Plea Rolls or drawn from his memory, he ignored contrary cases that were more recent in time. His abundant case citations were examples, merely illustrative, not authoritative. Thus, contrary to the classic common law rule-making, where the cases are ana ľ

themselves law that would impose the rule of decision in the case. It is also instructive that the word commonly used, even in the formal record of a case, to describe a court's justification for its action is "opinion." An opinion is a belief about something else that exists independently of that opinion, here the judge's belief about the facts, the applicable law, and their relation to each other.

Two other, partly overlapping rationales have been advanced frequently by judges and commentators in common-law jurisdictions to support the proposition that judicial cases are not law. They are that the common law applied by the courts is merely custom or customary law, and that judges do

> custom. In England legal right is based on an unwritten law which usage has approved . . . . For the English hold many things by customary law which they do not hold by *lex*.[22]

This is the common law as the "brooding omnipresence in the sky" that Justice Oliver Wendell Holmes, Jr., rejected as an accurate reflection of how the common law actually is generated and applied.[23] More in accord with Holmes's view would be the approach of legal positivists in England and the United States. One of the foremost articulators of English legal positivism was John Austin, who championed a "scientific" approach to the analysis of law. For Austin, "law" is a command of a political sovereign to a political subordinate, which command is enforced by the state.[24] Austin did not consider custom or customary law, as such, to be law. He criticized the nineteenth century German school of historical jurisprudence for claiming that customary law is true law because it is enforced by the courts and is adopted spontaneously by the governed through long adherence.[25] Austin agreed that judges can "transmute a custom into a legal rule." However, this is not due to an inherent nature of judicial decision-making as legislating. The judge is acting by permission of the sovereign. The principle he uses from the pre-existing customary law is not actual law because he makes it, but because he is permitted to do so to the extent the sovereign law-maker chooses. After all, that customary law can be limited or eliminated by the law-maker, and it must be enforced by the state.[26] Under either of these

---

22. HOGUE, *supra* note 14, at 10, n.5.

23. S. Pacific Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) ("The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or semi-sovereign that can be identified.") (superseded by statute as stated in Hetzel v. Bethlehem Steel Corp., 50 F.3d 360 (1995)).

24. "LAWS PROPER, or properly so-called, are commands[.]" John Austin, *Lectures on Jurisprudence; The Province of Jurisprudence Determined*, *in* THE GREAT LEGAL PHILOSOPHERS, *supra* note 2, at 336. "The matter of jurisprudence is positive law: law, simply and strictly so called: or law set by political superiors to political inferiors[.]" *Id*. at 337 (Lecture 1); "A command is distinguished from other significations of desire, not by the style in which the desire is signified, but by the power and the purpose of the party commanding to inflict an evil or pain ['sanction'] in case the desire be disregarded." *Id.* at 338. Since law is set by "political" superiors, sanction for violation of law must also be by the state*; see also* Thomas Hobbes, *Leviathan*, "Of Other Lawes of Nature," *in* THE GREAT LEGAL PHILOSOPHERS, *supra* note 2, at 113, 119 ("Whereas Law, properly is the word of him, that by right hath command over others.").

25. For a prime example of the German historical jurisprudence, see Von Savigny:

> The sum, therefore, of this theory is that all law is originally formed in the manner, in which, in ordinary but not quite correct language, customary law is said to have been formed: i.e. that it is first developed by custom and popular faith, next by jurisprudence--everywhere, therefore, by internal silently-operating powers, not by the arbitrary will of a law-giver.

Von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence*, "Origin of Positive Law," Chapter II, *in* THE GREAT LEGAL PHILOSOPHERS, *supra* note 2, at 290, 291.

26. "A subordinate or subject judge is merely a minister. The portion of the sovereign power which lies at his disposition is merely delegated. The rules which he makes derive their legal force

developed a different variant of "common law," one that was rooted in the necessity of the king and the Norman aristocracy to maintain control over the English masses. At the same time, and continuing even after the clear status lines between Norman rulers and English subjects had been obliterated, the courts were instrumental in establishing a uniform "national" law in areas of particular concern to the Crown in a feudal system evolving gradually into a precursor to the modern state: criminal law, land law, and revenue. This latter version, the "common law of the royal courts," has been the real origin of what became the body of English common law. It would be a gross oversimplification, however, to limit the content of that common law to judicial decisions. The various statutes adopted by other organs of the English "nation," that is, the Great Council and, later, the bicameral Parliament, are part of the totality of the English common law. So are the vestiges of Roman law principles, the "customary rules" of merchants, and eventually, various maxims and remedies developed by the body of English law referred to as equity.

If, by common law is meant only that more restricted sense, that it is the body of law created by the royal judges as the functionaries of the king in matters of particular consequence for the monarch, rather than being the old customary law of the people, the notion that the judges are merely finding pre-existing law becomes difficult to maintain. The judges sat in the King's Council and helped make the law that emerged from that administrative process. They also participated in legislating statutes if the

As discussed below, over time the mission of the king's courts to secure Norman power waned in favor of their role as arbitrators of legal disputes among competing interest groups in a changing political and economic order. The judges' function in ordinary legal matters changed well before the

litigants. However, their power only exists under the terms set by another governing authority.[30] In that sense, they do not make law. The positive law of the practical sovereign or the customary law of the people controls. This

> Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the Government has only one duty -- to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question.[32]

English courts are spared this difficulty. Regarding constitutional issues that go to fundamental matters of government, the English judges lon

Bench, and Exchequer. Initially, the use of previously-decided cases served the same function as tradition in other areas of human action, that is, to provide stability and predictability to human interactions. As well, such use of precedent by a judge gave legitimacy to his decision, based on the practical success of prior decisions in resolving similar disputes. Precedent also promoted social harmony by fostering the psychologically calming and, thereby, politically important, perception of equality before the law.[34]

As the earlier reference to Bracton shows, the initial use of precedent was to serve as examples and illustrations. There was no clear sense that those prior cases were "binding" on the judges.[35] The evolution of *stare decisis*, of precedent in one case "binding" subsequent courts, was gradual and not fully realized until the nineteenth century.[36]

However, a different consideration arose if there was a *series* of cases that was decided similarly. That line of cases represented more than just the

---

34. *See* Garay,

opinion of one judge. Instead, the application of that principle over time and by different judges was evidence that it had become part of custom, its legitimacy rooted in experience, and its existence verified by the judges' memory of what they themselves had decided or had learned in their legal training, and by what could be found, albeit in an annotated manner, in the Year Books. As time went on, and a unified modern nation state increasingly replaced the feudal order, any distinction between the common law as the "custom of the king's courts" and the "custom of the country" was meaningless. Common law and custom had become fully synonymous. From a sociological perspective, custom was how the people generally, or some important interest group (such as the merchants or other elite), responded repeatedly to actions by individuals that was an affront to some broadly accepted norm of behavior. From a jurisprudential perspective, custom had the essence of law in that it had been repeatedly applied in predictable fashion to similar facts and was a coherent form of social control. Even if not technically deemed binding on a court, this custom became difficult to ignore in the absence of compelling reasons of societal necessity. This was analogous to the "jurisprudence" of civil law countries that was developed by the continental scholars and judges expounding on Roman law molded to fit local conditions. It is similarly analogous to t

application of the common law to particular controversies required the student, the practitioner, and the judge to know cases. However, knowledge of cases was not and cannot be enough. There are too many "examples" with too many factual variables, and an atomized learning of cases lacks the structure that the human mind needs to impose order on an apparently chaotic system. That calls for the use of more general operative rules to govern similar cases. Even if a legal system relies on judges and individual cases to discern those rules, stability and predictability require those rules to be known and generally fixed.

One way to meet that requirement is to make the rule in a case binding on determinations of future such disputes. Acceptance of the binding nature

subsequent events and extraneous communications, summarized the argument and decision, but provided only cursory reference to the factual background. There was no discussion of the *ratio decidendi* behind the Court's decision.[44] Still, these reports soon took on a standard form that separated the lawyers' arguments from the Court's pronouncement. Within the latter, the new model distinguished between the facts, the legal reasoning applied to those facts, and the decision. By the nineteenth century, in England and the United States, the material conditions were in place that would allow for the evolution of the theory of the "binding" nature of a single precedent, at least when directed from a superior court to an inferior.[45]

However, there was one more hurdle. Adding to the jurisprudential chaos in England were the often-overlapping jurisdiction and specialized procedures of the common law courts of Common Pleas, King's Bench, and Exchequer. To provide more flexibility in responding to new legal issues, and to cut through arcane procedures in dealing with old ones, various equity courts arose that developed alternative structures and jurisdiction. Unfortunately, as time passed, the equity courts underwent their own process of bureaucratization, and equity as an alternative body of substantive and procedural law became more formalized and calcified. The former innovation then added to the complexity and opacity of the entire legal system. A more rational court system was needed, a process begun in the sixteenth century, but not completed until the Supreme Court of Judicature Acts of the 1870s. Its most recent iteration is the Constitutional Reform Act 2005.

A rudimentary appellate structure existed within the system through various avenues, most significantly the Court of Exchequer Chamber. That court exercised the formal appellate function beginning in 1585 until the late nineteenth century reforms.[46] Not surprisingly, decisions of that court

44. A particularly curious example is the 1794 case of *United States v. Yale Todd*, in which the Supreme Court for the first time apparently found a law of Congress unconstitutional. That case, for which there was a record in the Supreme Court of the lower court's decision and the motion by the attorneys, and an extract of the minutes of the Supreme Court showing a decision, nevertheless lacked a report of the Court's opinion. The "official" report appears nearly 60 years later, in *United*

received prominence in the decisions of the other courts at a fairly early stage. Professor Plucknett describes one case in 1483 when the chamber reached a decision on a case originating in the court of common pleas by a majority: "When the chief justice of the common pleas gave judgment, he explained that he disagreed with the decision of the chamber, but was bound to adopt the view of the majority."[47]

By the seventeenth century, Chamber decisions in particular cases, not just lines of cases as custom, increasingly became recognized as binding on (lower) courts.[48] Some judges began to distinguish the holding of a prior case from mere *dictum*, an unnecessary step if a precedent is not at all "binding." Chamber decisions, then, seem to be the germ of the modern theory of vertically binding precedent gradually emerging four centuries after Bracton. However, even that hesitant step was unsteady and was not taken uncritically. Moreover, decisions of other courts were not binding. Thus, decisions by the House of Lords, a court higher in theory than the Exchequer Cha ά h! aMs Ş ϰ % ar Mot ainding W

of the English courts even in the eighteenth century was to "string-cite" cases to cover the same point. He concluded that:

> Their very number is significant: under a developed system of precedents one case is as good as a dozen if it clearly covers the point . . . . The eighteenth century, however, still seems tempted to find safety in numbers, and to regard the function of citations to be merely that of proving a settled policy or practice.[50]

Or, to rephrase this idea, in contrast to a precedent in isolation, the "settled practice" was the "custom" represented in the common law, as had been envisioned by the English courts for several centuries. The cited cases were merely examples. It was the "jurisprudence" of the continental scholars, albeit developed by the courts and the practitioners, in a manner analogous to the *jurisprudencia* and its use by Argentine courts.[51]

With the reorganization of the English courts into a clearer hierarchy, the emergence of standardized reporting, and public dissemination of the reasoning behind the decisions during the nineteenth century, the stage was finally set to make a precedent binding on subsequent courts. Indeed, the English system relies on a comparatively strict fiction that has had, in the opinion of one skeptic, a debilitating effect on the traditional flexibility of the common law through its connection to living custom. "[I]f perchance a court has given a decision on a point of that custom, it loses for ever its flexibility and is fixed by the rule of precedent at the point where the court touched it."[52]

As to that last point, the culprits in this saga were the state supreme courts, particularly the Virginia Court of Appeals, which balked at accepting the finality of decisions and legal holdings of the U.S. Supreme Court in matters defined by Article III, Section 2 of the Constitution. In *Martin v. Hunter's Lessee* in 1813,[54] and *Cohens v. Virginia* in 1821,[55] the Supreme Court held that it had the constitutional authority to review state court decisions that involved the Constitution, treaties, or statutes of the United States. In *Martin*, Justice Joseph Story laid out several textual and historical reasons for the supremacy of the U.S. Supreme Court. But his clearest argument was practical:

> From the very nature of things, the absolute right of decision, in the last resort, must rest somewhere -- wherever it may be vested, it is susceptible of abuse. In all questions of jurisdiction, the inferior or appellate court must pronounce the final judgment; and common sense, as well as legal reasoning, has conferred it upon the latter.[56]

Story then stressed:

> different in different States, and might perhaps never have precisely the same construction, obligation, or efficacy in any two States.[57]

In sum, finality and uniformity necessarily require that a decision of the U.S. Supreme Court, including its holding, is binding on inferior courts through vertical *stare decisis*.

Just one Supreme Court opinion that is on point is binding in subsequent similar cases heard by lower courts. Yet there, too, "constitutional custom," established through repeated decisions of the Supreme Court (and possibly influenced by the actions of the other branches of government) lends extra force to the constitutional principle. Justice Story again:

> Strong as this conclusion stands upon the general language of the Constitution, it may still derive support from other sources. It is an historical fact that this exposition of the Constitution, extending its appellate power to State courts, was, previous to its adoption, uniformly and publicly avowed by its friends and admitted by its enemies as the basis of their respective reasonings, both in and out of the State conventions. It is an historical fact that, at the time when the Judiciary Act was submitted to the deliberations of the first Congress, composed, as it was, not only of men of great learning and ability but of men who had acted a principal part in framing, supporting, or opposing that Constitution, the same exposition was explicitly declared and admitted by the friends and by the opponents of that system. *It is an historical fact that the Supreme Court of the United States have, from time to time, sustained this appellate jurisdiction in a great variety of cases brought from the tribunals of many of the most important*

This practical consideration is supported conceptually by the idea that a sovereign acting at one point cannot bind the hands of a later sovereign with equal authority who has not consented to that earlier action, and neither can an entity exercising an aspect of that sovereignty bind a successor of equal authority. Thus, a legislature cannot by statute bind its successor,[60] an executive cannot by decree bind his successor, a court cannot by decision bind its successor, and an "explicit and authentic act of the whole people"[61]

---

by one panel on an issue may bind a subsequent, different panel of that same court until the matter is addressed by that appellate court, *en banc*, or by a higher court. It is also crucial to remember that *stare decisis* in any form applies only within the judicial branch. There is a vast difference between *Marbury v. Madison*, 5 U.S. 137 (1803) and *Martin v. Hunter's Lessee*. Despite occasional institutional bravado about the "finality," "infallibility," and "ultimate" nature of Supreme Court decisions that one may find in the writings of some justices, these expressions of judicial supremacy do not reflect theory or reality. None of those words, or simi

reflected in the Constitution cannot bind a future generation.[62] In all cases, such earlier action may be reversed by the successor.

In *Planned Parenthood v. Casey*,[63] the joint opinion explained the prudential considerations the Cour

Even leaving aside the creativity exhibited by justices to distinguish or re-interpret unfavorable precedents in what appear to be similar cases, it is clear that they do not consider prior precedent as strictly binding in subsequent matters of constitutional law as in other legal disputes.

FACT-SPECIFIC INCREMENTALIST RULE-MAKING OR A SEARCH FOR GENERAL PRINCIPLES AS RULES

One fault of Argentinian judges that Professor Garay finds disturbing, particularly in constitutional law cases, is the tendency to decide cases at a high level of abstraction in the rule applied. He cites to that end the Argentine right of privacy cases, *Bazterrica*, *Montalvo*, and *Arriola*, which dealt with possession of narcotics.[68] The courts do this, he charges, though it is unnecessary to resolve the particular dispute. For that shortcoming he blames another unfortunate inheritance from the civil law tradition, that of academic jurisprudents looking for general principles rather than employing the narrowly-reasoned, fact-focused, case-by-case incrementalism of the common-law tradition, a habit that is passed along to embryonic lawyers during their gestation in the law schools. Perhaps one should not be too harsh on the judges in those cases, if they were influenced by Article 19 of the Argentine Constitution: "This Article also provides that private actions that

was necessary to decide the case. The inclination to resort to sweeping declarations was criticized by Justice Felix Frankfurter in his concurrence in the important separation of powers case *Youngstown Sheet & Tube Co. v. Sawyer*.[71] Frankfurter was critical of Justice Hugo Black's opinion for the Court that sought to define and fix categorically presidential powers relating to his office as chief executive and as commander-in-chief. Frankfurter reminded his brethren of the "humble" role of the Court:

> Rigorous adherence to the narrow scope of the judicial function is especially demanded in controversies that arouse appeals to the Constitution . . . . So-called constitutional questions seem to exercise a mesmeric influence over the popular mind. This eagerness to settle--preferably forever

and John Marshall Harlan II tried to limit the right of privacy to the circumstances of that case, a married couple's decision to use contraceptives--a limitation soon forgotten or ignored in subsequent cases that involved much narrower restrictions on access to contraceptives or that regulated abortion.[74]

Since not all private actions are constitutionally immunized from government control, the Court did not really mean what it said--that the case was decided on the basis of the broad right announced. It was not clear from the opinions which actions would receive such favored status. Recreational use of drugs generally? Some drugs? Animal cruelty? Spousal violence? Liberty of contract? If not, why not? Goldberg would look to the collective conscience of the people and to legal customs and traditions; Harlan would look to principles of ordered liberty that inhere in a free society. Whatever those were.

At least Goldberg and Harlan would seek guidance by reviewing American legal history for evidence of concrete laws (or their absence) to help define their "collective conscience" and "ordered liberty."[75] An even more stunningly broad definition of the operative constitutional principle in a case was announced by Justice Harry Blackmun in dissent in *Bowers v. Hardwick*,[76] a case that upheld the constitutionality of an anti-sodomy law. The majority had described the principle at issue very narrowly as the "right of homosexuals to engage in sodomy," and considered whether or not that right was recognized under the Constitution. Blackmun countered that the true right at issue was the "right to be left alone," an assertion that would undermine the very function of law as a means of social control that typically

74. Compare the narrow formulation of the operative principle in *Griswold* with *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (finding a law that prohibited *distribution* of contraceptives to *unmarried* persons, except when done by a licensed pharmacist, unconstitutional under the *equal protection* clause), *Roe v. Wade*, 410 U.S. 113 (1973) (Supreme Court finding unconstitutional various restrictions on a woman's right to obtain an abortion, based simply on the assertion that

with too much rote learning of general principles, and not enough emphasis on fact analysis. The first thing we do, let's kill all the law professors.[84]

My response here does not necessarily disagree with this critique. Professor Garay is the expert on Argentina. I would maintain, however, that more is in play than changing legal education to focus more on Socratic discussion of cases to emphasize the importance of factual nuan

their students the foundations of legal doctrines. Practical skills are most effectively learnt outside the school. The current American system

At the same time, as I have argued, there are many similarities in the practical operation of the two systems, some of which, such as the need to identify stable legal principles at work in similar situations, are inherent in adjudicating cases. Others, such as the tendency to generalize at too high a level of abstraction, certainly infects not only Argentine judges. The conflicts among courts over the nature of precedent (vertical *stare* decisis) and the degree of discretion a court has to ignore its own precedent horizontal *stare decisis*), especially in constitutional matters, seem to be endemic, due in part at least to the inherently political nature of judges and their desire to maintain or increase personal and institutional influence. Argentina already has in place much of the material that shaped the modern common law approach to precedent and judicial decision-making: Regular publication of reports, a structured judiciary, and a familiarity, however passing and unsettled, with common law adjudication through its attempts over a century and a half to imitate the American tradition. Continued interaction between the different systems, and the efforts of reformers familiar with both, such as Professor Garay, over time likely will yield fruit in bringing the necessary improvements he seeks.