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# Authority in the Common Law

PETER JAFFEY<sup>†</sup>

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## Introduction

On one widely held view, the common law is a body of rules laid down by courts. The ratio or holding of a case is the rule laid down by the court in that case. In adjudication, courts apply rules laid down in previous cases, or if no rule previously laid down is applicable and there is a 'gap in the law', they make new law by devising a new rule to apply. There is clearly some truth in this picture, but it is nevertheless problematic, as various writers have argued. It does not appear to account very satisfactorily for the character of common law legal reasoning, including the conventional idea that it involves reasoning by analogy, and it implies that, at least in some circumstances – where there is a gap in the law – a court adjudicates by making law in a free exercise of moral judgement, unconstrained by authority, and that when it does so it legislates retroactively.

There is another, older conception of the common law, the 'classical theory' or 'declaratory theory' of the common law. This is more difficult to characterise, though one can say at least that it represents the courts as always applying existing law, and not legislating retroactively, even in the absence of a rule previously laid down, so that the law cannot simply be equated with a body of rules laid down in previous decisions. Ronald Dworkin's theory of interpretation is a modern account of the common law in this tradition, and an important part of the appeal of Dworkin's theory is that it also appears to be more successful in explaining the actual character of legal reasoning in the common law.

For proponents of the body of rules theory of the common law, any supposed shortcomings of the theory pale into insignificance in the light of the fact that it appears to follow directly from the nature of a legal system, understood as a system for providing authoritative guidance to its subjects about how they should act. The most comprehensive and celebrated version

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of this argument is Joseph Raz's 'service conception' theory of authority and the 'sources thesis' that he derives from it, which equate the law with a body of 'exclusionary rules' devised and laid down by legal authorities. I shall adopt this, in general, as the body of rules theory, and refer to it as the exclusionary rules analysis of the common law. From this standpoint, the objection to any version of the classical or declaratory theory is that it appears to lack a sound basis in a theory of authority. More particularly, it is not apparent how it can be that the common law arises from the authoritative character of the case law, and yet is not to be equated with a body of rules laid down in previous cases.

In this article I offer an account of authority in the common law that I argue is consistent with the service conception of authority, but amounts to a version of the classical or declaratory theory rather than the body of rules theory of the common law. I begin with an outline of the service conception and the exclusionary rules analysis of the law. Then I discuss the problems that this approach faces in explaining the common law. I then go on to consider analogical reasoning, and this leads to a discussion, in the final section, of a version of Dworkin's theory of the common law.

## **I. The law as a moral authority**

### **The service conception and the law as a body of rules**

According to Raz, a moral authority A has authority over a subject S with respect to some matter when, by following A's directives rather than relying on his own judgment, S is more likely to do as he ought to do in the circumstances. This is the 'service conception' of authority, because a directive provides a service to the subject by assisting him to act as he ought to. If S ought to follow A's directives because this is the case, A is a legitimate authority.<sup>1</sup>

In the absence of an authoritative directive, S should act on the balance of reasons or considerations applicable in the circumstances. A legitimate authority identifies these reasons and in the light of them issues a directive to S, which, if followed by S, will lead him to conform more reliably to the reasons that apply to him than he could by applying his own judgement. In this way, the authority 'mediates' between S and the reasons

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<sup>1</sup> Joseph Raz, *The Morality of Freedom* (1986) (below MF), ch 3; *Ethics in the Public Domain* (1994) (below EPD), ch 10; 'The Problem of Authority: Revisiting the Service Conception' (2006) 90 *Minnesota Law Review* 1003 (below Revisiting the Service Conception).

that apply directly to him.<sup>2</sup> Raz refers to these ‘first order’, directly applicable reasons as ‘dependent’ reasons. The ‘dependency thesis’ holds that the directives of a legitimate authority are based on dependent reasons.<sup>3</sup>

If an authority is legitimate, S ought to accept the authority’s assessment of the dependent reasons as definitive. He should follow the directive rather than acting according to his own assessment of the dependent reasons. Thus the authority’s directive generates an ‘exclusionary reason’, a reason to disregard the first order, dependent reasons. These reasons are ‘excluded’ or ‘pre-empted’ – this is the ‘pre-emption thesis’ – and replaced by a new reason for action, a reason to follow the directive instead.<sup>4</sup> It follows that, if the directive is to serve its purpose, it must be possible for S to establish what it requires of him without considering the dependent reasons that lie behind it, that is to say, without exercising moral judgement.<sup>5</sup>

The ‘normal justification thesis’ (NJT) gives the standard reason why an authority can be legitimate.<sup>6</sup> S ought to follow the directive because the authority A is more capable than S of determining what S should do, that is to say, more capable of determining what the dependent reasons are and how S should act in accordance with them. The NJT is satisfied where the authority has superior expertise on empirical or moral questions, by virtue of which it can determine how S should act when S may not be able to. It is also satisfied where, as a result of its being a ‘de facto authority’ – generally recognised as an authority – A is in a position to secure co-ordination by stipulating a convention, because its directives will generally be followed. For example, if there is no convention about which side of the road to drive, A can stipulate a convention that all cars should drive on the left. In practice, these two bases for authority are likely to arise in combination in what I shall refer to as a new regulatory regime, which creates quite new relationships and responsibilities relating to a certain sphere of activity.<sup>7</sup>

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<sup>2</sup> EPD, 214.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> EPD, 218. See also Scott J Shapiro, ‘Law, Morality and the Guidance of Conduct’ (2000) 6 *Legal Theory* 127, 148-9.

<sup>6</sup> Ibid.

<sup>7</sup> The example given involves an arbitrary solution to a pure co-ordination problem, but a regulatory regime is liable to comprise rules that are not arbitrary but are contentious and may appear arbitrary to S.

## The law as a body of 'exclusionary rules'

According to Raz, the law claims to be or purports to be a moral authority.<sup>8</sup> Although it may fail to be a legitimate moral authority, legal institutions and the character of legal reasoning can be understood only on the assumption that, at least by its own lights, the law acts as a moral authority. The law – in the form of a court or legislature – acts as a moral authority by issuing general directives in the form of rules. A rule gives a general description of conduct that S is required to follow – it applies to a category or range of conduct rather than a particular action, such as might be required by a command directed at S personally on a particular occasion. In laying down a rule, the legal authority assesses the dependent reasons that would apply in the absence of a rule. In accordance with the pre-emption thesis, by issuing the rule the authority generates a new reason, a reason to follow the rule, that replaces and excludes consideration of any of the dependent reasons that would otherwise apply. It is the defining feature of rules that they are 'exclusionary' in this sense. I shall generally understand rules in this way and refer to 'exclusionary rules' meaning rules understood in this way. From the standpoint of someone who accepts the law's claim to legitimacy, S should simply follow legal rules.<sup>9</sup>

The exclusionary rules analysis leads to certain important conclusions about the nature of law. First, on this approach, the law's main function is to provide guidance by laying down rules. It provides guidance because it consists of rules that govern a category of conduct and can be followed without the need for moral judgment.<sup>10</sup> Secondly, because the function of the law is to replace moral considerations with rules whose content is a matter of fact – a description of the conduct required – it makes sense to equate the law with these rules and their factual content: this is Raz's version of the famous 'sources thesis', that 'all law is source-based', or, more fully, the test for identifying the content of the law does not involve moral judgement or argument.<sup>11</sup> Also, on this approach, a legal rule is made by an authority acting to that end, that is to say by the exercise of a normative power to make the rule.<sup>12</sup> Furthermore, it appears to follow that

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<sup>8</sup> Ibid 215.

<sup>9</sup> For similar analyses of the nature and function of rules, see HLA Hart, 'Commands and Authoritative Legal Reasons' in *Essays on Bentham* (1982); Frederick Schauer, *Playing by the Rules* (1991); Larry Alexander & Emily Sherwin, *Demystifying Legal Reasoning* (2008), ch 1.

<sup>10</sup> Except insofar as moral issues are left open by the open texture of the directive, i.e. where the directive is not fully specified.

<sup>11</sup> EPD, 230-35; AL, 39-40. See also HLA Hart, *The Concept of Law* (2<sup>nd</sup> ed, 1994) 269.

<sup>12</sup> See Joseph Raz, *The Authority of Law: Essays on Law and Morality* (1979)

the content of a legal rule is the expression of the intention of the authority in making it.<sup>13</sup>

Although the sources thesis holds that the exercise of moral judgement is not involved in determining what the law is, in Raz's version this is not based on scepticism about the truth of propositions of morality or the possibility of exercising moral judgement soundly. To the contrary, the service conception presupposes that it makes sense to speak of an authority that can exercise its judgement to identify reasons and weigh them up to establish how a subject ought to behave, and it implies that if an authority is legitimate, a subject can incur a moral duty to follow rules that the authority lays down. The service conception is not a sociological concept of authority, concerned only with whether and in what way an authority exercises influence over its subjects.<sup>14</sup>

## II. The exclusionary rules analysis and the common law

### The common law

On this general analysis, the common law consists of exclusionary rules laid down by the courts in the adjudication of disputes. In adjudication, the main function of the court is to identify and apply the law, which means rules previously laid down. If the facts do not fall under any such rule<sup>15</sup> – i.e., there is a gap in the law – the court exercises its moral judgement to determine a new rule to lay down, which it then applies to the facts of the case to dispose of it, thereby filling the gap, or part of it. Here the court has a legal duty to reason morally and to formulate the best rule for the circumstances, just as a legislature should, and it does this as part of the legal process, but it does not apply pre-existing law.<sup>16</sup> In addition, a court may be empowered to overrule previous decisions, at least in some limited circumstances, in effect creating a gap that it then fills by laying down a

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(below 'AL'), ch 1; EPD, ch 14.

<sup>13</sup> EPD, 231.

<sup>14</sup> See MF, 23-28. For discussion of 'heretical' or sceptical accounts of adjudication, see William Lucy, *Understanding and Explaining Adjudication* (1999).

<sup>15</sup> This includes a case where a rule is not fully specified and leaves an issue open for moral judgement. It also includes cases where there is an unresolved conflict between rules.

<sup>16</sup> AL, 181-2, 197; EPD, ch 14. Thus a basic distinction is drawn between 'regulated' and 'unregulated' cases, and in unregulated cases the court has a discretion.

new rule.<sup>17</sup> Again this involves the exercise of moral judgement by the court.

## The character of legal reasoning in the common law

As suggested above, one problematic feature of this account of the common law concerns the character of common law reasoning. The recognised features of common law reasoning discussed below do not seem to be consistent with, or at least are not easily or naturally reconcilable with, the exclusionary rules analysis.<sup>18</sup>

On the exclusionary rules analysis, legal reasoning in the courts has a binary or dichotomous character. Where an issue is governed by a rule laid down by a previous directive, the issue is a matter of law, determined by authority, and here the court declares the existing law. Where an issue arises that does not fall under any such rule, the issue is not governed by authority and is not a matter of law; here there is a gap in the law, and the issue is dealt with by moral reasoning and judgment to formulate a new rule to apply. The exclusionary rules analysis implies that there will always be gaps because circumstances will always arise for which no rule has been laid down. It is doubtful whether this picture is reflected in the case law. Sometimes a court initially sets out an account of settled law before considering an issue on which the law is unsettled or unclear. This might suggest that there are two distinct stages in reasoning, concerned first with determining what the existing law is in accordance with authority, and then with determining how to make new law where there is a gap. It might be argued that the appearance of unsettled or unclear law rather than simply a gap might arise from the fact that, in the absence of law, although the courts are not subject to the authority of pre-existing case law, they should take account of the value of predictability in the law and so make law by analogy with previous cases.<sup>19</sup> This use of analogical reasoning would disguise the sharp difference between the law and a gap in the law. But it seems

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<sup>17</sup> For Raz's view on the position in English law, see Joseph Raz, 'Facing Up: A Reply' (1989) 12 *Southern California Law Review* 1153, 1208-9 (below 'Facing Up').

<sup>18</sup> For similar points see, for example, AWB Simpson, 'The Common Law and Legal Theory' in *Oxford Essays in Jurisprudence* (Second Series, 1973); Heidi Hurd, 'Sovereignty in Silence' (1990) 99 *Yale Law Journal* 945, 947; Schauer, above n 9, 174-81; Stephen R Perry, 'Judicial Obligation, Precedent, and the Common Law' (1987) 7 *Oxford Journal of Legal Studies* 215, 234-9; Grant Lamond, 'Do Precedents Create Rules?' (2005) 11 *Legal Theory* 1, 5-15.

<sup>19</sup> AL 205-6; see also Hart, above n 11, 274.

doubtful whether it is actually possible, even by very close examination, to distinguish between statements of existing law and statements of new law, and furthermore the courts always purport to declare or find the law in the sense that, in the end, they always apply it to the facts of the case without making any distinction between what was already law and what is new.<sup>20</sup>

More generally, on the exclusionary rules analysis one would expect a court to go to great lengths to produce a clear and explicit statement of the rule that it applies or lays down, just as if it were a statutory provision (and one might even expect a formal process for promulgating the new rule). Of course, this may be very difficult to achieve in practice, and it is understandable that a court will often fall short; but in fact one does not get the impression from the case law that laying down a rule as a guide is even the court's principal aim. It might seem more accurate to say that the court's principal aim is to reach a just resolution of the dispute according to law, and that the guidance it provides is to be inferred from this. Furthermore, on the exclusionary rules analysis, the rule laid down by the court is to be equated with the ratio decidendi or holding of the case,<sup>21</sup> but it is far from clear that when a court does pronounce an explicit rule as the basis for its decision this rule is necessarily the ratio of the case; there is great controversy over the proper way to understand the ratio of a case, which is difficult to reconcile with this straightforward conception of the ratio.

Another difficulty concerns the courts' power to overrule previous decisions. It is understandable that a court should have a power to overrule previous decisions, but since the court's first function in adjudication is to apply existing law, at least where there is law, it seems clear that a court should first apply the rule previously laid down, and then change the law for the future – it should separate the application of pre-existing law from legislation.<sup>22</sup> But the courts do not make purely prospective changes to the

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<sup>20</sup> Lord Goff in *Kleinwort Benson v Lincoln City Council* [1999] 2 AC 349, 378-9, said paradoxically that judges declare what the law is but that this inevitably has a retroactive effect. See J M Finnis, 'The Fairy Tale's Moral' (1999) 115 *Law Quarterly Review* 170.

<sup>21</sup> See AL, 183-4.

<sup>22</sup> Raz considers how it can be, if the courts are bound to apply the law, that they can be at liberty to overrule a previous decision by 'repealing' the rule laid down and replacing it with a new rule. His conclusion is that one can still say that rules previously laid down are binding provided that the court is not free to overrule a decision whenever it considers, on the balance of reasons, that another rule would be better, but only in more limited circumstances. On what these circumstances should be, see Facing Up, 208-9. In any case, it seems clear that one should distinguish between the circumstances in which it is justified to overrule retroactively and the circumstances in which it is justified to overrule prospectively. One might

law. When a court overrules a decision, it abrogates the rule laid down, and this takes effect retroactively, since the court then formulates a new rule that applies to the present case and to future cases involving events that have already occurred. This failure to give effect to rules previously laid down is at odds with the guidance function of the law under the exclusionary rules analysis.

The same difficulty arises in connection with the standard common law technique of distinguishing. As it is ordinarily understood, distinguishing a previous case means modifying the rule laid down in that case by limiting it so that it does not apply to the facts of the case now in issue. It appears that a court can distinguish a previous case whenever it considers that the facts of the new case differ materially from the facts of the previous case, though it can modify the rule laid down only in a way that leaves it consistent with the outcome in the previous case.<sup>23</sup> Again it would seem that, in accordance with the guidance function, the court should first apply the existing law and then separately alter it for the future.

Distinguishing, understood in this way, seems to be inconsistent with the exclusionary rules analysis for a further reason. Under the exclusionary rules analysis, a decision can be authoritative only if it takes the form of an exclusionary rule. A rule defines a category of cases, within which a later case can fall and so be governed by the rule, which can thus be applied without the exercise of moral judgement. But a court can always avoid the application of a rule declared in an earlier case by distinguishing it, by identifying a material difference between the new case and the earlier one, in the exercise of its moral judgement. What is binding, it appears, is not the rule declared in the earlier case, but the decision itself – the outcome on its facts – as understood by the later court, in the sense that it is binding if the later court cannot identify a material difference between the new case and the earlier one. On this understanding the court argues by analogy from the previous case, following it when the new case is ‘relevantly similar’ and distinguishing it when it is not. It treats the rule declared as merely *provisional*, adopting it or qualifying or extending it as it considers appropriate. If this is how the effect of a decision for later courts should be

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suggest that retroactive overruling is justified only where the rule was so obviously a bad one that S should have realised this, and that it was not therefore authoritative over him at all, but there seems far wider scope for prospective overruling.

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Distinguishing is sometimes understood to mean determining that the rule laid down does not, on its proper construction, apply to the facts of the new case. See generally AL, 185-6; Melvin Aron Eisenberg, *The Nature of the Common Law* (1988) 61-2; Neil Duxbury, *The Nature and Authority of Precedent* (2008) 113-6. Alexander & Sherwin, above n 9, 58-9, contend that distinguishing is really a disguised form of overruling.

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understood, it seems that a decision is not authoritative under the service conception, because it is the later court's moral judgement that really determines its decision, not the earlier case, and it seems that the earlier case provides no genuine guidance at all.<sup>24</sup> On this view, rather than playing a role in gap-filling to supplement the exclusionary rules analysis, making new law more predictable, analogical reasoning seems to be subversive of the exclusionary rules analysis.

Distinguishing is an aspect of a more general practice in legal reasoning, according to which a court decides a case by adopting a rule that it considers is consistent with the decisions on the facts in a body of previous cases, whether or not the rule was previously laid down. Such a rule is taken to give effect to the existing law and to respect the binding authority of previous cases, though it was not laid down in any previous case. It seems that in this way the courts can develop and change the rules of the common law not by rejecting previous decisions but by reinterpreting them. Again, this is inconsistent with the exclusionary rules analysis, according to which the law consists of exclusionary rules laid down by courts in previous decisions.

Thus the exclusionary rules analysis is difficult to reconcile with the recognised character of common law legal reasoning. Indeed the appeal of the exclusionary rules analysis surely lies far more in the fact that it appears to follow from the nature and function of legal rules, and more broadly from Raz's general theory of authority, than in its ability to explain common law reasoning as it is conventionally understood. On the strength of the exclusionary rules analysis, one might conclude that common law legal reasoning suffers from various pervasive forms of fallacious argument. The courts should only overrule prospectively; they should renounce the practice of distinguishing as it is normally understood, and also the practice of reasoning by analogy from previous decisions on their facts, and by the

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<sup>24</sup> Raz has an account of distinguishing: a court can modify a rule laid down only in the light of 'non-excluded reasons', i.e. reasons not taken into account by the court making the previous decision: see *Facing Up*, 1205; *AL*, 188. In these circumstances, the court does not contradict the judgement of the previous court. It seems that the rule laid down has a core, reflecting the court's rationale for the rule – the main justifying principle – and the rule can be cut down to this core, but no further. In effect the earlier case is authority for a rule, but not the one actually formulated by the court. This seems to detract from the efficacy of the law as a system of guidance through exclusionary rules. Also it does not seem to be consistent with the ordinary understanding and practice of distinguishing, according to which, on my understanding, the later court can distinguish whenever it considers that the new facts are materially different, provided only that the modified rule is consistent with the outcome in the earlier case on its facts.

construction of rules consistent with previous decisions on their facts, which seem to give rules a provisional character; they should abandon the pretence that they always declare the existing law; they should learn to differentiate clearly in their judgements between applying existing law in accordance with authority, and making new law by the exercise of moral judgement free of authority; and they should learn to express new rules in such a way as to make them clear and identifiable as such. But these supposed fallacies are time-honoured and apparently fundamental features of the common law, and one is bound to ask whether another account of authority and legal reasoning in the common law is available that can explain the common law as it stands.<sup>25</sup>

## Gaps and judicial legislation

The objection discussed above was that the exclusionary rules analysis does not appear to be consistent with the actual pattern of legal reasoning in the common law. It also appears that common law reasoning understood in accordance with the exclusionary rules analysis is open to objection on grounds of political morality. The conventional assumption is that the courts' function is only to apply existing law and not to make new law. Making new law involves the exercise of moral or political judgement, and this, it is said, is properly the preserve of a democratically-accountable legislature. But, according to the exclusionary rules analysis, where there is a gap in the law a court makes new law free of any constraint by authority. Here it seems that the court is free in principle to act in the same way as a legislature, though it is not democratically accountable in the same way.<sup>26</sup>

It is indisputable that in the common law the judges do make law. The law changes over time as a result of their decisions, and this is surely inevitable: there must sometimes be cases involving new situations that

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<sup>25</sup> I am not suggesting that it is impossible to reconcile any of the features of common law reasoning discussed with the exclusionary rules analysis, but that the exclusionary rules analysis does not explain them very naturally, and not as well as the alternative discussed below. See above n 20 on analogical reasoning; EPD, ch 11 on 'directed powers'; as to distinguishing, see the previous note. See also the problem of 'partial reform': AL, 200-1. However, even some commentators who adopt a version of the exclusionary rules analysis accept that it does not, on the face of it, account as well as the interpretative method discussed below for common law legal reasoning: see eg Larry Alexander and Ken Kress, 'Against Legal Principles' (1997) 82 *Iowa Law Review* 739, 747-52.

<sup>26</sup> AL, 197. To use Dworkin's expression, the court acts as a 'deputy legislature': Ronald Dworkin, *Taking Rights Seriously* (1977) (below TRS) 82.

cannot be resolved by the application of rules previously laid down,<sup>27</sup> and judges make new law as they resolve them. Furthermore, judges must be able to overrule poor decisions, unless all remedial work on the common law is left to the legislature. It seems inevitable that judges should on some occasions be free to decide cases purely on the basis of their own moral judgement unconstrained by authority, as the exclusionary rules theory holds, whatever political objections there might be to such an arrangement, and the impression that courts give that they always decide according to the existing law seems to be just a fiction that hides this fact.

The question is whether there might be an alternative analysis of authority in the common law that explains how it can be that, although judges do make law, they are at the same time in some sense governed by authority, and not free of it like a legislature. This might explain why it is always said that the law ‘develops’ or ‘evolves’, implying, it would seem, that in making new law the courts draw on and are constrained by the existing case law. This would go some way to meeting the objection to judicial legislation, though it will seem paradoxical in the light of the exclusionary rules analysis, according to which on any issue a court must either be free to exercise moral judgement or be bound by authority.<sup>28</sup>

## Doing justice in adjudication

Doing justice as between the parties to a dispute entails holding the defendant accountable to the claimant according to the moral requirements that applied as between the parties in the circumstances in which they acted.<sup>29</sup> On the exclusionary rules analysis, this means (on the assumption that the law’s claim to moral authority is justified) that justice is done when rules previously laid down are applied in adjudication. The defendant’s liability is assessed by reference to the authoritative guidance that governed the parties at the time.

This means, first, that overruling and distinguishing are liable to involve injustice, because, as pointed out above, they retroactively disapply rules previously laid down, which the parties were entitled to rely on as

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<sup>27</sup> To deny this, according to Raz, is to fall prey to the formalist fallacy: EPD 330-35.

<sup>28</sup> See generally Duncan Kennedy, ‘The Distinction between Adjudication and Legislation’, in *A Critique of Adjudication (fin de siècle)* (1997).

<sup>29</sup> This is normally understood to mean that the defendant had a duty to the claimant. I shall generally express the relation between the claimant and the defendant in this way, but often the claim is not best understood to arise from a breach of duty: see further Peter Jaffey, *Private Law and Property Claims* (2007) 20-29.

authoritative guidance. Secondly, a problem arises where there is a gap in the law, where no rule has been laid down. Here, to do justice between the parties, the court should in principle decide the matter according to the moral reasons or considerations that were applicable to the parties in the absence of a rule. On the exclusionary rules analysis, the court should legislate, devising a rule and then applying it to the facts to dispose of the case. Clearly, in this situation one cannot say that the defendant is held liable on the basis that he failed to conform to authoritative guidance. Nevertheless, it seems that it would not be unjust to hold him liable according to the rule laid down, if the duty arising by virtue of the rule corresponds to the duty that subsisted in the absence of the rule on the balance of moral considerations. But if there is no such correspondence, the court has imposed a new duty retroactively.<sup>30</sup>

It might appear that, since the moral considerations that should be applied are the dependent reasons underlying the rule, there is no difference between the requirements of the rule and the moral requirements in its absence, and so no possibility of injustice. However, as Raz points out, the law is liable to make a difference to the pre-existing moral position. He rejects what he describes as the 'no-difference thesis':<sup>31</sup> the law may well impose a duty that does not simply replicate a pre-existing moral duty. This is surely a crucial function of the law. In particular, first, sometimes a new convention is required to overcome a problem of social co-ordination – for example, a convention that everyone should drive on the left.<sup>32</sup> If, in the absence of a convention, the authority pronounces that henceforth everyone should drive on the left, it imposes a duty to drive on the left that did not exist before. Before this, one might say there was an abstract duty to follow whatever convention may become established, but there was certainly no concrete duty actually to drive on the left. If such a rule is adopted and applied in adjudication, the parties are treated on the basis that they ought to have followed a convention that was not then in effect. Secondly, an

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<sup>30</sup> On the problem of retroactive legislation, see TRS, 84.

<sup>31</sup> See MF, 30, 48. It is not necessary for present purposes to discuss the literature on the 'practical difference thesis' which concerns inclusive and exclusive positivism: see e.g. Shapiro, above n 5.

<sup>32</sup> More broadly, Raz refers to other types of case where the court has to make an arbitrary choice between possible options, though not in order to establish a convention, and to 'prisoner's dilemma' cases: MF, 48-9. An authority's pronouncement may be authoritative though mistaken, so the law could also make a difference by misstating the pre-existing moral duty. Raz argues that the law turns simple reasons for actions or 'oughts' into duties: MF, 60. This follows from Raz's view that, strictly speaking, a duty arises only by virtue of an exclusionary rule, and not on the balance of reasons. It reflects the fact that the law makes a difference, rather than constituting a different way in which it makes a difference.

authority may lay down a rule in the light of knowledge of the effects of the subject's actions in the circumstances that the authority possesses but an ordinary subject of the law does not. The ordinary subject's moral duty in the absence of the new rule or set of rules reflects his own more limited knowledge, and for this reason also it might be unjust to enforce the new rules against him.<sup>33</sup> Often, as suggested above, a new convention and specialist knowledge are combined in a new regulatory regime. For these reasons, a court that is free to lay down rules that it considers are prospectively the best rules for the situation at hand, in accordance with the dependency thesis, is liable to cause injustice if it applies them in adjudication to resolve cases. (If this were not the case there would be no need to be concerned about the effective promulgation of new legal rules).

A possible response to this objection is to argue that it is not unjust to a defendant for a court to legislate where there is a gap and enforce the new rule against him, provided this does not frustrate expectations engendered in the defendant by the law (this is the problem with respect to overruling and distinguishing), and where there is a gap in the law this requirement will be met because there have been no authoritative directives to engender any expectations.<sup>34</sup> But, with respect to gap-filling, the concern here is not with injustice arising from the fact that the defendant had expectations engendered by the law, but with injustice arising from the fact that a new rule can impose a duty that was not there before.<sup>35</sup> Another view is that, where there is a gap in the law, the defendant can have no reasonable objection if the process by which the court makes new law to fill the gap meets appropriate standards for law-making, according to the principle of legality or the rule of law, which requires in particular that the court should not have acted arbitrarily.<sup>36</sup> But the court might lay down a new rule according to impeccable standards of law-making (apart from the objection of retroactivity) that it would nevertheless be unfair to enforce against the

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<sup>33</sup> Some would object to this formulation and say that the subject's knowledge is relevant not to whether he has a duty but to whether or to what extent he can be held responsible for a breach, but this objection does not affect the substance of the argument. The point does not presuppose that the defendant's duty depends on actual knowledge of particular consequences, for example harm to others, as opposed to knowledge of circumstances affecting the risk to others.

<sup>34</sup> AL, 198; Facing Up, 1210.

<sup>35</sup> For example, Raz says, Facing Up, 1210, '... even when it is impractical to be guided by [the Hand test for negligence] before the accident, people should accept it as the basis for settlement of damages after the harm occurred'.

<sup>36</sup> Timothy Endicott, 'Adjudication and the Law' (2007) 27 *Oxford Journal of Legal Studies* 311. See also John Gardner, 'Legal Positivism: 5½ Myths' (2001) 46 *American Journal of Jurisprudence* 199 212, 217.

defendant, because he did not at this time have a moral duty to act in the way that the new rule now requires.<sup>37</sup>

One might say, finally, that it is not the function of the courts to do justice in the particular case, at least where this conflicts with their responsibility to lay down new rules.<sup>38</sup> A court must decide on a rule to apply, and it should adopt the best rule for the future even if this causes injustice in the particular case; injustice through retroactive legislation is inevitable in a system for guidance by authority. But, to the contrary, one would think that under the exclusionary rules analysis the courts should separate out adjudication and legislation, first doing justice as between the parties without 'making a difference', and then if necessary laying down a new rule for the future. This seems the appropriate approach, but of course the courts do not do this, and indeed it is widely thought that purely prospective legislation is in some sense contrary to the nature of the common law.<sup>39</sup> Conversely, if the courts do aim to do justice on the facts as they purport to do, so that they do not aim to make a difference, and they do not separately lay down rules with prospective effect, it is difficult to see how the law can change over time, as it evidently does.

Thus the question, again, is whether an alternative analysis of authority in the common law is available that explains the actual pattern of legal reasoning in the common law; and also explains how it can be that the courts are always subject to the authority of previous case law, even as they develop the law through the exercise of moral judgement; and in what sense a decision is authoritative if the rule declared by the court is merely provisional and the later court argues from the decision by analogy; and

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<sup>37</sup> Raz also says that if a party knew or ought to have known that the court would legislate in a certain way, it is not unjust for the new rule to be applied retroactively against him, because he was forewarned that this would be the case: Raz, *Facing Up*, 1211. This may be the case sometimes, but presumably people cannot generally be expected to foresee what an authority will do.

<sup>38</sup> According to Raz, we should not assume that it is the function of common law courts to dispense justice, and his theory leaves this point open: *Facing Up*, 1210.

<sup>39</sup> In *Kleinwort Benson* (above n 19) 379, Lord Goff says: '... when the judges state what the law is, their decisions do, in the sense I have described, have a retrospective effect. That is, I believe, inevitable... I must confess that I cannot imagine how a common law system, or indeed any legal system, can operate otherwise if the law is to be applied equally to all and yet be capable of organic change... The only alternative, as I see it, is to adopt a system of prospective overruling. But such a system, although it has occasionally been adopted elsewhere ... has no place in our legal system'.

how the law can change through decisions that always aim to do justice as between the parties in the prevailing circumstances.

### III. Analogical reasoning and interpretation

#### The problem of analogical reasoning

It is often said that the standard form of legal reasoning in the common law is analogical reasoning,<sup>40</sup> though its role and significance is controversial. The idea of analogical reasoning is that, if a new case is analogous or 'relevantly similar' to a decided case, it should be decided in the same way. This involves comparing the facts of the two cases. It does not depend on applying a rule laid down in the earlier case. It may involve formulating a rule that is applicable on the facts of both cases, but the rule is not inferred from or dictated by the earlier case. The objection usually directed at analogical reasoning is that it is indeterminate: it cannot actually assist courts in making their decisions, even if this is not appreciated by the courts that purport to employ it. The problem is that, as anticipated above, there seems to be no determinate way of saying whether a case is in fact 'relevantly similar' to an earlier case. Cases can be similar or dissimilar in innumerable ways. A later court can always find a difference between the current case and an earlier one in order to avoid following the earlier case, however many cases there have been, or treat the current case as similar in relevant respects if it is inclined to follow it.<sup>41</sup>

On one view of analogical reasoning, it complements the application of exclusionary rules by contributing to the formulation of new rules where there is a gap in the law. On this approach, the court begins with the rule laid down in the previous case. The rule determines what the material facts of the case were, the facts that were relevant to the outcome. Indeed the rule may be expressed simply as a statement of the material facts in the case. Analogical reasoning involves extending the rule laid down in the decision into a gap in the law, by treating the facts of the new case as analogous to the material facts of the previous case as defined by the rule. If the rule laid

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<sup>40</sup> There are many works on analogical reasoning including, for example, Raz, *AL*, ch 10; Neil MacCormick, *Legal Reasoning and Legal Theory* (Rev ed, 1994) ch 7; Cass R Sunstein, *Legal Reasoning and Political Conflict* (1996) ch 3; Lloyd L Weinreb, *Legal Reason* (2005); Scott Brewer, 'Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy' (1996) 109 *Harvard Law Review* 923; Edward H Levi, 'The Nature of Judicial Reasoning' (1965) 32 *University of Chicago Law Review* 395; Eisenberg, above n 23, 83-96.

<sup>41</sup> See, for example, Schauer, above n 9, 184; Alexander, 'Constrained by Precedent' (1989) 63 *Southern California Law Review* 1,38.

down was expressed to apply to motor cars, the court might now treat lorries as analogous and extend the rule accordingly. The use of analogical reasoning to make new law in this way has the advantage that new law is more likely to be continuous with existing law and predictable in the light of it.<sup>42</sup>

However, it seems doubtful whether analogical reasoning understood in this way really provides a genuine constraint on the later court's decision-making. The scope of the rule originally laid down must be taken to reflect a judgement that within its scope the considerations that support the rule prevail over the considerations against it, but there is clearly no implication that beyond its scope the considerations that support the rule should continue to prevail, so as to justify extending the rule. Outside the scope of the rule, where there is a gap in the law, all relevant considerations have to be considered afresh. It seems plausible to say that, when courts employ or purport to employ analogical reasoning in this way, all they are really doing is investigating and reflecting on the facts of earlier cases and comparing them to the case in hand in a way that may improve their understanding of the moral issues and help them formulate a sound new rule where there is a gap in the law.<sup>43</sup> In any case, on this understanding of analogical reasoning it does not provide an alternative to the exclusionary rules analysis that might avoid the problems identified above.

## **An alternative approach to analogical reasoning**

There is an alternative approach to analogical reasoning, according to which it is not based on accepting the exclusionary rule laid down in the previous case, and the court does not begin by accepting the previous court's determination of the material facts. Instead, the court compares the cases to see if they are equivalent according to its own determination of which facts are material in the two cases. This means, in particular, that, if the previous decision laid down a rule that applies to the facts of the new case, it is open to the court to modify the rule to exclude the current case if it considers that

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<sup>42</sup> In invoking predictability as the rationale for analogical reasoning, Raz 'attempts to steer a middle course' between those who regard analogical reasoning as 'window dressing' and those who consider it to be legally binding: AL 205-6. Cf Ronald Dworkin, *Justice in Robes* (2006) (below 'JR') 69.

<sup>43</sup> See Alexander & Sherwin, above n 9, ch III; Eisenberg, above n 23, 53, 86. Some writers say that judges simply have a faculty of intuition acquired through education and practical experience that enables them to discern relevant similarity: see eg, Weinreb, above n 40; Levi, above n 40. Although judges may no doubt develop skills in moral reasoning and judgement, this does not solve the problem of the logical relevance of the earlier case.

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the cases are not in fact analogous. This appears to be what a court does when it distinguishes an earlier decision.

This again invites the objection mentioned above, that analogical reasoning is indeterminate, and therefore, if rules can be modified in accordance with the courts' use of analogical reasoning, that the rules of the common law are illusory and do not really govern later cases at all.<sup>44</sup> But although analogical reasoning understood in this way cannot determine a later decision, it can, in a certain sense, constrain the later court. If a later court has to follow the earlier decision unless it is satisfied that there is a genuine moral basis for distinguishing between the two cases, it may be constrained, in the exercise of its moral judgement, to reach a decision that it would not have reached through an unconstrained moral judgement. The real objection is that there is no point in subjecting courts to such a constraint: a decision should either lay down an exclusionary rule, in which case its value as an authority depends on the fact that it can be applied in the ordinary case without moral judgement so as to provide effective guidance, or alternatively, if it does not lay down an exclusionary rule applicable to the new case and the later court has to exercise moral judgement to make the decision, it should be free to make its own best moral judgement without any constraint created by the previous decision. If there is no applicable exclusionary rule, why should the later court's judgement be constrained by the need to secure consistency with an earlier decision with which it may disagree? One suggestion is that making decisions by analogy in this way is justified by the requirement that 'like cases should be treated alike', meaning that it is unfair to discriminate between parties in different cases whose positions are in relevant respects the same. But this seems a very weak argument.<sup>45</sup> If the earlier case was wrongly decided, it would

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<sup>44</sup> See the discussion of the 'result model' in Alexander, 'Constrained by Precedent', above n 41, Part IV. Alexander also rejects the 'a fortiori' argument for analogical reasoning. This argument is that if the later case is identical save for some additional fact that favours the party equivalent to the winner in the earlier case, the result for this party follows 'a fortiori'; also, if the later case is identical to the earlier one save for the addition of a number of facts whose weights in favour of one party or the other can be added together, again the outcome of the later case follows a fortiori. The argument seems question-begging because it presupposes that morally-significant facts – which must really mean the moral considerations by virtue of which the facts have moral significance – can be weighed up against each other in an uncontentious way, but it is the contentious nature of this exercise that makes some constraint from previous case law desirable. Cf John F Horty, 'The Result Model of Precedent' (2004) 10 *Legal Theory* 19, defending a version of the a fortiori argument.

<sup>45</sup> See Alexander, 'Constrained by Precedent', above 41, 9-13. But Moore does think that a principle of equal treatment can account for common law

surely be better to ignore it and make the right decision now. There seems no value in repeating a bad decision in the interests of equal treatment.

The 'like cases should be treated alike' argument is based on the value of consistency with previous decisions, irrespective of whether they are correct. Similarly, the idea mentioned above, that the value of analogical reasoning lies in promoting continuity relative to, or predictability in the light of, previous decisions, does not rely on the assumption that previous decisions were correctly decided. But, in my view, analogical reasoning is better understood to be based on this assumption, that is to say that previous decisions were correctly decided as to the outcome on their facts. If a court has reason to defer to the earlier court's judgement and accept that its decision was sound as to the outcome on its facts, then analogical reasoning can surely increase the likelihood of reaching a sound decision, even though the decision is not determined by the earlier decision without the need for moral judgement, as it would be in the case of an exclusionary rule.

Analogical reasoning is based, in other words, on attributing to courts, not the authority to lay down exclusionary rules, but the authority to determine what outcome is just on the particular facts of the case. The first function of a court is to reach a decision that is just as between the parties on the facts of the case, and this function is reflected in the structure and character of litigation, including the emphasis on a detailed account of the particular facts and the focus of the arguments on them. This does not mean that the court is not required to articulate a justification for the decision and formulate an appropriate rule. The point is that a court's ability to identify and express the rationale for a decision, or to identify precisely which facts are material, or to formulate a rule that also applies in situations not directly under consideration, falls short of its ability to reach a just decision with respect to the outcome on the facts. On this assumption, if the court formulates a rule to justify its decision, the rule should indeed be treated as a provisional rather than a definitive exclusionary rule, in the sense that, although it is of necessity applied as the definitive law in the case in hand, with respect to future cases it is to be understood as a rule proposed or offered, as it were, as the appropriate rule, but subject to modification in cases that a later court regards as materially different.

One might object that one cannot distinguish between accepting the decision as sound on its facts and adopting the rule that the court laid down, because a later court has no access to any facts other than the findings of the original court. Of course, it is true that the later court must rely on the

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precedential reasoning: Michael S Moore, 'Legal Principles Revisited' (1997) 82 *Iowa Law Review* 867, 872. Dworkin also took this view at one time: TRS, 111-113. See also Duxbury, above n 23, 170-82.

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earlier court's judgement for its account of the facts. However, a court giving judgement sets out all the circumstances in detail, going well beyond the particular facts that it then picks out as material. There is plenty of room for a later court to accept the decision as sound, but adopt a different rule to account for it: it could recharacterise the material facts, defining a material fact more narrowly or more broadly, or discard a fact relied on by the original court, or rely on a fact regarded as immaterial by it. The common law style of judgement is entirely apt to enable a later court to reassess the basis for the decision.<sup>46</sup>

The question, then, is the nature of the constraint arising from the acceptance of a previous decision as sound in this way. The decision does not bind a later court in the way that an exclusionary rule does, without the exercise of moral judgement, unless the later case is identical,<sup>47</sup> and of course there is always some difference or other between the facts of two cases. However, the assumption of the soundness of a decision on its facts does create a constraint of the sort mentioned above. It arises because a court is not free to distinguish earlier decisions on arbitrary or artificial grounds, since this does not amount to genuine acceptance of them as sound decisions. Each decision represents, with respect to the outcome on the facts, a judgement of the balance of moral considerations in those circumstances, and, if a court accepts that the outcome on the facts was sound, it must either follow the decision or distinguish it on grounds that it considers morally defensible, that is to say by identifying some morally-relevant feature of the present case that justifies treating it differently. The decision provides a constraint by restricting the morally-plausible rules that can be adopted consistently with it.

The constraint arising in this way from a single decision may be weak and of limited use in providing guidance, certainly by comparison with an exclusionary rule, but many previous decisions combine to create a much stronger constraint. Whereas under the exclusionary rules analysis the law is constructed by adding together rules separately laid down in previous cases, on the suggested approach the court instead has to construct a body of rules by determining what rules are consistent with previous decisions taken together. Decisions have an interactive effect, in the sense that their material facts are mutually dependent, and so they operate holistically or collectively, not one by one. On this approach, one might say that the court reasons by way of multiple concurrent analogies, and simple analogical

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<sup>46</sup> Lamond, above n 18, 17, 23 notes this feature of judgements but has a different account of it: see below n 49.

<sup>47</sup> The decision is a binding authority for the parties with respect to the particular issues in dispute under the doctrine of *res judicata*, but the issue here is the effect of the decision on the general law.

reasoning from case to case is a limited and partial form of the general method. This general pattern of reasoning is quite different from that involved in reasoning from exclusionary rules. It has more in common with reasoning from a collection of observations or experimental findings in a scientific or empirical context, where they provide support for a theory that is used to make predictions for new circumstances.<sup>48</sup>

Furthermore, the assumption should be that, although the courts are generally reasonably successful in determining a just outcome, they are not infallible. Thus a court should not necessarily seek to develop a body of rules consistent with every single previous decision; it should be free to adopt an account that explains most decisions convincingly but is inconsistent with particular decisions, in preference to an account that accommodates these decisions with artificial or arbitrary distinctions. In other words, the courts should attempt to develop a body of rules for which there is the strongest support in the case law through convergence and mutual support and corroboration, that is to say they should aim to produce a coherent account of the case law.<sup>49</sup>

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<sup>48</sup> See Michael S Moore, 'Precedent, Induction, and Ethical Generalisation' in Laurence Goldstein (ed), *Precedent in Law* (1987). In scientific reasoning, no single finding on its own dictates or fully determines a prediction, but each makes a contribution to providing support for the theory. One might say that collectively the findings provide reliable evidence for the prediction. A scientific theory is generally supported by independent and duplicated findings so that the authority of individual scientists becomes irrelevant, but in the analogous moral case the position is different in this respect. The reliability of the prediction would normally also be understood to depend on whether the formula has support from other relevant theories that are well supported by findings in other experiments or from other observations. Furthermore, it is possible for an experimental finding to be mistaken, and sometimes it may be justified to reject an experimental finding if it is inconsistent with a theory that is otherwise well supported.

<sup>49</sup> Lamond, above n 18, also argues that the doctrine of precedent requires courts to treat previous decisions as correctly decided on their facts, but his approach is quite different from the one set out here. It has more in common with Raz's account of distinguishing mentioned in n 24 above. According to Lamond, the ratio of a decision consists of certain facts identified by the court as together justifying the decision in all the circumstances of the case. The circumstances include not just these facts, but all the other facts given in the judgement. If a later case falls within the ratio, the later court must follow the precedent unless it takes the view that in some respect the facts of the later case are relevantly different from the facts outside the ratio of the earlier case, in which case it can distinguish. On Lamond's approach, the facts forming the ratio are stated authoritatively by the precedent court. This means that, if the later court considers that the facts that bring the later case

It seems clear that this approach corresponds more closely with the actual pattern of legal reasoning in the common law than the exclusionary rules analysis. The fundamental constraint the court is under is to conform to previous decisions on their facts, not to apply exclusionary rules previously laid down, and rules are built up by analogical reasoning on the basis of this constraint. Thus the rules laid down by the courts are provisional, in the sense explained above.<sup>50</sup> A court can distinguish a previous case and modify the rule it laid down; it can extend a rule or subsume it into a more general rule; and it may even replace the old rule with an entirely different rule or body of rules that accounts for the previous decisions in a quite different way. The approach also provides a rationale for overruling: a decision should be overruled if it becomes apparent that it is anomalous in the sense that it does not cohere with other decisions.

On this analysis, furthermore, legal reasoning does not have the binary character implicit in the exclusionary rules analysis, under which an issue is either governed by an exclusionary rule or, if it falls outside the scope of any rule previously laid down, is a matter for moral judgement. In

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within the ratio differ from those of the earlier case, that is to say there is a different instance of the type of fact stipulated by the earlier court, the later court cannot distinguish. For example, if the earlier court considered that it was a fact forming part of the ratio that the defendant used a 'weapon', the later court could not distinguish on the basis that in the later case the weapon was a knife and not a gun, even if it thought this difference justified a different outcome. This seems to be contrary to the practice of distinguishing as ordinarily understood. It is a variant of the rule-based approach, inasmuch as the later court is bound to defer to the precedent court's authoritative formulation of the ratio. Lamond's approach is also contrary to the usual understanding in recognising, in effect, two categories of material fact, those within the ratio and those outside it. On the usual understanding, the ratio is equated with the material facts, and a court seeks to make an exhaustive statement of the material facts. On the approach suggested here, the reason why other facts may be relevant for a later court is that the later court is not bound to accept the earlier court's formulation of the ratio as authoritative.

<sup>50</sup> See also JR, 205-7, referring to 'presumptive' rules; Frederick Schauer, 'Is the Common Law Law?' (1989) 77 *California Law Review* 455 and Schauer, above n 9, 177; Donald H Regan, 'Authority and Value: Reflections on Raz's Morality of Freedom' (1989) 62 *Southern California Law Review* 995, who describes his 'indicator rules' as provisional; Eisenberg, above n 23, 65; Theodore M Benditt, 'The Rule of Precedent' in Goldstein, above n 48, 95; Levi, above n 40. Cf Perry's concept of a 'summary rule', meaning a 'device of convenience summarising the balance of principles': Perry, 'Judicial Obligation, Precedent, and the Common Law' above n 18, 225, and Stephen R Perry, 'Two Models of Principles' (1997) 82 *Iowa Law Review* 787, 791.

other words, precedential reasoning is not distinct from analogical reasoning, as it is under the exclusionary rules analysis. Instead, the exercise of moral judgement by way of analogical reasoning is an inseparable part of the process by which the court is constrained by previous decisions. It makes sense to say that the court always declares the law, even when it applies a rule not previously applied, or when it overrules or distinguishes a rule previously applied. There are no gaps in the law, where the court is free of any constraint from previous decisions, as a legislature is when it makes law.

One might object that provisional rules cannot actually provide guidance to ordinary subjects of the law. It is true that the provisional character of rules detracts from their effectiveness in guidance, but this provisional character reflects the actual position in the common law, in which distinguishing and overruling are established features. Furthermore, in a well-developed area of law, where there have been many decisions identifying the relevant underlying considerations, weighing them up, and exploring the way in which they interact and support each other, the rules will operate for practical purposes as if they were ordinary exclusionary rules.<sup>51</sup> Indeed one would think that the way in which they have been developed means that the law is more likely to be sound and stable, and so provide good guidance, than would be the case if each decision of a court independently lays down an exclusionary rule that is liable to be overruled by a later court.

## The interpretative method

This suggested approach amounts to a version of Dworkin's theory of 'constructive interpretation',<sup>52</sup> and I will refer to it as the interpretative

<sup>51</sup> It seems to me that only rules that have achieved recognition through a series of cases come to be known as 'the rule in X v Y'. Cf Lamond, above n 18, 21.

<sup>52</sup> See generally Ronald Dworkin, *Law's Empire* (1986) (below LE) ch 8. I have presented the interpretative method as a development of analogical reasoning. Raz describes Dworkin's theory as an 'extreme case of total faith in analogical arguments': AL, 205-6. Dworkin is dismissive of analogical reasoning for similar reasons to those given above: JR, 69. See also David O. Brink, 'Legal Theory, Legal Interpretation, and Judicial Review' (1988) 17 *Philosophy and Public Affairs* 105, and 'Legal Interpretation, Objectivity, and Morality' in Brian Leiter (ed), *Objectivity in Law and Morals* (2001) esp 49-54; Eisenberg, above n 23, 154, on the 'generative conception' of the common law; Stephen R Perry, 'Judicial Obligation, Precedent, and the Common Law' above n 18, 241-2, and 'Second-Order Reasons, Uncertainty, and Legal Theory' (1989) 62 *Southern California Law Review* 913.

method of legal reasoning, although, unlike Dworkin's general theory of constructive interpretation, the suggested approach is concerned only with legal reasoning from the decisions of courts in the common law. It might be thought that under the interpretative method the justification for following a previous decision on its facts, whether or not it is thought to be correct, is the intrinsic value of treating like cases alike; this argument was relied on by Dworkin at one time.<sup>53</sup> As mentioned above, this is sometimes said to be the justification of analogical reasoning, but the argument is not convincing – there seems no good reason to follow the earlier decision irrespective of whether it is likely to be sound, purely for the sake of uniformity of treatment – and it is not adopted in the analysis above. The interpretative method proceeds on the assumption that previous decisions are generally likely to be correct on their facts and that taking account of them in the way the interpretative method requires is the best way of reaching the right decision in the new case.

Similarly, one might think that the justification for the interpretative method is the value of coherence, and critics have argued that the interpretative method promotes coherence at the expense of justice, and have objected that a court should not follow or depart from a previous decision simply in order to promote coherence in the law.<sup>54</sup> But on the suggested analysis coherence is not sought for its own sake, and when a court disregards a previous decision in the process of constructing a coherent body of law, this is not in order to promote coherence over justice, but in order to determine what justice requires, by way of the interpretative method.

As Dworkin has explained, the approach draws on the 'reflective equilibrium' method of moral reasoning.<sup>55</sup> The reflective equilibrium

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<sup>53</sup> TRS, 111-13. See above n 45.

<sup>54</sup> The argument is made by way of criticism of Dworkin's concept of integrity which is offered as the basis for the interpretative method: see LE, Chs 6-7; JR, ch 6. Integrity is said to be a value in political morality distinct from, and capable of prevailing over, justice. Critics have doubted whether integrity is distinct from coherence or equality: see Alexander & Kress, 'Against Legal Principles' above n 25; Dale Smith, 'The Many Faces of Political Integrity' in Hershovitz (ed), *Exploring Law's Empire* (2006) ch 6; Raz, EPD 325; Christopher J Peters, 'Foolish Consistency: on Equality, Integrity, and Justice in Stare Decisis' (1996) 105 *Yale Law Journal* 2031. For more sympathetic accounts of integrity, see Gerald J Postema, 'Integrity: Justice in Workclothes' in Justine Burley (ed), *Dworkin and his Critics*; Scott Hershovitz, 'Integrity and Stare Decisis' in Scott Hershovitz, (ed), *Exploring Law's Empire*, 114-5.

<sup>55</sup> See TRS ch 6, especially 160-61; JR, 246-7; John Rawls, *A Theory of Justice* (1972) 48-51; Perry, 'Two Models of Principles' above n 50, 813;

method seeks to harmonise intuitions or convictions concerning the moral position in particular circumstances – decisions on the facts in the common law – with the general principles taken to justify them, by exposing for further reflection convictions or principles that appear anomalous. It relies on the assumption that each concrete conviction or decision is a reasonably reliable but not infallible guide to the balance of moral considerations applicable in those circumstances and that moral considerations and their relative weight should be understood consistently across the law.<sup>56</sup> Coherence is valuable not for its own sake, but because it is relevant to the construction of a just body of rules on the basis of these assumptions.<sup>57</sup>

#### IV. Authority and justice under the interpretative method

##### The interpretative method and authority

According to the exclusionary rules analysis, the ratio decidendi or holding of a case is simply the rule laid down by the court to decide the case in the exercise of a legislative power. The ratio is fixed and identifying it is a matter of construing the rule, which means establishing the intention of the court that laid it down.<sup>58</sup> Although the ratio of a decision is a rule that may

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Brewer, above n 40, 938-9.

<sup>56</sup> In the common law the interpretative method seeks harmony across the decisions of different judges, not the convictions of an individual. For objections to the argument for analogical reasoning based on the analogy with reflective equilibrium, see Larry Alexander 'Bad Beginnings' (1996) 145 *University of Pennsylvania Law Review* 57 and 'The Banality of Legal Reasoning' (1998) 73 *Notre Dame Law Review* 517. Raz points out that promoting coherence through the reflective equilibrium method does not eliminate systemic bias or ignorance: Joseph Raz, 'The Relevance of Coherence' (1992) 72 *Boston University Law Review* 273, 280. See also Barbara Baum Levenbook, 'The Meaning of Precedent' (2000) 6 *Legal Theory* 185, 233-38.

<sup>57</sup> More generally, some writers take the view that, if a court is to do justice, it must be altogether free to apply its judgement to determine and apply the applicable moral principles, free of any constraint by precedent. See M Moore, 'Authority, Law and Razian Reasons' (1989) 62 *Southern California Law Review* 827, 867, 872-3; Heidi M Hurd, 'Challenging Authority' (1991) 100 *Yale Law Journal* 1611, 1614-41; Alexander, 'Constrained by Precedent' above 41, 16. These writers were considering the exclusionary rules analysis not the interpretative method. There is surely no reason to think that complete freedom for judges to exercise their moral judgement, free of any constraint from previous decisions, is likely to be the best way to ensure that courts make just decisions.

<sup>58</sup> AL, 183-4.

operate in conjunction with another rule or set of rules, it is nevertheless fundamentally an independent rule to be construed purely by reference to the decision that laid it down. The authority of the law is simply the authority of particular decisions in the form of such rules, and the law is a patchwork of distinct, self-contained rules,<sup>59</sup> with gaps where no rule is applicable.

Under the interpretative method, individual decisions are taken to be generally sound, but it is really the common law as a whole that is authoritative, for two reasons.<sup>60</sup> First, common law rules are constructed from a body of decisions taken together, rather than by adding together rules laid down separately in different decisions. Secondly, even if there may be little reason to defer to an exercise of moral judgment by a single previous court, there is good reason to defer to what is in effect the accumulated wisdom of the common law built up over many decisions, in which many different judges have considered and reaffirmed the rules previously formulated, or modified or replaced them. Thus one can say, in short, that the cases of the common law constitute, or are taken to constitute, a collective authority with respect to justice.

Under the interpretative method a court's decision cannot be understood simply as the exercise of a power to make a new authoritative rule. A decision makes an incremental contribution to the collective authority of the case law. To determine the ratio of an earlier case, a court has to determine for itself what rule best accounts for the case, as part of an account of a wider body of law. A court might well attribute a ratio to an earlier decision that is at odds with the understanding of the court that made it,<sup>61</sup> and the standing and significance of a decision depend on the support it has received from later courts and how it has been interpreted.

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<sup>59</sup> Hence the importance attributed to the 'individuation' of rules: see Joseph Raz, 'Legal Principles and the Limits of Law' (1972) 81 *Yale Law Journal* 823; cf TRS 74-77.

<sup>60</sup> The common law has indeed sometimes been described as a system of collective law-making. See e.g., Gerald J Postema, *Bentham and the Common Law Tradition* (1986) 66-69. On the view taken here, integrity in adjudication amounts to collective authority. Dworkin does indeed say that the interpretative method is based on a principle of fidelity to past decisions or past practices: Dworkin, JR, ch 5. Constructing the law on the basis of consistency with a body of decisions on the facts also allows for 'theoretical ascent': JR 25, 53. I have not discussed this here.

<sup>61</sup> On Raz's approach one can say that in laying down a rule the court determines definitively what the material facts of the case are, whereas on the interpretative approach it is always a matter for the later court to decide for itself what the material facts of an earlier decision were. For criticism of

According to Raz, it is a necessary feature of a moral authority that its directives are capable of being understood and applied without the exercise of moral judgement: an authority cannot provide guidance if instead it refers the subject back to the moral questions that its guidance is supposed to resolve.<sup>62</sup> This is the basis for inferring the exclusionary rules analysis and the sources thesis from the authoritative nature of the law. The implication is that the common law cannot properly be said to be authoritative in the way suggested, that is to say by way of the interpretative method, because the interpretative method involves the exercise of moral judgement. But there seems no reason in principle why a subject cannot be guided towards a sound moral conclusion by a method of reasoning that imposes constraints on the way that moral judgement can be exercised, without altogether excluding it.<sup>63</sup> If it is reasonable to think that the interpretative method is a sound method of providing guidance as to what is just, the common law can reasonably be described as a collective authority in the way suggested, and this is consistent with the service conception and the NJT.<sup>64</sup> It is also consistent with the pre-emption thesis, at least in the sense that moral considerations are excluded except insofar as they are drawn on by way of the interpretative method. But the interpretative method is not consistent with the sources thesis, since it involves the exercise of moral judgement. The interpretative method recognises a middle way distinct from the two positions recognised under the exclusionary rules analysis:<sup>65</sup> the courts neither follow authority without moral judgement, nor do they exercise moral judgement to make new law free of authority.<sup>66</sup>

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the former approach, see, for example, Karl N. Llewellyn, 'Remarks on the Theory of Appellate Decision and the Rules or Canons about how Statutes are to be Construed' (1950) 3 *Vanderbilt Law Review* 395; William Twining & David Miers, *How to Do Things with Rules* (4<sup>th</sup> ed, 1999) 333; Duxbury, above n 23, 67-90.

<sup>62</sup> See above n 5. See also J Raz, 'The Relevance of Coherence' above n 56, 295-6, criticising Dworkin's approach on this ground.

<sup>63</sup> See Jeremy Waldron, 'Legislators' Intention and Unintentional Legislation' in Andrei Marmor (ed), *Law and Interpretation* (1995).

<sup>64</sup> Dworkin is at pains to deny this, as part of his rejection of Raz's theory of authority: see JR, ch 7. Similarly, Raz denies that Dworkin's theory of interpretation is compatible with his service conception: EPD, 225-6. If analogical reasoning can be used in gap-filling to make law in a more predictable fashion, it surely also generally helps the courts to make just decisions, by drawing on previous decisions that, since they involve the application of a presumptively sound rule, are presumptively sound on their facts.

<sup>65</sup> On whether there is such a middle way, see Kennedy, above n 28.

<sup>66</sup> They are not 'deputy legislators', as Dworkin put it: TRS, 82.

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The argument does not establish that the interpretative method is actually a sound method of determining the justice of a case, or of generating a body of rules. One might say, however, that, just as under the exclusionary rules analysis the common law's claim of moral authority implies a claim of the competence of the courts at laying down exclusionary rules, so under the interpretative method the common law's claim of moral authority implies a claim that courts are competent to make just decisions on the facts, and that the method of reasoning from these decisions – in the nature of the reflective equilibrium method – is reliable. If the interpretative method is superior, it is because courts are better at constructing a just body of rules by drawing on many decisions taken together in this way than by the accumulation of rules laid down separately.

## Doing justice in adjudication

As discussed above, a fundamental problem with the exclusionary rules analysis of the common law is that it fails to account for the fact that the courts do justice at the same time as they make new law. Under the exclusionary rules analysis, an authority can 'make a difference', creating duties that differ from the pre-existing moral duties, by introducing conventions to solve co-ordination problems, and by drawing on specialist knowledge beyond what can be attributed to ordinary subjects of the law. It can introduce what was described above as a new regulatory regime. This is clearly an important function of the law, but if a court creates a new duty in adjudication, it is liable to act unjustly by holding a party to the new duty retroactively.<sup>67</sup> If it is to do justice in adjudication, it seems that a court should first adjudicate and then separately lay down a new rule to apply prospectively, but this is not what courts actually do.

Furthermore, under the exclusionary rules analysis, even if a court lays down a rule that does justice and does not make a difference on the facts, there is a problem that the rule may not be apt in other circumstances that fall under the rule but were not under consideration in the case, and the rule may retroactively impose a new duty in those circumstances. This could cause injustice with respect to future or pending disputes over events that have already occurred. In practice, the problem is avoided by distinguishing, but it is doubtful whether this can be accommodated by the exclusionary rules analysis.

Under the interpretative method, the court does not lay down exclusionary rules that can impose a new duty retroactively. The interpretative method is a method by which a court draws on previous

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<sup>67</sup> This objection really applies with respect to later cases as well, if it is unreasonable to think that the new rule has been effectively promulgated.

decisions in constructing rules to do justice according to the law on the facts of the case before it, which has developed in a system whose primary function is adjudication.<sup>68</sup> A court always does justice on the facts or purports to do so, whether it applies a rule previously announced, or formulates a new rule. It follows that under the interpretative method a court does not introduce new conventions, or decide cases on the basis of specialist knowledge that a legislature might draw on but ordinary subjects cannot reasonably be expected to take into account. It does not introduce new regulatory regimes in adjudication, which could create new duties and apply them retroactively. In my view, this is how we should understand the exclusion from adjudication of considerations of policy, as Dworkin expresses it.<sup>69</sup> It is, of course, open to the legislature to change the law in this way, and the legislature's new rules will take effect prospectively.<sup>70</sup> Also, because the rules laid down in adjudication are provisional, a court cannot lay down a rule that, although it does justice on the facts of the case, applies in different circumstances where it is not apt and retroactively imposes a new duty, since in such circumstances the interpretative method allows for the rule to be modified by distinguishing the case.

If, under the interpretative method, the courts always aim to adjudicate by doing justice according to the existing law, it might appear to follow that they cannot make law and that under the interpretative method the law cannot develop. But in fact the courts do make law, in a limited way, under the interpretative method. They make law as they declare it, exercising moral judgement in the construction of rules consistent with previous decisions taken together. Because the courts make law by doing justice on the facts in adjudication, they develop the law not by drawing on specialist knowledge that ordinary subjects cannot be expected to take account of, or by laying down new conventions, but instead by developing the law's conception of what justice requires from the standpoint of the ordinary subject, that is to say, in the light of what, as things stand, ordinary subjects can be taken to know and be capable of doing. This is how the

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<sup>68</sup> Some writers, including Perry, characterise Dworkin's approach as 'adjudicativist': see eg 'Second-Order Reasons, Uncertainty, and Legal Theory' above n 52, 958. On Raz's view, characterising the law in terms of adjudication or equating it with considerations relevant to adjudication reflects an arbitrary preference for the lawyer's or judge's perspective: Raz, EPD, 199-203. The suggested approach is adjudicativist in the sense that the outcomes of cases are taken to have a special significance, but it does not imply that the law guides only courts and not subjects; it guides both in the sense of the interpretative method.

<sup>69</sup> For Dworkin's distinction between policy and principle, see TRS, 82-100.

<sup>70</sup> Though the courts can identify and endorse conventions that have become established in practice and custom, which people already have a moral duty to follow.

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requirement to make law in accordance with principle as opposed to policy should be understood.<sup>71</sup>

One might object that, when the law develops in this way, a decision can affect the determination of the law with respect to events that have already occurred, and this is retroactive legislation, however it is presented.<sup>72</sup> But this is not the right way to understand the operation of the interpretative method. A decision represents the court's determination of a just outcome on the facts. For a later court, this decision makes a contribution to the later court's determination of a just outcome on the facts of case before it, by way of the construction of rules under the interpretative method. Thus it would be better to say (as discussed further in the next section) that a decision can give a later court a different understanding of the law by providing new evidence of the law, and it can be evidence of the position before the decision is made without amounting to retroactive legislation. One can observe a development in the law over time, but this is the consequence of the exercise of moral judgement in establishing the subsisting law in accordance with the interpretative method, not to make a change in the law that can be applied retroactively.

According to the argument above, the interpretative method is the appropriate way for the courts to determine the law in adjudication and to develop it through adjudication. But one might reasonably ask why a court, having adjudicated, should not also be able to legislate separately for the future, so that it could introduce new regulatory regimes, with prospective effect, like a legislature. By creating new rights and duties, on the basis of an understanding of how people's behaviour can affect others and how it can be co-ordinated for the good of individuals and the community, a regulatory regime can achieve what is beyond individual subjects acting appropriately in the light of what they understand and are capable of doing in the circumstances they are in. It seems that the common law falls short of what it could be if the courts were able to do this. One problem is that judges are not in a position to carry out the empirical studies or set up the administrative systems that may be required to devise and implement sound regulatory regimes. This goes to whether they satisfy the NJT with respect

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<sup>71</sup> See, in particular, Ronald Dworkin, 'A Reply by Ronald Dworkin' in Marshall Cohen (ed), *Ronald Dworkin and Contemporary Jurisprudence* (1984) 263-68.

<sup>72</sup> See Kenneth J Kress, 'Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decisions' (1984) 72 *California Law Review* 369, 388. See also Susan Hurley, 'Coherence, Hypothetical Cases, and Precedent' (1990) 10 *Oxford Journal of Legal Studies* 221; Alexander & Kress, 'Against Legal Principles' above n 25, 755-61.

to their authority to create a new regulatory regime. More generally, the objection may be that, even where judges are in a position to improve the law in this way, because of the absence of democratic accountability their authority to make law should not extend beyond what is incidental to adjudication.<sup>73</sup>

## The declaratory theory and the common law as a theoretical authority

The exclusionary rules analysis represents the positivist tradition in the common law. It equates the law with the rules laid down by the courts, to be interpreted without the exercise of moral judgement. There is an older tradition in the common law, the classical or declaratory theory of the common law.<sup>74</sup> The interpretative method is in this tradition. It equates the law with justice rather than with the rules of the common law. A court determines what is just on the facts, and in doing so it draws on previous decisions in accordance with the interpretative method by treating them as authoritative with respect to the justice of the outcome on the facts, and accordingly the rules of the common law are provisional and subject to revision in the exercise of the court's moral judgement.

The declaratory theory has sometimes been dismissed out of hand.<sup>75</sup> One reason may be that it is thought to be incapable of accounting for the role of previous decisions as precedents, but the interpretative method does provide such an account. Another reason may be that it attributes an objective status to moral propositions, but in this respect one cannot distinguish between the two approaches considered above. The issue between them is not whether the law can make a valid claim of moral authority,<sup>76</sup> but what form of moral authority the law lays claim to, and one

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<sup>73</sup> TRS, 81-91.

<sup>74</sup> For discussion of the two traditions, see Gerald J Postema, 'Some Roots of our Notion of Precedent' in Goldstein, above n 48; Peter Wesley-Smith, 'Theories of Adjudication and the Status of Stare Decisis' in Goldstein, *ibid*; Jim Evans, 'Change in the Doctrine of Precedent During the Nineteenth Century' in Goldstein, *ibid*. See also Mark D Waters, 'Legal Humanism and Law-as-Integrity' (2008) 67 *Cambridge Law Journal* 352; Sean Coyle, 'Positivism, Idealism and the Rule of Law' (2006) 26 *Oxford Journal of Legal Studies* 257.

<sup>75</sup> The declaratory theory was dismissed by Lord Reid as a 'fairy tale' in 'The Judge as Law Maker' (1972-3) *Journal of the Society of Public Teachers of Law* (NS) 22 and by Austin as a 'childish fiction' (see Hurd, above n 18, 947). See also *Kleinwort Benson*, above n 19, 377, per Lord Goff.

<sup>76</sup> See above, n 14.

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can distinguish between the forms of authority claimed by the common law under the two approaches in the following way.<sup>77</sup>

There is a distinction between a practical authority and an epistemic or theoretical authority, which for ordinary purposes is often expressed as follows. A practical authority provides guidance, as for example where a commanding officer gives orders to his soldiers. If the officer is an authority, the soldiers have reason to shoot when ordered to do so. By contrast, an epistemic or theoretical authority makes descriptive pronouncements, for example a weather forecast, which provides grounds for belief rather than guidance. If the forecaster is an authority, someone who hears the forecast has reason to believe that the weather will be as forecast. But there can be theoretical authorities with respect to morality and justice and such an authority can, like a practical authority, provide guidance about how to act.<sup>78</sup> The difference is that a theoretical authority clarifies or reveals the duty the subject S already has, whereas a practical authority can give S a new duty, a duty he acquires by virtue of the directive issued by the practical authority.

A theoretical authority on moral questions has authority by virtue of its superior understanding of morality or justice. In other respects, that is to say with respect to the circumstances that S is in and how S's behaviour may affect others, the authority has the same understanding of the position as S. In this sense, it operates as if from S's standpoint. By contrast, the basis for practical authority is not only the authority's superior understanding of morality or justice, but also its superior scientific and technical knowledge concerning the consequences of S's behaviour and the behaviour of others, and how they might be co-ordinated, and also its status as a *de facto* authority, by virtue of which it can lay down new conventions. This is why a practical authority can give S a new duty. One might say that the difference between a practical authority and a theoretical authority is a matter of standpoint, the theoretical authority adopting S's standpoint and the practical authority a more elevated standpoint.

The law is generally understood to be a practical authority, and it seems clear that a legislature is a practical authority, or at least is capable of acting as a practical authority and creating a new regulatory regime. A court's first or original function is adjudication, finding and applying the

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<sup>77</sup> As to theoretical and practical authority, see, for example, *Revisiting the Service Conception*, 1032-37; Hurd, above n 57, 1615-20. Raz's service conception is a general analysis of authority, applicable to both theoretical and practical authorities.

<sup>78</sup> As noted above n 14, this is presupposed by the service conception approach to practical authority.

law on the facts of the case. An adjudicator may act as a practical authority over the parties to the dispute when it issues orders, but it is, in the first place, a theoretical authority with respect to the law. Insofar as it exercises moral judgement in adjudication, it also is, or purports to be, a theoretical authority with respect to justice in the circumstances of the case. It purports to do justice as between the parties in their particular circumstances, and it considers the position from their standpoint, in the sense that its authority lies only in its superior understanding of what justice according to the law requires of them in the circumstances, and not special knowledge about the circumstances or the ability to lay down conventions. With respect to the adjudication, the court's authority is over the parties, but through the adjudication the court can also make law or contribute to making law through the effect of its decision under the interpretative method. In this way, it acts as an authority for subjects of the law in general and not just the parties, but it is still a theoretical authority, not a practical authority like a legislature. In accordance with the interpretative method, previous decisions operate collectively as a theoretical authority with respect to justice.<sup>79</sup> By contrast, under the exclusionary rules analysis of the common law, the common law is, or purports to be, like the legislature, a practical authority. Insofar as they make law in adjudication, the courts adopt the legislative standpoint rather than the standpoint of the legal subject. This is inapt for an authority making law through adjudication, and this is the source of the problems that the exclusionary rules analysis has in explaining the common law.

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<sup>79</sup> Cf above n 48, for the analogy to reasoning with respect to scientific theories. Various writers have suggested that the law is in general a theoretical authority, though not in the way suggested, which is confined to the common law. See Hurd, above n 57. See also Regan, above n 50. One might object that if the common law is based, in the end, on the theoretical authority of the courts to determine what is just on the facts, based on their expertise, and not on the de facto authority required to introduce new conventions, the judges are in no different a position from other types of expert, such as legal academics or legal practitioners, and the suggested analysis does not explain why it is justified for courts to treat previous decisions of the courts as authoritative but not the opinions of academics or practitioners. This argument is made against Raz's service conception as a comprehensive analysis of political authority: see Stephen Perry, 'Two Problems of Political Authority' (2007) 6 *American Philological Association Newsletters* 31; and see Raz, *Revisiting the Service Conception*, 1032-37, discussing the 'qualification problem'. For present purposes, the point is that it is the application of the court's expertise to a particular set of facts in the particular context of adjudication, with all the procedural requirements governing its exercise of judgement, and not the ability of judges to expound the law, as an academic or practitioner might do, that makes the decision – the outcome on the facts – authoritative.

## V. Summary

The analysis of the common law as a body of exclusionary rules laid down by an authority is intuitively appealing and widely accepted, and appears to derive strong support from Raz's theory of authority. However, the analysis implies that there are gaps in the common law, where the courts act without any constraint by authority, and where they may adjudicate by way of retroactive legislation as a matter of course, and this is both contrary to the conventional understanding of legal reasoning in the common law and open to objection in principle. It is also difficult to reconcile with the distinctive common law reasoning techniques of distinguishing, overruling, identifying the ratio or holding of a case, and arguing by way of analogical reasoning.

On the alternative approach suggested above, a common law court should be understood not as having authority to apply or lay down exclusionary rules, but as having authority to determine a just outcome on the facts of the case. On this basis, one can say that the common law as a whole is a collective theoretical authority with respect to justice, and in this sense its authority is consistent with the service conception and the NJT, though not the sources thesis. The approach supports a version of Dworkin's theory of interpretation with respect to the common law. It explains how it is that common law courts are always guided by authority, and yet at the same time always do justice on the facts without retroactive legislation. It also shows that the courts do not lay down definitive exclusionary rules, but provisional rules in the sense explained, which later courts can modify by distinguishing an earlier decision; that these rules are developed through analogical reasoning and interpretation; that the common law has to be understood holistically, not as a patchwork of self-contained rules, and that it cannot be reduced to or equated with a body of rules; that there is no strict division in legal reasoning between matters of authority or precedent and matters of analogical reasoning and interpretation involving the exercise of moral judgement; that determining the ratio of a case is not simply a matter of ascertaining the rule that the court intended to lay down, but is a matter for subsequent interpretation and depends on other cases; and that common law courts do not legislate in the way that a legislature does, though they do make law in a more limited way: in the sense explained above, they make law in accordance with principle and not policy.