

# The Semantics of Common Law Predicates

M.B.W. SINCLAIR\*

The mission that ultimately unites us all is the fundamental struggle of the law to cope with unruly reality.<sup>1</sup>

## INTRODUCTION

The common law decision has the form "This  $c_i$  is an  $L_j$ " where  $c_i$  is a set of facts and  $L_j$  is a predicate such as "battery," "breach of contract" or the like. Thus, common law can be said to be comprised of a set of predicate expressions<sup>2</sup> together with the rules or conditions for their appropriate use in decisions.<sup>3</sup> But if common law is in part comprised of a set of predicate expressions, their meaning should be of great interest, and at least in part determinative of the propriety of any instance of their ascription. If one understands clearly the semantics of common law predicates—how it is they have meaning—one will be that much closer to understanding the nature of the common law.

This paper is an attempt at elucidating the semantics of common law predicates. It thus fits within the semantic branch of the traditional tripartite subdivision of semiotics into syntax, semantics, and pragmatics.<sup>4</sup> Syntax is

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\* Assistant Professor, Indiana University, Bloomington, Indiana.

1. Peters, *Reality and the Language of the Law*, 90 YALE L.J. 1193, 1193 (1981).

2. Predicate expressions are the sorts of words or strings of words that, together with a noun or noun phrase, can make a grammatical sentence. Thus, most adjectives, common noun phrases, and intransitive verb phrases are commonplace examples: "green," "house," "as high as an elephant's eye," "battery," "unconscionable," etc.

3. Glanville L. Williams has written that "[t]he law . . . is merely a particular application of language as a means of social control." Williams, *Language and the Law*, 61 L.Q. REV. 71, 71 (1945). Williams thus argued that questions of law are verbal, not factual. John Wisdom convincingly contested Williams' point. See J. WISDOM, *PHILOSOPHY AND PSYCHO-ANALYSIS* 248-52 (1953). He argued that although legal questions are not questions of fact such as a jury would determine ("Did Mrs. Barney shoot Stephens?"), neither are they verbal questions ("Do ichthyologists study fish?"). *Id.* at 250. Of such questions Wisdom writes: "[W]hat one is concerned with is either a question of linguistic fact 'Would most people apply such and such a word to this case?' or a question of linguistic decision 'Shall we apply such and such a word to this case?' And neither of these suggestions will do." *Id.* Rather, distinctions drawn in the use of legal predicates reflect a categorization implicit in the prevailing social mores of the time.

4. Morris, *Foundations of the Theory of Signs*, in 1 INTERNATIONAL ENCYCLOPEDIA OF UNIFIED SCIENCE 79, 87 (1938). The three subdivisions are neither independent nor precisely demarcated.

the theory of how words relate to each other, apart from their meaning or the purpose of their use.<sup>5</sup> Semantics deals with the relation of words to the extra-linguistic world, that is, with meanings.<sup>6</sup> Pragmatics deals with the relation of words to the context of their use.<sup>7</sup> It thus includes in its scope the speaker's purpose, and the social effect of the particular use of words, as well as the relation of words used to the physical context.<sup>8</sup> Although this article is primarily about semantics, unavoidably it requires some use of pragmatics. Common law predicates, like ordinary language predicates, are used in contexts, the influence of which is inescapable.<sup>9</sup> The results of this inquiry are surprising: common law predicates have meaning in a manner significantly different from ordinary language or scientific predicates. Section I introduces the theory of meaning to be used, and section II applies it to common law predicates. Section III shows how this theory explains common law decisionmaking.

### I. MEANING

In order to explain the semantic properties that distinguish common law predicates, and in particular to bring out their peculiarity, it is first necessary to give an account of the semantics of ordinary predicates. The theory of meaning to be used here is variously known as "possible world," "set theoretic," "model theoretic," or "proper" semantics.<sup>10</sup>

5. Syntax is "the study of the syntactical relations of signs to one another in abstraction from the relations of signs to objects or to interpreters." *Id.* at 91 (A sign is something that stands, in a system, in place of some other thing, usually not in that same system.).

6. "Semantics deals with the relation of signs to their designata and so to the objects which they may or do denote . . . [D]iscussions of the term 'truth' have always involved the question of the relation of signs to things . . ." *Id.* at 99 (A designatum is that for which a sign is a sign.). "Formal semantics abstracts the problem of giving truth conditions for sentences away from problems concerning the purposes for which those sentences were uttered." Stalnaker, *Pragmatics*, in *SEMANTICS OF NATURAL LANGUAGE* 380-81 (D. Davidson & G. Harman 2d ed. 1972).

7. "By 'pragmatics' is designated the relation of signs to their interpreters . . . [I]t deals with . . . all the psychological, biological, and sociological phenomena which occur in the functioning of signs." Morris, *supra* note 4, at 30. (Interpreters are the persons who use the system of signs in questions.). "Pragmatics is the study of linguistic acts and the contexts in which they are performed." Stalnaker, *supra* note 6, at 383.

8. "There are two major types of problems to be solved within pragmatics: first, to define interesting types of speech acts and speech products; second, to characterize the features of the speech context which help determine which proposition is expressed by a given sentence." Stalnaker, *supra* note 6, at 383.

9. "In most cases . . . the context of utterance affects not only the force with which the proposition is expressed, but also the proposition itself." *Id.* at 384.

10. The historical antecedents of this theory are in the work of Frege, Russell, Wittgenstein, and Carnap. The dramatic recent developments got their impetus from Kripke, *Semantical Considerations on Modal Logic*, 16 *ACTA PHILOSOPHICA FENNICA* 83 (1963), the categorial grammars of Polish logicians, *see, e.g.*, Adjukiewicz, *Syntactic Connection*, in *POLISH LOGIC 1920-1939*, at 207 (S. McCall ed. 1967), and Richard Montague, *see especially* R. MONTAGUE,

One could plausibly put together a great many sentences of the form “*X* is *pqr*” without knowing their meaning. The meaning of such sentences has something to do with knowing under what sorts of conditions they would be true or false, which is the same as knowing whether the particular subject *X* is or is not one of the things that are *pqr*. Thus knowing the meaning of the predicate expression *pqr* has to do with knowing to what it applies.

Consider, for example, the word “green.” If an English speaker goes into a factual environment (a room, for instance) in which he has never been before he will be able to pick out all of the green things there. This is simply what it is to be a speaker of English and to know the meaning of “green.” Included in this ability is the capacity to distinguish the things that are obviously and undisputably green from those that are borderline; ordinarily, the class of green things in a factual environment has fuzzy edges.

One could say that the meaning of “green” is the class of green things. But this would not do because then one would not know the meaning of “green” unless one had surveyed all green things; nobody has done or could do this but many people know the meaning of “green.” Nor is the meaning of “green” merely all the green things one is presently observing, for there are many other things that can properly be said to be green. On the other hand, it would not do to say that the meaning of “green” is the criterion in the mind of an English speaker according to which she personally ascribes the predicate. The language is more public,<sup>11</sup> more objectively testable than that; one can, and must be able to, be right or be mistaken in what one says. The meaning of predicates relates to, and their correct ascription depends upon, facts in the extra-linguistic world. A general theory of meaning has to accommodate both facets: the empirical world and the speaker’s linguistic knowledge.

What one knows, the criterion according to which the English speaker confidently can ascribe “green” to objects in an hitherto unobserved factual set-up, is the *intension* of the word. The class of green things is the *extension* of the word “green.”<sup>12</sup> These are two aspects (or modes of meaning) of predicate expressions.<sup>13</sup>

FORMAL PHILOSOPHY chs. 6-8 (R. Thomason ed. 1974). For a simple introduction to the theory of meaning, see Thomason, *Introduction to FORMAL PHILOSOPHY*, *supra*. See also Lewis, *General Semantics*, in SEMANTICS OF NATURAL LANGUAGE 169 (D. Davidson & G. Harman 2d ed. 1972). For an extensive formal exposition of the theory of meaning, see M. CRESSWELL, LOGICS AND LANGUAGES (1973).

11. S. KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE (1982); L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS §§ 243-304 (1953).

12. The words “intension” and “extension” are probably the most commonly used words in semantics; they correspond to Frege’s *sinn* and *bedeutung* (respectively) and mean the same as the translations “sense” and “reference.” Frege, *On Sense and Reference*, in TRANSLATIONS FROM THE PHILOSOPHICAL WRITINGS OF GOTTLIB FREGE 56-78 (P. Geach & M. Black eds. 1970). They are, for our purposes, roughly the same as the popular “connotation” and “denotation.”

13. A much larger variety of modes of meaning can be distinguished. See, e.g., C.I. LEWIS, AN ANALYSIS OF KNOWLEDGE AND VALUATION 35-70 (1946).

The meanings of the terms "intension" and "extension" can be made more precise by using the idea of possible worlds. A possible world is a subset of the set of all subsets of the set of everything.<sup>14</sup> Possible worlds are thus indefinitely numerous and include all possible arrangements of all things. Simpler conceptually (although theoretically inadequate) is to think of them as follows.<sup>15</sup> Imagine a list of all possible English sentences; now imagine increasing that list to include all possible uses of every one of those sentences (in other words, a list of all possible propositions).<sup>16</sup> Now assign all possible arrays of the truth values True and False to the propositions in the list.<sup>17</sup> Each such array is a description of a possible world. Possible worlds might be thought of in a more descriptive fashion as "conceivable or envisageable state[s] of affairs."<sup>18</sup>

Propositions thus have truth values at possible worlds, not in the abstract. Any given proposition is the set of possible worlds at which the proposition is true. The question is whether this, the world at which the proposition is expressed, is a member of the set of possible worlds for which the proposition is true.<sup>19</sup> In terms of the descriptive approach using arrays of truth value assignments, a given proposition (use of a sentence) is judged to be true or false according to whether this world, the world in which it occurs, is one at which it is assigned the value True or False.<sup>20</sup>

The final fundamental concept used in this theory of meaning is that of a *function*. A function is a special kind of *relation*; a relation is a conceptual connection between two things. A commonplace familial connection such as "brother of" is a suitable example of a relation. Given an argument from

14. A set is a collection of things. For our present purposes "set" and "class" are synonyms. For technical reasons sets and classes are sometimes distinguished, sets being those classes which are members of other classes, proper classes being those which are not. For the purposes of this article such a distinction need not be drawn.

15. See M. CRESSWELL, *supra* note 10, at 3-4, 23-24.

16. A proposition is what results from the use of a sentence in a particular context. Clearly, propositions and sentences are quite different: consider different persons using the sentence "I am hungry" at different times. A proposition, then, is a set of possible worlds, namely, all those at which it is true.

17. If there are  $n$  propositions in the list there will be  $2^n$  arrays. For example, suppose there are only two propositions,  $P$  and  $Q$ . Then, using  $T$  and  $F$  for True and False, the possible assignments are as follows:

	$P$	$Q$
Array 1:	T	T
Array 2:	T	F
Array 3:	F	T
Array 4:	F	F

18. G. HUGHES & M. CRESSWELL, *AN INTRODUCTION TO MODAL LOGIC* 75 (1968).

19. Obviously, the exact make-up of the real world is in dispute; otherwise, genuine disagreement would be impossible.

20. Thus, the circularity of this approach is apparent. This is one reason why possible worlds have to be set up out of sets of things; for intuitive purposes, however, any way to think of possible worlds that helps should not be ignored.

the appropriate domain,<sup>21</sup> for example, "Mary," the variable  $X$  in the schema " $X$  is brother of Mary" has as value a set of individuals (Mary's brothers) in the range of the relation. A function is a relation which, for any given argument, designates its value uniquely. For any given argument in the domain of the function there is only one value in its range of which the function is true. For example, "natural father of" is a function. Only one person can be the value  $Y$  in " $Y$  is natural father of Mary"; many could be the value  $X$  in " $X$  is brother of Mary."

The intension of a predicate expression is a function from possible worlds into sets. Its domain is possible worlds; its range is sets at those worlds. For a given possible world as argument this function will select a set at that world. That set is the extension of the predicate at that world. Think again of the example "green" and an hitherto unencountered factual environment (a possible world). A speaker of English knows the intension of "green"—the function. The factual set-up is the possible world argument. The value, the extension of "green" at this possible world, is the set of all the green things in the presence of the speaker. Should the speaker, picking up something, say, "This is green," the proposition so expressed will be true or false according to whether the thing indicated is or is not in that set.<sup>22</sup>

As described so far, possible worlds are inconceivably numerous, the theory bewilderingly general. For most purposes this is not bothersome because the focus is usually on only a limited subject matter in which there are a very large number of propositions accepted as true. Thus, the diversity of possible worlds is greatly reduced by clustering<sup>23</sup> them around the known and undisputed aspects and disregarding all the distinguishing features irrelevant to the discourse at hand.<sup>24</sup> In the illustrative example above, it does not matter to the determination of which things in the room are green whether the Mets win or the law building ceases to exist.

In summary, there are two aspects of the meaning of predicate expressions, intension and extension. These are analyzed in terms of three elements: sets, possible worlds (which are constructed out of sets), and functions. The intension of a predicate, what the speaker knows, is a function from possible

21. The *domain* is the set from which appropriate arguments of the function may be drawn. In the example "father of" the domain is animals. The *range* is the set from which values can be drawn; in this example it is male animals.

22. Completing the semantic theory so that this explanation forms the basis of the notion of truth and falsity of propositions in general is quite complicated, especially as it requires accounting for a large variety of types of words and ways of putting them together in sentences. See R. MONTAGUE, *supra* note 10; M. CRESSWELL, *supra* note 10.

23. The terms comes from Stalnaker, *supra* note 6. Formally, this reduction is essential to capture the impact of presuppositions (assumed shared knowledge) on discourse. *Id.*

24. Alternatively, we could restrict the entities from which possible worlds are constructed; or we could place the discourse under a characteristic modality and eliminate irrelevant possible worlds from consideration by accessibility conditions, which is the usual approach to epistemic and deontic modal logics. See G. HUGHES & M. CRESSWELL, *supra* note 18, at 63-71, 77.

worlds into sets; given a possible world as argument the intension selects a set at that world. The extension of the predicate at that world is the set thus selected. If one knows the meaning (intension) of "green," then faced with any factual set-up (possible world), one can determine the set of green things (the extension of "green" at that possible world).

## II. COMMON LAW PREDICATES

### A. *What is a case?*

Common law is based on judicial decisions of cases. A case is a factual situation brought before a court for resolution. Of course the actual occurrences themselves are not before the court—some representation of them is.<sup>25</sup> For present purposes this representation shall be solely linguistic.<sup>26</sup> Thus, the court is faced with a set of sentences describing facts. The sentences are offered and received in a context; in other words, they are used. Each sentence selects a proposition, a set of possible worlds, and together the propositions constitute a more complex proposition, a smaller set of possible worlds, the intersection of all the individual propositions.<sup>27</sup>

Facts are often in dispute in a law suit. In the resolution of factual disputes by judge or jury the judicial system provides for the determination of the unique factual set-up (the conjoined list of propositions) described above. This resolution is subject to restrictions: the facts thus arrived at must be logically, empirically, and conceptually possible.<sup>28</sup> Cases occur in this, the real world, and are thus constrained by the factual and conceptual organization of the prevailing world view.

In general, then, a case involves a uniquely determined set of facts, expressed as a proposition, a set of possible worlds.<sup>29</sup> The intrinsically legal

25. The representation may or may not be "accurate," but for the present the legal system accepts adversarial trial as the mode of determining facts, however problematic it may be. See J. FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 14-23 (1949).

26. The role of exhibits, demonstrations, films, etc. should be the same in principle, even if not formally reducible to language in all instances.

27. If this seems unduly complicated, think of a simple case: three sentences,  $S_1$ ,  $S_2$ , and  $S_3$ , which in this use pick out the propositions  $P_1$ ,  $P_2$ , and  $P_3$ .  $P_1$  is possible worlds  $W_1$ ,  $W_2$ ,  $W_3$ , and  $W_4$ .  $P_2$  is  $W_2$ ,  $W_3$ ,  $W_4$ , and  $W_5$ .  $P_3$  is  $W_1$ ,  $W_3$ ,  $W_4$ , and  $W_5$ . Together  $P_1 + P_2 + P_3$  pick out  $W_3$  and  $W_4$ . They are the only two possible worlds all three propositions have in common. Apart from the jargon, this is intuitively transparent.

28. For example, John either hit Mary or he did not, and he did not both hit her and not hit her. John could not have hit Mary if doing so would have required him to jump over a five-story building, or to run a mile in less than three minutes. Modern courts would be unlikely to entertain the possibility of an action in tort for deliberately causing a tornado to strike and demolish a barn.

29. This is a highly restrictive use of the word "case." "Case" is ordinarily used for the entire action, including pretrial procedure, the judge's decision and opinion, and any steps in the appellate process that may have been taken. In the following discussion, "case" will be used in the restricted sense set forth here. Footnotes are supplied where ambiguity may result.

decision is whether or not that set of facts is an  $L_i$ , where  $L_i$  is some legal predicate.

### B. Legal Predicates

The predicates peculiar to common law are just those words used for characteristically legal concepts. Some simple examples are "tort," "battery," "contract," and "unconscionable." Among them are words that have an everyday nonlegal use as well as a legal use, such as "negligent," "good faith," and "intent."<sup>30</sup> Many of these predicates are hierarchically ordered; battery, for example, is within the larger class of torts.

All predicates have a limited set of things over which they range. Thus, "green" ranges over material objects, lights, and spatially extended surfaces, but not normally over ideas or sounds. Common law predicate expressions range over factual set-ups that can be or become cases; in other words, over complex descriptions of interactions normally involving humans. Clearly a house can no more be a false imprisonment than a fraud can be colored pink.

The semantics of common law predicates is unique. Recall that there are two modes of meaning for ordinary predicate expressions: intension and extension. The intension of a predicate is a function from possible worlds into sets, a function which one knows if one knows the word. The extension at a given possible world is the set picked out by that function (the intension) at that world.<sup>31</sup> Common law predicates have no intensions. One cannot learn to "speak law" nor know the meanings of its crucial terms as one does a natural language. In addition, the extensions of common law predicates at this, the real world, are only partially determined.

Consider a case (a complex proposition depicting a set of facts) being litigated in tort: the legal question is whether this case—these facts—constitutes battery. If lawyers knew the meaning of "battery" in the same way that one knows the meaning of common language predicate expressions then they could say with confidence and authority whether or not this case is a battery. That is, lawyers could answer the question "Is this a battery?" in the same way, and with the same confidence and authority, that an English speaker could answer the question, "Is this green?"

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30. Of course, many of these words have been used in statutes, and sometimes even have been subjects of legislative definition. Statutory meanings are subject to development by judicial decision in common law fashion and to this extent are similar to nonstatutory legal predicates. In many instances—for example, "intent," or "criminal intent"—the drafters of statutes have adopted a common law predicate. In other cases—for example, "unconscionable" in U.C.C. § 2-302 (1978)—drafters have introduced relatively vague expressions with a view to common law elaboration of their meanings.

31. See *supra* text accompanying notes 21-22.

All one needs to be able to evaluate the truth of "This is green" is one's knowledge of English and observation of the indicated surface. But if a lawyer is asked of some case,  $c_i$ , and some legal predicate,  $L_j$ , whether " $c_i$  is an  $L_j$ " is true, she will not be able to answer in the same way. First she must resort to the library to discover whether the same set of facts has previously been litigated under the same predicate in a court with precedential power in the jurisdiction.<sup>32</sup> If, as is so often the case, the library does not produce a determinate solution,<sup>33</sup> the lawyer may argue for or against counting  $c_i$  as an  $L_j$ , but ultimately a certain answer is only available through the common law's decision mechanism: the courts.<sup>34</sup>

Thus common law predicates do not have intensions in the way that ordinary language predicates do. What about extensions? Given a relatively small number<sup>35</sup> of objects in the possible world (or observed universe) in question, one could label each green object "green" and then test the proposition, "This is green" by checking the label,<sup>36</sup> a purely extensional determination. For all cases already decided under the predicate  $L_i$ —for example, in battery—this labeling has been done. There is, then, a large set of cases which can be included with confidence in the extension  $L_i$  at this, the real world. This shall be called the *precedent set* of the predicate; it comprises all cases to which a court has decided the predicate applies, whatever the jurisdiction and whatever the level of the court. The complement of the precedent set of a legal predicate is the set of cases to which a court

32. The appropriate criterion of similarity is a critical problem to be addressed below. See *infra* notes 75-87 and accompanying text.

33. The historical background of "battery" is very rich and varied, so it may be that many lawyers can answer with great confidence for a great many given factual set-ups. But in less well-explored regions—for example, infliction of mental distress or unconscionability—and for "hard cases" in tort, the outcome has yet to be determined. There are, of course, easy cases. It is argued below, see *infra* notes 76-80 and accompanying text, that these are not intrinsically different from hard cases, and that the status of a case as easy or hard could change with time and social circumstances.

34. Thus, there are and can be no "native speakers" of law. As Professor Shapiro wittily writes:

The *law as language* movement . . . is to be seen as a means of abstracting from the world as it exists. It is an assertion that the proper study of legal scholars is that most internal part of the law itself, the language of the law, a language seen as separate and peculiar, and one in which the scholar's task is to polish up the concepts and vocabulary until the language seems beautiful *to the native speakers*.

Shapiro, *On the Regrettable Decline of Law French: Or Shapiro Jettet Le Brickbat*, 90 YALE L.J. 1198, 1199 (1981) (emphasis original). Although the language of law, at least in its distinguishing aspects, is "separate and peculiar," it will be argued below, see *infra* notes 43-59 and accompanying text, that this very peculiarity is what ties it most closely to "the world as it exists," and makes nonsense of the idea of internal, abstract "polishing." The semantic model avoids Shapiro's valid barbs.

35. Comparable, for instance, to the number of tort cases in the history of the United States.

36. People do this, for example, with manufacturers' brands in a furniture shop, but not, by contrast, with most automobiles.



has decided the predicate does not apply, again regardless of what court.<sup>37</sup>

The precedent set of a legal predicate (and its complement) is different from the extension at this the real world of a common language predicate (and its complement). The extension of "green" includes every green thing, and its complement includes everything that is not green; everything is in one or the other set.<sup>38</sup> But for legal predicates there are indefinitely many sets of facts (potential cases<sup>39</sup>) for which no decision was ever made, either because they were never litigated or, if litigated, because they were settled prior to a decision. Further, there are even more sets of facts, presently to be decided, future, and hypothetical, that have not been decided and for which no determination of membership in the extension of a legal predicate can be given. Thus the extension of a legal predicate at this the real world is only partially determined.

Words can, of course, have different meanings in different contexts of use. Pronouns provide obvious examples: the sentences "I am hungry" and "This is a pig" may be true, false, humorous or nonsensical according to who uses them, when, and to what they refer.<sup>40</sup> Not surprisingly, similar variability occurs with common law predicates. "Commercial good faith" does not require the same behavior of a poultry dealer as it does of a banker or druggist; "intent" has different meanings in criminal law and contract law. There is no difficulty in accounting for this context variability in this semantic model.

At all times in this discussion the semantic inquiry has been conducted at the level of propositions—words and sentences in use, not the abstract word and sentence types themselves. Certainly there may be radical ambiguities in the meaning of a word, but usually when that word is used properly in a sentence in a context that ambiguity will not be present in the proposition selected.<sup>41</sup> When someone says "I am hungry" a listener seldom has any difficulty in determining the referent of "I." If the context of use does not

37. Obviously, it is not a true complement. The complement of a set is everything not in that set. The complement of the precedent set contains only cases decided under the same predicate. Also, sets are normally consistent. The precedent set of a legal predicate, being historical and covering diverse jurisdictions, can contain cases decided differently and cases that appear the same as cases in the complement. Nevertheless, the terms are useful and have an analogical clarity that justifies their use here.

38. Although the boundary may, of course, be imprecise.

39. In the sense set forth *supra* notes 25-29 and accompanying text.

40. Indexicality (a part of pragmatics) is treated quite clearly by Lewis, *supra* note 10, although his approach is somewhat limited. See M. CRESSWELL, *supra* note 10, at chs. 8, 11, for a criticism of Lewis and a clear explanation of an alternative approach, which is roughly that to be taken here. Richard Montague has shown how one can avoid the intermediate level of propositions, see Montague, *Universal Grammar*, in *FORMAL PHILOSOPHY* 222 (R. Thomason ed. 1974), but the enormous increase in difficulty does not justify the gain in economy.

41. A proposition is a set of possible worlds; in the usual situation the hearer knows which set.

provide a resolution of the surface ambiguity<sup>42</sup>—"I am going to the bank"—a theory of meaning should not do so either. So it is with common law predicates. They are treated as used in appropriate contexts, not in abstract isolation. This is an analysis of common law as it exists in the real, everyday world, not as some abstract conceptual type.

### C. *The "Scientific" Theory of Common Law*

At this stage an important objection must be met: although the intensions of common law predicates may not be known in the same way as the intensions of ordinary language predicates, they can be discovered.<sup>43</sup> Such discovery is what lawyers are trained to do and work at in common law problems. Thus, the argument might conclude, it is the fruits of this discovery process that provide the judge with the requisite intensions to apply in the case before her.

The phenomena of nature—birds, fish, amoebae, molecules, quarks, and the like—do not come in naturally fixed classes nor behave according to prescribed rules, but they are classified and their behavior is described in terms of rules in order to make them intelligible. These classifications and rules more or less accurately model the universe. Langdell and others<sup>44</sup> advocated treating judicial decisions in much the same way. The idea was to take a scientific approach to legal rules, treating the reports of judicial decisions as raw data. Just as with the phenomena of nature, the data of judicial decisions can be classified and rules generated to explain them in a coherent and intelligible way. In fact, this is what lawyers and scholars do when they find and advocate theories reconciling sets of cases.

The precedent set is comprised of disparate data which must be somehow made coherent and from which a "rule" must be drawn. Faced with this challenge the lawyer proceeds as would an empirical scientist. He formulates an hypothesis which is then tested against the full set of decisions in the precedent set. If the hypothesis fits the data—if, that is, it accounts for the cases in the precedent set and its complement—then it can be said to explain

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42. In such a case the hearer could not be sure which set of possible worlds comprised the proposition.

43. The full force of this objection was brought home to the author by Professor John Humbach, in conversation and correspondence. Professor Humbach has also offered a very clear example of how the discovery and formulation of such intensions should proceed in Humbach, *A Unifying Theory for the Just-Compensation Cases: Takings, Regulation and Public Use*, 34 RUTGERS L. REV. 243 (1982). Accordingly, his analysis is used as a model in order to meet the objection.

44. See G. GILMORE, *THE AGES OF AMERICAN LAW* 42-43 (1977); Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983).

that data.<sup>45</sup> That explanation is, according to this argument, the intension of the predicate in question. It is the rule the judge must follow.

This procedure is very similar to the methods of empirical scientists.<sup>46</sup> Just as the scientist faced with disparate phenomena will devise a theory to explain them, so too will the lawyer faced with a set of cases. The theory thus devised will, in the case of the scientist, be testable against predictions under it of phenomena outside the initial data set; in the case of the practicing or academic lawyer the explanatory theory will be testable in subsequent court decisions of questions not yet raised.<sup>47</sup>

Notice that the courts that make the decisions, and the judges who write the opinions that comprise the raw data to be explained are not necessarily authoritative as to the correct explanatory theory. Professor Humbach's theory is a case in point: the explanation he offers for the Supreme Court's use of "just compensation" has not been the explicit basis for its decisions.<sup>48</sup> This too is not surprising and is in accord with the theory offered in this paper. The important requirement is that the result should be "an internally consistent, unifying theory."<sup>49</sup> Nor is this method *a priori* analysis; the theories that result are, like scientific theories, empirical and challengeable as such. "This may not be the ultimate way to wage the 'battle of conflicting interests,' but for courts of law it is at least a legal way to do so."<sup>50</sup>

The point of the above argument as an objection to the theory offered here is this: although one may not know the meanings of common law predicates in the same way that one knows the meanings of those of common language, one does know them in the same way as one knows the theories of empirical science. The epistemological status of the ascription of "green" to a green object is independent of and quite different from the accepted scientific explanation of greenness. Yet, the argument goes, the epistemological status of such a scientific theory is substantially the same as that of

45. Professor Dworkin uses the apt word "fit" for this requirement. Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527, 545 (1982) [hereinafter cited as Dworkin, *Interpretation*]; see also Dworkin, *Law's Ambitions for Itself*, 71 VA. L. REV. 173, 176-82 (1985).

46. Indeed, Professor Humbach models the procedure on the methods of empirical scientists: "[T]he approach of this Article is rather like that of a chemist, observing phenomena which appear to have their own (perhaps unknowable) 'natural' ontological logic, and afterwards positing a coherent explanatory structure for purposes of our own understanding." Humbach, *supra* note 43, at 254.

47. For the judge the theory is not testable in this way; the case she must decide and her decision of it is exactly the test in question.

48. See Humbach, *supra* note 43, at 254, 262 n.84. The available theory was in a state of disarray: the Supreme Court itself had recently acknowledged the lack of any "set formula," *id.* at 244 (citing Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978), and other cases), and scholars in the subject concurred that a principle that would rationalize the cases had yet to be discovered. Attempts had, of course, been made, but so far none had succeeded. See Humbach, *supra* note 43, at 244.

49. See Humbach, *supra* note 43, at 245.

50. *Id.* at 290.

the meanings of common law predicates. This argument identifying the intensions of common law predicates with scientific theories is thus a very significant one.

But is the identification of legal and scientific theories correct? The claim of a scientific explanation is that it can account for, or predict, what will happen in an indefinitely wide variety of circumstances. Can a prediction that the Supreme Court will decide future "just compensation" cases in a particular way be made with the same confidence as a prediction that copper will expand on heating, or that gases will increase pressure at constant volume in proportion to temperature? Is such confidence in legal predictions appropriate no matter what the change in social and economic circumstances?<sup>51</sup> The answers must be "no."

If this "scientific" argument were correct then, although meanings of common law predicates could not be ascribed to cases with the same authority as those of common language predicates, they could be ascribed with the same confidence that a scientist can have in the predictions of scientific theories. If so, then a lawyer could have confidently predicted, for example, that Buick would be found liable in *MacPherson v. Buick Motor Co.*<sup>52</sup> or that the murderer would not take under the will of his victim in *Riggs v. Palmer*.<sup>53</sup>

It might be argued that the above discussion misses an important point by comparing legal theory with the wrong sort of science. Although common law theories are not epistemologically identifiable with theories of "hard" sciences such as physics and chemistry, they may well be identifiable with theories of the human sciences of psychology, sociology, and anthropology. After all, law deals with relations among humans and not the activities of inanimate objects or "lower" animals.

Human sciences differ significantly from the nonhuman sciences. In collecting the data necessary for formulating and testing theories, the interaction between human subjects and their observer is of much greater consequence. It is not possible to test many human science theories as other scientific theories are tested. A researcher cannot, for example, remove half the children of a town from school in order to test the long-term consequences of education. Theories themselves can also directly affect the behavior of their subjects, as can be seen, for example, in economic theories of the stock market. If a theory is used to modify institutional behavior, that modification

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51. If Professor Tushnet is correct and mendacity is the only plausible normative explanation of the Supreme Court's decision in *Engle v. Isaac*, 456 U.S. 107 (1982), see Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction*, 36 STAN. L. REV. 623, 631-35 (1984), then the security of legal theories is very low. Even if Tushnet's argument is correct, the Court's decision is no less authoritative.

52. 217 N.Y. 382, 111 N.E. 1050 (1916).

53. 115 N.Y. 506, 22 N.E. 188 (1889).

will have an indirect impact on the behavior of the subjects that makes predictive testing uncertain.<sup>54</sup> That human sciences have these "defects" compared with nonhuman sciences lends such a lower degree of certainty to their theoretical statements as to make human sciences different in kind. This is not a fault: one should expect only the predictive certainty, and apply only the epistemological criteria, appropriate to the subject matter of any theory.<sup>55</sup>

Are the human sciences, then, the appropriate analogical model for legal theory? The answer is again "no." The same arguments as made above regarding nonhuman science and legal theory apply, but to a much lesser extent. Perhaps the difference in degree of certainty, coupled with the interaction of the subjects with the theory itself, are sufficient to make a human science theory more like a legal theory in these respects, but the differences are still significant. There is, however, another key difference that puts legal theory on a quite different plane.

In science, both human and nonhuman, theories are constructed about the behavior of various kinds of subjects in various circumstances. These theories explain that behavior and, to the extent they are successful, predict the subjects' behavior in those and other circumstances. The subjects may interact causally with the theories,<sup>56</sup> but they do not use the theory itself as a causal determinant of their behavior, be they humans, genes, trees or molecules. In law it is quite different. The courts, the data source for common law theories, themselves use legal theory as a decisionmaking device. A legal theory is used by the court as a basis for making its decision: it is one of the causal determinants of the decision. In no science is an explanatory theory itself a causal determinant of the phenomena explained. The court, when it looks at a legal theory as a basis for its decision, can, of its own volition, accept or reject it. If it chooses to reject it, it has, to that extent, discredited that theory. In no science can the subjects themselves volitionally accept or reject an hypothetical theory as an explanation of their behavior. These differences are of very great consequence: legal theory is, epistemologically, utterly different from scientific theory, be it human or not.

There is yet another problem with the "scientific" theory of common law. For any given set of data there are indefinitely many possible explanations.

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54. For an excellent and compendious summary of the differences between human and "hard" sciences, see Meehl, *Theoretical Risks and Tabular Asterisks: Sir Karl, Sir Ronald, and the Slow Progress of Soft Psychology*, 46 *J. CONSULTING & CLINICAL PSYCHOLOGY* 806 (1978). Meehl explains clearly the epistemological consequences of these differences. That the article is basically about psychology is no hindrance to understanding. For a sustained attack on Freudian psychology and structural anthropology on similar grounds, see P. MEDAWAR, *PLUTO'S REPUBLIC* (1982).

55. *Contra* P. MEDAWAR, *supra* note 54.

56. Thus, in testing drugs it is necessary to use a control group which is given a placebo, and that the subjects not be told which group they are in.

Two lawyers working on the same precedent set, but for opposing parties, most often will select two explanatory theories fitting the data but reaching opposite conclusions for the case under consideration.<sup>57</sup> How is the judge to choose between them? The empirical scientist's method of devising further experiments on critical data is not available: the case is the experiment. For the legal academic this approach may be plausible; for the judge it is not.<sup>58</sup>

The critical distinction is between a court that has designed a legal scheme, that has laid down a unique and discoverable theory as the intension of a legal predicate, and *will* not change it although it could, and one that *cannot* change it. The former is the most optimistic characterization of the courts of our legal system; the latter is the required model if legal theories are to have the same epistemological status as scientific theories. In reality, the patterns of decisions of our courts are neither unique nor unchangeable; theories accounting for those patterns, even when expressly adopted, can be changed whenever courts see fit, and *should* be changed whenever the interests of justice require. Thus, although the analogy between meanings of common law predicates and scientific theories is a much closer one than the analogy between meanings of common law and common language predicates, scientific theories enjoy an epistemological status significantly different from that of legal theories.<sup>59</sup> Common law predicates have no intensions in any ordinary sense.

#### D. Summary

Common law predicates are semantically unique: one cannot know their meanings. Unlike ordinary language predicates whose intensions are mastered in learning the language, the intensions of common law predicates cannot be mastered: the intensions of common law predicates are essentially unknowable. The extensions of common law predicates are also unique in being only partially determined and in having only partially determined complements. For all the past cases on which no court reached a decision, for all those future, hypothetical, and presently undecided cases, and for all those sets of facts which will not be litigated, one simply cannot give an answer under any legal predicate. The cases already determined by a court under a legal predicate, however, comprise a partial extension, a precedent set (and its complement), for that predicate.

The common law also provides a decision procedure—the courts—which can determine whether any particular set of facts is to be included in the

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57. This is a primary objection raised by Dworkin, *Interpretation*, *supra* note 45, at 545.

58. The argument here follows Dworkin's answer: the judge must choose on social, moral, and political grounds. *See id.*

59. This is not to say that "scientific" theory is not a suitable method for dealing with a diverse precedent set—quite the contrary. If a theory capable of consistent and perspicuous explanation of such precedential data is to be found, surely this is the way to go about it.

extension of any particular legal predicate, that is, whether such facts become part of the precedent set or its complement. How that decision is made and, in particular, the relation of the case to the precedent set of the legal predicate is central to the nature of common law.

### III. LEGAL DECISIONS

It would appear, *prima facie*, that if this article's analysis of the meanings of common law predicates is correct, then a judge is wholly unconstrained in reaching a decision. If that is true, then so much the worse for the analysis. Common law judges are not unconstrained in their decisionmaking, but neither are they as limited in their options as are civil law judges. This section is an explanation of how the stability, and the inherent corrigibility of common law flow from the semantic analysis of section II, above. The theory of judicial decisionmaking entailed by this semantic analysis is consistent with some of the more prominent current theories;<sup>60</sup> it is totally inconsistent with some others.<sup>61</sup>

The legal problem that is characteristic of the common law judge's role is of the form: "Is  $c_i$  and  $L_j$ ?" (where  $c_i$  is the case<sup>62</sup> before her and  $L_j$  is a common law predicate expression).<sup>63</sup> The case,  $c_i$ , is a complex set of facts, and has already been determined by judge or jury. The intrinsically legal question thus can be reframed as whether this set of facts is to be in the extension of  $L_j$  at this the real world.

#### A. *The Form of the Judgment*

What is the nature of the judge's answer? It is a stipulation.<sup>64</sup> When the judge decides, "This case,  $c_i$ , is an  $L_j$ ," she is making a stipulation. Her

60. In particular, it accords with the interpretive position exemplified in Dworkin, *Interpretation*, *supra* note 45, although starting from a different perspective.

61. This view does not accord with most positivist theories of judicial decisionmaking, nor with theories based on the belief that economic efficiency is or should be the touchstone of legal decisionmaking. In particular, in denying that courts make rules, this view is fundamentally at odds with the argument in Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984).

62. "Case" is used in the sense explained above. *See supra* text accompanying notes 25-29.

63. For example: "Is Mary's driving along road  $X$ , where road  $Y$  is the direct route, in the course of her employment?"

64. "Stipulation" is being used here in the same way as it ordinarily is in "stipulative definition," which is "the explicit and self-conscious setting up of the meaning-relation between some word and some object, the act of assigning an object to a name (or a name to an object), not the act of recording an already existing assignment." R. ROBINSON, DEFINITION 59 (1954).

decision cannot properly be said to be true or false,<sup>65</sup> although it might be wise, farsighted, wrongheaded, nearsighted, or close. Her decision cannot be proven wrong, although the reasoning she offers may be shown to be fallacious. A superior court might subsequently reverse ("overrule") the decision, but that decision will also be a stipulation overruling but not changing the nature of the first decision. If on Tuesday someone says, "Today is Thursday," another person can prove him wrong as well as stupid, perverse, or whatever. But if the judge says, "This is a battery," then unless a superior court reverses her, no matter how stupid or perverse that judge's decision may be, and no matter how much the parties and the commentators may disagree with her, her decision stands. That is how it is with stipulations. By judicial fiat the precedent set has increased by this one case.<sup>66</sup>

Because a judicial decision is a stipulation it is not necessarily arbitrary or unconstrained. Judges' decisions are both motivated and reasoned, and the reasoning (but not the motivation) is usually made available to the public in the form of an opinion. Accounting for the nature and justifiability of the judicial decision, and therewith its authority, is one of the major problems in jurisprudence.

In reaching her decision, the judge has essentially only two main sources<sup>67</sup> upon which to draw: the precedent set of  $L_j$  and the pervading moral, social, and political climate in which she participates.<sup>68</sup> Of course there are the advocates' arguments, but these draw upon the same sources in attempting to guide and persuade the judge in her decision. The judge's personal moral, political, and social views will inescapably influence her approach to the

65. See Dworkin, *Interpretation*, *supra* note 45, at 535, 542-46. The contrary view has been asserted by Martin Shapiro: "[I]t is obvious that legal discourse organized by the rules of *stare decisis* emphasizes, and itself insists that its success rests upon, high levels of redundancy and, therefore, . . . low levels of information." Shapiro, *Toward a Theory of Stare Decisis*, 1 J. LEGAL STUD. 125, 127 (1972). Shapiro's communication theory of *stare decisis*, however, as explained in this article, is generally in accord with the views offered here.

66. To the extent that a common law predicate can be defined, that definition is the precedent set (and its "complement") and therefore is purely extensional. The judge, by adding to the precedent set (or its complement), is by stipulation amending the definition.

67. For present purposes, this article neglects two other major sources: constitutions and statutes.

68. The latter category of sources is far from homogeneous; on the contrary, as Corbin points out in a useful passage, it is highly variegated:

The [judge's] rules come from all possible sources— from constitutions and statutes; from the decisions of other judges; from legal writers, ancient and modern, in this and in other countries; from books of religion and morality; from the general principles of right and wrong in which the judge was trained from his youth up; from the rules of action customarily followed in the community, lately referred to by Lord Chancellor Haldane as *Sittlichkeit*; from the judge's own practice and interest and desire.

Corbin, *The Law and the Judges*, 3 YALE REV. (n.s.) 234, 240 (1914).



decision, and this must be accounted for as one of the empirical phenomena at work in common law.<sup>69</sup>

What, then, is the nature of the relationship between this case,  $c_i$ , up for decision under predicate  $L_j$ , and the precedent set of  $L_j$ ? How does the prevailing moral, social, and political climate bear upon the answer to this question and upon the decision itself? These are the key questions in accounting for *stare decisis*, the doctrine of precedent.

### B. Stare Decisis

There is no rule of *stare decisis* laid down by statute in either the United States or Great Britain. Perhaps the closest is the House of Lords Practice Statement of 1966,<sup>70</sup> but this is, despite its lofty origins, still a statement of intent of a court. The Practice Statement indicated a change from prior practice:

[Their Lordships] propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.<sup>71</sup>

Prior to this the House of Lords had ostensibly followed *London Tramways Co. v. London County Council*,<sup>72</sup> in which it had declared that it was absolutely bound by its own decisions.

It is obvious, however, that a rule of precedential power cannot itself be founded in a case.<sup>73</sup> The precedential force of the case purporting to establish the rule of *stare decisis* would itself depend on the rule it states, a circularity of the worst kind. But if not in a case and not in a statute, where is the source of the authority of *stare decisis* to be found?

The judge faced with answering "Is  $c_i$  and  $L_j$ ?" will study the precedent set of  $L_j$ , and its complement, to see whether the same facts have been decided before. If she finds that they have, then her decision has already been made, and she need go no further; a case the same as  $c_i$  is already in

69. Serious disruptions are avoided by recusal of judges with a personal interest or excessive overt bias. Nevertheless, in judging, as both the realists and the present-day critics emphasize, personal, psychological, and political predilections must be influential. See generally J. FRANK, *LAW AND THE MODERN MIND* (1930); THE POLITICS OF LAW (D. Kairys ed. 1982). It is the same in all disciplines. See, e.g., Gould, *Between You and Your Genes* (Book Review), 31 N.Y. REV. BOOKS, Aug. 16, 1984, at 31.

70. [1966] 1 W.L.R. 1234 (H.L.).

71. *Id.* As Professor Paterson points out, the "modification" was more a recognition of what had in fact become the practice than a real change. A. PATERSON, *THE LAW LORDS* 143-53 (1982).

72. 1898 A.C. 375. Notice that this is not very long ago in the history of common law. See Simpson, *The Common Law and Legal Theory*, in OXFORD READINGS IN JURISPRUDENCE 77 (A. Simpson ed. 2d series 1973).

73. J. SALMOND, *SALMOND ON JURISPRUDENCE* 187 (G. Williams ed. 1957); Stone, *1966 And All That! Loosing the Chains of Precedent*, 69 COLUM. L. REV. 1162, 1164 (1969).

the extension of  $L_j$ , or its complement.<sup>74</sup> This is a first approximation to *stare decisis*; clearly it won't do.

What does it mean for one case to be "the same" as another? What is the criterion of similarity in use here? It cannot be empirical identity; that is, it cannot require the facts of each case to be the same on every criterion of similarity. Such a situation arises only in cases of *res judicata*, which might thus be considered the limiting case of *stare decisis*: exact similarity no matter what the criterion.<sup>75</sup>

Although it is easiest to see this analysis as it applies in "hard cases," it is not so confined but applies to all common law decisions, even the most "easy." No two cases are identical. The facts presented to the court are unique,<sup>76</sup> being at least spatio-temporally distinct.<sup>77</sup> If precisely the same factual setup as has already been decided is brought before the court, then *res judicata* applies: it has been decided and is thus not a proper candidate for judicial attention. All cases which have not previously been decided are distinguishable in some way from all other cases including those in the precedent sets of all common law predicates.<sup>78</sup> To say that some distinctions (for example time, place, and actors) are trivial is to beg the question of triviality;<sup>79</sup>

74. Thus, if  $c_i = c_k$  and  $c_k$  is in the precedent set of  $L_j$ , then it would appear that  $c_i$  must also be within the precedent set.

75. Exact similarity between cases does not arise when an appellate court reviews the decision of an inferior court; there it is the same case, not the same facts brought separately before the court system on different occasions. Talking of the identity of a thing with itself is empty. L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 216 (1953).

76. In the set theoretic model outlined above, *see supra* notes 30-42 and accompanying text, that each set of facts is unique can be shown as follows. Each case,  $c_i$ , is a proposition (the conjunction of all the particular factual propositions decided by judge or jury and the accepted world view shared by them), a set of possible worlds. For any two cases,  $c_i$  and  $c_j$ , there will be at least one possible world that they do not have in common. The point has been made before: "No identical case can arise. All other cases will differ in some circumstance,—in time, if in no other, and most of them will have differences which are not trivial." Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71, 72 (1928).

77. An exception is *People v. Rainford*, 58 Ill. App. 2d 312, 208 N.E.2d 314 (1965), in which only the time was changed from a prior case. In *Lopez v. Heckler*, 725 F.2d 1489 (9th Cir. 1984), *Kuehner v. Schweiker*, 717 F.2d 997 (3d Cir. 1983), and similar welfare reinstatement cases, the Reagan Administration attempted to distinguish prior cases on the basis of difference in parties alone.

78. Conversely, for any two cases there is some criterion of similarity on which they will be the same. "But everything has property *A*, so everything is *X*, and the distinction between *X* and *Y* has collapsed." Kennedy, *The Stages of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1351 (1982). This is useful only, however, if the critical feature is "property *A*."

79. "[The judge] acts under no compulsion different from that under which anyone else acts when making any kind of decision . . . . Even though there be a well-settled rule that has been applied for centuries, still the court may limit or disregard it, either ignorantly or corruptly or for benevolent reasons. In any case, the parties to the suit must obey the judgment." Corbin, *supra* note 68, at 234, 238.

in some important situations the distinctions of time and/or place might be the most crucial.<sup>80</sup>

Apart from those coming under *res judicata* no two cases are the same on all criteria of similarity. Between any two cases at least some facts are different, and thus the two can be distinguished on at least some criterion of similarity. For the judge to look to the precedent set of  $L_j$  and its complement with no conception of the relevant or appropriate criterion of similarity is therefore futile. But the question is: what is the relevant and appropriate criterion of similarity? How is it to be chosen?

The most typical exemplary cases one sees are those in which the present case,  $c_i$ , is "in one way" similar to a case in the precedent set of  $L_j$  and "in another way" similar to a case in its complement. Each "way" is a criterion of similarity. Advocacy consists, in part, in convincing the judge that one criterion is correct and the other incorrect.

The area from which arguments as to whether or not cases should be held similar, that is, the area from which relevant and appropriate criteria of similarity are drawn, is the realm<sup>81</sup> of "ought": morality, politics, economics—in general, of values.<sup>82</sup> Thus the judge must resort to the moral, social, and political values she (or the legislature or framers in the case of a statute or constitution) brings with her from her extra-legal<sup>83</sup> as well as her legal life for choosing the criterion necessary to bring the precedent set of  $L_j$  and its complement to bear on her decision. The advocate, too, must resort to arguments based in values with roots exogenous to the legal system in attempting to convince the judge; but that of which he seeks to convince the judge, viz., the appropriate criterion of similarity and with it a series of precedents, is the guiding light of the common law decision.

Morality, social, economic, and political organization and values change over time and vary from place to place. Accordingly so, too, do the ap-

80. "In the present temper of the courts, [legal questions] will be determined in ways very different from those obtaining a few decades ago . . ." *Id.* at 240. Of course, much else will have changed in that time, but the date may be the most useful device for expressing the differences.

81. The use of the singular is not intended to indicate that there is a single or unified realm; it may involve many different systems, varying related and varying autonomous. See H. CASTANEDA, *THE STRUCTURE OF MORALITY* (1974); Corbin, *supra* note 68, at 240.

82. "The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining rules by which men should be governed." O.W. HOLMES, *THE COMMON LAW* 1 (1881). Even the arch-positivist, John Austin, thought custom and positive morality to be the "grounds of judicial decisions upon cases." J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED ETC.* 163 (New York 1954) (1st ed. 1832).

83. Corbin, *supra* note 68, at 240.

propriate criteria of relevant similarity between cases.<sup>84</sup> If, two hundred years ago, the advocate had concluded "but that would be to condone child labor!" his argument would have fallen on insensitive ears: the value system of the time did condone child labor.

The temporal and geographic location of cases is useful in that it enables historians to track the changes in social mores upon which legal decisions are based. Cases are not abstract or timeless; they are important social phenomena.<sup>85</sup> Judicial decisions, drawing from current social mores, reflect the society just as they may influence it. Decisions grounded in the society of another time or place may be, for that very reason, inapposite:

And as the law is administered by able and experienced men, who know too much to sacrifice good sense to syllogism, it will be found that, when ancient rules maintain themselves . . . new reasons more fitted to the time have been found for them, and that they gradually receive a new content, and at last a new form, from the grounds to which they have been transplanted.<sup>86</sup>

The courts can and do adapt their decisions to fit the requirements of the time as they see them. Naturally, judges prefer to adapt existing law in an evolutionary manner rather than to make revolutionary sweeps, but the effect is similar: the common law left free to do so molds itself to the social, political, moral, and economic requirements of the time and place.

Professor Corbin provided a very clear illustration in the demise of the requirement that a deed be sealed with wax. In the new, wax-free environment of Pennsylvania the rule not only made little practical sense, it was virtually impossible to satisfy. Accordingly it was abandoned.<sup>87</sup> The import of this

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84. Of the evolution of legal rules, Dean Wigmore wrote: "What really takes place, in evolution, is a change of effect whenever there is a change of cause; and these causes come chiefly from outside the law itself." Wigmore, *Planetary Theory of the Law's Evolution*, in 3 *EVOLUTION OF LAW: SELECT READINGS ON THE ORIGIN AND DEVELOPMENT OF LEGAL INSTITUTIONS* 531, 534 (A. Kocourek & J. Wigmore eds. 1918).

85. A different approach is possible. One could include the time and place in the facts of a case, and with them the entire social, economic, moral, and political climate. The criterion of similarity would then be empirical identity of the relevant facts, and when the morality of the society changed, that would count as a distinguishing fact. This view is rejected by Williams in J. SALMOND, *supra* note 73, at 177, who argues that change in social conditions or custom is not a ground for distinguishing cases, citing *Radcliffe v. Ribble Motor Servs.*, 1939 A.C. 215, 245-46. It is true that in this case the House of Lords did refuse a request that it distinguish a case based on changed social conditions (it found other distinguishing grounds), but as precedent this suffers from the same problems as *London Tramways*, 1898 A.C. 375, does for *stare decisis*. Wright, *Precedents*, 4 U. TORONTO L.J. 247, 251-53 (1942), argues that changed social conditions and values should count as distinguishing facts, and cites language tending to support this view. It should be noted that if place, on a relatively large scale, were considered part of the facts, the distinction between binding and persuasive precedent would need to be changed.

86. O.W. HOLMES, *supra* note 82, at 36. This passage follows a series of illustrations of the point. *Id.* at 6-34.

87. Corbin, *supra* note 68, at 243-44.

story is clear. As the societal needs changed, so too the justification for the old rule failed; as the justification for the old rule failed, so too did the rule itself.

The prevailing social organization and morality have an impact not only on the cases that are to count as the same, but also on the facts of the cases. This applies not only to the facts of the case before the court but also to the cases in the precedent set and its complement. The facts of a case are comprised of a list of sentences (each describing some particular fact). That list, however, is not unordered: some facts are more important than others in the sense that finding similar facts in prior cases is of more compelling influence. How important a fact is within a case is itself a function of the prevailing social climate, the determinant of the criterion of similarity. The writer of the opinion in a case in the precedent set is not authoritative as to the importance of facts. For example, it was of no relevance to the author of *State v. Davis*<sup>88</sup> that the property from which the defendant separated the plaintiff was a slave; presumably that fact would be given central importance today. The facts of a case in the precedent set (or complement) themselves may be determined at the time of decision, but their importance is determined by the present judge under her chosen criterion of similarity.

Two patent cases, *Application of Tenney*<sup>89</sup> and *I.C.E. Corp. v. Armco Steel Corp.*,<sup>90</sup> provide a clear example of the impact of social change—albeit technological rather than moral—on the importance of facts. Both cases arose under a patent law section providing that an invention that has previously been described in a printed publication cannot receive a patent.<sup>91</sup> Both cases involved microfilms of German patent applications on file in the Library of Congress. In *Tenney*, the relevant microfilm had been wrongly indexed in the library's catalogue.<sup>92</sup> Both courts, however, addressed only the question of whether a microfilm counted as a "printed publication" for section 102 purposes.<sup>93</sup>

In 1958, the *Tenney* court argued that "printed" meant books, journals, and the like;<sup>94</sup> a printed publication thus required considerable expense which in turn implied a fairly wide circulation of the printed product. Microfilming,

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88. 19 S.C.L. (1 Hill) 46 (1833).

89. 254 F.2d 619 (C.C.P.A. 1958).

90. 250 F. Supp. 738 (S.D.N.Y. 1966). In patent law, the Court of Customs and Patent Appeals is of at least equal rank to a federal district court and, because of the specialization of its subject matter, is usually accorded some deference even by higher courts.

91. 35 U.S.C. § 102(b) (1982). Although these are cases interpreting a statute, the interpretation of the particular expression in the statute—in this case "printed publication"—is a common law process.

92. *Tenney*, 254 F.2d at 621.

93. *Id.*; *I.C.E. Corp.*, 250 F. Supp. at 739.

94. *Tenney*, 254 F.2d at 625-26.

the court found, was as inexpensive for one copy as for many, and thus such a print, not necessitating a fairly wide distribution, did not count as a printed publication.<sup>95</sup> On this reasoning, the incorrect indexing of the microfilm was of no relevance whatsoever.

A mere eight years later, the facts of *I.C.E. Corp.* were identical, except that the microfilm in question seems to have been correctly indexed.<sup>96</sup> On the reasoning of *Tenney*, this difference is irrelevant; the microfilm in *Tenney* did not count as a printed publication. However, the court in *I.C.E. Corp.* felt that the development of modern printing techniques and interlibrary communications systems meant that the *Tenney* decision created a dangerous loophole: a noninventor could reap the benefits of another's invention disclosed only on microfilm.<sup>97</sup> The court therefore distinguished *Tenney* under a new criterion which made the incorrect indexing the central fact. By 1966, accessibility to the public was the key to the meaning of "printed publication," and microfilm surely satisfied that criterion.

Despite the precedential status of the *Tenney* court, the district court judge in *I.C.E. Corp.* did not feel bound by its reasoning. Although the reasoning of both courts is intuitively transparent, it is worth reiterating what happened. *Tenney* and *I.C.E. Corp.* were factually distinct, but, under the criterion of identity put forward in the former, the distinction was irrelevant. If to be a printed publication required book- or journal-type printing and volume distribution, then the cases were relevantly identical: neither microfilm was a printed publication. If common law had a principle of binding *stare dictis*,<sup>98</sup> then the *I.C.E. Corp.* court would have been obliged to follow the earlier case to the conclusion opposite from that which it reached. But *stare dictis* is not a binding principle, and in the eight years from 1958 to 1966 the technology of printing and communications had so changed as to make the early argument of the *Tenney* court no longer acceptable. A new criterion—accessibility—based on a new argument not only made the cases quite distinct, but also changed the importance of the factual determinations in the cases.

A judge's reasons—her criterion of similarity—for deciding that  $c_i$  is or is not an  $L_j$ , or that  $c_i$  is the same as  $c_k$ , even when written into her opinion explicitly, are *dicta* and not binding on subsequent judges. The judge's conviction that the present case is the same as one in the precedent set of the legal predicate in question (or its complement) puts her under the obligation of *stare decisis*,<sup>99</sup> but another judge is not bound by that judge's

95. *Id.* at 627.

96. *I.C.E. Corp.*, 250 F. Supp. at 739.

97. *Id.* at 743.

98. *Stare dictis* is anathema to some. It is argued below, *see infra* notes 103-15, that not only is a measure of *stare dictis* inevitable, it is essential to the stability of the common law process.

99. Suppose  $I_c$  is the criterion of similarity chosen by the judge and that there is a case,

conviction, only by the decision if she herself is also convinced. The facts of the case and the decision ( $c_i$ , and  $c_i$  is/is not an  $L_j$ ) are the only legal phenomena involved in *stare decisis*. Thus, the force of previous decisions that pairs or sequences of cases in the precedent set (or complement) are the same reduces, simply, to "justice."<sup>100</sup>

Different judges, however, with their different social, moral, and political views, will often come to commensurately different conclusions as to what counts as justice in any given case. From the preceding analysis it would seem that a judge could reach whatever decision she may choose,<sup>101</sup> justifying it on reasons quite independent of the *dicta* of prior courts. Yet in practice this is not the case. If the Supreme Court has spoken in an area of morality the language of its opinion will usually be taken as authoritative, *dicta* or not.<sup>102</sup> How to account for this fact is the problem addressed in the next section.

### C. Stare Dictis

Judges are people, with normal human foibles.<sup>103</sup> Most are heavily burdened with decisional responsibilities that they are not looking to increase. It is much easier to follow a previous decision if the present case is reasonably subsumable under its reasoning than it is to strike out alone with an independently reasoned criterion. This must be especially true when the previous criterion was one adopted by a superior court. Judges do not like to be overruled and thus are understandably loath to invite reversal.<sup>104</sup> Thus, judges can be expected to take very seriously the criteria of similarity used in cases in the precedent set, especially those in recent decisions of courts of superior status<sup>105</sup>

$c_k$ , in the precedent set (or its complement) of  $L_j$ , such that " $c_i I_r c_k$ " is true. Then  $c_i$  must, under  $I_r$ , be in the same set;  $c_k$  is precedent for  $c_i$ , and the judge is bound by *stare decisis*.

100. "Justice" here includes morality, economics, politics, and all the other social organizational phenomena which a legal system serves and from which legal arguments are drawn. "Our courts must know that the justice of the present is the fountain of the law, and must know how to find such justice." Corbin, *supra* note 68, at 248.

101. Of course, there will be pairs of cases which are very difficult to distinguish on any but spurious criteria of similarity. For example, differences in color of automobiles do not normally justify different outcomes. Cases can only be distinguished on criteria of some significance to society, and many cannot be so distinguished. There is also the preliminary problem of determining the content of the precedent set: which prior decisions are properly included and which are not. See Dworkin, *Interpretation*, *supra* note 45.

102. *But see* Dronenburg v. Zech, 741 F.2d 1388, *reh'g denied*, 746 F.2d 1579 (D.C. Cir. 1984); *see also* Dworkin, *Reagan's Justice*, 31 N.Y. REV. BOOKS, Nov. 8, 1984, at 27 (commenting on *Dronenburg*, 741 F.2d 1388).

103. See Lehman, *How to Interpret a Difficult Statute*, 1979 WIS. L. REV. 501-07.

104. *Id.*; *see also* Lehman, *The Pursuit of a Client's Interest*, 77 MICH. L. REV. 1078 (1979).

105. Judges also have been to law school where, like many of us, they heard and read of "the rule of the case" as the object of binding precedent. *See, e.g.*, E. LEVI, AN INTRODUCTION TO LEGAL REASONING 1-8 (1948).

in their own system.<sup>106</sup> There is here, quite naturally, a strongly persuasive impact of *stare dictis*.

Judges also keep an eye on what their colleagues are doing. Like everyone else they must surely find security in not being far from the currently popular thinking. This is not to say that judges are not courageous individuals, only that they do not act individualistically all the time and in all fields. Professor Shapiro has made a persuasive empirical case that the essence of *stare decisis* can be found in the communication between courts.<sup>107</sup> “[I]t should be possible for social scientists to treat the phenomenon of *stare decisis* as a problem in human communications rather than as exclusively one of logic and/or obfuscation.”<sup>108</sup> The requisite communications exist in superfluity:

The litigation market assures that thousands of lawyers will devote their energies to carrying messages from one court to the next, keeping each informed of what the others are doing.<sup>109</sup>

[The] appellate courts and the lawyers that serve them spend an overwhelming proportion of their energies in communicating with one another, and . . . the judicial opinion, itself conforming to the style of *stare decisis*, and then manipulated along with others according to the rules of *stare decisis*, is the principal mode of communication.<sup>110</sup>

Allowing that this is more about *stare dictis* than *stare decisis* it is clear that Shapiro has made a valuable point. To have the basis for a persuasive *stare dictis*, one need only add the very reasonable premise that judges, like most people, will tend to be influenced by the behavior of their peers (thus communicated).

The relationship between the judicial decision and current social mores is not solely a one-way street, with the latter providing the grounds for the former. Judicial opinions also influence popular morality.<sup>111</sup> Lower court judges, persons among those most likely to read higher court opinions, are among those most immediately and significantly influenced in this way. This is hardly new.<sup>112</sup> The legal structure—including judicial decisions and opin-

106. That only superior courts in the same system can overturn a judge's decision, together with geographic variability—and conversely local stability—of the elements of justice, provide the basis for distinguishing binding from persuasive precedent in a multi-jurisdiction system such as the United States.

107. Shapiro, *supra* note 65.

108. *Id.* at 134.

109. *Id.* at 131.

110. *Id.* at 134.

111. Unquestionably, attitudes toward abortion have changed since, and because of, *Roe v. Wade*, 410 U.S. 113 (1973).

112. See G. Vico, *THE NEW SCIENCE* (M. Fisch & T. Bergin trans. 1968) (3d ed. 1744). Bergin and Fisch write:

What Vico wanted to assert was that the first steps in the building of the “world of nations” were taken by creatures who were still (or had degenerated into) beasts, and that humanity itself was created by the very same processes by which



ions—is a cultural artifact which shapes society just as the legal structure is shaped by society. One of the practical mechanisms through which the judiciary plays out this “shaping” role is *stare dictis*.

Nor is a measure of *stare dictis* unacceptable from the point of view of social values. Morality, general political opinion, economic thought, and the principles of social organization do not really change quickly nor vary greatly across most jurisdictions. Especially in law schools where the focus is on the difficult and changing areas, educators and students tend to lose sight of this quite pervasive stability. In most instances different judges representing the general underlying social value system are likely to come to quite similar conclusions about the cases they review. A sensible judge, finding that she disagrees with the criteria at large in the precedent set, is thus likely to check carefully to see whether her view is idiosyncratic or systematically biased before acting on it. Accordingly, criteria of identity are likely to remain reasonably stable across time and geography: *stare dictis* provides a fair measure of inertia in the common law system.<sup>113</sup>

Thus for all that a court's determination of the appropriate criterion of similarity is *dicta*, it is highly persuasive *dicta*. This is not at all a bad thing and in no way does it undermine the semantic model. On the contrary, it is essential. But for some stability of criteria of similarity, *stare decisis* would be an empty notion: if a judge were to be free to distinguish prior cases on any ground, then all cases would be distinguishable at the whim of the judge and (most importantly) properly so. The stability, predictability, reliability, and consistency that societies require of their legal systems<sup>114</sup> are only available if there is some *stare dictis*. But notice that it is not an intrinsically legal principle. It derives its force mostly from the social and psychological concomitants of the common law institution of judging,<sup>115</sup> but may reliably be expected in a stable society.

institutions were created. Humanity is not a presupposition, but a consequence, an effect, a product of institution building.

Fisch & Bergin, *Introduction to G. Vico, supra*, at xlv. More recently, Claude Levi-Strauss stated that “men have *made* themselves to no less an extent than they have made the races of their domestic animals, the only difference being that the process has been less conscious or voluntary.” C. LEVI-STRAUSS, *STRUCTURAL ANTHROPOLOGY* 353 (1972) (emphasis original).

113. As Martin Shapiro writes:

Under the rules of the game, the lawyer-communicator has the highest chance of winning if he can show a court that his client must prevail if the court keeps doing exactly what it has been doing; the next highest chance if he can persuade the court that it should do exactly what some other court has been doing; . . . and the worst prospect if he must argue that the court should do something markedly different from what it and other courts have done in the past.

Shapiro, *supra* note 65, at 131. This is empirically undeniable.

114. See L. FULLER, *THE MORALITY OF LAW* 33-41 (1964).

115. See generally Lehman, *supra* notes 103 & 104.

## CONCLUSION

Common law relies on the decisions of judges in disputes brought before them rather than on statutory enactments. Judges, however, are not primarily responsible for deciding factual issues; facts can be determined by judge or jury. The facts of a legal dispute once decided—what, in this article has been called a case—are a proposition, the conjunction of all the propositions expressing the particular factual findings. The intrinsically judicial function of the common law judiciary is to decide whether or not that case is to count as an  $L_i$  (where  $L_i$  is some legal predicate).

The common law is comprised of a set of predicate expressions with unique semantic properties. Unlike everyday predicates they have no intensions and thus their meanings cannot be known in the ordinary way. Furthermore, the extensions of common law predicate expressions are only partially determined: only for those cases already decided can the extension be known with certainty; for all those cases never finally resolved by a judicial decision, hypothetical, presently pending, and yet to arise, educated predictions can be made but no case can be decided with certainty except by litigation.

Litigation is the common law's decision procedure. The question the common law judge must answer is whether or not this case,  $c_i$ , is an  $L_j$  (for example, a battery). If  $c_i$  is the same as a case already decided under  $L_j$ —that is, a case in the precedent set of  $L_j$  or of its complement—then the decision has already been made. But no two cases are identical, being at least spatio-temporally distinct and almost as often having different parties. Thus, whether or not there is a precedent depends on the criterion of similarity being used. Just as there is some criterion on which any pair of cases can be distinguished, so too is there some criterion on which they are the same. How does the judge choose the criterion of similarity?

The criterion of similarity upon which precedent depends is the conclusion of the argument made by the judge—following or contrary to the argument made by some other judge, the advocates or commentators—based on the social mores of the time and place. The judge serves society as the intelligent repository of the prevailing moral, political, economic, and social climate, a responsibility exercised in the judicial decision. If, under the criterion of similarity selected by the judge as appropriate, there is a case in the precedent set or in its complement that is the same as the one before her, then she is bound to follow that decision. This is *stare decisis*. Clearly *stare decisis* depends for its efficacy on the stability and continuity of criteria of similarity used by the judiciary. In addition, all of the social pressures of the organized operation of the judicial role as well as the relative stability of social mores tends to promote an effective but nonbinding rule of *stare dictis*. *Stare dictis* operates with great force when the proposed precedent comes from a superior

court in the same jurisdiction, and with less force when it comes from junior courts or courts of distant jurisdictions.

The judge's decision (that  $c_i$  is/is not an  $L_j$ ) is a stipulation. It is not true or false even though it may be wise or stupid, well or fallaciously reasoned. It can be reversed by a higher court making an overriding stipulation. This is so even when the decision is apparently under the control of a clear precedent; the judge's acquiescence in the argument and criterion of identity according to which the precedent is clear is a choice which is not compelled. *Stare dictis* is not a rule of common law, as is *stare decisis*. Yet *stare dictis* is essential to a judge's determination of the meaning of a predicate, and, ultimately, of the similarity between a case and the predicate's precedent set or its complement.