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Alterity: About Rules, For Example

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> [A]n accepted judicial decision in the common law . . . is an object for further articulation and specification under new or more stringent conditions.
> Thomas S Kuhn[1]

The task of the comparatist is to lift himself out of his mundane existence and to attempt an 'appropriation of the foreign',[2] to confront the enigmatical as he discerns it in other legal cultures in the full knowledge that the study of different lifeworlds will tax his empathic powers. Beyond the challenge to the foundational assumptions by which he leads his legal life within his local community, the comparatist must engage in the hermeneutical act that will allow him, through his intrusion into alien forms of discourse, to decipher and explicate a range of phenomena that appear inhospitable to interpretation. The point is not, of course, the effacement of ambiguity because what it feels like to understand as a French lawyer will always remain for the English comparatist a matter of more or less distant conjecture. Rather, the comparatist aims to demonstrate that the discursive practices and the mental representations operating within a legal culture, often at a level beneath consciousness, are able to serve as a focus for speculative inquiry into significance in that they can communicate the specific legal and cultural sensibility of a given interpretive community. The main objectives of the comparatist, then, must be to understand why a particular legal culture has been attracted to a particular genre of cultural product and to capture the trajectory of epistemological justification that has been followed by that culture. Why, in other words, has a legal culture developed a characteristic pattern of social and epistemological legitimation?

An initial step, for the comparatist who proposes to conduct such an epistemological inquiry into legal rationalities with specific reference to the civil law and common law traditions as they have materialized in Europe, is to appreciate that he will encounter a radical difference between them.[3] In the way these

* Bernard Rudden once told me that the comparatist is a ceaseless digger who, although he occasionally finds something that glitters, rarely strikes gold. Written for my mentor with abiding respect and fond affection, this essay celebrates the dark good fortune of the digging itself and even the failure to find.

[1] *The Structure of Scientific Revolutions* (2nd edn, Chicago: University of Chicago Press, 1970) 23.

[2] MA Schneider, *Culture and Enchantment* (Chicago: University of Chicago Press, 1993) 64.

[3] See my 'European Legal Systems Are Not Converging' (1996) 45 ICLQ 52.

two legal traditions reflect two modes of experiencing the world, I argue that even the most sophisticated comparative analysis originating from one tradition will, ultimately, fail to cross epistemological boundaries. In the absence of shared epistemological premises, the civil law and common law worlds cannot enjoy an exchange that would lead to a complete understanding of one another. (I repeat that my focus is epistemological; I am not concerned with doctrinal or institutional developments in the sense that I do not ask, for instance, whether posited Italian law acknowledges anything resembling posited English law's criterion of reasonableness in the computation of contractual damages.)

I wish to explore, by way of illustration of the epistemological incommensurability I address, the crucial distinction arising between civil law and common law experiences as regards the character of rules. The notion of 'rule' has given rise to a considerable number of attempts at definition and it would seem futile to add to that list. Instead, it appears more fruitful to try to circumscribe one or two elements of 'ruleness', or 'canonicity', which ought to command a wide consensus. In my view, one such factor is that of generality: a rule is something to be applied in an indefinite number of instances.[4] Another characteristic is normative weight: the rule provides either a cause or a reason for action so that there is a disposition to regard the failure to follow the rule as a ground for criticism.[5] Indeed, how can one meaningfully talk of a given formulation as constituting a 'rule' unless that statement is of general application and carries a measure of normative weight? Both attributes feature in the following form, which I take to be exemplary of canonicity: *if* certain conditions are satisfied, *then* something follows. In the light of these specifications, it can be said that ever since the Digest's *regulae iuris*, the civil law tradition has wished to define itself as a body of articulated rules in keeping with the fact that the law has been regarded by civilians as the product of the will of the ruler.[6] The question for determination in this essay is, however, whether the common law also consists of rules, my focus being on English law—the most immediately relevant common law experience for European jurists.[7] If they exist, common law rules must arise either from the discrete decisions themselves (one decision = one rule) or from series of decisions (many decisions = one rule).

I shall first consider the matter of the single decision. Of course, a common law judicial decision is prescriptive. It is, however, prescriptive only for the parties to the litigation and does not reveal an authoritative fiat beyond those

[4] Eg J Raz, *Practical Reason and Norms* (London: Hutchinson, 1975) 49. [5] ibid.

[6] For a more detailed consideration of the civil law's epistemological profile with specific reference to the faith of entire legal communities in the probative efficacy of propositional knowledge, see my '*Antiqui juris civilis fabulas*' (1995) 45 U Toronto LJ 311.

[7] Not all the observations that follow would apply equally forcefully to the United States. As Mitchel Lasser illustrates, the United States Supreme Court, for instance, readily formulates 'tests': '"Lit. Theory" Put to the Test: A Comparative Literary Analysis of American Judicial Tests and French Judicial Discourse' (1998) 111 Harvard L Rev 689. But see n 49 below. For a discussion of conceptions of rules prevailing in English and American law, see PS Atiyah and RS Summers, *Form and Substance in Anglo-American Law* (Oxford: Oxford University Press, 1987) 88–93.

parties. In other words, it is intrinsically particularized and does not purport to be otherwise. How to account, therefore, for frequent references to 'the rule in *Hadley v Baxendale*' or 'the rule in *Rylands v Fletcher*' in English textbooks and law reviews? The answer to this question must begin with an observation that the use of the word 'rule' can not be regarded as conclusive of whether the relevant decision is, in fact, canonical. Clearly, 'opinion writing' may involve 'a conscious process of rule making'.[8] The language of Blackburn J in *Rylands v Fletcher*,[9] for instance, suggests that he wanted to posit a rule: 'We think that the rule of law is. . . .' But the fact that a judge calls what he writes a 'rule' is inconclusive as to what it effectively is and as to how it will be treated by later judges.

What the judge may label a 'rule' can not be a 'rule' because a judge does not have the authority at common law to pronounce in such a way that his decision could claim to be of general application and have a constraining effect on later judges. As a Law Lord writes: 'Certainly, the primary function of judges is not the formulation of legal principles. Their main task, more workaday, more humdrum, is to try cases: in civil cases, to adjudicate upon disputes between litigants, and in criminal cases, to secure a fair trial of the accused by jury'.[10] In *Westdeutsche Landesbank Girozentrale v Islington LBC*, Lord Goff recalls how '[t]he function of [the House of Lords] is simply to decide the questions at issue before it in the present case'.[11] Making reference to an earlier decision, he states: 'It is . . . apparent from the reasoning of the [judges] that they regarded themselves, not as laying down some broad general principle, but as solving a particular practical problem'.[12] Other cases also insist upon the inherently particularistic character of common law adjudication.[13] Even in such decisions as *Rylands v Fletcher*, one will not find a formulation which could, legitimately, claim general application and carry normative weight beyond the case, which could be canonical. Indeed, '[t]here is no way in which the judges in the course

[8] F Schauer, 'Opinions as Rules' (1995) 62 U Chicago L Rev 1455, 1470.

[9] (1866) LR 1 Ex 265, 279.

[10] R Goff, 'The Search for Principle' (1983) 69 Proceedings of the British Academy 169, 170.

[11] [1996] AC 669, 685, HL. See also eg *Broome v Cassell & Co* [1972] AC 1027, 1085, HL: 'it is not the function of [the House of Lords] or indeed of any judges to frame definitions or to lay down hard and fast rules' (Lord Reid); *Spring v Guardian Assurance plc* [1995] 2 AC 296, 354, HL: 'Some of the statements I have made I appreciate could be applied to analogous situations. However I do not intend to express any view either way as to what will be the position in those analogous situations. I believe that they are better decided when, and if, a particular case comes before the court. This approach can lead to uncertainty which is undesirable. However, that undesirable consequence is in my view preferable to trying to anticipate the position in relation to other situations which are not the subject matter of this appeal' (Lord Woolf); *R v Governor of Brockhill Prison, ex p Evans (No 2)* [2000] 3 WLR 843, 868, HL: 'The constitutional role of the courts is to decide disputes and grant remedies. . . . They would be declining to exercise their constitutional role and adopting a legislative role by deciding what the law shall be for others in the future' (Lord Hobhouse).

[12] [1996] AC 669, 687, HL.

[13] Eg *Masterson v Holden* [1986] 1 WLR 1017, 1043, QB; *Roberts Petroleum Ltd v Bernard Kenny Ltd* [1983] 2 AC 192, 201, HL; *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443, 481, HL; *Read v J Lyons & Co* [1947] AC 156, 175, HL.

of dealing with individual cases could reach out beyond them to the establishment of general principles'.[14] The point is explicated further by Tony Honoré:

> The legal adviser, advocate, or writer who sets out the "rule in *Rylands* v. *Fletcher*" does not copy it exactly from the case of *Rylands* v. *Fletcher*. He takes account of subsequent decisions, of the traditional formulation in textbooks and in general of professional tradition . . . . Indeed, he may go further and extract from the raw material a law which is implicit in it but has not been enunciated.[15]

Nor is a purported 'rule' effectively regarded as controlling by subsequent courts. An example should help to show that, habitual language notwithstanding, there is no 'rule' in a case like *Rylands v Fletcher* and that such a decision does not, as far as subsequent judges are concerned, enunciate any canonical proposition. In *Rylands*, Blackburn J observed as follows: 'the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape'.[16] This statement is conventionally understood as embodying the 'rule' in *Rylands v Fletcher*.[17] At this juncture, I wish to introduce a recent decision to establish how even such a seemingly well-entrenched formulation is, in practice, apprehended as being discardable—and is, in fact, liberally discarded—by judges, confirming that the statement in point is not envisaged by them as being of general application in later cases or as being constraining.

My illustration is the judgment of the House of Lords in *Cambridge Water Co Ltd v Eastern Counties Leather plc* rendered in December 1993.[18] The claimant company supplied a population of approximately 275,000 with water. The defendant, a leather manufacturer, used a chemical solvent in the degreasing of its pelts. In the process, there occurred regular spillages on the concrete floor of the defendant's tannery of relatively small amounts of solvent which, not being readily soluble in water, seeped into the soil below, eventually reaching the strata from which the claimant extracted its water through a borehole. The claimant was forced to stop using the borehole and to dig another one so as to make good the deficiency in its supply of water, at an approximate cost of £1m; hence the lawsuit. The House of Lords decided the case against the claimant. In the course of his judgment, Lord Goff sustained five different theses, which demonstrate how *he himself* freely took his leave from the 'rule' usually alleged or assumed to be contained in *Rylands v Fletcher* to the extent that

[14] G Wilson, 'English Legal Scholarship' (1987) 50 MLR 818, 844. Other commentators refer to 'the notorious reluctance of English judges to go very far beyond the facts of the case at hand': W Twining and D Miers, *How to Do Things with Rules* (4th edn, London: Butterworths, 1999) 141.

[15] T Honoré, 'Real Laws' in PMS Hacker and J Raz (eds), *Law, Morality, and Society: Essays in Honour of H.L.A. Hart* (Oxford: Oxford University Press, 1977) 100–101. Twining and Miers make a related point: 'It is only in a loose, metaphorical sense that common law rules "exist" and are interpreted; it is more exact to say that formulations of common law doctrine are extracted or constructed from judicial opinions' (n 14 above) 146.

[16] n 9 above. [17] Eg D Howarth, *Textbook on Tort* (London: Butterworths, 1995) 526–531.

[18] [1994] 2 AC 264.

the case shows how *Rylands v Fletcher* is never more than an argumentative point of departure. It is in this sense that Peter Goodrich can convincingly argue that the common law is enthymemic.[19]

First thesis

The general tenor of his statement of principle [Lord Goff is referring to Blackburn J's assertion in *Rylands v Fletcher* as quoted above] is therefore that knowledge, or at least foreseeability of the *risk*, is a prerequisite of the recovery of damages under the principle; but that the principle is one of strict liability in the sense that the defendant may be held liable notwithstanding that he has exercised all due care to prevent the escape from occurring.[20]

Second thesis

[T]he historical connection with the law of nuisance must now be regarded as pointing towards the conclusion that foreseeability of *damage* is a prerequisite of the recovery of damages under the rule.[21]

Third thesis

[F]oreseeability of *damage of the relevant type* should be regarded as a prerequisite of liability in damages under the rule.[22]

Fourth thesis

Turning to the facts of the present case, it is plain that, at the time when the PCE [the thing] was brought onto ECL's land [the defendant], and indeed when it was used in the tanning process there, nobody at ECL could reasonably have foreseen *the resultant damage* which occurred at CWC's borehole [the claimant].[23]

Fifth thesis

In the result, since those responsible at ECL [the defendant] could not at the relevant time reasonably have foreseen that *the damage in question* might occur, the claim of CWC [the claimant] for damages under the rule in Rylands v Fletcher must fail.[24]

The excerpt from Blackburn J's decision in *Rylands v Fletcher* quoted previously reveals that his concern was for the 'mischief if [the thing] escapes' or for the likelihood that, if the thing escaped, it would cause mischief. The judge, in other words, had in mind the harm or the capacity of the thing to cause harm. Although constantly making explicit reference to 'the rule in *Rylands v*

[19] P Goodrich, *Reading the Law* (Oxford: Blackwell, 1986) 190–191.
[20] [1994] 2 AC 264, 302, HL (my emphasis).
[21] ibid 304 (my emphasis).
[22] ibid 306 (my emphasis).
[23] ibid (my emphasis).
[24] ibid 307 (my emphasis).

Fletcher', Lord Goff initially emphasized foreseeability of 'risk'—that is, risk of escape of the thing or risk of 'mischief' or harm if the thing escapes—later to change his focus to refer to foreseeability of 'damage' and then to foreseeability of 'type of damage'. Finally, he settled on foreseeability of 'the resultant damage' or of 'the damage in question'. It will be noted that, having first broadened the ambit of *Rylands v Fletcher* ('risk' of escape or 'mischief' is easier to contemplate than 'mischief' or 'likelihood of mischief'), Lord Goff then proceeded to limit the purview of the case, making it more difficult with every passage for the circumstances at hand to sustain the analogy with the facts of *Rylands*.

But the important question for present purposes is the reformulation to which the so-called 'rule' in *Rylands v Fletcher* is subjected as it is made successively broader and narrower through the introduction of notions such as 'foreseeability of the risk', 'foreseeability of damage', 'foreseeability of damage of the relevant type', '[foreseeability of] the resultant damage', and '[foreseeability of] the damage in question'. Unquestionably, the judge in *Cambridge Water* regards himself as being at liberty to move away from the earlier case and from any allegedly canonical proposition it might have generated (or might have been thought by its interpreters to have generated).[25] The determination in the earlier case is confined by the subsequent judge to its immediate application: the creation of the solution and its application to the matter being litigated are regarded as circumscribed to the facts of the case to which it purported to give an answer.

A further example, based on the well-known decision in *Donoghue v Stevenson*,[26] can be offered as evidence of the latitude assumed by the later judge:

> Suppose a subsequent case presented the question of liability in the context of a decomposed spider in a bottle of sparkling water. Because spiders are not snails, because sparkling water is not [ginger] beer, and because the decision in *Donoghue* v. *Stevenson* was only about a particular event, the court in the spider-in-the-sparkling-water case must generalize, or construct a factual predicate, around the result in the snail-in-the-ginger-beer-case. The necessity of generalization is brought about by the fact that the first case did not involve a category, but was only about one event. *Donoghue* v. *Stevenson* did not involve all beverages, or all decomposed animals, or all of anything else. It was about decomposed snails in ginger beer, and there is nothing that logically compels the spider-in-the-sparkling-water case to be treated as similar to and therefore governed by the snail-in-the-ginger-beer case.[27]

Indeed, confirmation of the limited scope of *Donoghue v Stevenson* comes from the judgment of Lord Atkin himself, writing the leading opinion for the House of Lords in the case: 'The courts are concerned with the particular relations which come before them in actual litigation, and it is sufficient to say whether the duty exists in those circumstances.'[28]

[25] F Schauer, *Playing by the Rules* (Oxford: Oxford University Press, 1991) 184.
[26] [1932] AC 562, HL. [27] Schauer (n 25 above) 183. [28] (n 26 above) 579.

This judicial strategy is typical of the common law process of adjudication. Roy Stone refers to the practice as 'ratiocination', which he calls an 'intermediate logic' or an 'informal logic' and which he distinguishes from 'rationalisation'.[29] For the common law, the question arises in this way: 'how like the case of an architect giving advice causing pecuniary loss is the case of an accountant giving advice causing pecuniary loss, is the case of an architect giving advice causing physical harm, is . . .'.[30] Even though Blackburn J's pronouncement in *Rylands v Fletcher* may have wanted to adopt a rule-like form, it does not effectively posit a rule. It is not canonical. What is inaccurately regarded as a 'rule' is, therefore, no more than a defeasible statement devoid of normative weight beyond the case itself for which it was formulated. The most that can be asserted is that the earlier case will be presumptively controlling of later situations that appear alike on their facts *in the eyes of the subsequent judge*. As *Rylands v Fletcher* and *Cambridge Water* readily illustrate, the later judge enjoys ample authority to rebut the presumption. It can never be predicted from the reading of an earlier case, therefore, whether it will apply to the case at hand. All that can be said is that the earlier case *could* apply, by its terms, to the case at hand. Ultimately, all will depend on the later judge who will apply the earlier case *if* he wishes to apprehend it as offering an instance of congruence with the material facts of the case at hand and *if* he wishes publicly to acknowledge this congruence (in other words, *if* he is prepared to allow the result of the earlier case to govern the case at hand). Otherwise, the later judge will simply discard or reformulate earlier judicial statements and thereby justify a differential treatment of the two fact-situations. And if the subsequent judge shows himself ready to treat a prior decision as an exemplar of how the life situation at hand has been resolved in the past and, therefore, acknowledges sufficient congruence between the facts of the later case and those of the earlier one, then the later case will find itself being decided like the earlier one not because the earlier one had established a rule but because the later judge is prepared to approach the material facts between the two cases as sufficiently congruent, that is, because he is ready to draw isomorphic connections between the facts of the two cases. In sum, judges are not prepared to accept that an earlier case must be given a particular extension and that they must regard themselves as being bound by it. Whatever reading of the earlier decision seems correct to the later judge will be correct according to the earlier decision as he understands it. In other words, judges assume that the extension of the prior decision is partly independent of the decision itself or that the earlier decision leaves partly undetermined what accords with it.[31] Ultimately, the meaning of a given decision must be deferred,

[29] R Stone, 'Ratiocination Not Rationalisation' (1965) 74 Mind 463, 481.

[30] ibid 478–479.

[31] The way in which common law adjudication operates addresses Wittgenstein's expansive understanding of 'rules' focusing not on formulation but on use in practice. Judges feel free not to use a particular case for guidance and not to use a particular meaning of that case for guidance, which shows that they do not regard a case as immediately and transparently positing something

in the evocative words of Michel Rosenfeld, 'until the dusk will have settled on the last of the future adjudications'.[32]

The very conviction harboured by common law judges that reference back must always be made to the *facts* of the earlier case—that it is never enough to rely on the alleged 'rule' (the statement of the law) to decide the later case—indeed contradicts the whole idea of 'rule' pursuant to which if certain conditions are satisfied, then something ought to follow. If judicial decisions posited rules, it would be enough for a judge deciding a case to know the facts of the case at hand and the rule that would have been stated earlier. Clearly, however, such is not the situation: as common law decisions repeatedly show, the judge also feels that he requires the (detailed) facts of the earlier case.[33] Thus, the common law does not operate on an 'if–then' basis (the rule model) but rather adopts the 'as–therefore' form of the concrete case: *as* the material facts of the case at hand are found to be analogous to those of the earlier one, *therefore* the decision based on the present facts shall be the same as that arising from the earlier facts.[34] To borrow from Geoffrey Samuel, at common law '[l]egal development is not a matter of inducing rules, terms or institutions out of a number of factual situations and applying these rules, terms or institutions to new factual situations. Rather, it is a matter of pushing outwards from within the facts themselves'.[35]

According to this analysis, the discretionary powers of the common law judge seem very broad. And so they are, as explained by Geoffrey Wilson amongst others:

> Not only do the decisions often look pragmatic, they can also look arbitrary as well. It is clear that the English appellate judge regards himself as largely self-authenticating. As a result although the law may not be the judge's breakfast it may sometimes look like his thoughts on the train. So an appellate judge can turn years of tacit assumption on its head by declaring out of the blue, and without previous debate, that there is after all a distinction between public and private law and with it an appropriate division of principle and jurisdiction. And when the Law Lords decide that the time has come to stop looking

that is to be done. For a detailed discussion of Wittgenstein's argument, see GP Baker and PMS Hacker, *An Analytical Commentary on the Philosophical Investigations*, II: *Wittgenstein: Rules, Grammar and Necessity* (Oxford: Blackwell, 1985) 41–52.

[32] M Rosenfeld, *Just Interpretations* (Berkeley: University of California Press, 1998) 32.

[33] Eg *Lupton v FA & AB Ltd* [1972] AC 634, 658–659, HL, where Lord Simon is unable to outline a notion of 'rule' that would be divorced from that of 'material facts'.

[34] These formulations are used in F von Benda-Beckmann, *Property in Social Continuity* (The Hague: Martinus Nijhoff, 1979) 28. See also C Geertz, *Local Knowledge* (New York: Basic Books, 1983) 174.

[35] G Samuel, *The Foundations of Legal Reasoning* (Antwerp: Maklu, 1994) 195. When Neil MacCormick argues that a judicial decision 'must be logically universal or at least must be in terms which are reasonably universalizable' ('Why Cases Have Rationes and What These Are' in L Goldstein (ed), *Precedent in Law* (Oxford: Oxford University Press, 1987) 170), he is indicating what character decisions must adopt to fit within his theory of justification but he is not showing what character decisions must adopt in order to be regarded as credible and legitimate acts of judicial adjudication by the relevant interpretive communities. In this respect, it appears that whether or not a decision is 'logically universal' or 'reasonably universalizable' is irrelevant.

for individual duties of care but to assume a general duty unless there is a reason against it then that is that. And until they do so it is not.[36]

Indeed, the common law judge enjoys such interpretive latitude in his treatment of precedent that it would seem difficult to assert, with reference to any precedential reading he would propound, that he had made a *mistake*. And, in fact, a commentator would not critically approach, say, Lord Goff's interpretation of *Rylands v Fletcher* in *Cambridge Water* in those terms. Peter Winch draws an important conclusion from this state of affairs in terms of the question that preoccupies me:

> the notion of following a rule is logically inseparable from the notion of *making a mistake*. If it is possible to say of someone that he is following a rule that means that one can ask whether he is doing what he does correctly or not. Otherwise there is no foothold in his behaviour in which the notion of a rule can take a grip; there is then no *sense* in describing his behaviour in that way, since everything he does is as good as anything else he might do, whereas the point of the concept of a rule is that it should enable us to *evaluate* what is being done.[37]

To put it baldly, and in the words of a distinguished judge himself, '[t]he law is what the judges say it is'.[38] The legitimacy of this approach to adjudication is not challenged. On the contrary, for common lawyers 'it is important that the dominant element in the development of the law should be professional reaction to individual fact-situations, rather than theoretical development of legal principles'.[39] This passage suggests that the decision not to formulate judicial decisions as rules is wanted. Of course, judicial decisions *could* be formulated as rules. The point is, however, that they are not (even though, at times, as with Blackburn J in *Rylands v Fletcher*, they may be labelled as such).[40] One is reminded of Burke: 'We are protestants, not from indifference but from zeal'.[41]

Even if one agrees that a case does not, on its own, constitute a rule, one might wish to argue that there are still rules at common law, only that they appear as the summary of the cumulative effect of several decisions. This issue brings me

[36] G Wilson, 'English Legal Scholarship' (1987) 50 MLR 818, 840–841.

[37] P Winch, *The Idea of a Social Science* (London: Routledge and Kegan Paul, 1958) 32. See also A Marmor, *Interpretation and Legal Theory* (Oxford: Oxford University Press, 1992) 21: 'paradigms do not function like rules. They can be respected and emulated, but not followed . . . Deviating from an established paradigm . . . does not necessarily manifest a misunderstanding. Unconventional interpretations, idiosyncratic or crazy as they may be, are nevertheless possible interpretations'.

[38] P Devlin, *Samples of Lawmaking* (London: Oxford University Press, 1962) 2. This is not to say, of course, that common law judges do not persist in favouring 'pseudo–objective motivation'. For a discussion of rhetorical forms purporting to mask subjective discourse, see MM Bakhtin, *The Dialogic Imagination* (C Emerson and M Holquist (trs), Austin: University of Texas Press, 1981) 305–331.

[39] R Goff, 'The Search for Principle' (1983) 69 Proceedings of the British Academy 169, 185–186.

[40] Cf M Oakeshott, *Rationalism in Politics* (London: Methuen, 1962) 62.

[41] CC O'Brien (ed), E Burke, *Reflections on the Revolution in France* (London: Penguin, 1968) 187 [1790].

to the second branch of the argument. The contention can best be addressed as follows (the words are Frederick Schauer's): 'the ability to extract a rule from a series of cases is impeded by the phenomenon of underdetermination. No one rule is uniquely derivable from the series of previous decisions, and thus a multiplicity of extensionally divergent rules would satisfy the constraint of being compatible with all of the members of that series'.[42] Consider the judicial decisions in *McLoughlin v O'Brian*,[43] *Attia v British Gas plc*,[44] *Alcock v Chief Constable of South Yorkshire Police*[45] and *Frost v Chief Constable of South Yorkshire Police*.[46] To borrow from the language of an appellate judge, '[a]ll these cases depend on their own facts and render generalisations—tempting though they may be to the legal or social analyst—wholly out of place'.[47] In the words of Tim Murphy, 'adjudication functions in terms of a plurality of circulating instances and examples, hints and suggestions, allusions and intuitions, which in some sense always defer the "real thing" '.[48] And even if renditions by later judges of patterns which they perceived as having emerged from discrete and particularistic judicial interventions could be notionally understood as 'rules', such apprehensions would not mean that common law decisions state rules. There is an important distinction between interpreters of judicial decisions stating that judicial decisions state a rule and judicial decisions stating a rule.[49] In any event, any such 'rule' would have to be formulated in a case. As I maintain, however, no individual case can be regarded as stating a 'rule' at common law. Hence: 'To represent [the common law] as a systematic structure of rules is to distort it; it is to represent as static what is essentially dynamic and constantly shifting'.[50]

[42] F Schauer, *Playing by the Rules* (Oxford: Oxford University Press, 1991) 184–185.

[43] [1983] AC 410, HL.

[44] [1988] QB 304, CA.

[45] [1992] 1 AC 310, HL.

[46] [1999] 2 AC 455, HL.

[47] *Re T (A Minor)* [1997] 1 WLR 242, 254, CA (Waite LJ). See also *Caparo Industries plc v Dickman* [1990] 2 AC 605, 635, HL: 'the most that can be attempted is a broad categorisation of the decided cases according to the type of situation in which liability has been established in the past in order to found an argument by analogy' (Lord Oliver).

[48] WT Murphy, *The Oldest Social Science?* (Oxford: Oxford University Press, 1997) 113.

[49] Two American judges express this point well. See OW Holmes, 'Codes, and the Arrangement of the Law' (1931) 44 Harvard L Rev 725, 728: 'judge-made law [is] never authentically promulgated as rules, but [is] left to be inferred from cases' [1870]; J Frank, *Law and the Modern Mind* (New York: Coward-McCann, 1949) 127–128: 'The business of the judges is to decide particular cases. They, or some third person viewing their handiwork, may choose to generalize from these decisions in the cases of Fox vs. Grapes and Hee vs. Haw and describe the common elements as "rules". But those descriptions of alleged common elements are, at best, some aid to lawyers in guessing or bringing about future judicial conduct or some help to judges in settling other disputes. The rules will not directly decide any other cases in any given way, nor authoritatively compel the judges to decide those other cases in any given way; nor make it possible for lawyers to bring it about that the judges will decide any other cases in any given way, nor infallibly to predict how the judges will decide any other cases. . . . The law, therefore, consists of *decisions*, not of rules' [1930].

[50] GJ Postema, *Bentham and the Common Law Tradition* (Oxford: Oxford University Press, 1986) 10. See also TM Cooper 'The Common and the Civil Law—A Scot's View' (1950) 63 Harvard L Rev 468, 470, who notes that the common law judge operates '*solvitur ambulando*'.

An appreciation of the common law may be reinforced through a cursory contrast with civil law systems which, as I remarked previously, feature a different epistemological framework. In both legal traditions, legal agents operate by way of a logic relative to antecedents (rather than a logic relative to consequences), that is, they relate particular circumstances back to sets of antecedent premises (be they judicial decisions or statutory enactments) and search for some way to make the former match the latter.[51] Civil law systems, however, emphasize a schematic pattern—which can be traced to the Gaian institutional model—whereby the normative coherence of a given ordering of *regulae iuris* is key. A civil code, for example, is a cosmology. It attests to an effort to totalize or to produce absolute knowledge reduced to categories, typologies, and polarities. With a code, the world is abstracted through a process of mental ordering: it is temporalized and spatialized. To a civilian, once the law has fulfilled its diacritical function by separating what it wants to embrace from what it does not and after the experienced life has been described by the law in the language of basic rules, the existing world has *thereby* been captured. The words used in a code, beyond covering a whole area of law, account for the whole field of *possibility*: 'The result is a body of scholarly literature that seeks to create doctrinal consistency similar to the organic integration of the code itself and judicial opinions that, far from showing how the present case fits with the facts and categorizing concepts of prior decisions, demonstrates the place of the particular case in the provisions of the code, its interpretation, or its spirit'.[52] The operating model is, in sum, of the 'if–then' type.[53]

To talk of common law 'rules' (or to refer to 'a court ruling') is, therefore, to talk loosely. The common law is preoccupied with 'the apprehension of regularities rather than the knowledge of rules'.[54] It is, at best, governed by the generative principle of regularized improvisation. At common law, the 'normative purchase' is not provided by the supposed rule but rather by whatever factors are used to determine whether a given understanding of a prior decision should be modified or applied.[55] The only sense in which one can speak of common law decisions as rules is as 'rules of thumb'.[56] Not surprisingly, Schauer aptly concludes that 'it hardly pays to speak of them as rules at all'.[57] One will

[51] See J Dewey, 'Logical Method and Law' (1924) 10 Cornell LQ 17.

[52] L Rosen, *The Anthropology of Justice* (Cambridge: Cambridge University Press, 1989) 55.

[53] This qualification is not called into question by the fact that, as Paul Ricoeur observes, there always remains a 'hiatus' between the clearest rule and its application so that the concrete (judicial) decision, as it adapts the rule to fit a unique situation, always fulfils an interpretive role: P Ricoeur, *Philosophie de la volonté* I: *Le volontaire et l'involontaire* (Paris: Aubier, 1950) 165.

[54] Murphy (n 48 above) 151.

[55] F Schauer, *Playing by the Rules* (Oxford: Oxford University Press, 1991) 177. See also J Vining, *The Authoritative and the Authoritarian* (Chicago: University of Chicago Press, 1986) 45: 'What are called "the rules laid down by a decision" are verbal formulations of the reasons relied upon by a decision maker in making the decision. Those reasons are values, importances; any decision maker acting in a particular role necessarily gives relative weights to them in making a particular decision'.

[56] F Schauer, 'Is the Common Law Law?' (1989) 77 California L Rev 455, 455.

[57] ibid 456.

accordingly find contemporary philosophers,[58] historians,[59] and comparatists,[60] who have all explicitly stated that the notion of 'rule' is 'alien' to the common law.[61] Already, though, Bentham had reached a similar outcome: 'As a system of general rules, the Common Law is a thing merely imaginary'.[62]

It should greatly matter to a comparatist that English lawyers and scholars who have considered the issue do not themselves think of the common law in terms of rules. A meaningful understanding of common law thought must compel observers to comprehend what David Sugarman calls the 'omnipresent irrationality' and 'the tenacity of indigenous empiricism' that characterize English law.[63] For civilians simply to project their own understanding of 'rule' in an attempt to capture the local sociological colour of the common law's experience of law and of law-in-society shows inadequate knowledge of their 'object' of observation and lack of empathy for it. To be sure, civilians will never be common law lawyers but they will attain a closer approximation to the common law mind as they garner renewed awareness and heightened respect for the common law's idiosyncratic experience of legal ordering. This enhanced appreciation, in turn, will benefit from an awareness of sociological findings to the effect that the English 'feel definitely uncomfortable with systems of rigid rules', that there is even to be found in England 'an emotional horror of formal rules', and that the English 'pride themselves that many problems can be solved without formal rules'.[64] After all, 'the specific legal practices of a culture are simply dialects of a parent social speech' and there is no reason why a legal culture should be expected to 'depart drastically from the common stock of understanding in the surrounding culture'.[65]

Civilians must accept, ultimately, that while they are 'here', the other that is the common law tradition is 'elsewhere', that 'here' is not interchangeable with 'elsewhere', and that what lies 'elsewhere' deserves to be elucidated, as much as possible, *on its own terms*—which, incidentally, requires one to travel, sojourn,

[58] Eg NE Simmonds, *The Decline of Juridical Reason* (Manchester: Manchester University Press, 1984) 114–119.

[59] Eg AWB Simpson, 'The Common Law and Legal Theory' in *Legal Theory and Legal History: Essays on the Common Law* (London: Hambledon Press, 1987) 366–382. Elsewhere, Simpson writes that the 'common law, unlike a good lettuce, is never crisp': *Invitation to Law* (Oxford: Blackwell, 1988) 73.

[60] Eg CJ Hamson, 'The Comparative Study of Law' in CJ Hamson and TFT Plucknett, *The English Trial and Comparative Law* (Cambridge: Heffer and Sons, 1952) 9; JA Jolowicz, 'Vue générale du droit anglais' in JA Jolowicz (ed), *Droit anglais* (Paris: Dalloz, 1986) 58–60.

[61] R Cotterrell, *The Politics of Jurisprudence* (London: Butterworths, 1989) 22.

[62] J Bentham, *A Comment on the Commentaries* (Oxford: Oxford University Press, 1928) 125 [c. 1775].

[63] D Sugarman, *In the Spirit of Weber: Law, Modernity, and 'The Peculiarities of the English'* (Institute for Legal Studies, University of Wisconsin–Madison Law School, 1985) 23 and 38, respectively.

[64] G Hofstede, *Cultures and Organizations* (London: McGraw-Hill, 1991) 145, 121, and 121, respectively.

[65] RW Gordon, 'Critical Legal Histories' (1984) 36 Stanford L Rev 57, 90.

and immerse oneself 'elsewhere'. Only then can a genuine dialogue across legal traditions be sustained. Thus does the comparatist find himself constantly straddling the 'crossroads of separations'.[66]

[66] A Artaud, 'Fragments d'un journal d'enfer' in *Oeuvres complètes* I (Paris: Gallimard, 1976) 115 (*'carrefour des séparations'*) [1926].