

LEGAL SENTIENCE AND THE PROBLEM OF THE INSTANT: A CRITICAL ASSESSMENT OF THE TEMPORAL STRUCTURE OF PRECEDENT AND ITS IMPLICATIONS FOR LEGAL AUTHORITY

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Abstract – This paper assesses the authority of precedent from a phenomenological standpoint. Phenomenology distinguishes between two temporal models. One describes time in an idealised form, as a divisible chain of instants or events. The other looks at lived temporality as fluid and indivisible duration. In the system of precedent, we witness an interaction of both models. The legal order is constructed from slices in time that become the building blocks of future judgments. Precedents are binding for a potentially indefinite period and carry transcendental weight. But they are also entirely dependent on the occurrence of disputes in the lived world. If the law's structural stability is to serve as a source of its authority, it is undermined by this paradox because its structure lacks the consistent input it demands. But this paper considers an alternative source of authority: the common law's awareness of its structural shortcomings, and the mechanisms it has developed to overcome them.

*What, then, is time? If no one ask of me, I know; if I wish to explain to him who asks, I know not. Yet I say with confidence, that I know that if nothing passed away, there would not be past time; and if nothing were coming, there would not be future time; and if nothing were, there would not be present time.*¹

A. INTRODUCTION

This paper investigates one of the philosophical currents underlying the operation of the common law. This current relates to the passage of time, and time's relationship with the decision-making process. In particular, I want to look at the concept of the legal precedent, to try to understand its temporal structure and to test its adherence to perceived notions of

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¹ St. Augustine, *Nicene and Post-Nicene Fathers: Series I, Vol I, Confessions*, Trans. Schaff, P., Book XI (Hendrickson 1994), ch. 14.

temporality. As such, this is an exercise in applied phenomenology. But more than that, it is an attempt to develop a new angle for the discussion of legal authority. My hunch is that in the common law, legal authority is explained not in terms of the law's responsiveness to social convention, but in the stability and continuity of a particular temporal standpoint. In my assessment of this hypothesis, I will define this temporal standpoint by reference to two measures of time that are most clearly manifested in the common law order: the instant and perpetuity. At both the systemic level—that is, in the very system of precedent—and the internal level of individual cases, there is a complex interplay of these two elements, which creates the legal scaffolding that is then furnished with the substantive content of the law. As this study is interested in the systemic temporal structure of the common law, I will not confine myself to one area of law, but instead draw from a variety of areas where these issues are most clearly observed.

First, a confession: the seed for this paper comes from a question posed by Jacques Derrida: “what if the law, without being itself transfixed by literature, shared the conditions of its possibility with the literary object?”² One implication of this question (and this observation is especially pronounced in relation to the common law) is that the law could be described as having an essentially narrative structure and that its temporality is established by strict linear causality—that is, by adherence to precedent. Derrida continues:

“Though the authority of the law seems to exclude all historicity and empirical narrativity, and this at the moment when its rationality seems alien to all fiction or imagination—even the transcendental imagination—it still seems *a priori* to shelter these parasites.”³

Derrida is, of course, writing about the civil law system, where legal precedent plays a less central role than it does in common law. Without delving into literary theory, I am interested in the idea that the common law system involves the accumulation of rules developed and applied in a particular temporal order. Like the chapters of a novel that constitute its plot and lead to a convincing and coherent conclusion, legal judgments construct a picture of a certain judicial order and, ultimately, reinforce the authority of lawmakers. On this view, common law authority, or the power

² Jacques Derrida, ‘Before the Law’, in Derek Attridge (ed), *Acts of Literature*. (Routledge 1992), 191.

³ *ibid*, 190.

to bind others—the grand conclusion of the legal narrative—is dependent on an internal coherence of the system and its rules.

In the old English Court of Chancery, a claim seeking the enforcement of an equitable right was required to prove “an ancestry founded in history and in the practice and precedents of the court administering equity jurisdiction.”⁴ This is an appropriate description for the analytical process that governs common law trials insofar as it calls for the discovery of existing rules applicable to a given scenario. But it is also a bold statement, loaded with significance in the context of this discussion. The language of ancestry, of history and of narrativity suggests the existence of particular events occurring in linear succession that can be amassed into a larger whole. Each precedent is a building block of future decisions. Narrative form is also discernible in some legal instruments. The contract, generally speaking, lays out a series of conditions that become binding at the moment the document is signed. The will disposes of property at a future date subject to certain conditions. The date of birth is a legal reference point for the allocation of rights “to participate in the democratic life of the [European] Union”⁵ and the imposition of related responsibilities. In English law, property ownership is a purely temporal concept.⁶

These sketches point to a legal fixation with a constructive model of time. That is, one capable of being constructed from basic units: instants. They determine legal timetables, trial dates, the number of hours a lawyer can bill for and lengths of prison sentences.⁷ We are culpable at the moment the criteria of legal culpability intersect. We become ‘valid’

⁴ *Re Diplock* [1948] Ch. 465, 481.

⁵ Treaty on the European Union, Title II, Article 10.

⁶ See Latham CJ in *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 277: “no subject can hold land allodially—he can only own an estate in land.” ‘Allodial’ is defined in opposition to ‘feud’ (see ‘Feud’, definition 2) in Merriam-Webster’s Collegiate Dictionary (Eleventh Ed., Merriam-Webster Inc. 2004). Accordingly, it refers to land that is held absolutely, as opposed to ‘in feud’, i.e. under the feudal system. The feudal ownership of land involved renting land (a temporal act) from the allodial owner of land in a spatial sense—the Crown. The Crown remains the absolute owner of land to this day, and the ‘estate in land’ refers to the slice in time in which one’s rights over a particular property exist.

⁷ French generally describes the importance of time—and of new scientific means of temporal measurement—on the legal system. She develops a taxonomy of different theories of time, including those in philosophy, science and psychology, then shows how these apply in legal scenarios generally. This wide approach serves to open the discussion for the more precise application of its ideas. Rebecca R French, ‘Time in the Law’ (2001) 72 *University of Colorado Law Review* 664-665, 745.

citizens at the date of our birth. Something happens in the instant in time: legal weight is suddenly ingrained into the fabric of lived experience.

But legal temporality is more richly textured than this. It goes beyond the language of historicity and precedent. There are strict liability crimes—standards of culpability that bypass the constructive element of the crime—and retrospective and prospective laws. While beyond the scope of the present discussion, these issues point to the importance of temporal processes in legal decision-making. Indeed, little study has been conducted on the law's temporal structure, but it is an area with serious theoretical ramifications, as one role of judges and legislators is to alter lived temporality by enacting static rules that are unconstrained by time's fickleness. For this reason, “[t]ime is always necessary in the law.”⁸

Here, the central tension of this discussion begins to crystallise. The tension is between temporality in the lived world, which is associated with organic and indivisible movement, and the idealised world of mathematical time, which compartmentalises lived experience into symbols and formulae. To understand how these mechanisms conflict in the process of legal decision-making requires a critical analysis of these ways of thinking about time.

One of my broad aims in approaching this paper has been to look at how legal decision-making takes place from a position of temporal authority. In the common law, a court has the power to apply precedent (both hierarchical⁹ and temporal) in order to reach a conclusion. The case may then be referred to a higher authority, but the final decision establishes a legal benchmark for future conduct. The instant at which the decision is made represents the moment at which legal value is imparted into lived experience, and that unit of legal decision-making is binding indefinitely until it is revised. It is not entirely clear how the law justifies this use of temporal precedent and how the application of static temporal units to

⁸ French (n 7) 663.

⁹ The hierarchy in the United Kingdom is a system of courts. At the bottom of the hierarchy are the subordinate courts: the County Courts and Tribunals for civil cases, and the Magistrates' Courts for criminal cases. Higher up, three divisions of the High Court operate both as civil courts of first instance and as appellate courts for criminal and civil cases, while the Crown Court deals with criminal cases, both at first instance and on appeal. Then there is the Court of Appeal, which has a criminal and civil division. Finally, there is the Supreme Court. The decisions of each court within the hierarchy establish precedents that are indefinitely binding on all lower courts, and only the Supreme Court has the discretion to overrule its previous decisions. Despite this, a departure from precedent by the Supreme Court will be circumscribed by legislation; Parliament is the final arbiter in English law.

events in the dynamic lived world affects the law's authority. In exploring this question, it is important to begin by looking at the ontology of time itself: what kind of thing is time, what is its structure, what is the process of reasoning by which we come to understand it?

B. THEORIES OF TIME

We can distinguish between two understandings of time. One is the realist position, also known as Newtonian time. On this model, time is independent of any external factors; it is a sequential ordering of events. This structure allows for the divisibility of time into measurable units and time is the packaging that accumulates those units.¹⁰ The other view, which has become a cornerstone of phenomenological accounts of time, is that time consists of indivisible duration. It is thematic in that it presents us with a reality that cannot be deconstructed. It is more whole.

Bergson identifies each view with a different category of knowledge.¹¹ Realist time gives us relative knowledge, which can only be obtained through the observation of an object from without. It is knowledge that is contingent on the observer's point of vantage, and so it yields an imperfect and incomplete view of the object. Duration, by contrast, is associated with absolute knowledge because it is internal to the object being observed. To have absolute knowledge of an object is to be "in sympathy" with its states of flux—to know it perfectly.¹²

We obtain relative knowledge through the process of analysis. The observed object is reduced to "elements already known... elements common both to it and other objects".¹³ Thus, we ascribe meaning to objects by comparison with known benchmarks; we are able to define slices in time as seconds, weeks or years. Yet we do not feel instants, and we are incapable of precisely identifying a temporal unit in which something occurred. The precise identification of the instant would require us to refine our measurement techniques *ad infinitum*. This process suggests that the instant cannot be precisely located within a temporal continuum; it is an ideal.¹⁴

¹⁰ Ned Markosian, 'Time' Stanford Encyclopaedia of Philosophy (2008), available at <http://plato.stanford.edu/entries/time/#3>.

¹¹ Henri Bergson, *An Introduction to Metaphysics* (1912) T.E. Hulme trans. (Hackett Publishing 1999).

¹² *ibid* 23.

¹³ *ibid* 24.

¹⁴ Michael Dummett, 'Is Time a Continuum of Instants?' *Philosophy* (CUP 2000) 497-515.

Instead, we use language to assign a unitary quality to our otherwise indivisible experiences. We define time on a macro and micro scale.¹⁵ On one hand, the unit of the second, minute or hour helps us put duration into a kind of theoretical perspective: we define our place in a given setting within a particular temporal context (e.g. the trip took 30 minutes; I signed the document at 15:30). When we ask for the time, we are given a specific number of hours and minutes; a Google search for ‘time’ yields the current time in its geo-spatial context. These temporal units are firmly embedded in our everyday language. On the other hand, we use the notion of the week, month or year to contain groups of experiences. These macro measurements of time already represent a breakdown of the concept of the temporal unit: many things occur over the course of a week or month, and they begin to resemble the temporal theme more than they resemble any identifiable unit. When we look at patterns of time on the macro scale, we begin to see time as a cultural force: it is cyclical, symbiotically attached to daylight cycles, the changing seasons, the arability of land.

Absolute knowledge is obtained through intuition. Bergson understands intuition as an ‘intellectual sympathy’ with an object—a state of understanding the object from within.¹⁶ Objects in the lived world exist in a state of Heraclitean flux—they experience no two identical states. If we cannot know an object in its innate state, our understanding of it is limited by analysis: we compare the states we witness to states that we already know, thus replicating elements that are in fact unique. In our experience of temporality, intuition allows us to dispense with the metaphors and symbols of Newtonian time, because our knowledge of the object is already perfect.

Our understanding of time is thus governed by its constitutive duality: it comprises a mathematical model of constructed time, and experienced duration, which is extended and indivisible. Husserl developed the idea that the starting point of perception is the ‘natural standpoint’. This is a taking for granted of the totality of the world and its phenomena that is untarnished by the language of philosophy. We perceive objects and phenomena, and they exist without the need for ‘conceptual thinking’.¹⁷ We naturally ascribe certain values to external objects in the world. In that sense, lived experience is cultural, rather than scientific or otherwise

¹⁵ Liaquat Ali Khan, ‘Temporality of Law’ (2009) 40 *McGeorge Law Review* 59-61.

¹⁶ Bergson (n 11) 23.

¹⁷ Edmund Husserl, *Ideas* (1913), W.R. Boyce Gibson trans. (Humanities Press 1976) 101.

systematic. The objects we perceive are beautiful or ugly, inviting or frightening; people we communicate with are friends or foes, superiors or colleagues. Our responses to these elements create a “world of values, a world of goods, a practical world.”¹⁸ The natural standpoint, then, relates to a pure ‘lived-world’ existing before the language of philosophy, science and mathematics, which strive to explain experience.

Our natural standpoint to time consists of our inherent acceptance of its passage and influence on the world, without the attempt of measurement or justification. On the other hand, Bergson argues that “abstract time”, understood theoretically as a series of instants, is an artificial construct that appears in mathematics and suits human language. It is distinct from “concrete duration”, which is the succession of events without distinction, or experienced time passage. Going further, Bergsonian duration is constructed as a kind of temporal ouroboros: each indefinite instant,¹⁹ having moved to the past, feeds the present and culminates in an ever-progressing temporal sum.²⁰

The analysis of our intuition of duration is expressed in language. We ascribe ideal qualities to experience, to measure and explain what we see and feel. Thus, we enter the post-scientific world where objects have theoretical definition, and are explicable in ideal terms. The discord between the basic nature of raw experience and the fullness of the understood world has been a recurring theme in Western philosophy. It applies equally to our understanding of time. Time in its experienced form simply passes, but we grant it structure by describing it in unitary terms. And when we grant it meaning, time’s structure comes alive; it becomes “a delineator of rights that are initiated and terminated at certain times... [an] organiser for telling us when we are supposed to go to lunch...”²¹

On Bergson’s view, an empirical model of time would require “a multiplicity of parts or units, which are absolutely alike.”²² This, he says, is the product of a confusion of duration in a spatial sense and in a temporal sense. Space, Bergson argues, is a homogenous and quantitative multiplicity. When time is understood as a series of parts occurring in spatial succession—of discernible lines on a ruler—it is reduced to a

¹⁸ *ibid* 103.

¹⁹ I use ‘instant’ here for want of a more precise term. The instant is, in fact, identifiable, whereas Bergsonian duration is based on the idea that we cannot distinguish between events; each successive moment is part of a larger flowing whole.

²⁰ Henri Bergson, *Time & Free Will* (Elibron Classics 2005) 79.

²¹ French (n 7) 665.

²² Bergson (n 20) 76.

measurable causal model: each instant causes the subsequent one, and is dependent on the one that came before; we “count the points of duration by means of points in space.”²³ But time’s passage cannot be understood in terms of homogenous instants, occurring in ideal linear succession, with each instant being distinguishable. Instead, Bergson likens it to the unwinding of a spool. Duration follows a constant and indivisible thread. To cut it would be to create two events from one. Yet this metaphor, Bergson concedes, is imperfect: the unwinding of the spool can still be understood in linear terms, since the spool has a continuous and predictable form. In duration, no two states are comparable.²⁴ So Bergson suggests:

“Let us take our mind off the space subtending the movement and concentrate solely on the movement itself, on the act of tension or extension, in short, on pure mobility. This time we shall have a more exact image of our development in duration.”²⁵

At first, this view appears to constitute a push away from empiricism and the analytical methods of science, and indeed the law. Yet it would be wrong to come to such a conclusion. Bergson discusses the processes of analysis and intuition as complementary. It is possible, he says, to pass from intuition to analysis, or to ascribe to an experienced thing an idealised quality. But the contrary is impossible: one cannot start at analysis and derive intuition from it. Analysis merely serves as a convenient reminder of what has already been.²⁶ The process of analysis yields nothing more than static elements, without replicating the state of constant flux in itself. Yet intuition allows us to revise the products of analysis as we experience new things. This yields nothing more than “a clumsy imitation, a counterfeit of real movement, but this imitation is much more useful in life than the intuition of the thing itself would be.”²⁷

That measured time is a conceptual ideal which does not firmly correspond to fundamental temporal intuitions has implications for any institution founded on a modular temporal model. When trying to decode the temporal dynamics at work in the common law system, I think that we need to begin by distinguishing between what we might call ‘modular time’, representing the ordered sequence of events, and time as a

²³ *ibid* 78.

²⁴ Bergson (n 11) 26.

²⁵ Henri Bergson, *The Creative Mind: An Introduction to Metaphysics*, trans. Mabelle L. Andison (Citadel Press 1992) 165.

²⁶ Bergson (n 11) 41-42.

²⁷ *ibid* 44.

phenomenological theme, or a particular perception of the fluid and constant relationship between events. The modular model comprises instants in time strung together to form a narrative. The temporal theme is a duration of indistinct events. A careful interaction between the two exists in the common law. The instant serves as the point of law's creation, after which it passes into the grand theme of the law: a decision becomes perpetually binding until a subsequent case revises it.

The law, like science, has dominion over Bergsonian analysis. Yet it would be wrong to dismiss its authority on the grounds that the products of its analysis are detached from the 'authentic' state of duration. The question to ask, as Bergson notes, is whether analysis follows from intuition in legal reasoning, or whether the law seeks to define intuition itself.

C. THE LEGAL STANDPOINT

Every legal decision fits within a broader structure that seeks to provide continuity within the legal order, to deliver justice when disputes arise and, particularly within democratic political regimes, to balance the powers of the executive and legislative branches of government. This structure demands substantive content to furnish it with meaning. This is drawn from the particular facts of individual cases, which serve as benchmarks by which to judge and apply law; the similarity of a precedent to a contemporary legal scenario will serve as a trigger for that precedent's application. Then, new law will be developed. In simple terms, the law can be described as having an external structure with a corresponding set of internal facts, and the combination of the two yields the substantive content of the law.

I want to be clear in distinguishing these two levels of legal decision-making. The first is the systemic structure of the system of precedent—the scaffolding of temporal and hierarchical precedent through which factual circumstances of particular cases are processed to deliver judgments. A judgment occurs at a time and is indefinitely binding until it is overturned. A series of judgments constitutes the building blocks of the system of precedent. This temporal structure is distinguished from Bergsonian time in an important way. Bergsonian time incorporates past events into the present. On this model, the effect of the past is cumulative—the present is already incorporated into the past as it occurs. Time progresses in a fluid manner, always feeding itself. This constitutes duration. The system of legal precedent also depends on the past for continuity—an established

judgment becomes a tool for applying rules in the present if its facts correspond to those of a present legal situation. But this past is stagnant and contained to an instant; it is a slice of time that is clearly marked and separated from the temporal continuity of the lived world. The system of legal citation, which always includes a date, freezes a judgment in a particular temporal context. Old judgments are locked away in books where they gather dust. In the world of the legal precedent, there is no continuity of duration.

The other element of the system of precedent is the internal level of the individual case. This stands in contrast to the timelessness of precedent generally, since it exists in a contemporary setting, at the time the dispute occurs. There is an interesting interaction between these two levels. One exists indefinitely and creates structural coherence within the common law system. The other occurs spontaneously and is sucked into this structural framework when a triggering event brings a dispute to light and the governing legal order demands its resolution.

We have a clear recognition that the ontology of the common law is one of ‘ancestry’. This chain of historical precedent is the hallmark of the system; the passing of law from one precedent to the next is one of its structural features. Its importance is brought to light in the application of precedent on the internal level of the individual case. This has important parallels to Bergson’s concept of analysis: to apply a legal precedent is to compare a new element with elements drawn from the repository of prior experience. It is to “express a thing as a function of something other than itself.”²⁸

The function of the system of precedent is the resolution of disputes, which is done with reference to decisions made by individuals at precise moments in time. This function has been recognised as an intrinsic component of the common law—of the legal standpoint.²⁹ The law will not hold me accountable before I have committed a crime, and the law will not seek to impose penalties if I have not breached a contract. It will do so only where it can identify an instant in which a violation has occurred. This instant marks the point of law’s bindingness, and without these triggering instants, the law is dormant. Of course, there are certain temporally

²⁸ Bergson (n 11) 24.

²⁹ Referred to as the legal attitude in Wayne M Martin, ‘Time to Decide’ Society for Existential Phenomenology Conference (Christchurch, Oxford, 25-28 June, 2010) 11, available at <<http://privatewww.essex.ac.uk/~wmartin/wmcvA4.pdf>>, to which I credit this idea.

extended legal instruments. The contract is one example. Its bindingness is confined to a precise timetable, within which the obligations it establishes need to be fulfilled.³⁰ But the contract is only a precautionary and guiding document until the point that it is breached. Then the law comes into play.

The corollary of this is that laws exist for a temporally indefinite period. A law—that is, both a statutory provision and a decision by a common law court—will continue to bind the court system until it is repealed or amended. This requires a dispute to trigger such an amendment—something needs to occur for judges to dust off the books of legal precedent and consider the rules they contain. In some cases, the dust has grown thick. A case from 1568, which held that any deposits of gold or silver automatically belong to the crown, remains valid law to this day.³¹ Over time, numerous principles have been added to this royal prerogative: all rights in petroleum, including natural gas and mineral oil, are now also vested in the crown.³² As it stands, these laws build upon the early principles of the royal prerogative, which is indefinitely binding.

The law draws on temporal precedent to interpret a particular moment. Thus, modular time is a constitutive element of the legal structure. Each instant in time where law is created forms a basic unit of legal packaging, which then contains the facts and decisions of particular cases. These decisions are imbued with a special significance: unless overturned or revised, they are binding forever. Thus, legal precedent acquires a transcendental quality: it is an immutable and unchanging source of legal truth.

The law takes for granted that legal events occur in structured, linear progression. And it makes use of a temporally loaded vocabulary to describe this progression on both a macro and micro scale: ‘history’, ‘ancestry’, ‘precedent’, and even terms like ‘*scintilla temporis*’: a sliver in time that once marked the moment where a legal interest in a mortgaged property was created.³³ Within the law is embedded a precise language of

³⁰ In other words, the contract can be distinguished from a law generally by its power to require particular behaviours from the contracting parties, rather than simply forbid certain practices.

³¹ *Case of Mines or R v Earl of Northumberland* (1568) 1 Plowd.310, 75 ER 472.

³² Petroleum Act 1998.

³³ *Abbey National Building Society v Cann* [1990] UKHL 3; I mention this to highlight the specificity of temporal tools at the disposal of common law judges. This particular tool creates a ‘sliver in time’ between the creation of a proprietary interest in favour of the mortgagor and the granting of a mortgage in favour of a mortgagee. This serves to give temporal precedence to one event that, for all practical purposes, occurs simultaneously with another.

modular temporality that acts as a kind of structural scaffolding built from statutes and judgments. But there is a distinction between the legal position on time, and our inherent perception of it. Bergsonian ‘concrete duration’ does not discriminate between instants. It is the seamless interplay between heterogenous events that precludes the repetition, or even direct identification, of any particular instant. So the human natural standpoint is characterised by a passive recognition of time’s fluidity; this is built into our perceptual mechanisms. The legal standpoint is characterised by the assumption that time is modular. It is a constructed reality that requires triggers to progress. It is only imbued with meaning once these triggers force the application of existing rules to new circumstances. And the meaning of legal judgments on a structural level is significant.

On the internal level, too, we see a strong preference for modular time. Cases are constructed from carefully constituted factual scenarios. The assessment of these scenarios, in light of examples and rules drawn from precedent, leads to a binary outcome, and sets an example for further trials to follow. In the criminal law, a series of cases established that a crime requires the concurrence of *mens rea* and *actus reus* – that is, it seeks to identify the temporal instant where, broadly, the guilty mind meets the unlawful act (criminal lawyers will forgive the imprecision of this language). In one case,³⁴ four men took a victim to a hut and got him drunk. They had earlier planned to kill him, and when they struck him in the head with a blunt object, the *mens rea* to kill was present. The four men rolled the body up a hill and disposed of it by pushing it off the edge of a cliff, hoping to make it seem like the fall caused the death.

But the victim hadn’t died. The blow caused merely him to lose consciousness and he died of exposure at some point after the fall from the cliff. The argument before the court was that at the time of death, there was no *mens rea* to kill. The four men only intended to dispose of a body, and the only identifiable intersection of *mens rea* and *actus reus* concerned their assault on him, which did not cause his death. But the court rejected this argument, saying that it is “impossible to divide up what was really one transaction.” To call a series of distinct events a part of one “transaction” is to try to conform real-world events to a particular understanding of temporality and causality. It is to acknowledge that the law is strict in requiring events to exist within a particular temporal packaging: the instant. This is what Bergson referred to when he described the confusion between

³⁴ *Thabo Meli v R* (1954) 1 AER 373 (PC).

events in space and time. Trying to imagine a line on a ruler or a particular number, we need to lay out the constitutive parts of that unit on a spatial plane, and visualise where we want to end up. Thus, when we are thinking of the number three, we think of it as being constituted from three digits, or imagine the numbers one and two preceding it in a causal sequence.³⁵ This quantum leap from chronology to legal causality is one that is demanded by the common law. And it requires events to be structured such that this causal relationship is clearly defined. But when the structure of real-world events is not parcelled out in this way, difficulties arise.

This is an example of a dilemma that I think is central to legal decision-making, and to phenomenology. It involves the reconciliation of a modular understanding of temporality with the reality of experienced events. Courts are often forced to adapt precedent in a way that suits the particular circumstances of a case, but these circumstances may not always be divided into distinct temporal units. The law's response in *Thabo Meli* was to look for larger temporal packaging to accommodate what was in fact a series of separate acts.

Even in subsequent criminal law decisions, the preference for the temporal instant remained central. In one case, a man committed a number of brutal acts against his girlfriend, who eventually died. It was impossible to ascertain which act killed her. The judge directed the jury to decide whether any of the acts on their own could have caused her death.³⁶ Again, the question was not whether the perpetrator caused the death, but whether a single action attributable to him at a particular time could have been its cause. Here, the act of killing is untethered from the perpetrator, and attached to a wider causal framework in which the perpetrator's guilty mind already plays a role. To put it differently, if at points t_1 , t_2 and t_3 we can show that the perpetrator had a guilty mind – a continuous intention to kill that transcended the particular instants in which his actions were said to occur – we only need to show that at one of those points his action was the realisation of that intention.

On an internal level, the legal standpoint is characterised by its binary outcome. Someone is either culpable or not, and the decision rests on whether someone's action can be traced to a particular instant and placed within established causal structures. This can swing the pendulum of culpability one way or the other. So, just as we can construct a vertical

³⁵ Bergson (n 20) 78-79.

³⁶ *Attorney-General's Reference (No 4 of 1980)* [1981] 1 WLR 705.

hierarchy of the court system, we can construct a temporal hierarchy of legal decision-making in general. The court looks at whether the right events satisfy the right conditions in the right order. The events form the factual background of a case, the conditions involve matters of precedent, and the right order refers to a kind of temporal framework in which all this has to occur (this has a particular relation to the application of precedent, which we will look at later). Each of these elements is a collection of instants. They are packaged together and present us with one of two outcomes: the case succeeds or fails.

A judgment thus occurs within the very narrow temporal framework of the instant: it is a culmination of a number of factors that result in a rule, which will remain perpetually valid until it is invoked in a subsequent case, where the court has the power to overrule it. But the binary possibilities each decision presents mean that these instants are without duration. Nothing happens over the course of a case; the case is decided, and we are left with a digital building block of future judgments. Here we have the hallmarks of the classical understanding of time as a measurable phenomenon composed of instants without duration.

I have already suggested that defining a precise unit of time is practically impossible. Rupert Read suggests that defining temporal change according to static units is, in a sense, logically unintelligible.³⁷ The law can adopt any temporal model, but the question of its authority only gains importance when we see that model departing from conventional understandings of time in a way that creates a rift between the law and society. As Bergson notes, it is a mistake to derive intuition from analysis. Yet even if we presuppose that intuition does determine analysis in legal reasoning – after all, rules flow from originating disputes in the real world – this process is undermined by what I have identified as the legal standpoint, one element of which is the requirement of events in the real world to trigger the analytical process. Instants in modular time occur with strict regularity and are amassed into a continually progressing whole – in human life, the process of analysis is never dormant. Events are analysed as they occur and the ‘counterfeit of real movement’ is continually reassessed, yielding a pale but useful imitation of duration. Legal time, by contrast, waits until a dispute occurs or a crime is committed. In that sense, the ideal of legal time is entirely dependent on imperfections in the lived world. In

³⁷ Rupert Read, ‘Is ‘What is time?’ a good question to ask?’ (2002) 77 *Philosophy* 2 193-209.

the system of precedent, then, the tension between the perpetuity of duration and the transience of the legal judgment is felt particularly strongly.

D. A TENSION BETWEEN PERPETUITY AND TRANSIENCE

In a 1789 letter to James Madison, Thomas Jefferson said that the “question whether one generation of men has a right to bind another, seems never to have been started either on this or our side of the water.” He asserted in the letter that “no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation.”³⁸ Jefferson was troubled by the idea of a static law, one that binds across generations without responding to the fluidity of culture. This worry is about the law’s dual nature: as a rule enacted at a time, and as one that binds for a potentially infinite duration.

Considering the hierarchical structure of the institutions of English law, rules that are outdated could remain binding until they reach the Supreme Court or are revised by Parliament. Individuals may find themselves culpable under relics of obsolete cultural standards or political agendas.

The arguments supporting perpetuity within the doctrine of precedent, and the attached disregard for the dynamics of cultural and political norms, cite the need for “systemic stability” within the legal system:

“The doctrine has been praised as a principle of justice and stability, which safeguards settled expectations. In one sense, the temporality of precedent is past-oriented since the past (t_1) holding controls the present (t_2) holding. Seen differently, precedent enforces timeless (∞) law that transcends the qualitative social difference between the past (t_1) and the present (t_2).”³⁹

But can perpetuity serve as a benchmark of legal stability? Earlier, I wrote about the tools we have developed to measure time. Specifically, I discussed the cyclical nature of macro time, which is rooted in an understanding of natural patterns and the transience of life. The date of birth confers upon a citizen certain rights and responsibilities within his political community. Similarly, the date of death terminates those responsibilities. Each individual, and each human endeavour, can be said to

³⁸Thomas Jefferson, *The Papers of Thomas Jefferson*, Julian P. Boyd et al (eds) (Princeton University Press, 1950).

³⁹Khan (n 15) 84.

have a termination date beyond which any talk of legal responsibility becomes incoherent. This is reflected in a new transcendental philosophy, which adopts human intuition as its guide. Thus, truth becomes subjective and is untethered from any immutable and eternal sources.

This natural order is reflected in the attitude of common law courts and legislative bodies, which are reluctant to accept any legal arrangement of infinite duration. A contract cannot be established for an indefinite period, but must have a specific termination date.⁴⁰ In the law of trusts, there is a rule against perpetuities.⁴¹ Culpability for non-serious crimes expires after a time dependent on the severity of the sentence,⁴² and even sentences for serious crimes have a limited temporal scope. Even symbolic sentences that exceed a criminal's expected lifetime are calculated with the lifetime as a guiding benchmark; the sentences may be given in multiples of the lifetime. In human endeavours, as in proclamations of the law, temporality is directly attached to natural patterns of life and death.

If we return to our initial question – what if the law shares the narrative structure with literature? – we see clearly some of the tensions that arise. On a structural level, the law is tethered to an order that relies on the perpetuity of rules: this is a hallmark of its stability. But, viewed as sources of truth, these rules take on a transcendental character. Until overturned, the validity of a precedent established by the Supreme Court is absolute. But it is also detached from the needs and intuitions of contemporary society. As such, it is an external source of truth that is applied to resolve human disputes, which have an individual and contemporary character.

At the same time, the internal structure of the law requires the recognition of shifting cultural norms, but this recognition is always circumscribed by precedent. In other words, the discretion afforded to a judge by a previous ruling limits his ability to import new principles into his decision. So, the temporal packaging that contains the legal, cultural and political standards of a particular time is stored away until a triggering

⁴⁰ See, eg, cases on the requirement of certainty in property leases: *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 AC 386; *Lace v Chantler* [1944] KB 368.

⁴¹ See, generally, Law Commission, 'The Rules Against Perpetuities and Excessive Accumulations' Item 7 of the Sixth Programme of Law Reform: The Law of Trusts (1998), available at http://www.justice.gov.uk/lawcommission/docs/lc251_The_Rules_Against_Perpetuities_and_Accumulations.pdf.

⁴² Rehabilitation of Offenders Act 1974.

dispute brings it to light. Then, supposing that the original judgment was made by the right court, it emerges with all the authority it held at the point of its creation.⁴³

If we look deeper into the factual circumstances of a case, we see a similar trend. Judges apply the language of modular temporality to describe events in sequence and to construct a viable narrative for the particular purposes at hand. This sequence matters. Sometimes, it is applied on a truly micro scale: did the defendant have his fingers inside or outside the windowsill at the time the victim gave him permission to enter her room?⁴⁴ Here, the decision hinged on a matter of seconds. But it is not the duration of the activity that the courts look for. It is the placement of this particular occurrence within a compartmentalised temporal framework, which satisfies the structural requirements established in previous cases.

This is linked in an important way to our use of language. The defendant in a criminal trial will be asked to recount the order in which something happened. His answers will be drawn from memory, in which events are structured in a particular way (indeed, being of ‘sound memory’ has been named as an essential component of culpability for murder).⁴⁵ Depending on the context, a person may have arranged these events, compartmentalised them and prepared to recount them in deposition. But it is also possible that the events have become distorted, that their sequence has not been reduced to instants in memory, that they exist as a single temporal theme of indivisible duration. That is, they exist in the phenomenological model of perceived time, rather than within a wider universal temporality that can be dissected to fit the causal structures demanded by a particular case. But during a trial, the facts of the case will be repeated in varying contexts. The story might be told in chronological order and retold with reverse chronology. Just as the legal judgment is binding at a time, we get a sense of the courtroom as a static space, existing outside the dynamics of lived temporality.⁴⁶

Earlier, I wrote that the implications of the law’s temporal model are only relevant insofar as they interfere with the intuition of lived experience. On an internal level, at least, legal analysis appears to satisfy Bergson’s account of the complementarity of analysis and intuition. The common law is imposing a particular understanding of temporality on our consciousness.

⁴³ That is, subject to the rules on legal interpretation.

⁴⁴ *R v Collins* [1973] QB 100.

⁴⁵ 3 Co Inst 47.

⁴⁶ French (n 7) 701.

That is to say, it demands of us that we compartmentalise that which lacks a naturally causal and narrative order. It imposes on the imprecise temporality of the lived world a mathematical structure that serves both to clarify a situation for the purposes of establishing legal causation and to distort the actual fluid nature of events. Time in the common law is different from perceived time. It is a structured temporality that bends, twists and orders time to suit its particular demands.⁴⁷ Yet over the course of a judgment, legal time only serves to clarify and package intuition into analysis. This occurs within a relatively short timeframe and the distortion between intuition and analysis need not be more severe than is conceptually desirable. In other words, the counterfeit of courtroom time is tolerable.

But the system of precedent as a whole reveals, at least on a raw structural level,⁴⁸ a reliance on transcendental absolutes in time—on eternal principles detached from the subjective intuitions of the individuals to whom the law applies. Viewed like this, the state of the legal precedent is radicalised. It becomes a deference to the transcendental authority of the past, which undermines the uniqueness of the present. The process of contrasting a (potentially distant) point in time with the facts of a present case serves to filter out the particular temporal setting that defines the contemporary dispute. Legal meaning, then, is not derived from the subjective cultural norms of the individuals to whom the law applies, but from absolutes existing in some distinct slice in time. The precedent is deified at the potential expense of relevance.⁴⁹

E. REINING IN THE INSTANT

The structure of legal language is the structure of causation, which has two functions. One is “forward-looking: that of specifying what will happen and by what stages if certain conditions are present together. This use of cause serves to provide recipes and make predictions. It also yields the idea

⁴⁷ *ibid.*

⁴⁸ By “raw structural level”, I am referring to the system of precedent as understood independently of the whole common law judicial order, which includes Parliament, its laws and any ancillary rules that affect trial outcomes but do not originate from within the courts.

⁴⁹ French suggests, similarly, that the importance of US Supreme Court decisions imbues them with a transcendental quality: “The oracular pronouncements of the Supreme Court authorise enormous changes in American life, and large segments of the population are informed about, and pay attention to, what the Justices decide.” French (n 7) 709.

of a causal process.” The other “is backward-looking and explanatory: that of showing which earlier conditions best account for some later event or state of affairs.”⁵⁰ The legal judgment contains both of these elements: it looks to the facts of the case to establish a chain of precedent and it compares these facts to historical examples which serve both an explanatory and a guiding role: cases with similar factual circumstances can be matched together to help judges apply the most relevant rules. As discussed earlier, there is no doubt that the process of legal reasoning is the process of Bergsonian analysis, which yields relative knowledge.

The written word is the law’s agent. It forms a part of the law’s packaging,⁵¹ and carries legal principles from case to case. But language—including legal language—changes over time. The word ‘awful’ once described something that inspires awe or wonder. The word ‘invaluable’ once meant ‘without value’. Similarly, legal terms have changed their meaning. One example is the term ‘*non est factum*’. In the case of *Gallie v Lee*, it was highlighted that the term was initially used in situations where “the person sought to be held liable did not in fact sign the document”. The term in 1970 referred to cases where the person signing a document believed that it “had one character or one effect whereas in fact its character or effect was quite different.”⁵² Changes in language reflect broader transformations in the cultural, political and legal landscape.

This is why the ‘ordinary and plain meaning rule’ has become an important interpretive maxim in the common law. And it led Lord Reid to conclude in *Gallie* that to adopt a new, modern reading of an old legal rule is unproblematic as long as this application is reasonable. But what is a ‘plain meaning’? At a very minimum, it is a meaning that is contained within a temporal package: it is based on a generation’s cultural and linguistic norms. This slice in time, from which the ‘plain meaning’ of a law is drawn, does not transcend the particular temporal modality that has been adopted by the law. It exemplifies the hegemony of the temporal instant in the common law order, which confines events to limited and clearly defined temporal contexts. And it poses a new kind of justificatory problem for legal authority. For if we presume that to adopt a legal

⁵⁰ Antony Honoré, ‘Causation in the Law’ Stanford Encyclopaedia of Philosophy (2010), available at <<http://plato.stanford.edu/entries/causation-law/>>.

⁵¹ I borrow this expression from Julius Stone, *Precedent and Law: Dynamics of Common Law Growth* (Butterworths 1985) 52, from which I also derive the source material for this section.

⁵² *Saunders v Anglia Building Society* [1970] UKHL 5.

precedent is to apply an existing rule to a new set of facts—the key element of this process being the factual comparison of the contemporary dispute to existing precedent—then surely the rule must be applied according to its original meaning. The interpretive rule has been explained as a way for judges to avoid the danger of overriding parliamentary intention (a statute, we will remember, is binding on all courts); if a rule is read literally rather than interpreted according to the abstract standard of ‘original intention’, a judge cannot be accused of trying to create new law. But if the meaning of certain words used in statute or precedent has changed, the literal rule becomes self-defeating: it results in the creation of new law.

Case law has recognised that the literal rule poses a particular danger for common law judges. For “if the precise words [of a statute] are clear and unambiguous, in our judgment we are bound to construe them in their ordinary sense, even though it does lead, in our view of the case, to an absurdity or manifest injustice.”⁵³ For a long time, the underlying principle was that courts have nothing to do with Parliamentary decision-making; any decision by Parliament, whether absurd or not, will be binding on the courts.⁵⁴

This has been resolved with the development of two further rules: the golden rule and the mischief rule. The golden rule allows judges to stray from the literal meaning of statute where adherence to it would lead to “manifest absurdity”⁵⁵ to an extent that makes the effect of the statute different from the intentions of legislators. The mischief rule looks to a problem (mischief) that Parliament was seeking to resolve, asks whether it could have been a mistake that Parliament had not resolved it, and considers what additional words could be inserted into the statute to remedy the discrepancy.⁵⁶

We can see that the justification for the particular interpretive maxims serves to circumscribe the role of the judge while reducing the scope for legislative arbitrariness. In a different sense, it strengthens a nation’s political stability of which a functional and independent judiciary is a hallmark. The role of the judiciary serves as a balance and check on the powers of the legislature and executive. Its authority comes partly from the precision of this duty. Any breach of this remit would push judges into the role of legislators or executors, so limits on the powers of judges serve to

⁵³ *Abley v Dale* (1851) 20 LJ 233.(Jervis CJ)

⁵⁴ *R v Judge of the City of London Court* [1892] 1 QB 273.

⁵⁵ *Becke v Smith* (1836) 2 M&W 195.

⁵⁶ See Lord Diplock in *Jones v Wrotham Park Settled Estates* [1980] AC 74.

enhance their independence. This impartiality, combined with the ability to safeguard against Parliamentary error, invites trust and confidence.

Another element of legal authority comes from the law's structural coherence, which is set up as an antithesis to arbitrariness. Here the playing field is more contentious. We find ourselves at an impasse between the structure of the precedent, which operates in a temporally linear and hierarchical manner, creating rules of potentially indefinite validity, and the standards of statutory interpretation, which are more attuned to present social convention. Each element is contained in a temporal parcel, but the two often don't exist in the same space; the sixteenth century precedent exists in the particular legal standards of its time, and the modern application of this precedent takes place within an entirely different socio-cultural and legal package. The act of applying precedent, then, may involve creating a temporal discontinuity where one may not have existed. It is a kind of selective blending of temporal packages to reach a desired outcome.

At the core of this problem is the need to reconcile a stable, and therefore static and impartial legal structure with the transient and dynamic demands of particular cases. This gap finds a corollary in Husserl and Bergson, who outline the divide between the idealised world of symbols and real-world experience. On one hand, the world is "a rational systematic unity – this is thought to be a matter of apodictic insight – in which each and every singular detail must be rationally determined. Its systematic form... is purely mathematical."⁵⁷ On the other hand, Husserl contrasts this push towards the rationalisation of nature with the prescientific life-world, where:

"All knowledge of laws could be knowledge only of predictions, grasped as lawful, about occurrences of actual or possible experiential phenomena, predictions which are indicated when experience is broadened through observations and experiments penetrating systematically into unknown horizons, and which are verified in the manner of inductions."⁵⁸

Here, Husserl writes, we find no traces of mathematical time. That is, the prescientific lived world is one that lacks the tools for the precise measurement and compartmentalisation of time and events. This has important bearings for the law. The common law system derives its

⁵⁷ Edmund Husserl, *The Crisis of European Sciences and Transcendental Phenomenology* (Northwestern University Press 1970) 65.

⁵⁸ *ibid*, 50.

authority from pre-existing rules that are arranged within a particular temporal narrative. Common law judges are faced with a particular challenge: the reconciliation of old rules, kept valid through perpetuity, the changing norms of society and the cyclical demands of politics. The implication of a 'non-scientific' legal regime would be arbitrariness: the law would lack stable rules based on which consistent decisions can be reached in similar circumstances. In other words, the law's role as a safeguard against arbitrariness would be compromised if its rules lacked the systematic structure of mathematical time.

But the basic structure of precedent lacks the temporal stability to fully support this paradigm of absolute non-arbitrariness. Legal decisions are not made when a change in the law becomes necessary, but when a particular dispute needs to be resolved. The occurrence of disputes, which serve as foundations for legal rules within the common law system, is entirely random. And so the creation of law becomes ad hoc; if no disputes arose for a century, the common law would remain static. This leads me to one important conclusion. Legal time, when constituted as a mathematical ideal, shows us that the absolute elimination of arbitrariness is an ambition of the common law that is not practically attainable within the confines of the system of precedent. The authority and bindingness of precedent elevates that moment in legal time to a transcendental status: this precedent is the source of truth for cases with similar factual backgrounds. The precedent's randomness seems to be at odds with its significance.

But there is a stronger conclusion to be reached here, namely that the common law has developed an awareness of its structural limitations or, perhaps, its own type of intuition. In one way, the act of considering old rules in the light of new circumstances does not undo the law's fixation with the instant. Ontologically, we cannot discuss context without recourse to mathematical time. Context is a temporal container. It is shorthand for events and trends that occupy a defined space in time. But an understanding of the importance of context says something about the way judges view precedent: as a static conduit for rules whose meaning is wholly dependent on a fluctuation in the lived world. That is to say: they are aware of the tension between the instant in time, or the unit of legal decision-making, and the lived world from which the instant is both inseparable and conceptually distant. In light of this self-awareness, the process of legal interpretation becomes a safeguard against the dogma of the instant, a mechanism developed by the judges to undo the law's paradox. The institutions of the legal system become a counterpoint to the

transcendence of the legal judgment. Intuition and analysis are brought into closer harmony.

F. CONCLUSION

I feel it is necessary to preface this conclusion with a clarification. I have deliberately focused on the system of precedent in isolation of the other elements that constitute the common law regime. We have seen that the common law court forms part of a larger political machine that is carefully calibrated to deliver justice and promote stability. But taken on its own, the common law judge has immense authority to create law and, more crucially, to apply precedent. This system is an intrinsic part of the common law judiciary, but it is also unique to it. The judiciary's independence from the vicissitudes of the political process – which is reflected in the timelessness of its decisions – serves to justify its authority. Understanding this particular source of authority matters.

The common law system has adopted two temporal 'tools' – the instant in time and perpetuity – as emblems of its stability and timelessness. The common law judge says: if there is a case whose factual circumstances correspond to the present dispute, the rules adopted in that previous case will apply. Thus, the precedent serves as a guiding force in the resolution of contemporary disputes. This happens regardless of the temporal context that the previous case was decided in, invariably giving rise to a dialectic between the old and the new. But this temporal structure comes at a cost. In each trial, there is an interplay of a number of elements: past example, flowing through time as an indefinitely binding precedent, and the contemporary circumstances and predominant cultural norms that define the context of the case. The tension here is between structural stability, rooted in an idealised standpoint of the binary outcome of disputes occurring at a time, and the arbitrary temporality of the lived world, on which the development of the common law is dependent.

If the common law shares the structure of the literary narrative, it appears to lack its coherence. The chapters of the common law don't occur in consistent intervals: they progress whenever disputes of sufficient importance arise, and progress to a court with the authority to define and redefine the governing rules. In other words: they lack the consistency and deliberateness of the narrative, but share its past-to-present form. More than that, the system of precedent is eternal. Unlike the literary narrative, it has no ending, and its conclusions are always subject to revision. The common law precedent is a product of that transcendental ideal that is

separated from human intuition. A precedent exists as a dormant source of legal truth that is awoken by disputes with similar facts. When a dispute occurs and reaches a sufficiently advanced level in the court hierarchy, the common law judge is given the power to draw a slice in time and declare: this is the law and it will be binding forever. The parasites of the narrative and of the transcendental imagination are very alive in the system of precedent. They create the risk that, in Bergsonian terms, the analytical process will precede intuition, creating fictions.

Judges play an important role in the democratic state. The particular temporal standpoint inherent in their decision-making process serves as an emblem of judicial stability; that is, it reflects a timelessness and procedural rigour that stands in contrast with the volatility and immediacy of the political system. On a systematic level, this stability is expressed as a narrative: disputes occur one after another and form a coherent and authoritative whole. But this formulation reflects a highly idealised conception of temporality, one that relies on the regular and orderly occurrence of relevant disputes. In the lived world, disputes occur much more randomly. This has direct implications for the internal structure of the common law. At the case level, judges may be bound by any number of factors, including precedent, statute and the contemporary facts of the dispute. The irregularity of past example means that, in some circumstances, judges will lack sufficiently contemporary legal tools to apply to a given case, but will nonetheless be bound by past decisions. There are ways to resolve these issues: Parliament can legislate to resolve a mischief in the law, and the Supreme Court can overrule a previous decision. But the discrepancy between ideal and reality is firmly embedded in the system of precedent. Judicial authority relies on a structural integrity that the lived world cannot deliver. To that extent, the common law judge's claims to authority can only be measured in relation to the unattainable ideals of modular time.

In some cases, Parliament has stepped in when common law rules ceased to be relevant or coherent, but were of significant public interest. Today, advances in technology and the bureaucratic systems of the state have significantly increased the pace of the legislative process. A greater amount of legislation will serve to limit the ability of judges to invoke precedent, and might bring the common law system closer to the civil law. But putting aside the question of legislation, we can ask a more important question: what mechanisms has the law developed to mitigate these structural limitations? We have seen that the various interpretive maxims

available to the common law judge allow him to impart, at his discretion, greater context into the facts of a particular dispute. While this does not undo the law's fixation with mathematical time, it gives ontological definition to the common law as a whole: it is not a legal system or a language, but a legal entity with its own intuition, conscious of its conceptual shortcomings and ingenious in developing safeguards against arbitrariness. And here is where I would begin my search for the common law's authority. Not in structural soundness, but in sentience—in the common law's ability to respond dynamically to its own paradoxes and, to an extent, undo them.